LEAGUE OF CALIFORNIA CITIES

Seed to Sale:

A Guide to Regulating Cannabis in California Cities

MARCH 2025

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PART 1 | Introduction and Overview

In September 2021, the Cannabis Regulation Committee (Committee) of the League of California Cities City Attorneys Department presented the first edition of Seed to Sale: A Guide to Regulating Cannabis in California Cities (Guide), which was intended to assist municipal attorneys in addressing legal issues related to cannabis regulation. Cannabis issues continue to be particularly challenging for local government due to the lack of legal precedent and constantly evolving laws. For this reason, it is important that municipal attorneys stay abreast of current cases and precedent from other legal fields that can be used to advise clients and offer creative solutions. To that end, the Committee continues its work by presenting this update to the Guide, a comprehensive and practical compilation of city attorney experience from throughout California.

This updated Guide is a starting point for approaching cannabis regulation questions. It is a useful tool to learn some of the background of cannabis law, understand its current status, and consider practical approaches and tips to handle evolving regulation issues.

This updated Guide is meant to help municipal attorneys better understand the intersectionality of cannabis issues with other relevant fields such as land use, environmental law, taxation, and public health and safety, among others. Equally important, this updated Guide can be used as a reference to analyze regulation options at the administrative, civil, and criminal levels, to achieve particular goals within a city.

Although this updated Guide is intended to be a reflection of the latest statutory and case law known to us, we impress that the field of cannabis regulation continues to evolve quickly, and this Guide does not constitute legal advice. A thorough review of the laws and regulations applicable to your agency at the time of reading this Guide should be conducted.

We hope you find the Committee's update useful.

Cannabis Regulation Committee
League of California Cities
City Attorneys Department
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PART 2 | Regulatory Framework

I. EARLY FEDERAL REGULATION

The Federal Government first attempted to regulate the national drug market in 1906 by imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug in interstate commerce.[1] Subsequent federal drug regulations were generally found in revenue laws, like the Harrison Narcotics Act of 1914, which required producers, distributors, and purchasers of narcotics—specifically cocaine and opiates—to register with the Federal Government, pay taxes, and comply with prescription regulations.[2]

In 1937, when accounts arose of the addictive qualities and physiological effects of "marihuana," the Federal Government enacted the Marihuana Tax Act.[3] Like the Harrison Act, the Marihuana Tax Act did not prohibit cannabis outright, but required those who import, produce, sell, or deal in the drug to register with the government, pay prohibitively expensive taxes, and comply with burdensome administrative requirements for prescriptions.[4] As a result, even though the Marihuana Tax Act did not declare the drug illegal, it had the practical effect of curtailing the cannabis trade.[5]

II. FEDERAL CONTROLLED SUBSTANCES ACT (CSA)

In the 1970s, federal drug policy underwent a significant transformation. Shortly after taking office, President Nixon declared a national "war on drugs" and Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.[6] The legislation consolidated various drug laws on the books into a comprehensive statute, provided uniform regulation to prevent diversion into illegal channels, and strengthened law enforcement tools against illegal drug trafficking.[7]

Title II of the Comprehensive Drug Abuse Prevention and Control Act is the Controlled Substances Act (CSA). The CSA categorizes all controlled substances into five schedules based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.[8] Cannabis, or "marihuana" as it is termed in the CSA, is presently classified as a Schedule I drug, which means the federal government views cannabis as having high potential for abuse, no accepted medical use, and not safe for use in medically supervised treatment.[9] Because the CSA classifies cannabis as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of cannabis is a federal criminal offense, with the sole exception being its use as part of a preapproved research study.[10] In 2018, the definition of "marihuana" (or marijuana) in the CSA was revised to expressly exclude "hemp,"

1 *Gonzales v. Raich* (2005) 545 U.S. 1, 10-11 (hereinafter *Raich*).
2 *Ibid.*
3 *Id.* at p. 11.
4 *Ibid.*
5 *Ibid.*
6 21 U.S.C. § 801 et. seq.; *Raich, supra*, 545 U.S. at p. 10.
7 *Raich, supra*, 545 U.S. at p. 10.
8 21 U.S.C. §§ 811, 812.
9 21 U.S.C. §§ 812, subd. (b)(1) and (c).
10 *Raich, supra,* 545 U.S. at p. 14, citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a); see also *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 490 (hereinafter *Oakland Cannabis Buyers' Cooperative*).

which in turn is defined as any part of the cannabis plant containing no more than 0.3% concentration of the psychoactive compound delta-9 tetrahydrocannabinol.

Despite considerable efforts to change the policy, cannabis remains a Schedule I drug.[11] Moreover, the CSA does not recognize a medical necessity defense to its cannabis prohibitions.[12] Notably, on August 29, 2023, the Department of Health and Human Services recommended to the DEA that marijuana be reclassified from a Schedule I to a Schedule III drug. The Schedule III classification is reserved for substances having a legitimate medical use and a lower potential for dependence than Schedule I drugs. On May 21, 2024, the DEA issued a Notice of Proposed Rulemaking indicating its intent to transfer cannabis from Schedule I of the CSA to Schedule III, consistent with the Department of Health and Human Service's view that cannabis has a currently accepted medical use and otherwise aligns with the factors warranting a reclassification under the CSA. This initiated the process for the DEA to accept public comment, conduct its own review, and determine whether to reclassify cannabis to a Schedule III drug, and has not yet completed this process. Accordingly, at the time of publication, the manufacture, distribution, or possession of cannabis, even for medicinal purposes, remains prohibited under federal law. If cannabis is ultimately reclassified as a Schedule III substance, it is not considered fully decriminalized; criminal penalties for the manufacture, distribution, or sale of cannabis could still apply, but would be

reduced in terms of length of imprisonment and/or amount of the fine imposed.[13]

The CSA remains enforceable in California, even though these cannabis activities are now allowed by State law. The courts have found that the CSA's cannabis regulations are a valid exercise of Congress' authority under the Commerce Clause, even as applied to purely local cannabis activities allowed by State law.[14] Courts have also upheld enforcement of the CSA's cannabis regulations against a variety of other legal challenges.[15]

At the same time, the CSA explicitly contemplates that states can adopt their own controlled substance regulations, so long as there is not "a positive conflict between [the CSA]... and that state law so that the two cannot consistently stand together."[16] Indeed, several courts have held

11 *Raich, supra*, 545 U.S. at p. 15; see *Americans for Safe Access v. Drug Enforcement Admin*. 706 F.3d 438, 453 (D.C. Cir. 2013) (denial of petition to review the DEA's decision to maintain cannabis as a Schedule I drug.)"

12 *Oakland Cannabis Buyers' Cooperative, supra*, 532 U.S. at p.2.; but see *Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 858-860.

13 See 21 U.S.C. 841-844.

14 *Raich, supra,* 545 U.S. at p. 29.

15 *Oklevueha Native Amer. Church of Haw., Inc. v. Lynch* 828 F.3d 1012 (9th Cir. 2016) (Religious Freedom Restoration Act, American Indian Religious Freedom Act, Free Exercise Clause, Equal Protection Clause); see also *Raich v. Gonzales, supra*, 500 F.3d 850 (Substantive Due Process, Tenth Amendment); *Marin Alliance for Medical Marijuana v. Holder* 866 F.Supp.2d 1142 (N.D. Cal. 2011) (Substantive Due Process, Tenth Amendment, Equal Protection, Commerce Clause); *Sacramento Nonprofit Collective v. Holder* 855 F.Supp.2d 1100 (E.D. Cal. 2012) (Commerce Clause, Tenth Amendment, Ninth Amendment, Equal Protection)."

16 21 U.S.C. § 903; *Gonzales v. Oregon* (2006) 546 U.S. 243, 251.

that the CSA does not preempt recent California laws allowing cannabis activity.[17] Notably, one court has held that the CSA does not preempt a municipal ordinance requiring medicinal cannabis dispensaries[18] to obtain permits.[19] Another court ruled that, because medicinal cannabis use remains illegal under federal law, the Americans with Disabilities Act of 1990 (ADA) does not protect against discrimination on the basis of medicinal cannabis use, even if that use is in accordance with state law explicitly authorizing such use.[20]

Nevertheless, for many years, the federal government has not been prosecuting cannabis crimes in states where cannabis is legal and the activity is done in accordance with state law. This is due in large part to: (1) Department of Justice (DOJ) memoranda—most notably the "Cole Memo"[21]—providing policy guidance to federal prosecutors and law enforcement on where to focus enforcement efforts; and (2) the "Rohrabacher-Farr Amendment."

1. The Cole Memo told federal prosecutors in states that had legalized cannabis they should use their prosecutorial discretion to focus not on businesses that comply with state regulations, but on illicit enterprises that create harms, like operating with dangerous drug cartels, use of firearms, and distribution to minors. The assumed directive from this memo was that, if a state has legalized cannabis and put in place its own regulatory system, the DOJ should leave those operating within that system alone.

2. The federal budget also contains a provision known as the Rohrabacher-Farr[22] Amendment, which prevents the Justice Department from using any resources to prosecute state-compliant medicinal cannabis operations in states that have legalized medicinal cannabis. In 2016, the Ninth Circuit Court of Appeal confirmed that while this amendment is in place the DOJ could not spend federal funds to prosecute individuals engaged in conduct permitted by state medicinal cannabis laws.[23] This amendment is a restriction on the use of federal funds and does not provide immunity from prosecution for federal drug crimes.[24]

The Rohrabacher-Farr amendment must be renewed annually with the federal budget. Historically, the Rohrabacher-Farr amendment has received bi-partisan support for its inclusion in the federal budget.

In 2018, then-Attorney General Jeff Sessions released his own guidance memorandum (Sessions Memo) on the subject of federal prosecution of

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17 *Kirby v. City. of Fresno* (2015) 242 Cal.App.4th 940, 963 (no preemption of MMPA's prohibition of arrests); *Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 756 (hereinafter *Qualified Patients Ass'n*) (no preemption of CUA's or MMPA's marijuana decriminalization provisions); *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 818 (hereinafter *San Diego NORML*) (no preemption of MMPA's identification card program); *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 (hereinafter *Garden Grove*) (no preemption of right to return of impounded marijuana under CUA or MMPA); but see *Conejo Wellness Ctr., Inc. v City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1558, fn. 5 (hereinafter *Conejo Wellness Ctr., Inc.*) (authorization of medical marijuana activity is likely subject to federal preemption).

18 It should be noted that as of the publication of this Guide, the term "storefront retail" is a more modern term for what used to be known as "dispensary."

19 *City of Palm Springs v Luna Crest, Inc.* (2016) 245 Cal.App.4th 879, 884-886.

20 *James v. City of Costa Mesa* 700 F.3d 394 (9th Cir. 2012).

21 James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

22 Also referred to more recently as the Rohrabacher-Blumenaeur Amendment.

23 *U.S. v. McIntosh* 833 F.3d 1163 (9th Cir. 2016).

24 *Id.* at p. 1180, fn. 5.

cannabis activity and in doing so rescinded the Cole Memo.[25] While the Sessions Memo removed any perceived safe harbor that may have existed for state-authorized cannabis activity, the Sessions Memo does not direct U.S. Attorneys to prosecute cannabis-related crimes. Essentially, the Sessions Memo removed any de-prioritization for cannabis crimes and reminded U.S. Attorneys that they can use their normal prosecutorial discretion.

At the time of writing this Guide, the Biden Administration and current Attorney General, Merrick Garland, have not released updated guidance on federal prosecution of cannabis activity. Nevertheless, California has not seen an uptick of federal enforcement of cannabis activities conducted in compliance with state law since the issuance of the Sessions Memo. The drafters of this Guide have seen nothing at this time to suggest that United States Attorneys in California will prioritize prosecuting state-authorized cannabis activity over the more serious and dangerous crimes they are charged with enforcing. In fact, although no new federal enforcement guidance has been formally issued, Merrick Garland reaffirmed in testimony before the Senate that the DOJ will maintain its practice of deprioritizing the prosecution of those who are operating within the parameters of applicable state law with respect to cannabis.[26]

III. CALIFORNIA UNIFORM CONTROLLED SUBSTANCES ACT (UCSA)

The State has the power to regulate controlled substances in the interest of the public health and welfare.[27] Furthermore, Congress expressly provided that the federal CSA does not preempt state regulation of controlled substances like the California Uniform Controlled Substances Act (UCSA).[28] Thus, in 1972, shortly after the enactment of the CSA, the State of California consolidated its narcotics laws under the UCSA.[29] Chapter 6, Article 2 of the UCSA set forth criminal prohibitions and punishments for the possession, cultivation, transportation, and distribution of cannabis.[30]

Only 24 years later, the cannabis regulations in the UCSA would undergo a significant transformation when California voters approved the Compassionate Use Act of 1996.

IV. COMPASSIONATE USE ACT OF 1996 (CUA)

The Compassionate Use Act of 1996 (CUA) was approved by California voters through Proposition 215. The CUA is codified at Health & Safety Code section 11362.5. It provides that certain state criminal laws relating to the possession and cultivation of cannabis "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral

25 Jeffrey B. Sessions, Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), available at: https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

26 A Review of the President's Fiscal Year 2023 Funding Request for the U.S. Department of Justice: Hearing before the Senate Appropriations Committee on Commerce, Justice, Science and Related Agencies, 117th Cong. (2022) (testimony of The Honorable Merrick Garland), available at: https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fiscal-year-2023-funding-request-for-the-us-department-of-justice.

27 *Robinson v. California* (1962) 370 U.S. 660, 664.

28 21 U.S.C. § 903. ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the filed in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.")

29 Cal. Health & Saf. Code, § 11000, et seq.

30 Cal. Health & Saf. Code, § 11357 et seq. See, e.g., Cal. Health & Saf. Code, §§ 11357 [possession of cannabis is a misdemeanor], 11358 [cultivation of cannabis is a felony], 11359 [possession with intent to sell any amount of cannabis is a felony], 11360 [transporting, selling, or giving away cannabis in California is a felony; under 28.5 grams is a misdemeanor], 11361 [selling or distributing cannabis to minors, or using a minor to transport, sell, or give away cannabis, is a felony].

recommendation or approval of a physician."[31] Thus, qualified patients (or their primary caregiver) may possess and cultivate any amount of cannabis reasonably necessary for the patient's current medical condition.[32] However, the CUA is very limited in scope.

First, the CUA only applies to qualified patients, and their primary caregiver, who have obtained the written or oral recommendation of a physician *before* cultivating or possessing cannabis, not after.[33] A primary caregiver is a defined term with different components.[34] A person does not qualify as a primary caregiver merely by having a patient designate him or her as such or by the provision of medicinal cannabis itself.[35]

Second, the CUA is narrowly drafted to limit cannabis use for *the patient's* own personal medical purposes.[36] While a primary caregiver could care for and cultivate more than one patient's cannabis, the CUA does not allow patients and their caregivers to "pool talents, efforts, and money to create a stockpile of marijuana that is to be collectively distributed." [37] The CUA does not authorize, or even mention, medicinal cannabis dispensaries. Collectives and cooperatives were only authorized years later in the Medical Marijuana Program Act (MMPA).

Third, the CUA does not decriminalize all medicinal cannabis-related conduct; it grants a defendant a limited immunity from prosecution, allowing for a motion to set aside an indictment or information prior to trial.[38] Such decriminalization only applies to cultivation and possession. The CUA does not provide a defense to other cannabis-related conduct, such as transportation[39] or sale.[40] Because the CUA does not actually "legalize" cannabis, but only determines that no punishment will be imposed on certain cannabis offenses under state law, the CUA is not preempted by the federal CSA.[41]

31 Health & Saf. Code, § 11362.5, subd. (d).

32 *People v. Kelly* (2010) 47 Cal.4th 1008, 1013 (hereinafter *Kelly*), citing *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

33 *People v. Rigo* (1999) 69 Cal.App.4th 409.

34 Health & Saf. Code, § 11362.5, subd. (e).

35 *Ibid*.; see also *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1016 (hereinafter *Hochanadel)* ("Individuals operating a marijuana-buying cooperative do not, by providing medical patients with medicinal marijuana, consistently assume responsibility for the health of those patients.").

36 *People v Urziceanu* (2005) 132 Cal.App.4th 747, 768.

37 *Ibid.*

38 *People v. Mower* (2002) 28 Cal.4th 457, 480; see also *Kelly, supra*, 47 Cal.4th 1008, 1014; *Ross v. Raging Wire Telecommunications* (2008) 42 Cal.4th 920, 926 (hereinafter *Raging Wire Telecommunications*).

39 *People v. Young* (2001) 92 Ca.App.4th 229, 235-237; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551 (the CUA only provides an implied defense to transportation of cannabis when "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.").

40 *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152; *People ex rel. Lungren v. Peron,* 59 Cal.App.4th 1383, 1389-1390.

41 *Garden Grove, supra,* (2007) 157 Cal.App.4th at pp. 371-373, 381-382.

The modest and narrow immunity provisions of the CUA, while groundbreaking for its time, limited its effect on other issues. Despite the language of the findings and declarations evincing an intent to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," courts held that the CUA did not create "a broad right to use marijuana without hindrance or inconvenience."[42] The CUA does not require an employer to accommodate an employee's use of medicinal cannabis.[43] However, in 2023, the California Legislature passed Assembly Bill 2188, which—with a couple of exceptions for construction and certain jobs requiring federal background checks—bars employers from asking workers about or otherwise penalizing their use of cannabis outside of the workplace as of January 1, 2024.[44] This bill also prohibits employers from discriminating or otherwise penalizing any person in decisions involving hiring, termination, or terms and conditions of employment, based solely upon an employer-required drug screening test using hair, blood, urine, or other bodily fluids. This provision does not prevent the employer from discriminating against or penalizing a person based on other scientifically valid preemployment drug screening methods that do not screen for nonpsychoactive cannabis metabolites. In addition, Senate Bill 700, adopted in 2023 and effective January 1, 2024, now prohibits employers from requesting information from an applicant for employment that relates to the applicant's prior use of cannabis. However, this does not prevent employers to consider or inquire about prior cannabis use if permitted under other state or federal law, such as when the applicant seeks a position with a criminal justice agency (among other things).[45]

Notably, California laws enacted after UCSA and CUA, and authorizing various cannabis activities—such as the Medical Marijuana Program Act in 2003 (MMPA), the Control, Regulate and Tax Adult Use of Marijuana Act in 2016 (AUMA), and the Medicinal and Adult-Use Cannabis Regulation and Safety Act in 2017 (MAUCRSA), discussed below—may have rendered complete reliance on the CUA as a defense to cannabis-related charges somewhat unnecessary.

V. MEDICAL MARIJUANA PROGRAM ACT (MMPA)

In 2003, the California Legislature passed the MMPA[46] to "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in need of medical marijuana," as expressed by the voters in the CUA.[47] The MMPA's intent was to:

a. Clarify the scope of the CUA and facilitate the prompt identification of qualified patients and their designated primary caregivers to avoid unnecessary arrests and provide needed guidance to law enforcement officers;

b. Promote uniform and consistent application of the CUA;

c. Enhance the access of patients and caregivers to medicinal cannabis through collective, cooperative cultivation projects; and

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42 *Raging Wire Telecommunications, supra,* 42 Cal.4th at p. 928.
43 *Id.* at p. 931.
44 See Stats. 2022, Ch. 392; see also Gov. Code, § 12954.
45 *See* Stats. 2023, Ch. 408; *see also* Gov. Code, § 12954.
46 Health & Saf. Code, § 11362.7 et seq.
47 Health & Saf. Code § 11362.5, subd. (b)(1)(C).

d. Address additional issues not included within the CUA.[48]

The MMPA creates a voluntary program for issuing identification cards to qualified patients and their primary caregivers. Under the MMPA, the California Department of Health Services is required to establish and maintain a program under which qualified applicants may apply for a California identification card, to be annually renewed, identifying them as qualified for exemptions. County health departments are mandated to operate the program under state protocols. The program is also designed to provide law enforcement with a method to immediately verify the validity of identification cards.[49]

The MMPA expressly immunizes qualified persons with identification cards who transport or possess cannabis for their personal medicinal use.[50] Qualified caregivers (and those who provide assistance to the patient or caregivers) who transport, process, administer, deliver, or give away cannabis for medicinal purposes to qualified patients or other caregivers are also expressly immunized under the statute.[51] In contrast to MAUCRSA, which restricts adult-use cannabis to persons age 21 and up, the MMPA does not include an age restriction. Therefore, persons ages 18-20 may be qualified patients and, therefore, obtain medicinal cannabis. In addition, minors may obtain medicinal cannabis with parental consent.[52]

Former section 11362.775 of the MMPA also provided that qualified persons with valid identification cards, and their designated primary caregivers, who associate "collectively or cooperatively" to cultivate cannabis for medicinal purposes, could not be subject to state criminal law sanctions, including for the sale of cannabis, solely on that basis.[53] However, in January 2019, MAUCRSA repealed Section 11362.775; accordingly, today collectives and cooperatives are subject to the same state and local licensing and permitting provisions as any other license or permit applicant.

While the MMPA also established limits on the quantity of cannabis that qualified persons and primary caregivers could possess, the California Supreme Court struck down the quantitative limitations holding that the Legislature did not have the authority to amend the initiated state statute in that manner.[54] Nevertheless, the section was not removed from the MMPA.[55]

The first published decision following the MMPA's passage found that the MMPA "represent[ed] a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers…"[56] Despite this broad pronouncement regarding the

48 Stats. 2003, Ch. 875, §1, subd. (b)–(c).

49 Health & Saf. Code, §§ 11362.71, 11362.72.

50 Health & Saf. Code § 11362.765, subd. (b)(1)–(2).

51 Health & Saf. Code § 11362.765, subd. (b)(2)–(3).

52 Health & Saf. Code § 11362.7, subd. (e).

53 Former Health & Saf. Code, § 11362.775. Courts of appeal reached varying conclusions regarding whether former Health & Safety Code, section 11362.775 immunized the sale and distribution of medicinal cannabis or whether it protected only collective cultivation; compare *In People ex rel Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512 (hereinafter *Trutanich*) (holding that the statute protects group activity only to cultivate cannabis for medicinal purposes; it does not immunize dispensing or selling cannabis) with *People v. Jackson* (2012) 210 Cal. App.4th 525 (expressly rejecting the Joseph court's interpretation).

54 *Kelly, supra,* 47 Cal.App.4th at p. 785.

55 *Id.* at pp. 1047-1048.

56 *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.

MMPA's purpose, the California Supreme Court has narrowly interpreted the additional immunities conferred by the MMPA.[57]

VI. CALIFORNIA ATTORNEY GENERAL GUIDELINES

The MMPA required the Attorney General to "develop and adopt appropriate guidelines to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under the [CUA]."[58] The Attorney General adopted such guidelines in August 2008 (2008 Guidelines).[59] The purpose of the 2008 Guidelines was to: (1) ensure that cannabis grown for medicinal purposes remains secure and does not find its way to nonpatients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medicinal cannabis under California law. Although the 2008 Guidelines are not binding, many courts have afforded them great weight and have relied on them in resolving medicinal cannabis issues.[60] The 2008 Guidelines were also helpful in articulating the appropriate degree of local regulation of medicinal cannabis dispensaries, a novel land use that proliferated throughout the state after the adoption of the CUA and MMPA.

On August 6, 2019, the Attorney General released updated "Guidelines for the Security and Non-Diversion of Cannabis Grown for Medicinal Use" (2019 Guidelines),[61] and again in 2023. The Guidelines provide a helpful summary of applicable law, with compliance and enforcement recommendations for individual qualified persons and primary caregivers, as well as for collectives and cooperatives, which under MAURCSA, are required to obtain state licenses to operate.[62]

VII. CONTROL REGULATE AND TAX ADULT USE OF MARIJUANA ACT (PROPOSITION 64 OR AUMA)

On November 8, 2016, California voters approved Proposition 64, the initiative known as the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA). Unlike the earlier cannabis legalization framework in Colorado, AUMA did not modify the California Constitution; instead, it enacted and modified a variety of state statutes.[63]

Section 3 of the ballot initiative set forth its 27 distinct purposes, which can be a guiding resource in understanding the voters' intent.[64] The statements of purpose and intent generally relate

57 See *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 744 (hereinafter *"Inland Empire Patients Health & Wellness Center"*) (acknowledging MMPA's "limited reach" and holding that it did not preempt local zoning regulations). See also, *People v. Mentch* (2008) 45 Cal.4th 274, 290 (while MMPA does convey additional immunities against cultivation and possession-for-sale charges to specific groups of people, it does so only for specific actions)."

58 Health & Saf. Code § 11362.81, subd. (d).

59 California Office of the Attorney General, Atty. General Brown Issues Medical Marijuana Guidelines for Law Enforcement and Patients (Aug. 25, 2008), available at https://oag.ca.gov/news/press-releases/atty-general-brown-issues-medical-marijuana-guidelines-law-enforcement-and.

60 *Hochanadel, supra*, 176 Cal.App.4th at p. 997.

61 *See* California Office of the Attorney General, Guidelines for the Security and Non-Diversion of Cannabis Grown for Medicinal Use (2019), available at: https://oag.ca.gov/system/files/attachments/press-docs/MEDICINAL%20CANNABIS%20Guidelines.pdf.

62 See California Office of the Attorney General, Guidelines for the Security and Non- Diversion of Cannabis Grown for Medicinal Use (2023), available at: https://oag.ca.gov/system/files/media/medicinal-cannabis-guidelines.pdf.

63 See e.g., Health & Saf. Code, § 11357 et seq.; Bus. & Prof. Code, § 26000 et seq.

64 Proposition 64, section 3 (Nov. 9, 2016), available at: https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf

to state regulation, local control, taxation, public safety, public health, and enforcement.[65] In addition to reducing criminal penalties for cannabis-related offenses,[66] and providing funding for cannabis-related research and social programs,[67] AUMA established a comprehensive system to legalize, control, and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedicinal cannabis and cannabis products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of cannabis.[68]

A. State Agencies

AUMA created a complex regulatory and licensing scheme for commercial cannabis activities, designating three main licensing authorities and providing several other state agencies with specific authority and responsibilities related to cannabis. This regulatory scheme was in effect until July 12, 2021, when the Governor signed AB 141,[69] consolidating the three existing agencies charged with licensing of commercial cannabis under AUMA and creating the Department of Cannabis Control. A summary of AB 141 and the Department of Cannabis Control (DCC) may be found in Section IX of Part II of this Guide.

1. Licensing Authorities

The three agencies charged with licensing of commercial cannabis under AUMA were the Bureau of Cannabis Control, within the California Department of Consumer Affairs; the California Department of Food and Agriculture; and the California Department of Public Health.[70] Each of the three licensing authorities was charged with making reasonable rules and regulations to implement, administer, and enforce their respective duties.[71, 72]

a. *Bureau of Cannabis Control (Bureau)*

The Bureau was the lead agency tasked with regulating commercial cannabis licenses

65 Proposition 64, section 3, subd. (a) – (aa) (Nov. 9, 2016), available at: https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf.

66 Health & Saf. Code, § 11357 et seq.

67 Rev. & Tax. Code, § 34019.

68 AUMA uses the term “marijuana”; the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), effective June 27, 2017 and discussed in Chapter Six, incorporated many of AUMA’s provisions; MAUCRSA also substituted the term “cannabis” for “marijuana.” This chapter uses the term “marijuana” when referring to specific aspects of AUMA; it uses the term “cannabis” for generic reference.

69 The bill amended, renumbered, added, and repealed many provisions of the Business and Professions Code, and amended various sections of the Fish and Game Code, Food and Agricultural Code, Government Code, Health and Safety Code, Penal Code, Revenue and Taxation Code, and Water Code. See: https://leginfo.legislature.ca.gov/faces/billPdf.xhtml?bill_id=202120220AB141&version=20210AB14195CHP.

70 Bus. & Prof. Code, § 26012.

71 Bus. & Prof. Code, § 26013.

72 Consolidated regulations of the three former agencies in early 2022 are available at cannabis.ca.gov.

for medicinal and adult-use cannabis.[73] AUMA gave the Bureau exclusive authority for creating, issuing, denying, renewing, disciplining, suspending, or revoking state licenses for transportation, storage unrelated to manufacturing activities, and distribution and sale of cannabis and cannabis products.[74]

b. California Department of Food and Agriculture (CDFA)

CDFA was responsible for licensing the commercial cultivation of cannabis.[75] CDFA was also responsible for the track-and-trace system, which tracks the movement of cannabis and cannabis products throughout the distribution chain in California. Cannabis Cultivation Licensing, a division of CDFA, was organized into two branches: the Licensing Branch and Compliance and Enforcement Branch.

CDFA's licensing included conditions from the California Department of Fish and Wildlife (CDFW) and the State Water Resources Control Board (SWRCB) related to the individual and cumulative effects of water diversion and the discharge associated with cultivation.[76]

c. California Department of Public Health (CDPH)

The California Department of Public Health was responsible for licensing and regulating all commercial cannabis manufacturing in California.[77] This included ensuring commercial cannabis manufacturers operate safe, sanitary workplaces and follow good manufacturing practices to produce products that are free of contaminants, meet product guidelines, and are properly packaged and labeled.

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73 The Bureau was originally called the Bureau of Medical Marijuana, then renamed the Bureau of Marijuana Control by AUMA, and then the Bureau of Cannabis Control under MAUCRSA. (See former Bus. & Prof. Code, § 26010, subd. (a) [as in effect from Jun. 27, 2017, to Jul. 11, 2021].)

74 MAUCRSA subsequently transferred to the Bureau licensing authority as to microbusinesses and testing. (See former Bus. & Prof. Code, § 26012, subd. (a)(1) [as in effect from Jun. 27, 2017, to Jul. 11, 2021]; see also Bus. & Prof. Code, § 26012, subd. (a) [subsequently granting the Department of Cannabis Control sole authority over all commercial cannabis activity]). From June 27, 2017 to July 11, 2021, a version of Business and Professions code section 26012 subdivision (a)(1) indicated that: "The bureau shall have the sole authority to create, issue, deny, renew, discipline, suspend, or revoke licenses for microbusinesses, transportation, storage unrelated to manufacturing activities, distribution, testing, and sale of cannabis and cannabis products within the state." The language is updated now to "It being a matter of statewide concern, except as otherwise authorized in this division, the department shall have the sole authority to create, issue, deny, renew, discipline, condition, suspend, or revoke licenses for commercial cannabis activity." (subd. (a).) While this revised language does not explicitly mention "microbusinesses," it encompasses all forms of "commercial cannabis activity," which includes microbusinesses.

75 Former Bus. & Prof. Code, § 26012, subd. (a)(2)) (as in effect from Jun. 27, 2017, to Jul. 11, 2021).)

76 Former Bus. & Prof. Code, § 26060, subd. (c) (as in effect from Jun. 27, 2017, to Dec. 31, 2018).)

77 The AUMA initially delegated licenses for testing to CDPH the authority as to testing; MAUCRSA moved the testing to the Bureau. (See former Bus. & Prof. Code, § 26012, subd. (a)(3) [as in effect from June 27, 2017, to July 11, 2021]; current Bus. & Prof. Code, § 26012, subd. (a).)

2. Cannabis Control Appeals Panel

The Cannabis Control Appeals Panel is responsible for hearing appeals of any decision by state cannabis licensing authorities relating to any penalty assessment or the issuing, denying, transferring, conditioning, suspending, or revoking of a cannabis license.[78] The Panel's review is based on a "substantial evidence" standard;[79] the Panel's decision may be reviewed in court.[80] To implement its mandate, the Panel has adopted regulations governing such things as the record on appeal, how briefs are filed, and ex parte communications, among others.[81]

3. California Department of Pesticide Regulation (CDPR).

CDPR is responsible for developing guidelines for the use of pesticides in the cultivation of cannabis and residue in harvested cannabis.[82] This included coordination with CDFA. In practice, CDPR focuses on three main areas: (1) providing statewide guidance on the use of pesticides in the cultivation of cannabis, and residue in harvested cannabis; (2) providing guidance to the Bureau on testing for pesticides; and (3) requiring that pesticides being applied to cannabis comply with food and agriculture standards. Pesticide products can be legally used on cannabis in California, provided they meet certain criteria approved by CDPR. The criteria can be found online.[83] CDPR will continue its work, coordinating with DCC after the consolidation of the licensing agencies.

4. Other State Agencies

State agencies — including, but not limited to the State Board of Forestry and Fire Protection (Cal Fire), the California Department of Fish and Wildlife (CDFW), and the State Water Resources Control Board (SWRCB), the California regional water quality control boards (Water Boards), and state law enforcement agencies — are required to address environmental impacts of cannabis cultivation and coordinate, when appropriate, with cities and counties in enforcement efforts.[84]

5. Cannabis Advisory Committee

The Cannabis Advisory Committee was created to advise the Department of Cannabis Control on the development of standards and regulations for commercial cannabis businesses necessary to protect the public health and safety.[85] Members of the Committee are appointed by the director of DCC and must include, among others, representatives of the cannabis industry and of local agencies.[86]

The Committee is required to publish an annual public report describing its activities, including, but not limited to, the recommendations the Committee made to the licensing authorities during the

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78 Bus. & Prof. Code, §26040 et seq.

79 Bus. & Prof. Code, § 26043, subd. (c)(4).

80 Bus. & Prof. Code, § 26045.

81 Cal. Code Regs., tit. 16, §§ 6000-6018.

82 Bus. & Prof. Code, § 26060. SWRCB has regulatory authority for adopting principles and guidelines for diversion and use of water for cannabis cultivation, in consultation with CDFW. (Cal. Wat. Code, §13149.) SWRCB has primary enforcement but is required to notify the CDFA of any enforcement action taken for violations. (Wat. Code, § 13149.) 83 https://www.cdpr.ca.gov/docs/cannabis/certain_criteria.pdf

83 https://www.cdpr.ca.gov/docs/cannabis/certain_criteria.pdf.

84 Bus. & Prof. Code, § 26066.

85 Bus. & Prof. Code, § 26014, subd. (a).

86 Bus. & Prof. Code, § 26014, subd. (b).

immediately preceding calendar year and whether those recommendations were implemented by the licensing agencies.[87] The Committee's annual report is published on the DCC website: cannabis.ca.gov.

B. Types of Licenses under AUMA

Under AUMA, there are 19 types of cannabis-related licenses.[88] This list was revised and expanded under MAUCRSA and is discussed in more detail below.

C. Local Control and Regulation

1. Personal Use of Cannabis

AUMA legalized the ability of persons age 21 or older to smoke or ingest cannabis or cannabis-related products under California law.[89] AUMA also provided that a person age 21 or older has a right to plant, cultivate, harvest, dry, or process up to six living cannabis plants, subject to reasonable local regulation.[90] Although a city cannot prohibit these activities inside a private residence or accessory structure that is fully enclosed, secured, and located at a private residence,[91] cities can ban these activities when done outdoors, even upon the grounds of a private residence.[92] Generally speaking, cannabis cannot be smoked or ingested in public. AUMA also preserved and enumerated several restrictions on the manner and places in which cannabis may be consumed or handled.[93]

AUMA also legalized a person's ability to possess, process, transport, purchase, obtain, or give away to persons over 21 years of age or older, no more than 28.5 grams of cannabis that is not in the form of concentrated cannabis. (Concentrated cannabis is restricted to eight grams.)[94] Similarly, a person may possess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age or older.[95]

87 Bus. & Prof. Code, § 26014, subd. (c).
88 MAUCRSA added License Type 1C, Cultivation, Specialty cottage, Small (Bus. & Prof. Code, § 26050), MAUCRSA also authorized each licensing authority to create additional licenses. (Bus. & Prof. Code, § 26012, subd. (b).)
89 Health & Saf. Code, § 11362.1, subd. (a)(4).
90 Health & Saf. Code, §§ 11362.1, subd. (a)(3), 11362.2, subd. (a)(1).
91 Health & Saf. Code § 11362.2, subd. (b)(2).
92 Health & Saf. Code § 11362.2, subd. (b)(3).
93 Health & Saf. Code, § 11362.45.
94 Health & Saf. Code, § 11362.1, subds. (a)(1)–(2). Essentially, individuals at least 21 years old are able to "gift" cannabis as long as both parties are at least 21 years old and there is no compensation exchanged
95 Health & Saf. Code, § 11362.1, subd. (a)(5). Similarly, individuals over 21 are able to "gift" cannabis products as long as both parties are at least 21 years old and there is no compensation exchanged

2. Local Regulations

AUMA does not supersede or limit the authority of a city to adopt and enforce local ordinances regulating commercial cannabis-related activities and cannabis-related businesses.[96] Regulation through local ordinance is allowed for, but is not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke.[97] A city may also completely ban commercial cannabis activity.[98] Furthermore, a licensing authority must not approve a state license if such approval would violate a city's ordinance or regulation adopted consistent with state law.[99]

AUMA distinguishes between the authority to regulate or ban the transportation of commercial cannabis through a jurisdiction and the authority to regulate or ban the delivery of commercial cannabis inside a jurisdiction.[100] In 2018, the Bureau issued a regulation to clarify the scope of legal delivery, and which authorized retail licenses to deliver into "any jurisdiction in the state, "subject to specific requirements and restrictions.[101]

3. Locational Restrictions

AUMA restricts the location of commercial cannabis businesses.[102] These restrictions are incorporated into MAUCRSA and discussed in more detail below.

4. Authority to Conduct Law Enforcement Activity and Local Enforcement Related to Cannabis.

AUMA does not supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.[103] Also, it does not require a licensing authority to undertake such enforcement activities.[104] Thus, a local jurisdiction should conduct enforcement of its own laws and requirements.

5. Authority to Allow or Restrict Business Activity Related to On-Site Cannabis Consumption.

Under AUMA, the Bureau was authorized to issue a state temporary event license to a licensee authorizing onsite cannabis sales at a county fair event, district agricultural association event, or at another venue expressly approved by a local jurisdiction, provided that the activities comply with certain requirements.[105] These events tend to be large-scale gatherings, often with thousands of people in attendance. It is important to note that the Bureau was only authorized to issue a state license for these events if the local jurisdiction authorizes such events.[106] However, it was unclear whether the Bureau could issue a state license if the event was held on state land located within a local jurisdiction. In practice, the Bureau had required

96 Bus. & Prof. Code, § 26200, subd. (a)(1)-(2).
97 Bus. & Prof. Code, § 26200, subd. (a)(1)-(2).
98 Bus. & Prof. Code, § 26200, subd. (a)(1).
99 Bus. & Prof. Code § 26055, subd. (d).
100 Bus. & Prof. Code, §§ 26080, 26090.
101 California Code of Regulations, Title 16, Section 5416(d); Bureau of Cannabis Control (2018), Initial Statement of Reasons, Regulation 5416(d), page 110; *County of Santa Cruz et al v. Bureau of Cannabis Control* (2020), Fresno County Superior Court, case no. 19CECG01224.
102 Bus. & Prof. Code, § 26054, subd. (b).
103 Bus. & Prof Code, § 26200, subd. (a).
104 Bus. & Prof Code, § 26200, subd. (b).
105 Bus. & Prof. Code, § 26200, subd. (e)(1).
106 Bus. & Prof Code, § 26200, subd. (e)(1)(D).

local authorization even when the event was held on state land (e.g., California State Fair located in Sacramento).

AUMA authorizes local jurisdictions to allow businesses where the public can smoke, vape, or ingest cannabis or cannabis-related products on premises, if specific conditions are met.[107] Specifically, the business must comply with the following: (1) access to the area where cannabis consumption is allowed must be restricted to persons 21 years of age or older; (2) cannabis consumption must not be visible from any public place or non-age-restricted area; and (3) sale or consumption of alcohol or tobacco is not allowed on the premises. The law also authorizes local jurisdictions to issue temporary licenses to nonprofit entities primarily providing certain products to low-income persons, subject to various conditions.[108]

PRACTICE TIP: *There is no state license category for cannabis consumption businesses. Some cities locally license and permit cannabis consumption as an accessory use to a cannabis retail business. Some cities license and permit cannabis consumption as a stand-alone business. Either way, in order for the business to receive a license from the state, in drafting a cannabis licensing ordinance, the city should identify the consumption business category in the context of a state license category (e.g. retail with consumption permitted).*

6. Authority to Enforce State Laws and Regulations.

A city attorney has the authority to bring a civil action against a person engaging in commercial cannabis activity without a license required under state law, and each day may be considered a separate violation.[109] The penalties collected under such action may be used to reimburse the city attorney for costs associated with bringing the action with one-half of the remainder to be paid to the city treasure, and one-half to be deposited into the state's general fund.[110]

In the regulation of state-licensed facilities located within a city, a city has the authority to enforce the regulations of the licensing authority if the licensing authority delegates that authority to the city.[111] A complete discussion on enforcement is found later in this Guide.

7. Coordination with the State.

A city has the duty to notify the department upon revocation of any local license, permit, or authorization for a licensee to engage in commercial cannabis activity within the city. Within 60 days, the department is required to begin the process to determine whether the state license issued to the licensee is to be suspended or revoked.[112]

D. Taxation

AUMA imposes state taxes on the commercial cultivation and sale of both medicinal and nonmedicinal cannabis.[113] This state tax is in

107 Bus. Prof. Code, § 26200, subd. (g).
108 Bus. & Prof. Code, § 26070.5.
109 Bus. & Prof Code, § 26038, subd. (a)(1).
110 Bus. & Prof Code, § 26038, subd. (d)(4).
111 Bus. & Prof. Code, § 26200, subd. (d).
112 Bus. & Prof. Code, § 26200, subd. (c).
113 Rev. & Tax Code, § 34011 et seq.

addition to any tax imposed by a city, county, or city and county.[114] However, because a city may impose a sales tax only with voter approval and because medicinal cannabis, like any medicinal product, is not subject to a sales tax, many cities have imposed fees or taxes on the gross receipts of cannabis businesses.

Revenues collected from the state retail excise tax and state tax on cultivation, in addition to specified fines on businesses or individuals who violate regulations, are deposited in the California Cannabis Tax Fund.[115] Funds generated from taxes and fines are used to compensate state agencies for any regulatory costs not covered by license fees.[116] In addition, a portion of revenues is meant to be allocated to youth programs, environmental clean-up efforts associated with illegal grows, and programs designed to reduce driving under the influence of alcohol, cannabis or other drugs, among other things.[117]

The following chart describes the current taxes on cannabis.[118]

Type of Tax	Type of Cannabis Taxed	Rate of Taxation
State tax on cultivation[119]	Both medicinal and nonmedicinal	Pursuant to AB 195, as of July 1, 2022, the state cultivation tax no longer applies to cannabis or cannabis products that enter the commercial market.
State retail excise tax[120]	Both medicinal and nonmedicinal	15% of the average market price of any retail sale by a cannabis retailer[121]
Existing state and local sales tax[122]	Nonmedicinal only	Rates vary across the state
Existing state and local use tax[123]	Nonmedicinal only	Rates vary across the state; for instance, when calculating the total excise tax, the local cannabis business tax is applied based on the selling price of the cannabis product, then the state excise tax rate is applied to that value, creating a subtotal which is then subject to the local sales tax rate for the grand total.

114 Rev. & Tax. Code, § 34021.
115 Rev. & Tax Code, § 34018.
116 Rev. & Tax. Code, § 34019.
117 Rev. & Tax. Code, §§ 34019, 34012, (a)(1)–(2), 34011 (a).
118 A city may still enact various fees under Proposition 26 (2010) related to cannabis activities, e.g., regulatory fees.
119 Rev. & Tax Code, § 34012, subd. (a)(1)–(2).
120 Rev. & Tax Code, § 34011, subd. (a)(1).
121 As of January 1, 2023, cannabis retailers (rather than distributors) are responsible for collecting this excise tax, based upon gross rceipts from the retail sale of cannabis or cannabis products. See Cal. Dep't of Tax and Fee Administration, "Tax Facts for Cannabis Businesses" available at https://www.cdtfa.ca.gov/industry/cannabis/taxfacts.htm#:~:text=Cultivation%20Tax%20No%20Longer%20Applies,-Beginning%20July%201&text=Additionally%2C%20distributors%20and%20manufacturers%20are,or%20after%20July%201%2C%202022. Further, as of January 1, 2023, cannabis retailers who are approved by the DCC to receive an equity fee waiver for the issuance or renewal of their cannabis retailer license can apply to retain 20% of the state excise tax due on retail sales of cannabis or cannabis products.
122 Rev. & Tax Code, § 6051.
123 Rev. & Tax Code, § 6202.

VIII. MEDICINAL AND ADULT USE OF CANNABIS REGULATION AND SAFETY ACT (MAUCRSA)

In 2015, California enacted the Medical Marijuana Regulation and Safety Act (AB 243, AB 266, and SB 643) (MMRSA). MMRSA established a statewide regulatory scheme for the medicinal cannabis industry, including licenses for cultivation, manufacturing, testing, transportation, and distribution. State licensing was expected to commence in 2018, but before that could happen, California voters approved AUMA to allow the use of cannabis for non-medicinal purposes in 2016. As a result, MMRSA did not last long enough for most of its provisions to take effect.

On June 27, 2017, California adopted SB 94, which includes not only MAUCRSA[124], but also modifies a variety of statutes in the Fish & Game Code, Food & Agriculture Code, Health & Safety Code, and Vehicle Code. MAUCRSA repeals MMRSA,[125] while combining and harmonizing many of its provisions with AUMA.

Prior to MAUCRSA, the applicable statutes used the terms "marijuana" and "medical marijuana." MAUCRSA renames these terms as cannabis and medicinal cannabis.[126] Thus, the Bureau of Marijuana Control and the Marijuana Control Appeals Board, each created by AUMA, became the Bureau of Cannabis Control (Bureau) and the Cannabis Control Appeals Board. Similar changes were made throughout various California Codes to make applicable statutes consistently refer to cannabis rather than marijuana.

A. State Licensing

MAUCRSA eliminates AUMA's requirement that a licensee be a California resident. MAUCRSA adds another license type (Type 1C) to those delineated by AUMA, and allowed the Bureau to add additional license types,[127] an authority it has exercised.[128] The current types of licenses are:

1. Type 1 — Cultivation; Specialty outdoor; Small.
2. Type 1A — Cultivation; Specialty indoor; Small.
3. Type 1B — Cultivation; Specialty mixed-light; Small.
4. Type 1C — Cultivation; Specialty cottage; Small.
5. Type 2 — Cultivation; Outdoor; Small.
6. Type 2A — Cultivation; Indoor; Small.

124 Bus. & Prof. Code, § 22000 et seq.

125 MMRSA, later modified to be the Medical Cannabis Safety and Regulation Act (MCRSA), related solely to medical cannabis. Since repealed by MAUCRSA, MMRSA/MCRSA is not discussed here.

126 One reason why SB 94 modified a broad range of statutes was to implement this change in terminology.

127 Bus. & Prof. Code, § 26050.

128 The Bureau has added Types 13 and 14. (See e.g. Cal. Code Regs., tit. 16, § 5014.)

7. Type 2B — Cultivation; Mixed-light; Small.
8. Type 3 — Cultivation; Outdoor; Medium.
9. Type 3A — Cultivation; Indoor; Medium.
10. Type 3B — Cultivation; Mixed-light; Medium.
11. Type 4 — Cultivation; Nursery.
12. Type 5 — Cultivation; Outdoor; Large.
13. Type 5A — Cultivation; Indoor; Large.
14. Type 5B — Cultivation; Mixed-light; Large.
15. Type 6 — Manufacturer 1.
16. Type 7 — Manufacturer 2.
17. Type 8 — Testing laboratory.
18. Type 10 — Retailer.
19. Type 11 — Distributor.
20. Type 12 — Microbusiness.
21. Type 13 — Distributor (transport only).
22. Type 14 — Event Organizer.

A state license is valid for one year from the date of issuance and may be renewed annually. Each license, except for testing labs, are designated with an "A", indicating adult commercial use, or with an "M", indicating medicinal use. A testing lab license may test both adult commercial and medicinal cannabis; its license is not marked with an A or M.[129] There are differences between an A and an M license; an A-licensee may not sell to persons under the age of 21 nor allow persons under the age of 21 on the licensed premises.[130] An M-licensee may allow any person age 18 and over on the premises, and may sell to any person age 18 and over, if such person possesses a valid government-issued identification card and either a valid physician's recommendation or a valid county-issued identification card.[131] With a few exceptions, discussed below, a licensee may hold multiple licenses. However, each licensed premises must be separate and distinct.[132] No alcohol or tobacco may be sold on the licensed premises.[133]

As discussed earlier, authority for issuing licenses was divided among the Bureau, the California Department of Public Health (CDPH), and the California Department of Food and Agriculture (CDFA). The Bureau issued licenses under Types 8 through 14, the CDPH issued licenses under Types 6 and 7, and the CDFA issued licenses under Types 1-5. The DCC became the sole licensing authority as of July 12, 2021.[134]

Various restrictions exist on different types of licenses. For example, license types 5, 5A, or 5B could not be issued until January 1, 2023.[135] Furthermore, a holder of license type 5, 5A, or 5B may not also hold license type 8, 11, or 12.[136] A type 8 licensee may not hold any other type of license

129 Bus. & Prof. Code, § 26050.
130 Bus. & Prof. Code, § 26140, subd. (a).
131 Bus. & Prof. Code, § 26140, subd. (c).
132 Bus. & Prof. Code, § 26053, subd. (c).
133 Bus. & Prof. Code, § 26054, subd. (a).
134 Bus. & Prof. Code, § 26012.
135 Bus. & Prof. Code, § 26061, subd. (c).
136 Bus. & Prof. Code, § 26061, subd. (d).

and may not employ anyone who works at another licensed cannabis business, unless it is also a type 8 business.[137]

1. Coordination with the State

Under MAUCRSA, a city was required to provide to the Bureau the city's ordinances or regulations relating to commercial cannabis activity, and the name and contact information for the person designated to serve as the contact for the Bureau in regard to cannabis activity within the city. If no contact was provided, the Bureau assumed the contact was the clerk of the legislative body.[138] The city should also provide the Bureau with any changes to the contact person or to the city's ordinances or regulations.[139] These obligations on a City remain after the July 2021 consolidation of agencies, and the City is obligated to send its ordinances and regulations to the DCC.

When an application for a cannabis license is received by the State (the Bureau under MAUCRSA and currently the DCC), the state agency is required to notify the city in which the business proposes to operate, unless the applicant provides evidence of compliance with the city's ordinances or regulations. The city has 60 days in which to respond, indicating whether the proposed business complies with the jurisdiction's ordinances and regulations. No response from the city creates a rebuttable presumption that the applicant complies with the city's ordinances and regulations.[140] Even after the 60-day period passes, the city may notify the state agency in writing that the applicant or licensee does not comply with the local ordinances or regulations, and the licensing authority may no longer presume compliance and may begin disciplinary proceedings.[141] The state agency may not issue a license to a cannabis business if the business would violate local ordinances or regulations.[142]

In addition, under MAUCRSA, if the city revoked a local license, permit, or authorization for a licensee to operate a commercial cannabis business, the city must notify the Bureau, and within 10 days of the notice, the Bureau notified the CDFA or CDPH, if that agency issued the license. As of July 12, 2021, the DCC will begin a suspension or revocation process within 60 days of being informed by the city.[143]

Most cannabis-related licenses require local authorization as a pre-condition to obtaining the desired state license. This requirement provides cities with significant power and discretion to determine the cannabis landscape within their borders. Likewise, it requires city attorneys to be well-versed in the relevant and complex cannabis laws and regulations governing each type of license.

PRACTICE TIP: *Cities should designate one staff contact person responsible for responding to licensing inquiries from the DCC, and provide that contact information to the DCC. The two-step (local and state) licensing process works best when there is frequent and open communication on licensing matters between state and city.*

137 Bus. & Prof. Code, § 26053, subd. (b).
138 Bus. & Prof. Code, § 26055, subd. (f)(1).
139 Bus. & Prof. Code, § 26055, subd. (f)(2).
140 Bus. & Prof. Code, § 26055, subd. (g)(2)(D).
141 Bus. & Prof. Code, § 26055, subd. (g)(2)(E).
142 Bus. And Prof. Code, § 26055, subd. (g)(1).
143 143: Bus. & Prof. Code, § 26055, subd. (g)(2)(E).

B. Local Control and Regulation

Cities retain the authority to adopt and enforce ordinances regulating or prohibiting cannabis businesses, including local zoning and land use requirements and business license requirements.[144] Similarly, local law enforcement retains the authority to enforce local zoning requirements and ordinances.[145] State standards constitute the minimum requirements as to health and safety, environmental protection, testing, security, food safety, and worker protections; a city may establish additional standards, requirements, and regulations.[146]

1. Locational Restrictions

Under state law, there are restrictions on the location of cannabis businesses. A cannabis business cannot be within a 600-foot radius of an existing:

- School providing instruction in kindergarten or any grades 1 through 12;
- Day care center, as defined by Health & Safety Code section 1596.76; or
- Youth center, as defined by Health & Safety Code section 11353.1(e)(2).[147]

The 600 feet is measured as a straight line between the property line of the cannabis business and the closest property line of the lot on which the cannabis business will be located, without accounting for any intervening buildings.[148]

However, a city has the discretion to reduce the 600-foot restriction.[149]

C. Advertising

MAUCRSA imposes various restrictions on the advertising of cannabis. For example, a licensee may not advertise on a billboard located on an interstate highway or on a state highway that crosses the California border.[150] A licensee may not advertise or market cannabis or cannabis products within 1000 feet of a day care center, a school providing instruction in kindergarten or any grades 1 through 12, a playground, or a youth center.[151] Finally, beginning January 1, 2024, it is a violation of MAUCRSA to use or possess the "cannabis

144 Bus. & Prof. Code, § 26200, subd. (a)(1).
145 Bus. & Prof. Code, § 26200, subd. (a)(2).
146 Bus. & Prof. Code, § 26201.
147 Bus. & Prof. Code, § 26054, subd. (b).
148 Health & Saf. Code, § 11362.768, subd. (c).
149 Bus. & Prof. Code, § 26054, subd. (b) ("A premise licensed under this division may not be located within a 600-foot radius …unless a … local jurisdiction specifies a different radius."); see also Cal. Code Regs., tit. 16, § 5026, subd. (b).
150 Bus. & Prof. Code, § 26152, subd. (d).
151 Bus. & Prof. Code, § 26200, subd. (g).

universal symbol" in connection with commercial activity other than commercial cannabis activity that is licensed by DCC. A product impermissibly bearing the cannabis universal symbol is deemed contraband and subject to seizure by a peace officer or employee of DCC.[152]

D. Transportation and Delivery

Delivery and transport of commercial cannabis remains an issue. A local jurisdiction cannot ban the transport of cannabis on public roads.[153] However, the delivery of cannabis must comply with local law.[154] When transporting cannabis between licensees, or between the licensed premises and the purchaser, the transporter must comply with a number of statutory requirements. These include, among other things, ensuring only an allowed vehicle type is used, that only the licensee or its employees is conducting the transportation, and that the licensee or employee carries the correct documentation at all times, among other things.[155]

E. Interstate Commercial Cannabis Activity

Because of the risks of federal preemption of state cannabis law, the California Attorney General has opined that authorization of commercial cannabis activity between out-of-state licensees and California licensees could "result in significant legal risk to the State of California under the federal Controlled Substances Act."[156] SB 1326, which took effect January 1, 2023,[157] empowers the Governor to enter into interstate cannabis agreements with other states, to authorize medicinal or recreational commercial cannabis activity between entities licensed under the laws of each state. In other words, if such an agreement were enacted, cannabis businesses licensed in California could engage in commerce with out-of-state licensees without violating California law.[158] However, the statute contains an important limitation: no such interstate agreement can take effect unless one of four conditions are satisfied.[159] Three of the conditions relate to changes in federal law or policy, but the fourth turns on the California AG issuing a written opinion concluding that the agreement would not result in "significant legal risk" to California in light of the federal Controlled Substances Act. In issuing Opinion No. 23-103, the AG determined that in light of an ongoing split in judicial authority and the lack of any directly on-point precedent, its office could not conclude that the risk of preemption of such interstate agreements (or litigation involving the same) was so low as to be "[not] significant," as required by the statute.[160]

152 Bus. & Prof. Code, § 26031.6.
153 Bus. & Prof. Code, § 26080, subd. (b).
154 See Bus. & Prof. Code, § 26090, subd. (f).
155 For a full list of transportation requirements, refer to 4 Cal. Code Regs., § 15311, subd. (a)-(p).
156 23 Op.Cal.Atty.Gen 103 (2023) available at https://oag.ca.gov/system/files/opinions/pdfs/23-103_0.pdf, quoting Bus. & Prof. Code, § 26308, subd. (a)(4).
157 Codified at Bus. & Prof. Code, §§ 26300-26308.
158 23 Op.Cal.Atty.Gen 103, supra; see also Bus. & Prof. Code § 26080, subd. (a) (prohibiting cannabis exports "[e]xcept as provided in Chapter 25," i.e., the chapter added by SB 1326).
159 Bus. & Prof. Code, § 26308, subd. (a).
160 3 Op.Cal.Atty.Gen. 103, *supra*, citing Bus. & Prof. Code, § 26308.

IX. JULY 2021 CONSOLIDATION OF CANNABIS PROGRAMS INTO THE DEPARTMENT OF CANNABIS CONTROL

On July 12, 2021, AB 141 was signed into law, as part of the Budget Act of 2021. Four days later, SB 160[161] was signed into law, making revisions and additions to AB 141. These bills went into effect immediately and amended numerous sections of the California Health and Safety Code, most importantly establishing the Department of Cannabis Control (DCC) within the Business, Consumer Services and Housing Agency. The powers, duties, functions, responsibilities, regulations, and jurisdiction for commercial cannabis activities previously divided among the Bureau of Cannabis Control, the Department of Food and Agriculture and the Department of Public Health were transferred to the newly created DCC.[162]

The majority of the changes made by AB 141 and SB 160 involve consolidating the regulations of the three previous licensing agencies into the same title of the California Code of Regulations, making it simpler for businesses, local governments, and the public to understand the law. A new central DCC website was established at https://cannabis.ca.gov. There are a few substantive changes due to the passage of this new legislation, but for the most part, these do not affect a city's local control over commercial cannabis activity within its jurisdiction, as established under AUMA and MAUCRSA. The key substantive changes under AB 141 and SB 160 include:

- The definition of "commercial cannabis activity" has been revised to include acting as a cannabis event organizer for temporary cannabis events.[163]
- "Manufacturer" has been removed from the definitions section; however, the Type 6 and Type 7 licensee categories of "Manufacturer 1" and "Manufacturer 2," respectively, remain.[164]
- The definition of "manufacture" has been revised to include to package or label.[165]
- Until June 30, 2023, MAUCRSA authorized DCC to issue a provisional license to a local equity license applicant if the applicant met specified requirements. No provisional licenses shall be renewed after January 1, 2025, and no provisional license is effective after January 1, 2026. The legislature also expressed its intent that no further exemptions from annual licenses be adopted, and any licenses issued after January 1, 2025, shall be issued in compliance with all relevant environmental laws.[166]
- MAUCRSA, for purposes of the California Cannabis Equity Act, defines local equity program as a program adopted or operated by a local jurisdiction that focuses on inclusion and support of individuals and communities who were negatively or disproportionately affected by cannabis criminalization. MAUCRSA required the former Bureau of Cannabis Control to administer a grant program to assist local jurisdictions with the development of local equity programs. Under MAUCRSA the bureau was authorized to enter into an agreement with the Governor's Office of Business and

161 Bus. & Prof. Code, § 26001 et seq.
162 Bus. & Prof. Code, §§ 26010, 26010.7.
163 Bus & Prof. Code, §§ 26001, subd. (j), 26200.
164 Bus. & Prof. Code, §§ 26001, 26050, subds. (a)(15)–(16).
165 Bus. & Prof. Code, § 26001, subd. (a)(1).
166 Bus. & Prof. Code, § 26050.2.

Economic Development (GO-Biz) to administer the program. Under the new legislation, GO-Biz is required to administer the grant program.[167]

- The disciplinary procedures of MAUCRSA have been revised to allow the DCC to suspend, prior to a hearing, a license that has been procured by fraud, misrepresentation, deceit, or material misstatement of fact under specified conditions, including an opportunity for a post-suspension hearing pursuant to the Administrative Procedure Act. In addition, the procedures for recovery of the DCC's costs for investigation and enforcement of disciplinary proceedings have been clarified. Further, the Superior Court is now vested with the authority to enjoin violations of Division 10 of the Business and Professions Code upon petition by the DCC, and to order restitution to victims of violations and reimbursement of the DCC's expenses related to such injunctions.[168]

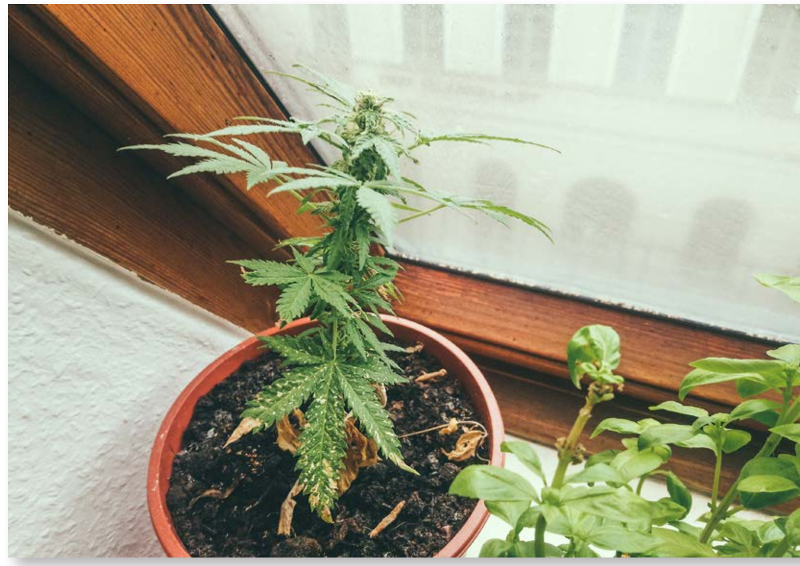
- The DCC has been given authorization to establish regulations governing the designation, amount and exchange of trade samples of cannabis and cannabis products by and between licensees.[169]

The full text of AB 141 and SB 160 may be found here: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB141

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB160

167 Bus. & Prof. Code, § 26244.
168 Bus. & Prof. Code, §§ 26031–26031.2.
169 Bus. & Prof. Code, § 26153.1.

PART 3 | Regulating Cannabis in Cities



State cannabis law is designed to balance decriminalization of certain personal cannabis-related conduct with the intent to "[a]llow local governments to reasonably regulate the cultivation of nonmedical marijuana for personal use by adults 21 years and older through zoning and other local laws, and only ban outdoor cultivation as set forth in this Act."[170] This Part discusses the various aspects of cannabis regulation in cities.

I. MUNICIPAL AUTHORITY TO REGULATE CANNABIS GENERALLY

Municipal authority in the regulation of cannabis is generally derived from the California Constitution's grant of police powers.[171] For charter cities, such power is coupled with the Constitution's grant of municipal affairs authority.[172]

A. The Effect of State Law

The California Constitution limits cities' exercise of police power only to impose local laws that do not conflict with "general" or state laws.[173] A local law conflicts with state law if it either (1) duplicates, (2) contradicts, or (3) enters a field which has been fully occupied by state law, whether expressly or by legislative implication.[174] Local legislation that conflicts with the general laws of the state is said to be "preempted" and is void.[175] However, charter cities are exempt from this restriction in regard to "municipal affairs."[176]

Currently, state law fully occupies some fields, such as cannabis-related personal conduct, as described below. In many other fields, however, state law expressly permits local control. For example, municipal land use and business license regulations are expressly permitted by MAUCRSA. When enacting any cannabis-related regulations, cities will need to analyze each regulation for state law preemption.

B. The Effect of Federal Law

Although California has enacted substantial regulations to legitimize cannabis in recent years, cities should remain cognizant of the fact that

170 Proposition 64, Section 3, subd. (m) (Nov. 9, 2016), available at: https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf.

171 Cal. Const. art. XI, § 7 ("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.").

172 Cal. Const. art. XI, § 5 ("It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.").

173 Cal Const art XI, §7.

174 *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1; *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885; *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 396.

175 *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 290; *People ex rel Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.

176 Cal. Const. art. XI, §5; *Johnson v. Bradley* (1992) 4 C4th 389, 397; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61, superseded by statute on other grounds as stated in *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850.

it remains illegal under federal law.[177] Despite considerable efforts to change the Controlled Substances Act (CSA), cannabis remains a Schedule I drug.[178] Moreover, the CSA does not recognize a medicinal necessity defense to its cannabis prohibitions.[179] Accordingly, the manufacture, distribution, or possession of cannabis, even for medicinal purposes, is prohibited under federal law. The courts have found that the CSA's cannabis regulations are a valid exercise of Congress' authority under the Commerce Clause, even as applied to purely local cannabis activities allowed by state law.[180] Courts have also upheld enforcement of the CSA's cannabis regulations against a variety of other legal challenges.[181]

Nevertheless, the CSA also explicitly contemplates that states would adopt their own controlled substance regulations "unless there is a positive conflict between that provision of [the CSA] and that state law so that the two cannot consistently stand together."[182] Indeed, several courts have held that the CSA does not preempt recent California laws allowing cannabis activity.[183] Similarly, one court has held that the CSA does not preempt a municipal ordinance requiring medicinal cannabis dispensaries[184] to obtain permits.[185] Another case ruled that because medicinal cannabis use remains illegal under federal law, the Americans with Disabilities Act of 1990 does not protect against discrimination on the basis of medicinal cannabis use, even if that use is in accordance with state law explicitly authorizing such use.[186]

II. REGULATION OF CANNABIS-RELATED PERSONAL CONDUCT

As discussed in more detail earlier in this Guide, the majority of AUMA was incorporated into MAUCRSA; however, the operative sections of AUMA governing personal cannabis use remained unchanged.

A. Personal Conduct Authorized

1. Medicinal Cannabis

Even though AUMA and MAUCRSA were enacted later, the CUA is still the touchstone on medicinal-cannabis-related personal conduct. The CUA provides that certain state criminal laws relating to the possession and cultivation of cannabis "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates cannabis for the personal medicinal purposes of the patient upon the written or oral recommendation or approval of a physician."[187] This allows a qualified patient (or their primary caregiver) to possess

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177 Given the status of cannabis under federal law, there is an unresolved question of the effect of California Government Code section 37100, which allows cities to pass local laws that are "not in conflict" with state or federal law.

178 *Raich, supra,* 545 U.S. at p. 15. See *Americans for Safe Access v. Drug Enforcement Admin.* (D.C. Cir. 2013) 706 F.3d 438, 453 (denial of petition to review the DEA's decision to maintain cannabis as a Schedule I drug.).

179 *Oakland Cannabis Buyers' Cooperative, supra*, 532 U.S. at p.2.; but see *Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 858-860.

180 *Raich, supra*, 545 U.S. at p. 29.

181 *Oklevueha Native Amer. Church of Haw., Inc. v. Lynch* (9th Cir. 2016) 828 F.3d 1012 (Religious Freedom Restoration Act, American Indian Religious Freedom Act, Free Exercise Clause, Equal Protection Clause). See also *Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850 [Substantive Due Process, Tenth Amendment]; *Marin Alliance for Medical Marijuana v. Holder* (N.D. Cal. 2011) 866 F.Supp.2d 1142 (Substantive Due Process, Tenth Amendment, Equal Protection, Commerce Clause); *Sacramento Nonprofit Collective v. Holder* (E.D. Cal. 2012) 855 F.Supp.2d 1100 (Commerce Clause, Tenth Amendment, Ninth Amendment, Equal Protection).

182 21 U.S.C. § 903; *Gonzales v. Oregon* (2006) 546 U.S. 243, 251.

183 *Kirby v. City of Fresno* (2015) 242 Cal.App.4th 940, 963; *Qualified Patients Assn.,* supra, 187 Cal.App.4th at 756; *San Diego NORML*, supra, 165 Cal. App.4th at 818; *City of Garden Grove*, supra, Cal.App.4th 355. But see *Conejo Wellness Ctr., Inc.,* supra, 214 Cal.App.4th at 1558, fn. 5.

184 It should be noted that as of the publication of this Guide, the term "storefront retail" is a more modern term for what used to be known as "dispensary."

185 *City of Palm Springs v. Luna Crest, Inc.* (2016) 245 Cal.App.4th 879, 884-886.

186 *James v. City of Costa Mesa* (9th Cir. 2012) 700 F.3d 394.

187 Health & Saf. Code, § 11362.5, subd. (d).

and cultivate any amount of cannabis reasonably necessary for their current medical condition.[188] For additional details on the scope of the CUA, see Part I of this Guide.

However, the CUA does not preempt local ordinances regulating or banning the cultivation of medicinal cannabis.[189] Similarly, it does not preempt local ordinances that completely and permanently banned medicinal cannabis dispensaries that were later allowed under the Medical Marijuana Program Act.[190]

2. Non-Medicinal Cannabis

In 2016, AUMA made it expressly legal for those age 21 and older to:

- Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis,[191] or not more than 8 grams of concentrated cannabis, including as contained in cannabis products;
- Possess, plant, cultivate, harvest, dry, or process up to six living cannabis plants and possess the cannabis produced by the plants; and
- Smoke or ingest cannabis or cannabis products.[192]

However, personal use and consumption is not unfettered. For example, cannabis in excess of 28.5 grams that is produced by plants kept pursuant to the personal cultivation provision of the Act must be kept in a locked space on the grounds of a private residence that is not visible from a public place.[193] In addition, state law prohibits the following:

- Smoking or ingesting cannabis or cannabis products in public, except as authorized locally (for example in cannabis consumption lounges);
- Smoking cannabis or cannabis products where smoking tobacco is prohibited;
- Smoking cannabis or cannabis products within 1,000 feet of a school, day care center, or youth center while children are present, with certain exceptions;
- Possessing an open container of cannabis or cannabis products while driving, operating, or riding in a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation;
- Possessing, smoking, or ingesting cannabis or cannabis products on the grounds of a school, day care center, or youth center while children are present; and

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188 *Kelly, supra,* 47 Cal.4th at p. 1008 (citing *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.).

189 *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 969-970; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704.

190 *Inland Empire Patients Health and Wellness Center, supra*, 56 Cal.4th 729.

191 This equates to just under an ounce.

192 Health & Saf. Code, § 11362.1, subd. (a)(4).

193 Health & Saf. Code, § 11362.2, subd. (a)(2).

- Smoking or ingesting cannabis or cannabis products while driving or riding in a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation, with certain exceptions.[194]

With the notable exception of cannabis cultivation, as discussed below, cities cannot regulate the personal cannabis-related conduct that is expressly authorized by AUMA.[195] However, AUMA expressly provides that cities may regulate or prohibit any cannabis-related personal conduct within a government owned, leased, or occupied building.[196] Additionally, AUMA maintained the rights and obligations of cities, as public employers, to maintain drug-free workplaces, to prohibit cannabis activity in the workplace, and to implement policies prohibiting cannabis use by employees and prospective employees.[197]

B. Cannabis Cultivation for Personal Use

Cities have flexibility to regulate cannabis cultivation for personal use. Cities may reasonably regulate, but not ban, indoor cannabis cultivation in a private residence for personal use. Cities may regulate or ban outdoor cannabis cultivation for personal use on the grounds of a private residence.[198] Personal use cannabis cultivation in a fully enclosed, secure, accessory structure on the grounds of a private residence may be reasonably regulated, but not banned.[199] AUMA defines "private residence" as "a house, an apartment unit, a mobile home, or other similar dwelling."[200]

State law limits personal cannabis cultivation to six plants, and requires that the plants and any cannabis produced by the plants, exceeding the allowable 28.5 grams, be stored in a locked space not visible from a public place.[201] Only six plants may be cultivated in or on the grounds of a private residence at one time.[202]

Within these parameters, cities may consider additional, reasonable regulations of cannabis cultivation for personal use. No appellate court has yet opined on the permissible scope of "reasonable regulations." To date, only a few unpublished trial court opinions have addressed a challenge to municipal regulation of personal cannabis cultivation.[203] The court found that the local regulations outlining permit eligibility requirements were "arbitrary and capricious" because they

194 Health & Saf. Code, § 11362.3.
195 Health & Saf. Code, § 11362.1, subd. (a).
196 Health & Saf. Code, § 11362.45, subd. (g).
197 Health & Saf. Code, § 11362.45, subd. (f).
198 Health & Saf. Code, § 11362.2, subd. (b).
199 Health & Saf. Code, § 11362.2, subd. (b)(2).
200 Health & Saf. Code, § 11362.2, subd. (b)(5).
201 Health & Saf. Code, § 11362.2, subd. (a)(2).
202 Health & Saf. Code, § 11362.2, subd. (a)(3).
203 *Harris v. City of Fontana* (Super. Ct. San Bernardino County, 2018, No. CIVDS 1710586); *Cordova v. Mendocino County Sheriff's Office*, 2024 WL 1090012 (N.D. Cal. Feb. 2, 2024); *County of Santa Cruz v. Bureau of Cannabis Control* (Super. Ct. Fresno County, 2019, No. 19CECGO1224.)

excluded "certain persons from doing what state law specifically allows them to do," i.e. cultivate six cannabis plants within a single residence.[204] Additionally, the court found the local regulations on permitting, use of residential space, and inspections were unreasonable because they did not have a nexus to the activity being regulated: personal cultivation of six cannabis plants.[205] Until appellate judicial guidance is provided, cities may consider adopting reasonable, rationally-related public health, safety, and welfare regulations furthering their Constitutional police powers and the authority given by the voters in AUMA.[206]

PRACTICE TIP: *In crafting reasonable regulations on personal cannabis cultivation, cities should consider the breadth and scope of desired regulations, being careful to establish the rational connection to regulating personal cultivation of small amounts of cannabis plants. Regulations may require coordination with multiple city departments regarding permitting, permissible locations for personal cultivation, compliance with safety codes and standards, accessory structure requirements, environmental standards, as well as safety and nuisance standards, and outdoor inspections. Regulatory needs will vary according to the environment and the will of each city. Cities should be mindful of the types of regulations found to be unreasonable in Harris v. City of Fontana when determining how best to approach this type of regulation.*

Until the permissible scope of reasonable local regulation is delimited by a published court opinion, restrained regulations that do not conflict with the broad permission granted to individuals by AUMA are likely to be upheld. Aggressive local regulations, such as those limiting who can obtain a permit or requiring payment of any delinquent, preexisting administrative citation fines, may be at a greater risk of being struck down.

204 *Id.* at p. 7.

205 *Id.* at pp. 7-9; see *Sheetz v. County of El Dorado* (2024) 501 U.S. 267, 275-276.

206 Cal. Const., art. XI, § 7; *Inland Empire Patients Health and Wellness Center, supra*, 56 Cal.4th at 739-38; Health & Saf. Code, § 11362.2, subd. (b).

PRACTICE TIP: *Given the lack of court guidance on this issue, a severability clause should be included in any local regulatory ordinance imposing regulations of cannabis cultivation for personal use.*

III. REGULATION OF COMMERCIAL CANNABIS ACTIVITY

Cities may prohibit or regulate commercial cannabis activity within their jurisdictions.[207] The scope and type of regulation may vary depending on the nature and character of the city and the will of its residents. A city may allow and regulate all types of cannabis businesses, only certain types of cannabis businesses, or may ban any or all commercial cannabis activity. Local regulations may be stricter than the minimum state standards.[208] One of the main tenets of AUMA was local control—cities that want to permit commercial cannabis activity may do so on their own terms and cities that want to prohibit these uses are free to do so as well.

Commercial cannabis activity is also regulated extensively by state law, which includes a detailed licensing scheme. Generally, a state license for commercial cannabis activity may not be issued if that activity would violate local regulations.[209] Cities are required to provide copies of commercial cannabis ordinances to the state, along with a contact person who can verify local compliance by an applicant.[210] The local jurisdiction must provide a response to an inquiry by the state licensing agency (now consolidated under the Department of Cannabis Control) within [60] business days, or the licensing authority will make a rebuttable presumption that the application complies with local regulations.[211]

A. Land Use Considerations

Prior to the adoption of AUMA and MAUCRSA, many cities used planning and zoning regulations to prohibit or regulate cannabis activity. The California Supreme Court ruled unanimously in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*[212] that the CUA and MMPA do not preempt local ordinances that completely and permanently ban medicinal cannabis facilities.[213] In reaching this conclusion, the court recognized that the local police power, which derives from California Constitution, article XI, § 7, "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."[214] The court concluded that the CUA and MMPA neither expressly nor impliedly preempt local zoning authority.[215] Instead, the CUA and MMPA both have a very limited and specific reach.[216] *Inland Empire* reasoned that the MMPA immunizes only "the cooperative or collective cultivation and distribution of medical marijuana 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,

207 Bus. & Prof. Code, §§ 26200, 26201.
208 Bus. & Prof. Code, § 26201.
209 Bus. & Prof. Code, § 26055, subd. (d).
210 Bus. & Prof. Code, § 26055, subd. (f)-(g).
211 Bus. & Prof. Code, § 26055, subd. (g)(2)(D)-(F).
212 (2013) 56 Cal.4th 729 (hereinafter *Inland Empire*).
213 Only medical cannabis was authorized at the time of this case.
214 *Inland Empire, supra*, 56 Cal.4th at p. 738.
215 *Id.* at p. 742.
216 *Id.* at p. 762.

allow, or accommodate the existence of such facilities."[217]

Subsequently, the court in *Maral v. City of Live Oak*[218] held that neither the CUA nor MMPA preempts a city's police power to prohibit medicinal cannabis cultivation. In so holding, the *Maral* court relied heavily on the reasoning and analysis of the Supreme Court's decision in *Inland Empire*. *Maral* confirmed that there is "no right—and certainly no constitutional right—to cultivate medical marijuana."[219] The *Maral* plaintiffs made several other arguments against a cultivation ban, including claims of violation of equal protection of disabled persons, procedural and Ralph M. Brown Act[220] "irregularities" in the adoption of the ordinance, and "negative impact" to "long-cherished property rights." The court rejected all of these claims as "undeveloped" arguments, which the court felt it did not need to address.[221]

In *Kirby v. County of Fresno*[222] the court upheld the part of a county ordinance banning medicinal cannabis dispensaries and banning the personal cultivation or storage of medicinal cannabis within the county. The court also upheld a component of the ordinance that limited the use of medicinal cannabis to qualified patients at their personal residences only. In reaching these holdings, the court relied on *Inland Empire* and *Maral*, and it also conducted an independent analysis of the text of the CUA and MMPA. The court found there is no right to cultivate medicinal cannabis and that municipalities may enact land use regulations restricting or banning cultivation. The court further concluded that a patient does not have a right to obtain or use medicinal cannabis but that the CUA and MMPA provide a defense to possession or use when a person is faced with arrest or criminal prosecution. However, the court struck down the criminal penalty portions of the county ordinance, finding that the component of the ordinance making its violations a misdemeanor was preempted by California's extensive statutory scheme relating to cannabis.

Together, *Inland Empire, Maral,* and *Kirby* supported a municipality's authority to regulate or to ban both medicinal cannabis dispensaries and medicinal cannabis cultivation pre-AUMA (a concept that is continued in AUMA and MAUCRSA). These principles do not abrogate the medicinal cannabis defense in a prosecution under state criminal law, however, as local land use authority cannot nullify a statutory defense to violations of state law.[223]

In addition to *Inland Empire, Maral,* and *Kirby,* the following opinions have upheld local zoning bans or restrictions on medicinal cannabis establishments:

- *County of Los Angeles v. Hill*[224] rejected a claim that the CUA and MMPA preempted a conditional use permit requirement and locational restrictions for medicinal cannabis dispensaries;

217 *Id.* at p. 759 (italics in original).
218 (2013) 221 Cal.App.4th 975 (hereinafter *Maral*).
219 *Id.* at 984.
220 Gov. Code, § 54950 et seq.
221 *Maral*, *supra,* 221 Cal.App.4th at p. 984.
222 (2015) 242 Cal.App.4th 940.
223 *People v. Ahmed* (2018) 25 Cal.App.5th 136, 143.
224 (2011) 192 Cal.App.4th 861.

- *Browne v. County of Tehama*[225] upheld a rural county ordinance regulating cannabis cultivation;

- *County of Tulare v. Nunes*[226] upheld a zoning ordinance that restricted the location of medicinal cannabis collectives and cooperatives; ruling that limitations on the quantity of cultivation do not render an ordinance unconstitutional in a context other than criminal prosecution;

- *Conejo Wellness Ctr., Inc. v. City of Agoura Hills*[227] held that neither the CUA nor the MMPA preempted a local ban on medicinal cannabis dispensaries; and

- *City of Monterey v. Carrnshimba*[228] affirmed summary judgment against a medicinal cannabis dispensary and held that a dispensary was not a listed use in the city's planning ordinance and thus was presumptively banned; the court rejected the claim that a dispensary fell within preexisting land use classifications for personal services, retail sales, and pharmacies and medical supplies.

It is important to note that many medicinal cannabis advocates have unsuccessfully challenged local bans, regulations, and permitting schemes on equal protection, due process, and other constitutional grounds.[229]

In *Safe Life Caregivers v. City of Los Angeles*[230] the court found that an initiative measure banning medicinal cannabis businesses did not have to comply with either (1) the state's minimal procedural requirements for zoning ordinances in Government Code section 65804 (which requires compliance with the public hearing requirements of Government Code section 65854) or (2) 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 explicit immunity from prosecution of nuisance violations for medicinal cannabis businesses that fell within certain limited categories and complied with a set of regulations. The court held that the measure did not unlawfully grant, in violation of substantive and procedural requirements, a

225 (2013) 213 Cal.App.4th 704.
226 (2013) 215 Cal.App.4th 1188.
227 (2013) 214 Cal.App.4th 1534.
228 (2013) 215 Cal.App.4th 1068.
229 *Maral, supra,* 221 Cal.App.4th at p. 984 (rejecting various constitutional challenges to city's cultivation ban); *County of Tulare v. Nunes, supra,* 215 Cal.App.4th at p. 1204 (county's public safety concerns constituted rational basis for differential treatment of medical cannabis dispensaries); *Conejo Wellness Ctr., Inc. supra,* 214 Cal.App.4th at p. 1560 (rejecting substantive due process, procedural due process, and right to privacy challenges to dispensary ban); 420 Caregivers, *LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316 (rejecting due process and right to privacy challenges to ordinance restricting medical cannabis dispensaries); and *County of Los Angeles v. Hill* 192 Cal.App.4th at 874 (zoning requirements for medical cannabis dispensaries did not violate Equal Protection Clause because dispensaries created unique public safety concerns and were not similarly situated to pharmacies). See also *The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116 (ban on dispensaries did not violate state or federal laws protecting disabled persons, did not constitute civil rights violation under 42 USC §1983, and did not violate various state tort laws).
230 (2016) 243 Cal.App.4th 1029.

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. Finally, the court reviewed the MMRSA and held that it did not preempt local regulation.[231]

NOTE: *Remember that all of the foregoing cases arose prior to the adoption of AUMA and MAUCRSA, and accordingly, some of the holdings may be affected. Under MAUCRSA, cities may no longer prohibit indoor personal cultivation, although it may impose reasonable restrictions. See Part 3, Section II of this Guide regarding Regulation of Cannabis-Related Personal Conduct. Nevertheless, these cases illustrate the evolution of local land use and regulatory authority for cannabis uses in California, which ultimately became a critical element of AUMA. These cases also discuss many relevant topics that are helpful to practitioners, including local police power, preemption, zoning ordinance adoption, disabled access, conflicts of law, torts, as well as many cannabis-specific topics. Accordingly, this body of case law remains relevant and helpful, even after adoption of AUMA.*

With the adoption of both AUMA and MAUCRSA, cities' ability to adopt land use ordinances and other business license ordinances to regulate both medicinal and adult-use cannabis uses was reaffirmed.[232] In *City of Vallejo v. NCORP4*,[233] the court recognized that both prior state law and AUMA do not preempt cities ability to allow, restrict, limit, or prohibit commercial cannabis land uses, and upheld the city's ordinance limiting allowed medicinal cannabis dispensaries to those that previously paid local business taxes.

Notwithstanding the foregoing, practitioners should familiarize themselves with the following sections from MAUCRSA that affect local regulation of cannabis uses:

- **Personal cannabis cultivation:** Cities may reasonably regulate but may not prohibit personal cultivation. See Local Regulation of Cannabis Cultivation for Personal Use above.
- **Cannabis consumption lounges:** In addition to any local regulations, cannabis consumption lounges must meet certain state criteria related to access and ensuring consumption is not visible from public areas.[234]
- **Buffer Zone:** Cannabis dispensaries may not be located within 600 feet of schools, youth centers, and day care centers, unless a city has adopted a local ordinance providing otherwise.[235]
- **Delivery:** Cities can ban or regulate deliveries within their borders.[236] However, cities cannot prevent a delivery service from using public roads to pass through its jurisdiction.[237]

B. Local Ordinances

1. Distinguishing Between Business and Land Use Regulation

Whether cities should adopt a land use ordinance or a business license ordinance, or both, to regulate cannabis uses and activities depends upon the goals the city is trying to achieve. If a city's goal is to address land use impacts associated with

231 *Safe Life Caregivers v City of Los Angeles*, *supra,* 243 Cal.App.4th at pp. 1045-1049.
232 Bus. & Prof. Code, § 26200, subd. (a)-(b).
233 (2017) 15 Cal.App.5th 1078.
234 Bus. & Prof. Code, § 26200, subd. (g).
235 Bus. & Prof. Code, § 26054, subd. (b). Cf. Health & Saf. Code, § 11362.768.
236 Bus. & Prof. Code, § 26200.
237 Bus. & Prof. Code, § 26090, subd. (e).

cannabis uses, such as limiting the location or odor, then the city will need to follow both state and local law for adopting ordinances that regulate the land use impacts of cannabis activities.[238] For example, local operating regulations may encompass industry-specific standards, public safety risks, quality of life concerns, and other factors unique to the locale. If a city's goal is to address the concerns of the business aspect of cannabis activities, such as who may engage in commercial cannabis activities, then the city may regulate the cannabis activity through its general police powers. For example, cities may consider permit or business license requirements, including objective standards for applications, approvals, denials, renewals, and licensing revocations, as well terms of security, odor, inspections, notices of violations, levels of penalties, and an appeals process.

PRACTICE TIP: *A city that incorporates most regulatory provisions in the business regulations should still identify in its zoning ordinance the zones where the various commercial cannabis uses are permitted.*

PRACTICE TIP: *Many cities historically regulated cannabis operations through conditional use permits authorized under the zoning ordinance. The conditional use permit gave cities the ability to impose conditions on the use to prevent any secondary impacts. Remember that a conditional use permit runs with the land and is not tied to a particular operator. A regulatory business license tied to the operator should be required in cities that want to maintain control of who operates a commercial cannabis business.*

2. California Environmental Quality Act (CEQA)

In adopting an ordinance that regulates or prohibits cannabis uses, cities should consider the application of the California Environmental Quality Act[239] (CEQA). Depending upon the circumstances, the adoption of these types of ordinances may be supported by a finding that the ordinance is either not a "project" under CEQA or exempt from CEQA. Otherwise, an environmental document may be required.

Cannabis regulations are not a "project" subject to CEQA if they "will not result in a direct or reasonably foreseeable indirect physical change in the environment"[240] or if they will not have "the potential for causing a significant effect on the environment."[241] However, in *Union of Med. Marijuana Patients, Inc. v. City of San Diego*,[242] the California Supreme Court held that an ordinance amending zoning regulations to allow up to four

238 See, e.g., *Safe Life Caregivers, supra,* 243 Cal.App.4th 1029.
239 Pub. Res. Code, § 21000 et seq.
240 Cal. Code Regs., tit. 14, § 15060, subd. (c)(2).
241 Cal. Code Regs., tit. 14, § 1561, subd. (b)(3).
242 (2019) 7 Cal.5th 117.

medicinal cannabis dispensaries in each council district at specific locations with a conditional use permit qualifies as a "project" under CEQA.[243] The Court found that the regulations could, potentially, result in indirect physical changes in the environment by permitting the establishment of a sizeable number of a new type of business that could foreseeably result in new retail construction to accommodate the businesses and by changing patterns of vehicle traffic.

MAUCRSA had provided a statutory exemption for "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."[244] However, that exemption expired by operation of law on June 30, 2021.[245]

If an ordinance is subject to CEQA, and not exempt, an environmental document may be required. The scope of the environmental review will depend on the type of activity the city is authorizing under the ordinance. By way of example, cultivation activities can require analysis into water use, pesticide use, drainage, and other environmental considerations. Retail operations, on the other hand, may be more similar to all other permitted retail operations in the city's commercial zones and may not generate any unusual impacts to the environment.

3. Social Equity Issues

In adopting local ordinances, cities may also want to consider social equity concerns. The California Legislature has found that cannabis prohibition has had a "devastating impact on communities across California," with individuals who have cannabis convictions encountering greater difficulties in accessing capital, business space, technical support, and regulatory compliance assistance.[246] Furthermore, these impacts from cannabis convictions have had a disproportionate impact on Black and Latinx people, even though people of all races used or sold cannabis at the same rates during the cannabis prohibition.[247] *The California Cannabis Equity Act of 2018*[248] is intended to ameliorate these adverse impacts by providing assistance to those individuals and communities that have been negatively impacted. The Act was amended in July 2021 when the three state licensing agencies were consolidated under the DCC. Under the Act, the DCC may provide technical assistance for local equity programs, which includes providing grant funding to eligible local jurisdictions upon appropriation of funds by the Legislature, through the Governor's Office of Business and Economic Development (GO-Biz).[249]

Any local jurisdiction that allows for commercial cannabis activity may implement a local equity program. A "local equity program" is defined as "a program adopted or operated by a local jurisdiction that focuses on inclusion and support of individuals and communities in California's cannabis industry who are linked to populations or neighborhoods

243 Cf. *Union of Med. Marijuana Patients v City of Upland* (2016) 245 Cal.App.4th 1265 (ordinance banning mobile dispensaries, adopted in 2013, is not a "project" under CEQA partly because of speculative nature of plaintiffs' claims of environmental consequences).

244 Bus. & Prof. Code, § 26055, subd. (h).

245 Bus. & Prof. Code, § 26055, subd. (h).

246 Sen. Bill 1294 (2017-2018 Reg. Sess.) § 2, subd. (b).

247 Sen. Bill 1294 (2017-2018 Reg. Sess.) § 2, subd. (c).

248 Bus. & Prof. Code, § 26240 et seq.

249 Bus. & Prof. Code, § 26242, subd. (a).

that were negatively or disproportionately impacted by cannabis criminalization as evidenced by the local jurisdiction's equity assessment."[250] An "equity assessment" may include a review of historical rates of local cannabis arrests or convictions, consideration of how the local jurisdiction's cannabis policies have impacted communities and populations, and other information about how the War on Drugs has impacted communities within its jurisdictions.[251] GO-Biz publishes a list of local jurisdictions that have adopted local equity programs and a list of model local equity ordinances developed by advocacy groups and experts.[252] Although the California Cannabis Equity Act of 2018 provides that the state may assist local jurisdictions with the implementation of local equity programs, a local jurisdiction allowing cannabis-related use and activities is not required to implement a local equity program.

PRACTICE TIP: *It is important to remember that local equity programs are intended to mitigate the adverse impacts caused by a city's cannabis-related policies. For example, a city that prohibited all cannabis-related use and activities until AUMA was passed will have different social equity considerations compared to a city that allowed for uses and activities related to medicinal cannabis following the adoption of Proposition 215. Practitioners should be mindful of their own city's historic practices when researching and borrowing from other cities' social equity programs.*

250 Bus. & Prof. Code, § 26240, subd. (e).

251 Bus. & Prof. Code, § 26240, subd. (b).

252 Bus. & Prof. Code, § 26246, subd. (b). The list is available at https://business.ca.gov/cannabis-equity-grants-program-for-local-jurisdictions/.

PRACTICE TIP: *Social equity can come in many forms and can be incorporated into many aspects of a business selection process. In jurisdictions that have merit-based or competitive business selection processes, some cities have given more weight to, or otherwise favored, applicants in communities that have been historically and disproportionately impacted by the criminalization of cannabis activities. Cities can also consider creating a more even playing field in the selection process by allowing potential operators to participate in a selection process before having secured a physical location for the business. For many, the cost of securing and leasing a business location and holding that location for many months during a long selection process can be too expensive. This leaves only well-capitalized and well-established businesses able to compete for the licenses, which can in turn perpetuate the historical social inequities that the California Cannabis Equity Act aimed to reverse.*

C. Commercial Cannabis Cultivation

Commercial cannabis cultivation is regulated statewide through Chapter 6 of Division 10 of the Business and Professions Code, and through regulations originally promulgated by the Department of Cannabis Control in California Code of Regulations, Title 4, Division 19, Chapter 7. Cultivation is defined as "any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis."[253] Cultivation may occur in a variety of ways, including indoor, outdoor, mixed light, nursery, and special cottage cultivation operations, each subject to specific state licensing and regulatory requirements.[254] The type of commercial cultivation license required generally depends on the square footage of the canopy size[255] and the type of light used in cultivation.[256] Beginning January 1, 2023, state law also permits for large cultivation site licenses.[257] Large sites include those greater than one acre for outdoor sites with no artificial light, indoor sites using exclusively artificial light greater than 22,000 square feet, and mixed light sites greater than 22,000 square feet.[258] Large cultivation site license holders, or those with an ownership or financial interest in such a license may not hold or have an interest in a Type 8 (testing laboratory), Type 11 (distributor) or Type 12 (microbusiness) license.[259]

Commercial cultivators are subject to strict, statewide, water supply and irrigation requirements,[260] as well as restrictions on marketing cannabis as organic and properly designating the county of origin.[261] State license applicants must submit a detailed cultivation plan that includes a premises diagram, a pest management plan, and a cannabis waste plan.[262] Additionally, state-licensed cannabis cultivators must comply with

253 Bus. & Prof. Code, § 26001, subd. (o).; Cal. Code Regs., tit. 4, § 15000, subd. (q).

254 Bus. & Prof. Code, § 26061, subd. (a).

255 "Canopy" is the designated area(s) at a licensed premises that will contain mature plants at any point in time. (Cal. Code Regs., tit. 4, §15000, subd. (m); see also Cal. Code Regs., tit. 4, §16308 [canopy requirements].)

256 Bus. & Prof. Code, § 26061; Cal. Code Regs., tit. 4, §§ 16201.

257 Bus. & Prof. Code, § 26061, subd. (c).

258 Bus. & Prof. Code, § 26061, subd. (c); Cal. Code Reg., tit. 4, §16201.1.

259 Cal. Code Regs., tit. 4, § 16300.1.

260 Bus. & Prof. Code, § 26060.1; Cal. Code Regs., tit. 4, § 16311.

261 Bus. & Prof. Code, §§ 26062.5, 26063.

262 Cal. Code Regs., tit. 4, § 16309.

weighing, packaging, labeling, and track and trace regulations.[263] Finally, indoor and mixed-light cultivators must ensure the electrical power used meets the average electricity greenhouse gas emissions intensity required by their local utility provider, or they will be required to obtain carbon offsets.[264] As of January 1, 2023, cultivation and microbusiness licensees authorized to engage in indoor, tier 2 mixed-light cultivation, or nurseries using indoor or tier 2 mixed-light techniques, are required to report total electricity for each power source used to DCC upon license renewal.[265]

Cities have broad discretionary authority in the regulation of commercial cannabis cultivation. Accordingly, cities may regulate local licensing, traditional public safety measures, environmental measures, and zoning and land use and development standard regulations (lighting, hours of operation, noise, odor, etc.). Some areas of particular regulation are identified in state law, including land conversion, building and fire standards, grading, electricity, water usage and quality, habitat protection, and other environmental concerns.[266] Cities may enact further regulations to ameliorate odors, excessive noise, unsanitary conditions, pesticide exposure, security concerns, including background checks, and local environmental impacts.

D. Commercial Cannabis Manufacturing

Commercial cannabis manufacturing is regulated in state law by Chapter 13 of Division 10 of the Business and Professions Code, and by California Code of Regulations, Title 4, Division 19, Chapter 8. Cannabis manufacturers create "cannabis products," defined as "cannabis that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or concentrated cannabis and other ingredients."[267]

Cannabis manufacturers must obtain a state license, the type of which depends, in part, on whether the manufacturer uses volatile solvents, non-volatile solvents, or no solvents.[268] Manufacturers are subject to detailed state regulatory requirements, including:[269]

- Security regulations
- Extraction regulations[270]
- Product quality control regulations
- Grounds, building, and premises regulations designed to ensure quality control and safety
- Equipment regulations
- Personnel procedures promoting cleanliness
- Raw material safety regulations

263 Cal. Code Regs., tit. 4, §§ 17221, 17398, 15048–15051.
264 Cal. Code Regs., tit. 4, § 16305.
265 Cal. Code Regs., tit. 4, § 15020(e).
266 Bus. & Prof. Code, § 26066.
267 Bus. & Prof. Code, § 26001, subd. (k); Health & Saf. Code, § 11018.1; Cal. Code Regs., tit. 4, § 15000, subd. (j).
268 Bus. & Prof. Code, § 26130, subd. (a); Cal. Code Regs., tit. 4, § 17006.
269 See generally, Cal. Code Regs., tit. 4, §§ 15042.1, 17006–17220, 17402–17412.
270 Notably, no volatile solvent cannabis extraction or closed loop extraction may occur in an area zoned as residential. (Cal. Code Regs., tit. 4, § 17202.1, subd. (b).)

- Manufacturing protocols
- Record keeping
- Labeling and packaging regulations
- Inspection requirements

Like other commercial cannabis businesses, cannabis manufacturers must comply with all local ordinances and regulations in order to obtain a state license.[271] In addition to land use and zoning requirements, cities may enact health, safety, and welfare regulations for local cannabis manufacturers.[272] Such regulations may include, for example, (1) land use and zoning regulation imposition of development standards; (2) business permits or licenses; (3) regulatory inspections; (4) a limit on the number of permitted manufacturing businesses; (5) restricted hours of operation; (6) proof of landlord authorization; (7) notice to surrounding property owners; (8) insurance and indemnity; (9) facility and equipment requirements; (10) safety requirements; (11) specific requirements on the use of compressed gases and other manufacturing techniques; (12) building and perimeter security requirements; (13) background checks that go beyond that required under state law; and (14) signage requirements or restrictions. Cities may also consider different requirements for manufacturers operating under different types of state licenses, calculated to apply the most stringent regulations to those manufacturing operations posing the greatest public safety risk.

There are several different manufacturing license types.[273] For example, Type N is for manufacturers that produce cannabis products, other than extracts or concentrates that are produced through extraction. As an example, a Type N license can be for a manufacturer who merely uses an already-produced extract and infuses the extract into a food or beverage.

PRACTICE TIP: *"Manufacturing" with a Type N Manufacturing license is somewhat of a misnomer and can be confusing to city staff or city councilmembers. Technically, merely mixing an extract into a food or beverage is considered "manufacturing." Therefore, cities may distinguish between manufacturers who are merely infusing products (taking a cannabis extract and mixing in brownie mix, for example), and those who are using a more comprehensive manufacturing operation to extract the THC from other cannabinoids. Because infusion may have fewer impacts on surrounding areas, cities may consider allowing infusion in more populated zones, like general commercial districts, and extraction in less populated zones, like industrial districts.*

E. Commercial Cannabis Testing

Commercial cannabis and cannabis products are subject to state-imposed testing requirements, and shall not be sold commercially without a representative sample being tested by a licensed laboratory.[274] A person that holds a state testing laboratory license is prohibited from obtaining a license for any other commercial cannabis activity, and is prohibited from employing anyone who is

271 Bus. & Prof. Code, § 26055.

272 Bus. & Prof. Code, §§ 26200, 26201; Proposition 64, Section 3, subd. (c), (d) (Nov. 9, 2016), available at: https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf.

273 Cal. Code Regs., tit. 4, § 17006.

274 Bus. & Prof. Code, § 26100, subd. (a).

also employed by another licensee that does not hold a state testing laboratory license.[275]

All cannabis testing laboratories must be certified to test for a variety of substances in cannabis and cannabis products, and must follow accepted laboratory testing guidelines.[276] Testing laboratories must provide a certificate of analysis for each representative cannabis sample analyzed,[277] and are responsible for quality assurance,[278] proficiency testing,[279] and audits.[280]

In addition to traditional land use and zoning requirements, cities may consider the following when regulating cannabis testing laboratories: business permits, regulatory inspections, notice to surrounding property owners, landlord authorization, insurance and indemnity, proof of all laboratory certifications and accreditations, building and perimeter security requirements, operating procedures and security requirements for delivery of cannabis and cannabis products for testing, restricted hours of operation or restricted hours for accepting cannabis deliveries for testing, background checks, and signage requirements or restrictions.

PRACTICE TIP: *Cities may want to consider allowing testing facilities in various zones within their city, as secondary effects may be minimal. The use functions much like any other medicinal testing facility or laboratory.*

F. Commercial Cannabis Distribution

Distribution plays a vital role in the commercial cannabis system. Distribution is defined as the "procurement, sale, and transport of cannabis and cannabis products between licensees."[281]

A distributor can hold a Type 11[282] or Type 13 license.[283] A Type 11 license allows a distributor to transport cannabis between licensed cannabis premises; to package, re-package, label, and re-label cannabis for retail sale; transport a cannabis goods batch to a testing lab while also ensuring the proper retrieval and documentation of batch samples;[284] transfer untested cannabis goods, or untested immature cannabis plants or seeds to specified licenses; and to store certain packaged cannabis goods.[285] A Type 13 license allows a distributor to engage in transport only.[286] In addition, a microbusiness (Type 12 license) can act as a distributor for self-distribution of its own commercial cannabis products.[287]

275 Bus. & Prof. Code, § 26053, subd. (b).
276 Cal. Code Regs., tit. 4, §§ 15701, 15702, 15712–15725.
277 Cal. Code Regs., tit. 4, § 15726.
278 Cal. Code Regs., tit. 4, §§ 15729–15730.
279 Cal. Code Regs., tit. 4, §§ 15733–15734.
280 Cal. Code Regs., tit. 4, § 15735.
281 Bus. & Prof. Code, § 26001, subd. (u).
282 Bus. & Prof. Code, § 26050, subd. (a)(19).
283 Cal. Code Regs. tit. 4, § 15315.
284 If the batch passes, the distributor may transport the cannabis good to a licensed retailed or a licensed distributor. However, if the batch fails and cannot be remediated, the distributor must destroy the batch. (Cal. Code Regs. tit. 4, § 15306, subd. (f).)
285 Cal. Code Regs. tit. 4, §§ 15300–15314.
286 Cal. Code Regs. tit. 4, § 15315.
287 Bus. & Prof. Code, § 26001, subd. (am).

All distributors must comply with minimum security and transportation safety requirements for the commercial distribution of cannabis and cannabis products, which relate to the following:

- Comprehensive general liability insurance;
- Restrictions on who may be a driver or passenger in the transport vehicle;
- Restrictions on the vehicle itself — each vehicle must have a valid motor carrier permit pursuant to Vehicle Code section 34620;
- Inventory accounting;
- Records of tax payments, testing, etc.; and
- Shipping manifest.[288]

In addition to state law, a distributor must also comply with any local ordinances.[289] However, a city cannot prevent the transportation of cannabis or cannabis products on public roads by a licensee acting in compliance with Division 10 of the Business and Professions Code.[290] Therefore, a city cannot prevent a distributor's transport vehicle from traveling through its jurisdiction on public roads simply because the distributor is transporting cannabis products, but can regulate or ban distribution facilities within its boundaries.[291] Some types of regulations that a city may adopt include zoning regulations to ensure that the distribution facilities are located in a commercial/industrial center, as well as health and safety regulations relating to security, vehicle, and storage requirements.

288 Cal. Code Regs., tit. 4, §§ 15300–15315; Bus. & Prof. Code, § 26070.
289 Bus. & Prof. Code, § 26055.
290 Bus. & Prof. Code, § 26080, subd. (b).
291 Bus. & Prof. Code, § 26055.

G. Commercial Cannabis Retail

Commercial cannabis retail operations are regulated statewide through Chapter 7 of Division 10 of the Business and Professions Code, and through regulations in the California Code of Regulations, Title 4, Division 19, Chapter 3.

A commercial cannabis business that engages in the retail sale and delivery of cannabis or cannabis products to customers must obtain a state "Retailer" license, which is a Type 10 license.[292]

The term retailer includes both medicinal retailers as well as adult-use retailers. A license may be an A-designation (for adult-use) or an M-designation (for medicinal).[293] Dispensaries that previously operated under the collective or cooperative model for medicinal cannabis have been phased out under the regulatory scheme promulgated by MAUCRSA.[294] State law provides two distinct types of retailers: storefront (formerly known as "dispensaries") and non-storefront. Each is discussed further below.

All retailers must comply with minimum security and transportation safety requirements for the commercial delivery of cannabis and cannabis products established in the California Code of Regulations, Title 4, Division 19 as well as those requirements identified in Division 10 of the Business and Professions Code.[295]

A retailer must have a licensed premises, which is a physical location from which commercial cannabis activities are conducted, however, a retailer's premises may be closed to the public, such that the retailer conducts sales exclusively by delivery.[296]

All licensed retail premises must not be located within a 600-foot radius of a school, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius.[297]

1. Storefront Retail (Formerly, "Dispensaries")

The Department promulgated regulations for all retailers, which include a variety of requirements such as security, packaging, labeling, and operation of a retail business.[298] Local jurisdictions may also regulate or prohibit retail businesses.[299] Like other commercial cannabis activity, a local jurisdiction may regulate commercial cannabis retail businesses within its jurisdiction through its police power.[300]

292 Bus. & Prof. Code, § 26050, subd. (a)(18).
293 Bus. & Prof. Code, § 26050, subd. (b).
294 Stats. 2017, ch. 27, § 140 (repealing Health & Saf. Code, § 11362.775 et seq.).
295 Cal. Code Regs., tit. 16, § 5300 et seq.; Bus. & Prof. Code, § 26070.
296 Bus. & Prof. Code, § 26070, subd. (a)(1).
297 Bus. & Prof. Code, § 26054, subd. (b).
298 Cal. Code Regs., tit. 4, §§ 15400–15427.
299 Bus. & Prof. Code, §§ 26055, 26200.
300 Cal. Const, art. XI, § 7; *Inland Empire Patients Health and Wellness Center, supra*, 56 Cal.4th 729, 737-38."

PRACTICE TIP: *For retail facilities, many cities have adopted zoning regulations to identify appropriate commercial zones, development standards, and limitations on the number of retail facilities per zone. In addition to zoning regulations, a city may adopt regulations pertaining to retail operations to address health and safety concerns. Some examples of regulations that address health and safety concerns include limiting hours of operation, security requirements, storage, and restrictions on customer accessibility.*

PRACTICE TIP: *Since cannabis businesses often operate as cash-based businesses, security is a critical component of successful retail cannabis regulations. Cannabis products can also create an odor. In commercial districts, regulations should be in place to ensure that odor does not seep into adjacent commercial tenant spaces.*

2. Consumption Lounges

Some store-front retailers may want to offer consumption lounges where the consumer may ingest, smoke, or vape the cannabis products on site. There is no separate state license category for on-site consumption. Business and Professions Code section 26200, subdivision (g) provides that, notwithstanding Health and Safety Code section 11362.3, subdivision (a), a local jurisdiction may allow for the smoking, vaporizing, and ingesting of cannabis or cannabis products on the premises of a retailer or microbusiness licensed under this division, if all of the following are met:

a. Access to the area where cannabis consumption is allowed is restricted to persons 21 years of age and older;

b. Cannabis consumption is not visible from any public place or nonage-restricted area; and

c. Sale or consumption of alcohol or tobacco is not allowed on the premises.

A store-front retailer that offers consumption on site is different from a temporary cannabis event licensee that offers consumption pursuant to California Code of Regulations, title 4, section 15603. However, the above-identified criteria apply to both types of consumption, in addition to other state and local regulations relating to retailers and temporary cannabis events.

PRACTICE TIP: *Consumption lounges are increasing in popularity, as they offer the public a safe place to consume or smoke cannabis and allow retail operators an opportunity to distinguish themselves from other retailers. As interest in consumption lounges increase, it is important to make sure that city regulations clearly indicate whether on-site consumption is allowed and under what conditions.*

3. Prohibition on Free Cannabis Goods

A licensed retailer is prohibited from providing free cannabis goods to any person. However, a licensee who holds an M-Retailer license, an M-Retailer Non-storefront license, or an M-Microbusiness license that is authorized for retail sales may provide free medicinal cannabis goods, or donate cannabis goods and the use of equipment, if certain criteria are met.[301] In addition, cultivators, manufacturers,

301 Cal. Code Regs., tit. 4, § 15411, subds. (b) and (c).

distributors, and microbusinesses may design limited amounts of cannabis or cannabis products as trade samples through the track and trace program, and provide them free to their employees and most other licensees under new regulations.[302]

4. Non-Storefront Retail

A non-storefront retailer licensee is authorized to conduct retail sales exclusively by delivery using a Type 9 license.[303] A non-storefront retailer is required to comply with all regulations relating to retail storefronts, except for those provisions relating to public access to the licensed premises and the retail area, as the non-storefront retail facility is closed to the public.[304]

5. Cannabis Deliveries

Licensed store-front retailers, non-storefront retailers, and microbusinesses can engage in delivery of cannabis and cannabis products.[305]

The Department adopted minimum security and transportation safety requirements for the commercial delivery of cannabis and cannabis products.[306] These regulations specify, among other things, requirements for delivery employees, technological platforms for delivery, authorized delivery locations, delivery vehicle requirements, allowed cannabis goods carried during delivery, delivery request receipts, and delivery routes.

Some general requirements relating to the delivery vehicle include, but are not limited to, the following: the vehicle cannot have any markings or other indications on the exterior that can indicate it is used for cannabis delivery;[307] the cannabis goods need to be locked in a fully enclosed box or container that is separate from the vehicle and secured to the vehicle;[308] the delivery vehicle needs to have a dedicated Global Positioning System (GPS) used for the delivery vehicle only;[309] and any vehicle used by a licensed retailer for delivery is subject to inspection by the state.[310] Other regulations provide that the delivery driver cannot carry cannabis goods in the delivery vehicle with a value in excess of $10,000 at any time.[311] Additionally, the delivery driver must be at least 21 years of age, must deliver to a physical address in California, and cannot deliver cannabis goods to an address on publicly owned land or in a building leased or owned by a public agency.[312]

Under AUMA, cities can ban or regulate deliveries within their borders.[313] However, cities cannot prevent a delivery service from using public roads to pass through their jurisdiction.[314]

On January 25, 2019, the Bureau of Cannabis Control promulgated Regulation 5416(d) (now Regulation 15416(d)), which provides that a delivery employee may deliver to any jurisdiction within California provided that such delivery is conducted in compliance with all regulations in Division 19

302 Cal. Code Regs., tit. 4, §§ 15041.2–15041.7; Bus. & Prof. Code, § 26153.1.
303 Cal. Code Regs., tit. 4, § 15414.
304 Cal. Code Regs., tit. 4, § 15414; Bus. & Prof. Code, §§ 26012, 26070.
305 Bus. & Prof. Code, § 26090, subd. (a).
306 Bus. & Prof. Code, § 26070; Cal. Code Regs., tit. 4, §§ 15400-15427.
307 Cal. Code Regs., tit. 4, § 15417, subd. (a).
308 Cal. Code Regs., tit. 4, § 15417, subd. (b).
309 Cal. Code Regs., tit. 4, § 15417, subd. (d).
310 Cal. Code Regs., tit. 4, § 15417, subd. (f).
311 Cal. Code Regs., tit. 4, § 15418, subd. (a).
312 Cal. Code Regs., tit. 4, §§ 15415, subd. (b); 15416, subds. (a) and (c).
313 Bus. & Prof. Code, § 26200.
314 Bus. & Prof. Code, § 26090, subd. (f).

of Title 4 of the California Code of Regulations.[315] Regulation 15416(d) can arguably be interpreted to mean that delivery of cannabis goods is authorized in any city within California, regardless of whether the city regulates or bans deliveries within its borders.

However, in April 2019, a number of cities and the County of Santa Cruz filed a complaint against the Bureau challenging Regulation 15416(d) and seeking judicial declarations that, among other things, the Bureau exceeded its authority in promulgating Regulation 15416(d) and has no authority to preempt local control over commercial cannabis activities. In an order dated November 17, 2020, the trial court concluded that the issue was not ripe for decision because Regulation 15416(d) does not command local jurisdictions to do anything or preclude them from doing anything.[316] Although the Bureau had taken a contrary position in a separate lawsuit, in this case the Bureau argued that Regulation 15416(d) did not preempt local ordinances regulating deliveries. Concluding that the Bureau was not judicially estopped from arguing such a contrary position, the trial court agreed with the Bureau that Regulation 15416(d) does not preempt or conflict with any local ordinances regulating or banning deliveries, nor does it preclude the plaintiffs from enforcing such ordinances. The local agencies appealed the trial court's decision, but later dismissed that appeal. As a result, there is no published authority that Regulation 15416(d) does not preempt a local ordinance regulating or banning deliveries.

H. Cannabis Microbusinesses

A microbusiness is a business that engages in multiple areas of commercial cannabis activity.

In order to hold a microbusiness license, a licensee must engage in at least three of the following commercial cannabis activities: cultivation, manufacturing, distribution, and retail sale.[317] A microbusiness (Type 12 License) can be issued for a microbusiness that conducts cultivation of cannabis on an area less than 10,000 square feet and to act as a licensed distributor, Level 1 manufacturer, and retailer under this division, provided such licensee can demonstrate compliance with all requirements imposed by this division on licensed cultivators, distributors, Level 1 manufacturers, and retailers to the extent the licensee engages in such activities.[318]

There were two different licensing authorities for a microbusiness prior to July 2021: the Bureau and the CDFA. With the passage of AB 141, all cannabis licensing authority rests with the DCC. The Bureau and the CDFA had each established a process by which an applicant for a microbusiness license can demonstrate compliance with all the requirements for the activities that will be conducted under the license.

A holder of a microbusiness license shall comply with the following:

a. A holder of a microbusiness license engaged in cultivation shall comply with all the rules and requirements applicable to the cultivation license type suitable for the cultivation activities of the licensee.

315 Cal. Code Regs., tit. 16, § 5416, subd. (d).

316 Order, *County of Santa Cruz v. Bureau of Cannabis Control* (Super. Ct. Fresno County, 2019, No. 19CECG01224) (Nov. 17, 2020) ("With judicial estoppel principles in mind, the court wishes to make clear that it is persuaded by, agrees with and adopts the BCC's argument that Regulation 5416(d) is not inconsistent with and does not preempt plaintiffs' local ordinances regarding adult-use cannabis delivery, nor does it preclude plaintiffs from enforcing such ordinances. On the basis of that conclusion, the court finds that this matter is not ripe for adjudication, and dismisses the action as to all plaintiffs").

317 Cal. Code Regs., tit. 4, § 15500, subd. (a).

318 Bus. & Prof. Code, §§ 26001 subd. (am); 26050, subd. (a)(20).

b. A holder of a microbusiness license engaged in manufacturing shall comply with all the rules and requirements applicable to a Manufacturer 1 license in Division 19 of Title 4 of the California Code of Regulations.

c. A holder of a microbusiness license engaged in distribution shall comply with all the rules and requirements applicable to a distributor license.

d. A holder of a microbusiness license engaged in retail sale shall comply with all the rules and requirements applicable to a retailer license, or a non-storefront retailer license if retail sales are conducted by delivery only.

All cultivation, manufacturing, distribution, and retail activities performed by a licensee under a microbusiness license shall occur on the same licensed premises.[319] However, areas of the licensed premises for manufacturing and cultivation shall be separated from the distribution and retail areas by a wall and all doors between the areas shall remain closed when not in use.[320]

A microbusiness licensee must comply with all the security rules and requirements applicable to the corresponding license type suitable for the activities allowed pursuant to that license.[321] Suspension or revocation of a microbusiness licensee shall affect all commercial cannabis activities allowed pursuant to that license.[322]

Like other commercial cannabis activities, a local jurisdiction may regulate cannabis microbusinesses within its jurisdiction through its police power.[323]

I. Temporary Cannabis Events

A temporary cannabis event is an event where either the sale or consumption of cannabis will occur over a short period of time, and at a temporary location. A temporary cannabis event cannot exceed more than 4 consecutive days.[324] "A temporary cannabis event may only be held at a county fair event, district agricultural association event, or at another venue expressly approved by a local jurisdiction for the purpose of holding a temporary cannabis event."[325] The location of a temporary cannabis event cannot be on premises licensed for the sale of alcohol or tobacco.[326]

319 Cal. Code Regs., tit. 4, § 15500, subd. (c).
320 Cal. Code Regs., tit. 4, § 15500, subd. (j).
321 Cal. Code Regs., tit. 4, § 15500, subd. (i).
322 Cal. Code Regs., tit. 4, § 15500, subd. (k).
323 Cal. Const., art. XI, § 7. See also *Inland Empire, supra,* 56 Cal. 4th at pp. 737-38.
324 Cal. Code Regs. tit. 4, § 15601, subd. (c).
325 Bus. & Prof. Code, § 26200, subd. (e)(1); see also Cal. Code Reg. tit. 4, § 15601 subd. (e).
326 Cal. Code Regs. tit. 4, §§ 15601, subd. (f); 15602, subd. (f); 15603, subd. (c).

PRACTICE TIP: *"Premises" is defined as "the designated structure or structures and land specified in the application that is owned, leased, or otherwise held under the control of the applicant or licensee where the commercial cannabis activity will be or is conducted."[327] If the temporary cannabis event is part of a larger event, such as a street fair, the premises for the temporary cannabis event may not be the same as the premises for the larger event. Thus, alcohol could be served at the location where the larger event is occurring, unless a local ordinance provides otherwise.*

To organize a temporary cannabis event, the organizer must first obtain a cannabis event organizer license and then a temporary cannabis event license.[328] The cannabis event organizer license regulates the organizer only and is an annual license.[329] The temporary cannabis event license regulates the event itself, including by specifying when and where the onsite sale and consumption of cannabis goods is authorized.[330] Only a licensed retailer (whether storefront or non-storefront) or licensed microbusiness may sell cannabis at a temporary cannabis event.[331] A licensed cannabis event organizer may not sell cannabis goods unless the organizer also holds a retailer, non-storefront retailer, or microbusiness license.[332] Mobile sales are prohibited at a temporary cannabis event.[333]

Cannabis consumption at a temporary cannabis event is restricted to persons at least 21 years of age or older. Onsite consumption must comply with any local regulations, including any smoking pollution control regulations.[334]

Informational or educational cannabis events where there are no sales or consumption of cannabis goods do not require a state cannabis license.[335]

J. Cannabidiol (CBD)

State and federal cannabidiol (CBD) law went through some significant changes with the passage

327 Bus. &. Prof. Code, § 26001, subd. (at).
328 Cal. Code Regs. tit. 4, §§ 15600, subd. (a); 15601, subd. (a).
329 See Cal. Code Regs. tit. 4, § 15600.
330 Cal. Code Regs. tit. 4, § 15601, subd. (a).
331 Bus. & Prof. Code, § 26200; Cal. Code Reg. tit. 4, § 15602, subd. (c).
332 Bus. & Prof. Code, § 26200; Cal. Code Reg. tit. 4, § 15600, subd. (c).
333 Cal. Code Regs. tit. 4, § 15602, subd. (c)(2).
334 Cal. Code Regs. tit. 4, § 15603, subd. (e); see also Bus. & Prof. Code, § 26200, subd. (e)(5).
335 Cal. Code Regs. tit. 4, § 15604.

of AUMA in California and the Federal Agriculture Improvement Act of 2018[336] (2018 Farm Bill).[337]

CBD can be extracted from both cannabis and hemp plants. Cannabis CBD is extracted from cannabis, which is generally grown and consumed for its intoxicating properties. Cannabis plants are those that contain more than 0.3% tetrahydrocannabinol (THC).[338]

Hemp CBD is sourced from industrial hemp plants, which are grown primarily for their fiber and seeds. Hemp plants are distinguished from cannabis plants in that hemp must contain no more than 0.3% THC.[339]

At the state level, cannabis CBD is regulated by the Department of Cannabis Control (DCC).[340] A business wishing to manufacture and sell cannabis CBD products, including edibles, must obtain state commercial cannabis licenses prior to operation.

Industrial hemp is expressly excluded from the state's definition of cannabis. For this reason, Hemp CBD is largely unregulated. Since the hemp CBD products in topical and ingestible forms are often sold and marketed for health and wellness benefits, these products fall under the purview of the U.S. Food and Drug Administration (FDA) and CDPH, Food & Drug Branch (FDB) as a food, drug, or cosmetic. California law does not currently provide any requirements for the manufacturing, processing, or selling of non-food industrial hemp or hemp products.

Neither cannabis nor hemp CBD products are permitted as food additives. The FDB adopts federal law and policy pertaining to food, drugs, and cosmetics. The FDB concludes that CBD is, as a Schedule I drug, prohibited in conventional foods, drugs, and cosmetics. Therefore, the FDB found that CBD products derived from industrial hemp are likewise prohibited in food and drug retail within the state – this applies to human and animal foods. Industrial hemp CBD products are not approved in California as a "food, food ingredient, food additive, or dietary supplement."

The FDB goes even further, maintaining that the state prohibition extends to the sale of topical creams and other products, because these items are typically marketed for their CBD content and therapeutic value. While enforcement has not been aggressive, the FDA has issued warning letters to companies selling CBD products stating that a company, by placing an unapproved new drug in the stream of commerce, is engaged in illegal activity. A product is a "drug" if its intended use is the "diagnosis, cure, mitigation, treatment, or prevention of disease," which is largely determined by a company's claims about the value of active ingredients (e.g. CBD) on its product labels and website.

The FDA has been sympathetic to CBD health benefit claims, and therefore has authorized clinical investigations to substantiate claims supporting CBD's therapeutic value in the interests of consumer protection and public safety. The FDA has approved one CBD drug for the treatment of seizures. Because the FDA has recognized CBD

336 Pub. L. No. 115-334 (Dec. 20, 2018) 132 Stat 4490.

337 Originally set to expire in 2023, the 2018 Farm Bill was extended to September 30, 2024 by President Biden with H.R. 6363, the *Further Continuing Appropriations and Other Extensions Act, 2024*.

338 Health & Saf. Code, § 11018, subd. (a).

339 Health & Saf. Code, § 11018.5, subd. (a); 2018 Farm Bill, § 10113.

340 Bus. Prof. Code, § 26012.

as a pharmaceutical drug authorized for clinical investigations, any commercial product containing CBD and marketed for its therapeutic value would need to undergo the FDA's rigorous drug approvals or else it will be treated by the federal government, and by the state FDB, as an illegal, unapproved new drug.

The law on industrial hemp cultivation is similarly being developed. In 2019, the California legislature passed Senate Bill (SB) 1409, which relaxes industrial hemp cultivation regulations. Nevertheless, if the FDB continues to follow federal policy on hemp, that SB 1409 has no impact on CDB's use in edible or topical products. Also, the 2018 Farm Bill allows hemp cultivation broadly, not simply pilot programs for studying market interest in hemp-derived products. It explicitly allows hemp-derived products to be transferred across state lines for commercial or other purposes. It also puts no restrictions on the sale, transport, or possession of hemp-derived products, so long as those items are produced in a manner consistent with the law.

Nevertheless, the CBD extracted from industrial hemp remains largely unregulated and to the extent that the FDA and FDB have taken positions, those positions are not well-known. Unregulated CBD sales have proliferated throughout California, creating practical and regulatory challenges for cities. The FDA reports that it will continue to focus on supporting scientific testing and approval of drugs that are derived from cannabis. The FDA also reports that it will solicit input on how to make legal pathways for the lawful marketing of these products and continue to protect and promote the public health. The drafters of this guide recommend checking the FDA's website at fda.gov for the most up-to-date information on the FDA's position CBD. These positions will inform the state FDB. The most up to date information from the state FBD can be found at cdph.ca.gov.

PART 4 | Finance and Taxation

Cannabis operations impose financial challenges and benefits on both operators and regulators alike. The goal is to strike a balance that raises revenue (or, at minimum, defrays the cost of regulation) without driving operators out of business or otherwise deterring compliance, thereby indirectly perpetuating the illegal market. This chapter discusses financial tools for regulators, including the imposition of fees and taxes on cannabis operations, as well as laws affecting operators' access to banking solutions.

I. FEES AND COSTS

A. Cost to Cities

The costs incurred by cities from cannabis operations may vary greatly depending on the unique local regulations of each jurisdiction. These costs may include costs associated with the processing and issuance of permits, initial and ongoing inspection costs, enforcement costs (including implementation of track-and-trace programs), and in some cases, costs associated with the use of public property.

B. Fees

Imposition of fees is one means of cost recovery attendant to local regulation. Under the California Constitution, fees are distinct from taxes as an exercise of local police powers to advance a regulatory purpose or recover costs for a benefit conferred or a service provided by a local agency. Taxes, however, are generally imposed for revenue purposes.[341]

1. The Distinction Between Fees and Taxes

The constitutional distinction between taxes and fees was clarified with the adoption of Proposition 26 in 2010, which defined local agency taxes under the California Constitution as:

...[A]ny levy, charge, or exaction of any kind imposed by a local government, except the following:

1. A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

2. A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

341 See *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874, 879–880; *California Building Industry Association* v. *State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1046.

3. A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

4. A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

5. A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

6. A charge imposed as a condition of property development.

7. Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.[342]

This definitional distinction is important because taxes are subject to approval by the electorate, while certain types of fees can be adopted without voter approval.[343]

However, Proposition 26 imposes a burden on local government agencies to demonstrate "by a preponderance of the evidence" that:

- A fee is not a tax;
- The amount of the fee is no more than necessary to cover the reasonable costs of the governmental activity; and
- The manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[344]

There is some debate as to whether the foregoing burden applies to all seven fees and charges set forth in subsection (e) of section 1 of Article XIII C of the California Constitution, or to just the first three enumerated fees.[345]

2. Fees and Local Cannabis Regulation

a. Regulatory Fees

Fees "imposed for the reasonable regulatory costs to a local government" are undoubtedly one of the most commonly employed charges in the regulation of cannabis operations. To impose a regulatory fee a local agency must first establish a lawful regulatory process for the cannabis facilities in its jurisdiction.[346] Consequently, the validity of any city fees will be constrained by the unique regulatory program of that city. Depending on the scope of a city's regulatory scheme, appropriate fees could include recovery of the reasonable costs for:

- Review and processing of permit applications, including associated noticing and hearings;

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342 Cal. Const. art. XIIIC, § 1, subd. (e).

343 See Cal. Const. art. XIII C, § 2. See also *Johnson* v. *County of Mendocino* (2018) 25 Cal.App.5th 1017, 1032–1033 (construing Proposition 26, which amended section 3 of Article XIII C of the California Constitution, to hold that a charge on the gross receipts of commercial cannabis activities was a tax and not a fee).

344 Cal. Const. art. XIII C, §1, subd. (e).

345 See League of California Cities, *Propositions 26 and 218 Implementation Guide* (2021), pp. 76–77, available at https://www.calcities.org/docs/default-source/city-attorneys/propositions-26-and-218-implementation-guide.pdf?sfvrsn=23fe61f2_3 (opining that the burden applies only to three of the seven exceptions that mention the "reasonable cost" requirement).

346 See generally *Newhall County Water Dist.* v. *Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1450, holding that a water district could not impose conservation rates on a water retailer for groundwater that it did not supply.

- Investigation of prospective applicants;
- Inspections of the premises, products, equipment, and personnel involved in the operation;
- Review of the tracing and tracking of cannabis and cannabis products, including any license or access fees to intellectual property employed in the process;
- Auditing transactional records; and
- Reasonably anticipated costs for administrative enforcement of the agency's regulations.

Proposition 26 is generally perceived as having eliminated an agency's ability to impose a regulatory fee directed at mitigating the adverse impacts of the regulated product or business.[347] However, agencies may be able to impose such impact fees as part of a land use approval. (See discussion of Fees Imposed as a Condition of Property Development below; Propositions 26 and 218 Implementation Guide; https://www.calcities.org/docs/default-source/city-attorneys/propositions-26-and-218-implementation-guide.pdf?sfvrsn=23fe61f2_3.)

In determining whether a regulatory fee satisfies Proposition 26's constraints, it is not normally necessary to finely calibrate the fee to each individual subject to the fee. Instead, the fee is measured collectively. Proposition 26 should be satisfied if the fee does not "exceed the reasonable cost of regulation with the generated surplus used for general revenue collection."[348]

PRACTICE TIP: *It is critical to create and maintain detailed records showing how the costs of the regulatory program were determined, and how those costs were spread among the fee payors. Determining a reasonable estimate of costs may prove challenging when establishing a new regulatory program with no prior history for such things as anticipated enforcement costs. You may want to look to the experience of other more established regulatory schemes in similar jurisdictions to gather evidence about likely costs.*

b. Fees Imposed as a Condition of Property Development

Proposition 26 recognizes the longstanding ability of cities to impose fees as a condition of property development.[349] If a cannabis operation must obtain a land use permit, the governing agency has an additional opportunity to recover fees. Development fees include the costs of reviewing and processing the application for the proposed project, and the costs to mitigate the adverse impacts of the proposed project and to provide for public facilities and services.[350] Development fees afford local agencies a means to recover funds necessary to mitigate impacts to natural resources and public facilities caused by the cultivation, manufacturing, and processing of cannabis and cannabis products, such as impacts on water

347 See League of California Cities, *Proposition 26 and 218 Implementation Guide* (2021), pp. 71, available at https://www.calcities.org/docs/default-source/city-attorneys/propositions-26-and-218-implementation-guide.pdf?sfvrsn=23fe61f2_3.

348 *Griffith* v. *City of Santa Cruz* (2012) 207 Cal.App.4th 982, 997.

349 Cal. Const. art. XIII C, §1, subd. (e)(6).

350 See *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504 (affirmed in part, reversed in part); *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325; Cal. Gov. Code §§ 66000 et. seq.

supplies and infrastructure, transportation, air quality, and farmland.

In order to pass constitutional muster, development fees that are imposed as a condition of development must have a logical "nexus" between the impacts of the development and the purpose for which the fee is imposed,[351] as well as "rough proportionality" in "nature and extent to the impact of the proposed development."[352]

Additionally, the Mitigation Fee Act[353] places further restrictions on the imposition and use of development fees. Pursuant to the Act, an agency imposing the fee must:

1. Identify the purpose of the fee.

2. Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

3. Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

4. Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.[354]

If the fee is imposed as a condition of approval, "the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed."[355] The funds must be deposited in a separate account.[356] The Act sets forth various noticing and reporting requirements, procedures for adopting fees, and provides for return of the collected funds if a date is not timely set for the commencement of the mitigation on which the funds are to be spent.[357]

c. Fees for Use of Government Property

Some cities allow the use of their facilities, such as fairgrounds, for cannabis events. Under Proposition 26, fees charged for use of government property are one of the exceptions to the general rule that any levy, charge, or exaction is a tax.[358] Historically, this type of fee has not been limited to recovery of an agency's costs, allowing the agency to charge whatever the market would bear.[359] Whether Proposition 26 changed the common law is subject to debate.[360]

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351 *Nollan* v. *California Coastal Commission* (1987) 483 U.S. 825, 837.

352 *Dolan* v. *City of Tigard* (1994) 512 U.S. 374, 391; see also *Koontz* v. *St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595, 612 (applying the "*Nollan/Dollan* test" to ad hoc, in-lieu fees to mitigate environmental impacts).

353 Gov. Code, §§ 66000 et. seq.

354 Gov. Code, § 66001, subd. (a).

355 Gov. Code, § 66001, subd. (b).

356 Gov. Code, §§ 66001, subd. (c), 66006, subd. (a).

357 Gov. Code, §§ 66001, 66006, 66016–66019.

358 Cal. Const. art. XIII C, § 1, subd. (e)(4).

359 *City of Oakland v Burns* (1956) 46 Cal.2d 401, 407. See also *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 18 (budget transfer from enterprise fund to general fund that exceeded costs of services incurred by utility from other city departments was not a tax).

360 See League of California Cities, Proposition 26 and 218 Implementation Guide (2021), pp. 76-77, available at https://www.calcities.org/docs/default-source/city-attorneys/propositions-26-and-218-implementation-guide.pdf?sfvrsn=23fe61f2_3.

PRACTICE TIP: *When enacting fees related to water use by cannabis cultivators, it is important to build a clear record of the purpose for the fee. If the charge is for regulating the use of the water to avoid adverse impacts on water supplies, rather than on merely supplying the water, then the fee should not be subject to the onerous procedural requirements that apply to property-related fees.*

d. Property-Related Fees

Proposition 218 as adopted by the voters in 1996 created special rules for fees "imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[361] In the context of cannabis regulation, property-related fees can arise for water irrigation charges related to cultivation. In this regard, the courts have drawn a distinction between delivery of water and regulation of groundwater. While charges for supplying water through an established connection are property-related service fees,[362] charges on groundwater pumping for the purpose of "the conservation of limited groundwater stores, and remediation of the adverse effects of groundwater extraction," are not considered property-related, but regulatory.[363]

While property-related water, sewer, and refuse collection fees are subject to the substantive and majority protest requirements of Proposition 218, those fees are exempt from the voter-approval requirement that applies to all other property-related fees.[364] Procedurally, before adopting a property-related fee, a local agency must:

- Identify the parcels on which a fee or charge is proposed;[365]
- Calculate the amount of the proposed fee or charge on each parcel in light of cost-justification requirements of article XIII D, section 6, subsection b of the California Constitution;[366]
- Provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel on which the fee or charge is proposed;[367] and

361 Cal. Const. art. XIII D, § 2, subd. (e).
362 *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216.
363 *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1208.
364 Cal. Const., art. XIII D, § 6, subd. (c).
365 Cal. Const., art. XIII D, § 6, subd. (a)(1).
366 Cal. Const., art XIII D, § 6, subd. (a)(1).
367 Cal. Const., art. XIII D, § 6, subd. (a)(1).

- Conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee.[368]

At the public hearing, "[i]f written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge."[369]

Property-related fees *other than water, sewer, or refuse charges* must then be approved by a majority of property owners or two-thirds of registered voters.[370]

Substantively, property-related fees must meet the following requirements:

- Revenue derived from the fee or charge must not exceed the funds required to provide the property-related service;
- Revenue from the fee or charge must not be used for any purpose other than that for which the fee or charge was imposed;
- The amount of the fee or charge imposed on any parcel or person must not exceed the proportional cost of the service attributable to the parcel on which it is imposed;
- The fee or charge may not be imposed for service unless the service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not allowed. Stand-by charges must be classified as assessments and must not be imposed without compliance with the proportionality requirements and property-owner mailed ballot protest proceedings for assessments; and
- No fee or charge may be imposed for general governmental service, where the service is available to the public in substantially the same manner as to property owners (e.g., police, fire, ambulance, or library services).[371]

For additional information on the imposition of fees see: League of California Cities, *Propositions 26 and 218 Implementation Guide* (2021), pp. 53 – 96 (Chapter 4, Fees); *The California Municipal Law Handbook* (Cal CEB) §§ 5.161 – 5.181, 10.238 – 10.253, 10.418(3).

II. TAXES

A. State Taxes

1. Sales and Use Tax

The general California sales and use tax on all tangible retail goods, including cannabis and cannabis products, is 7.25%. Cities may impose their own sales taxes, subject to the Bradley-Burns Uniform Local Sales and Use Tax Law,[372] resulting in total sales taxes of between 9 and 11%. The retail sales of medicinal cannabis, medicinal cannabis concentrate, edible medicinal cannabis products, and topical medicinal cannabis are exempt from these sales and use taxes when the customer provides a valid Medical Marijuana Identification Card (MMIC) indicating they are a qualified patient (or the primary caregiver for a

368 Cal. Const., art. XIII D, § 6, subd. (a)(2).
369 Cal. Const., art. XIII D, § 6, subd. (a)(2).
370 See Cal. Const., art. XIII D, § 6, subd. (c).
371 Cal. Const. art. XIII D, § 6, subd. (b).
372 Rev. & Tax. Code, § 7200 et seq.

qualified patient), and a valid government-issued identification card.[373] Cannabis retailers, cultivators, manufacturers, and distributors making sales must register with the California Department of Tax and Fee Administration (CDTFA) for a seller's permit to report and pay any sales and use tax due to the CDTFA. The contact information for the CDTFA office nearest to you can be found at: https://www.cdtfa.gov/office-locations.htm.

While cities are not involved in the day-to-day operations of cannabis businesses, they should ensure that cannabis retailers comply with the requirement to provide receipts that separately state the cannabis excise tax, as outlined in Revenue and Taxation Code section 34011.2(d). While non-compliance may not directly impact the city, it can lead to inaccurate tax collections, affecting local revenue.

2. Cannabis Excise Tax

State law also establishes two statewide taxes specific to cannabis. The first is a cannabis excise tax that is imposed upon the purchaser of cannabis or cannabis products at the rate of 15% of the average market price of any retail sale by a cannabis retailer.[374] The average market price for an arm's-length transaction is defined as the wholesale cost of the product plus a mark-up, which is determined by the CDTFA on a biannual basis in six-month intervals.[375] In a non-arm's-length transaction, the average market price is defined as the cannabis retailer's gross receipts from the sale.[376]

The cannabis excise tax does not apply to medicinal cannabis or medicinal cannabis products donated for no consideration to qualified patients.[377] Retailers are responsible for collecting the cannabis excise tax from purchasers at the time of the retail sale and for paying the tax to the distributor.[378]

As of January 1, 2023, cannabis retailers in California are required to report and pay the cannabis excise tax for retail sales of cannabis or cannabis products. This responsibility was previously held by distributors. The first excise tax return from retailers under this new requirement was due by May 1, 2023, and subsequent returns are required to be filed quarterly. This change, enacted under A.B. 195,[379] aims to streamline the tax collection process and ensure that retailers handle the excise tax directly. For more detailed information, you can refer to the CDTFA's resources on cannabis taxes, at https://www.cdtfa.ca.gov/Industry/cannabis/.

3. Cannabis Cultivation Tax

The statewide cannabis-specific cultivation tax was eliminated as of July 1, 2022, also pursuant to A.B. 195. Before its elimination, the cultivation tax was imposed on all cultivators at the following rates: (1) $9.25 per dry-weight ounce for cannabis flowers,[380] (2) $2.75 per dry-weight ounce for cannabis

373 Rev. & Tax Code, § 34012, subd. (a)(1)(B); see also Cal. Code Regs., tit. 18, § 3700.
374 Rev. & Tax. Code, § 34011, subd. (a)(1). See also Cal. Code of Regs., tit. 18, § 3701.
375 Rev. & Tax. Code, § 34010, subd. (c).
376 Rev. & Tax. Code, § 34010, subd. (c)(2).
377 Rev. & Tax. Code, § 34011, subd. (g).
378 Rev. & Tax. Code, § 34011, subd. (b).
379 California Assembly Bill 195 (2022 Reg. Sess.)
380 Rev. & Tax. Code, § 34012, subd. (a)(1). See also Cal. Code of Regs., tit. 18, § 3700.

leaves,[381] and (3) $1.29 per ounce for fresh cannabis plants.[382] The CDTFA was responsible for adjusting these rates for inflation annually.[383]

Before its elimination, the cultivation tax applied to all harvested cannabis entering the commercial market,[384]with exceptions for plant waste or medicinal cannabis or medicinal cannabis products designated for donation.[385] The tax did not apply to cannabis cultivated for personal use, or cultivated by a qualified patient or primary caregiver in accordance with the CUA.[386]

Cultivators were responsible for paying the cultivation tax to the distributor or to the manufacturer if the first transfer or sale was to a manufacturer.[387] Manufacturers collecting the cultivation tax were required to remit the tax to the distributor.[388] The distributor, registered with the CDTFA for a cannabis tax permit, reported and paid the cultivation tax and cannabis excise tax to the CDTFA.

The elimination of the cultivation tax was a part of A.B. 195's goals to reduce the financial burden on cannabis cultivators, promote participation in the legal market, and make legal cannabis products more competitive with the illegal market.[389]

B. Local Taxes

For general guidance on implementing new taxes, see League of California Cities, *Propositions 26 and 218 Implementation Guide* (2021), pp. 19-26; *The California Municipal Law Handbook* (Cal CEB) §§ 5.96 – 5.123, 10.244

Cities have employed a wide range of tax strategies, including:

1. Percent of Gross Sales

Many cities have opted to tax cannabis businesses by implementing a voter-approved tax on a percentage of gross sales receipts. The approved tax rates range from 2 to 20%. Some cities tax different segments of the industry at different rates, often levying higher rates on retailers and lower rates on, for example, cannabis testing labs. This is not a consumer sales tax and is a tax levied on the business.

> **PRACTICE TIP:** *Because this local tax will be placed on top of the state's 15% excise tax, a city may opt to propose these tax rates as "up to" those maximum amounts (or even with explicit ballot language authorizing tax rate decreases below a set maximum tax rate without returning to the voters), with initial rates set lower. The purpose would be to give law-abiding operators an opportunity to establish themselves and compete with entrenched illegal market dealers. The trend among cities is to decrease taxes in order to lessen the financial burden on legitimate businesses, so that they can better compete with the illegal market.*

381 Rev. & Tax. Code, § 34012, subd. (a)(1)(B); see also Cal. Code of Regs., tit. 18, § 3700.
382 Rev. & Tax. Code, § 34012, subd. (c); See also Cal. Code of Regs., tit. 18, § 3700.
383 Rev. & Tax. Code, § 34012, subd. (k).
384 Rev. & Tax. Code, § 34012, subd. (a).
385 Rev. & Tax. Code, § 34012, subd. (i).
386 Rev. & Tax. Code, § 34012, subd. (j).
387 Rev. & Tax. Code, § 34012, subd. (h).
388 Rev. & Tax. Code, § 34012, subd. (h)(2).
389 See generally California Assembly Bill 195 (2022 Reg. Sess.), § 1.

As highlighted in recent discussions among industry stakeholders, the layered taxation system currently in place has significantly impacted legal cannabis operators, making it challenging for them to thrive. There are reports[390] that these tax structures have created an uneven playing field, where legitimate businesses face higher operational costs while illegal market dealers continue to offer lower prices. This discrepancy underscores the importance of local governments considering tax reductions or flexibility within their tax frameworks. By doing so, cities can support the growth of compliant businesses, which in turn could lead to increased tax revenues in the long term as more businesses enter the legal market and contribute to the local economy.

2. Dollar Per Square Foot of Business Space

This method is mostly used for cultivators. Rates appear to range from $1 to $25 per square foot, with initial rates often set lower. Several cities tax indoor growers more than outdoor growers. Others set gradually decreasing rates based on size – e.g., $10 per square foot for the first 5,000 square feet and gradually dropping to $2 per square foot for space beyond 40,000 square feet.

3. Miscellaneous

Depending on the segment of the industry, cities have charged annual flat rates, dollar amounts per vehicle of a distributor's fleet, and dollar amounts per gram of oil or piece of edible produced. They have also set "tax floors" – i.e., a minimum tax that is imposed, regardless of gross sales, whether a business makes a profit or suffers a loss. As a policy matter, some cities tax medicinal cannabis purveyors at significantly lower rates than adult-use cannabis operators.

In addition to these specific cannabis-related taxes, cities in California often impose a business operations tax, which applies to all businesses operating within the city's jurisdiction.[391] For cannabis businesses, this tax can add yet another layer of financial obligation. The business operations tax is typically calculated based on gross receipts, though the method can vary depending on the city's ordinance. This tax, when combined with the industry-specific taxes, can further strain legal cannabis operators, making it more difficult for them to compete with the illegal market.

390 See, e.g., Sacramento Business Journal, *Cannabis Dispensaries Fight to Stay Afloat Under Layered Taxation System*, available at: https://www.bizjournals.com/sacramento/news/2024/04/10/cannabis-dispensaries-layered-taxation-system.htmlj.

391 Cal. Bus & Prof. Code, § 16000.

PRACTICE TIP: *Mix and match. None of the above strategies are mutually exclusive. When considering the business operations tax in conjunction with cannabis-specific taxes, it's crucial to assess the cumulative tax burden on operators. Whichever the city employs, the key is to strike a balance so that taxes are not so high that they deter operators from doing business legitimately and encourage them to continue in the illegal market.*

4. Development Agreements

Because it can take months and be very expensive to get tax measures on a ballot, some cities opt to let cannabis businesses open before taxes are in place to give local operators a competitive edge. In such instances, also as a way to "test the waters," some cities have entered into development agreements (with corresponding annual development fees) with cannabis businesses.

PRACTICE TIP: *While the potential for revenue may be appealing, a development agreement provides the holder a vested right to continue the operation for the term of the agreement. Approval of a development agreement is also a legislative act that can be the subject of a referendum. Cities should carefully consider the risks and benefits before granting a long-term, contractual right to operate a cannabis business. A less risky practice is to follow the business and land use regulation models discussed earlier in this Guide. Additionally, whether development agreements are merely placeholders until a tax measure can be approved or permanent solutions, cities should note that entering into a development agreement in lieu of a formal tax measure could expose them to liability for violating Proposition 218, which requires voter approval for all new taxes.*

III. BANKING

It is commonly believed that banks and other financial institutions are *prohibited* from doing business with the cannabis industry. Technically, this is not the case. As a practical matter, however, financial institutions refuse to work with cannabis businesses directly to avoid the burdensome duties and risks associated with doing so. As described further below, this refusal creates a de facto ban on banking that prevents the complete legitimization of the cannabis industry, and places a significant burden on cannabis businesses and the cities that seek to collect tax and fee revenue from them.

A. Federal Law

Federal law pertaining to cannabis banking includes the Currency and Foreign Transactions Reporting Act of 1970, which is commonly referred to as the Bank Secrecy Act (BSA),[392] as well as guidance by the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN), which administers the BSA.

1. The Bank Secrecy Act

The BSA requires U.S. financial institutions to assist U.S. government agencies in detecting and preventing money laundering. Specifically, the Act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000[393] and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities like the sale of Schedule I drugs.[394]

2. FinCEN Guidance

In 2014, FinCEN issued guidance (FinCEN Guidance) regarding "BSA Expectations Regarding Marijuana-Related Businesses."[395] This guidance included establishing best practices for customer due diligence, a Suspicious Activity Report (SAR) filing structure, and ways to identify business red flags. The FinCEN Guidance provided that, in assessing the risk of providing services to a cannabis-related business, institutions should conduct extensive customer due diligence that includes verifying state licenses, reviewing license applications and other documentation, understanding the expected activity of the business, and performing ongoing monitoring for suspicious activity.

Financial institutions must also file a SAR on any activity involving a cannabis business. Generally, BSA regulations require the filing of a SAR when a financial institution knows, suspects, or has reason to suspect that a transaction: (1) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (2) is designed to evade regulations promulgated under the BSA; or (3) lacks a business or apparent lawful purpose. Since federal law prohibits the distribution and sale of cannabis, this means a SAR must be filed for every activity with a cannabis business, regardless of state law.

With this in mind, the FinCEN Guidance established a three-tier SAR reporting regime for cannabis businesses that denotes the type of activity involved:

1. "Marijuana Limited" SAR Filing. This report is used when the institution reasonably believes that the cannabis business is consistent with state law and does not violate any of the eight Department of Justice (DOJ) priorities set forth in the Cole Memo,[396] such as sales to minors;

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392 31 U.S.C. § 5311, et seq.

393 31 U.S.C. § 5313; 31 C.F.R. § 1010.311

394 31 U.S.C. §§ 5313-5316; 31 C.F.R. § 1020.320.

395 U.S. Department of the Treasury, Financial Crimes Enforcement Network, FIN-2014-G001 (Feb. 14, 2014), available at https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf.

396 James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. The *Cole Memo* provided a safe harbor from prosecution — including to financial institutions serving the cannabis industry, upon which the FinCEN Guidance is based — provided federal priorities were met or protected. On January 4, 2018, then-Attorney-General Jeff Sessions announced the rescission of the *Cole Memo*. Over a year later, on January 31, 2019, FinCEN issued a statement noting "FinCEN's February 2014 guidance remains in place." Letter from Drew Maloney, Assistant Sec'y for Legislative Affairs, FinCEN, to Representative Denny Heck (Jan. 31, 2018). See discussion of Federal Controlled Substances Act for more information on the Cole Memo and federal enforcement.

2. "Marijuana Priority" SAR Filing. This report is used when the institution reasonably believes that the cannabis business has violated one of the Cole Memo DOJ priorities, or the business is not in full compliance with state law requirements; and

3. "Marijuana Termination" SAR Filing. This report is used when the institution deems it necessary to terminate the relationship with the cannabis business "in order to maintain an effective anti-money laundering compliance program."

Furthermore, the FinCEN Guidance also provides a long list of "red flags" that indicate that a cannabis business may be engaged in activity that implicates the Cole Memo priorities or violates state law. These signs may be circumstances that include: the business receiving substantially more revenue than may reasonably be expected, rapid deposits of cash followed by immediate cash withdrawals, the business has been subject to an enforcement action, or a purported non-profit business is making excessive payments to its managers or employees. These red flags, the FinCEN Guidance provides, may indicate a need for additional due diligence.

Finally, the FinCEN Guidance reminds financial institutions that they must file currency transaction reports for cannabis businesses the same as they would for other businesses. This means, for instance, that banks need to file reports on the receipt of withdrawal by any person of more than $10,000 in cash per day.

B. Legislative Fixes and Alternative Solutions

Given the added burden of cannabis-specific customer due diligence and heightened risk of criminal violations of the BSA/AML by failing to report possible breaches of the DOJ's priorities in the Cole Memo, most federally chartered banks will simply refuse to serve cannabis-related businesses. While the Congressional Cannabis Caucus supports federal legislation to both remove cannabis from Schedule I of the Controlled Substances Act and provide a safe haven for financial institutions to do business with the cannabis industry in states that have legalized medicinal or adult-use cannabis, certainty remains elusive on the federal level.

To get around this obstacle, California has conducted research into the heavier reliance on credit unions, the establishment of a state-chartered bank that would bypass the Federal Reserve,[397] and the development of cryptocurrencies. Private entrepreneurs have also developed "closed-loop" app solutions for the industry, but by and large, cannabis in California still remains a predominantly cash-based business, resulting in extreme challenges for cities when it comes time to collect taxes and fees.

397 This approach has been generally unsuccessful in other jurisdictions and most recently suffered a setback at the Tenth Circuit Court of Appeals. See *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City* (10th Cir. 2017) 861 F.3d 1052 (reversing and remanding trial court's order with instructions to dismiss credit union's complaint filed to order the Federal Reserve to issue a "master account" to the credit union for the purpose of serving the banking needs of the cannabis industry in Colorado).

IV. FEE AND TAX COLLECTION CONSIDERATIONS

Transparent communication is key to providing cannabis businesses the assurance that their fees and taxes will be secure upon payment. Cities have experienced that cannabis fees and taxes are often paid in cash, creating a significant safety and security concern for both the cannabis business and the city in which it is located. This concern has prompted cities to implement a fee and tax collection program aimed at mitigating security risks without compromising convenience, security, and logistical ease.

Some practical issues with fee and tax collection include:

- Transportation and security risks, like armed robbery and accompanying violence; and
- Time and place of fee and tax collection.

PRACTICE TIP: *Prudent practice includes providing a direct contact to set up individualized appointments for the collection of fees and taxes. The individual appointments should be coordinated with the finance department and police department for additional security.*

PRACTICE TIP: *Since many financial institutions are wary of potentially violating federal anti-money laundering and other laws related to engaging in transactions with the proceeds from cannabis businesses, cities should keep meticulous records of cannabis fee and tax revenues in the event of a bank or other governmental audit.*

PRACTICE TIP: *Check with the risk management department of your city's financial institution before adopting fees or taxes for which the city will be collecting money from cannabis businesses. After adoption of AUMA, some risk management departments of banks have issued guidance on whether the bank will accept funds that have derived from fees and taxes from cannabis businesses.*

PART 5 | Enforcement Tools

Both AUMA and MAUCRSA included language intended to preserve a municipality's ability to regulate commercial cannabis activity within its jurisdictional boundaries. A city has a constitutional right to make and enforce ordinances and regulations not in conflict with general laws. Consistent with this constitutional principle the statute states:

> This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.[398]

Pursuant to this grant of authority, commercial cannabis activity may be regulated or completely prohibited by a city.

Cities may consider a variety of options and tools when enforcement against unlawful cannabis operations is necessary.[399] Potential enforcement tools include civil injunctions, criminal enforcement, and administrative enforcement. Each city should evaluate the most appropriate tool or tools for the situation.

I. CIVIL ENFORCEMENT

A. Civil Injunction

Cities may consider seeking injunctions to close unauthorized cannabis operations. State law authorizes courts to issue temporary restraining orders, and preliminary and permanent injunctions. In addition, most municipal codes and cannabis ordinances provide for issuance of an injunction to address code violations.

The traditional test for issuance of a preliminary injunction requires the court to weigh two interrelated factors: (1) the likelihood that the moving party will prevail on the merits; and (2) the relative interim harm to the parties from the issuance or non-issuance of the injunction.[400] The court evaluates the two factors on a sliding scale, such that "if the party seeking the injunction can make a sufficiently strong showing of likelihood of successes on the merits, the trial court has discretion to issue the injunction notwithstanding

398 Bus. & Prof. Code, § 26200, subd. (a); Code Civ. Proc., §§ 526, 527; Code Civ. Proc., § 527(a).

399 See Appendix 1 regarding selection of defendants in cannabis enforcement.

400 *White v. Davis* (2003) 30 Cal.4th 528, 554; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286; *Butt v. Sup. Court* (1992) 4 Cal.4th 668, 677-78.

that party's inability to show that the balance of harms tips in his favor."[401]

However, the traditional test does not apply when a governmental entity seeks to enjoin violations of a statute or ordinance that expressly provides for injunctive relief. In such an instance, the governmental entity need only establish that it is "reasonably probable" that it will prevail on the merits. Once it has done so, there is a rebuttable presumption that the potential harm to the public outweighs the potential harm to the defendant. However, when a defendant can establish that an injunction would inflict grave or irreparable harm, the court must examine the relative harms to the parties. Substantial economic loss alone, however, does not constitute such harm or irreparable injury.[402]

Where a city seeks to enjoin the violation of a law and the city is likely to prevail on the merits, courts generally are to presume that public harm will result if an injunction is not issued.[403] No showing of actual harm is required.[404]

When an enjoined party fails to comply with the injunction, the injunction may be enforced through contempt or the appointment of a receiver.[405]

B. Nuisance Per Se and Cannabis Law

A nuisance per se exists whenever "a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance."[406] A nuisance may be established and enjoined through state or local law.

The role of the court in an action to enjoin nuisance activity is limited to determining whether a statutory or regulatory violation exists. Where the Legislature has determined a particular condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.[407]

Accordingly, a nuisance per se arises whenever an activity occurs that a city or the state has expressly declared to be a nuisance. Stated differently, the only element a city must satisfy for a cannabis business to be a nuisance per se is that the business engaged in an activity declared to be a nuisance under state or local law.

As discussed in Part 2 of this Guide, the development of California's cannabis law supports enforcement through nuisance injunctions, as earlier case law confirmed local land use authority over cannabis activity. Additionally, under state law, a commercial cannabis business may be regulated or completely prohibited by a city.[408]

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401 *Common Cause of California v. Bd. of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 447; *King v. Meese* (1987) 43 Cal.3d 1217, 1227 ("[T]he more likely it is that [the moving parties] will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue".).

402 *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 71.

403 *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.

404 *City of Claremont v. Kruse* (hereinafter *Kruse*). (2009) 177 Cal.App.4th 1153, 1166.

405 *See* Code Civ. Proc., §§ 527, 564-570; Health & Saf. Code, § 11573.

406 *Beck Development Co. v. Southern Pacific Transportation Co*. (1996) 44 Cal.App.4th 1160, 1206; *City of Claremont v. Kruse, supra*, 177 Cal.App.4th at pp. 1163-1164.

407 *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100; See also *Beck Development Co. v. Southern Pacific Transportation Co., supra,* 44 Cal.App.4th at p. 1207 ("[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made…").

408 Bus. & Prof. Code, § 26200, subd. (a).

1. Establishing Nuisance Through Violation of Municipal Code

Commercial cannabis businesses may be specifically prohibited throughout a city and thus constitute a prohibited land use in the city. A city ordinance may provide that any violation of the zoning code is deemed a public nuisance,[409] and that any such violations may be remedied by the city through whatever civil remedies are available, including a civil action for injunctive relief. Violations of municipal laws prohibiting cannabis businesses have been upheld as nuisances per se subject to abatement by injunction.[410]

A city's authority to regulate illegal cannabis activities via nuisance actions has been widely upheld by California courts, both before and after the passage of AUMA and MAUCRSA. In *City of Claremont v. Kruse,*[411] the court affirmed a trial court's permanent injunction that enjoined the operation of a cannabis distribution facility anywhere within the City of Claremont.[412] The court analyzed whether there was express or implied preemption by the CUA or MMPA that would prevent local regulations, such as bans, from restricting the establishment of cannabis dispensaries.[413] The court found that neither the CUA nor the MMPA expressly or impliedly preempts local laws in any way.[414]

Kruse followed the holding in *City of Corona v. Naulls*.[415] In *Naulls*, the court affirmed the issuance of a preliminary injunction to shut down a medicinal cannabis dispensary that was operating without any zoning designation. The *Naulls* court held that "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*."[416] Accordingly, the court held that the cannabis dispensary was "a nuisance per se, subject to abatement in accordance with the City's municipal code."[417]

In *County of Los Angeles v. Hill,*[418] the court confirmed that local governments have the ability to regulate the establishment of cannabis dispensaries. There the court stated, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local governments may regulate dispensaries."[419] Thus, a city has the power to restrict not only where a cannabis business may operate (i.e. the location of a dispensary), but also whether it may operate at all.

Although the foregoing cases were decided prior to the passage of AUMA, they still provide legal authority for local regulations relating to commercial cannabis. This authority was further reinforced in cases decided after the passage of AUMA. In *Safe Life Caregivers v. City of Los Angeles*, the court rejected the argument that more comprehensive state medical marijuana legislation preempts municipal regulation,

409 Many municipal ordinances may be enforced civilly without designating cannabis activities as a specific nuisance per se.
410 *Kruse, supra,* 177 Cal.App.4th at pp. 1158, 1163-1166; *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 428, 432-433.
411 *Kruse, supra*, 177 Cal.App.4th at p. 1158.
412 *Ibid*.
413 *Id.* at pp. 1172-1176.
414 *Id.* at p. 1176.
415 166 Cal.App.4th 418 (hereinafter *Naulls*).
416 *Naulls, supra,* 166 Cal.App.4th at p. 433 (emphases in original).
417 *Ibid*.
418 (2011) 192 Cal.App.4th 861 (hereinafter *Hill*).
419 *Hill, supra,* 192 Cal.App.4th at p. 868.

concluding that regulation of medical marijuana "solely within the City's borders" remains a "wholly municipal matter." [420] Similarly in *City of Vallejo v. NCORP4, Inc.*, the court upheld a local ordinance treating medical marijuana dispensaries as a public nuisance but granting limited immunity to dispensaries that met certain requirements, confirming that the state's regulatory framework, including MAUCRSA, does not preempt local control.[421]

These opinions all support enforcement by enjoining unlawful cannabis businesses. An injunction to prohibit the continuing nuisance is an appropriate enforcement tool, and a city is likely to prevail on the merits of its public nuisance claim based on violations of local law.

PRACTICE TIP: *An ordinance may expressly declare some or all commercial cannabis activity to be unlawful. For example, one ordinance provides as follows: "It shall be unlawful for any person to own, manage, establish, conduct, or operate, or to participate as a landlord, owner, employee, contractor, agent or volunteer, or in any other manner or capacity, in any commercial cannabis activity in the City."*[422]

PRACTICE TIP: *Review your city's municipal code for additional violations that may be alleged in the complaint in addition to the cannabis ordinance. Often building code, electrical code, property maintenance, business license, or zoning violations are present, which may also be alleged in the complaint.*

2. Establishing Nuisance through Violation of State Law

In addition to local law, an injunction may also be obtained under state law. Civil Code section 3479 and Health and Safety Code section 11570 both expressly declare particular activities to be a nuisance, and may be used for a nuisance per se claim.[423] Compliance with state and local cannabis law is required in order to lawfully engage in commercial cannabis activities.[424]

a. Civil Code sections 3479 and 3480

Civil Code section 3479, defines a nuisance, in pertinent part, as: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property…." And Civil Code section 3480 provides that a nuisance is a public nuisance when it affects an entire community or neighborhood, or any considerable number of persons at the same time, although the extent of the annoyance or damage inflicted on individuals

420 *Safe Life Caregivers v City of Los Angeles*, *supra,* 243 Cal.App.4th at p. 1045.

421 (2017) 15 Cal.App.5th 1078, 1086-87.

422 See The City Code of the City of San Marino, California, § 23.06.15, subd. (C)(2), available at: https://codelibrary.amlegal.com/codes/sanmarinoca/latest/sanmarino_ca/0-0-0-1.

423 *Trutanich, supra*, 204 Cal.App.4th at p.8; *Lew v. Sup.Ct.* (1993) 20 Cal.App.4th 866, 871-872.

424 Health & Saf. Code, §§ 11358 – 11360.

Every building or place used for the purpose of drug activity is expressly declared a nuisance.[430] “Cannabis” is listed as a controlled substance under Health and Safety Code section 11054, subdivision (d)(13).

Accordingly, evidence that individuals or a business cannabis business used a building or place “for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance” is all that is required for a nuisance per se claim based on Health and Safety Code section 11570.[431]

The sale of cannabis is illegal when not conducted in conformance with state and local law.[432] In *People ex rel. Trutanich v. Joseph*, the court affirmed the trial court’s entry of judgment against a defendant dispensary owner after the trial court granted a motion for summary judgment and a motion for permanent injunctive relief for violations of the narcotics abatement law.[433] The court observed that:

> Plaintiff presented admissible evidence that [the marijuana dispensary’s] premises were used ‘for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away a[] controlled substance,’ in violation of section 11570. Such violations constitute nuisances per se under Civil Code section 3479.[434]

may be unequal. Accordingly, showing that a cannabis business engaged in the “the illegal sale of controlled substances” and that it affects an entire community, or a “considerable” number of people is all that is required for a nuisance claim pursuant to the Civil Code.[425] Cannabis remains a Schedule I controlled substance.[426] Unless properly licensed and allowed by state and local authorities, the sale of cannabis is illegal.[427] Thus, a cannabis business engaged in the illegal sale of cannabis is a public nuisance subject to abatement and injunction.[428]

b. Health and Safety Code sections 11570–11587

The California Drug Abatement Act[429] allows cities to remove occupants from any building or place where any illegal drug activity occurs.

425 *Trutanich, supra*, 204 Cal.App.4th at p.8 (sale of marijuana constitutes a nuisance per se under Civil Code § 3479).
426 Health & Saf. Code, §§ 11007, 11054, subd. (d)(13).
427 Health & Saf. Code, § 11360; Civ. Code, § 3482.
428 Code Civ. Proc., § 731.
429 Health & Saf. Code, §§ 11570–11587.
430 Health & Saf. Code, § 11570.
431 *Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 871 (property being used to sell and distribute drugs is a nuisance per se under Health and Saf. Code, § 11570); *Trutanich, supra*, 204 Cal.App.4th at p.8.
432 Health & Saf. Code, § 11360; see also Health & Saf. Code, § 11570
433 *Trutanich, supra*, 204 Cal.App.4th at p.8; Health & Saf. Code, § 11570 et seq.
434 *Trutanich, supra*, 204 Cal.App.4th at p.8.

The Court affirmed summary judgment of a permanent injunction against the defendant without placing any burden on the city to prove the defendant's non-compliance with the CUA or the MMPA. *Joseph* also held that "Section 11362.775... does not cover dispensing or selling marijuana."[435] Thus, a city is likely to prevail on the merits of a nuisance per se claim against a dispensary, whether based on local law, Civil Code section 3479 or Health and Safety Code section 11570.

In addition to injunctive relief, the Drug Abatement Act provides for unique remedies, including civil penalties up to $25,000,[436] attorney's fees, costs of investigation, vacated and boarded against entry for up to one year,[437] a lien on the property, for the lien to be enforced through the sale of the property,[438] among others.

> **PRACTICE TIP:** *The Drug Abatement Act is particularly useful to compel the cooperation of a property owner where the property is occupied by a tenant. The potential liability of the property owner (a $25,000 fine, attorney's fees that can be liened, closure of the building for a year preventing re-renting, and possible sale of the fixtures and property itself) is often enough to cause the property owner to collaborate with the City to eject the dispenser in order to avoid these severe remedies.*

a. Business and Professions Code sections 17200 et seq.

Known as the Unfair Competition Law,[439] Business and Professions Code sections 17200 et seq. authorizes certain remedies to address repeated violations of state and local regulations, so long as they are a part of a "business practice."[440]

An action under the Unfair Competition Law is usually brought by the Attorney General or a district attorney; but a city attorney may bring such an action if the city has a population greater than 750,000 or if the city attorney obtains the consent of the district attorney.[441] Injunctions and civil penalties up to $2,500 for each violation, are authorized.[442]

b. Business and Professions Code section 26038

MAUCRSA imposes civil penalties for unlicensed commercial cannabis activity "of up to three times the amount of the license fee for each violation, and the court may order the destruction of cannabis associated with that violation in accordance with Section 11479 of the Health and Safety Code."[443] This penalty is payable to the city,[444] and a separate penalty may be assessed for each day a violation persists.[445]

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435 *Id.* at p. 1523.
436 Health & Saf. Code, § 11573.5, subd. (b).
437 Health & Saf. Code, § 11573.5, subd. (b).
438 Health & Saf. Code, § 11585.
439 See *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 394.
440 See *People v. McKale* (1979) 25 Cal.3d 626, 632.
441 Bus. & Prof. Code, § 17204.
442 Bus. & Prof. Code, §§ 17203, 17206, 17206.1
443 Bus. & Prof. Code, § 26038, subd. (a)(1).
444 Bus. & Prof. Code, § 26038, subd. (d)(4).
445 Bus. & Prof. Code, § 26038, subd. (a)(1).

II. CRIMINAL ENFORCEMENT

Criminal enforcement is an important function of local government and should be considered alongside administrative and civil enforcement as an option to achieve code compliance in a given case. Criminal enforcement requires different focus and resources than civil enforcement. Criminal enforcement often requires schedule flexibility and a consistent presence in court. Whether to criminally prosecute a code violation raises the question of the goals of criminal prosecution. In general, there are three goals: (1) abatement of the violation, (2) punishment, and (3) deterrence. While abatement is generally the primary goal, the other goals may be equally important in the context of cannabis prosecutions. Punishment commensurate with the crime can be appropriate, and imposition of punishment will deter future criminal activity.

The criminal enforcement portion of this chapter will introduce the substantive law and provide practice tips. It is not possible to cover every issue that will confront a city attorney in a criminal prosecution. This section will attempt to provide some legal background and practical guidance specific to cannabis. For additional information on criminal code enforcement, see Cal. Municipal Law Handbook (Cal CEB 2023) Code Enforcement, Chapter 12 and for information on criminal law generally, see California Criminal Law Procedure and Practice (Cal CEB 2023).

A. Prosecution of Municipal Code Violations

City attorneys have the authority to prosecute misdemeanor criminal cases to enforce city ordinances in the name of the People of the State of California.[446] Accordingly, this section will focus on the criminal laws most likely to be enforced by a city attorney, namely, municipal codes. Certain categories of violations are typical of cannabis-related activity. Most commonly, criminal cannabis activity implicates a city's cannabis ordinance and zoning regulations. Commercial cannabis activity, such as an illegal dispensary or cultivation operation, also implicates a city's business license requirements and property maintenance requirements. Establishment or operation of an unlawful commercial cannabis business often entails routine code enforcement violations, such as building or public nuisance violations. While a single act may constitute a violation of several ordinances, keep in mind the prohibition on multiple punishments.[447]

A violation of a city ordinance is a misdemeanor, unless it is made an infraction by ordinance.[448] Violations of ordinances that are otherwise misdemeanors can generally also be charged as or reduced to infractions in the discretion of the prosecuting attorney.

A misdemeanor is punishable by six months in jail, a $1,000 fine, or both, unless otherwise provided by law.[449] An infraction violation of an ordinance is punishable by a $100 fine, with fines increasing upon repeated violations.[450]

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446 Gov. Code, § 36900, subd. (a). But see *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940 (holding that a city's misdemeanor penalty for medical marijuana ordinance violations was preempted concerning valid medical marijuana cardholders protected under the Medical Marijuana Program Act, specifically by California Health and Safety Code section 11362.71(e)).

447 Pen. Code, § 654.

448 Gov. Code, § 36900, subd. (a).

449 Pen. Code, § 19.

450 Gov. Code, § 36900.

Where the unlawful cannabis activity is highly profitable, misdemeanor prosecutions are generally considered to be more effective than infraction prosecutions given the increased penalties for misdemeanors and the possibility of jail time. The minor punishment involved in infraction prosecutions may cause the fines to be viewed simply as a "cost of doing business." Note that if the prosecuting attorney elects to proceed with the violation as a misdemeanor, the case will be more complex, time-consuming, and costly for the city. When charged with a misdemeanor, a defendant has the right to an attorney and a jury trial.[451]

For further discussion regarding criminal enforcement of misdemeanors see Appendix I.

B. Prosecutions of State Law Violations

In general, state law misdemeanors must be prosecuted by the district attorney unless a city attorney is authorized to bring prosecutions by the district attorney.[452] However, district attorney's offices are often reluctant to prosecute cannabis crimes, since the consumption of cannabis has become normalized in many jurors' minds. Nevertheless, state law prosecutions may be more viable in the more egregious cases that may interest prosecutors.

C. Criminal Investigations

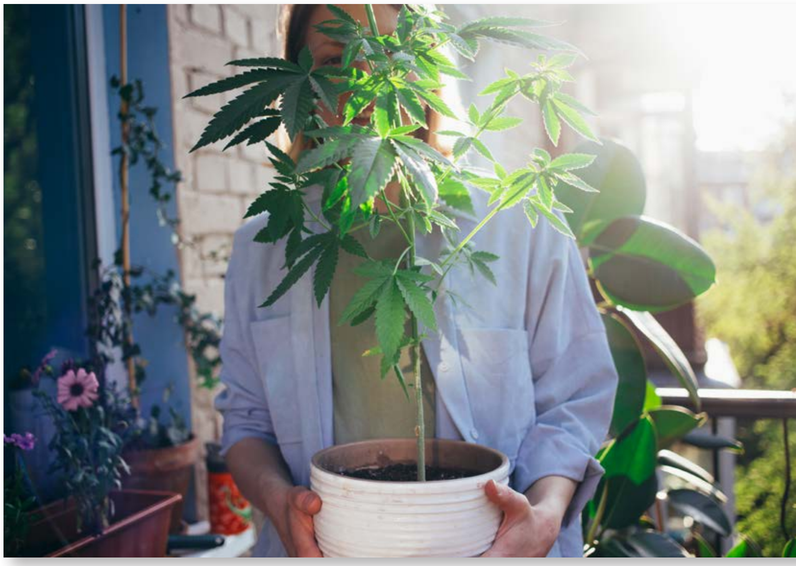
Even though district attorneys may not be eager to prosecute state law cannabis crimes, the suspected violations may still be the basis of a criminal investigation by peace officers. Peace officers have unique resources, training, experience, and expertise to handle cannabis enforcement efforts. This is especially the case with illegal cannabis cultivation sites, which can be dangerous.

One criminal investigation tool that law enforcement agencies can employ is their access to power usage records to identify suspected illegal cannabis cultivation sites.[453] That information can also be used by the law enforcement agency to obtain a criminal search warrant. The benefit of a criminal search warrant is that peace officers can seize any controlled substances and paraphernalia that are discovered.[454] In addition, any amount of growing or harvested cannabis in excess of two pounds, or the amount a medicinal cannabis patient or designated caregiver is authorized to possess, may be destroyed without a court order if certain requirements are satisfied.[455]

Once the search is conducted, not only can state law be enforced, but municipal code violations can be addressed too. And enforcement is not limited to the criminal prosecution—violations discovered through the execution of a search warrant may also be addressed through the civil and administrative processes.

451 Pen. Code, § 17, subd. (d)(1).
452 Gov. Code, § 41803.5, subd. (a).
453 Gov. Code, §6254.16.
454 Health & Saf. Code, § 11472
455 Health & Saf. Code, §11479.

PRACTICE TIP: *One strategy employed by some cities is to execute criminal search warrants on suspected illegal cannabis cultivation sites with peace officers and building inspectors. If there is an illegal grow, the plants and equipment may be seized and destroyed, and violators can be issued administrative penalty citations. More egregious cases (e.g. large-scale industrial grows, networks of residential grow houses) can be addressed with civil lawsuits or criminal prosecution.*



III. ADMINISTRATIVE ENFORCEMENT

A. Administrative Fines

Cities may adopt an ordinance that makes violation of any ordinance in its municipal code subject to an administrative fine or penalty.[456] Such an ordinance must establish administrative procedures that govern the imposition, enforcement, collection, and review by the city of those administrative fines.

The maximum allowable administrative fines for violations that would otherwise be infractions, other than local building and safety codes,[457] are: $100 for the first violation; $200 for the second violation that occurs within one year of the first; $500 for each additional violation that occurs within one year of the first.[458] If a code violation is designated a misdemeanor, one California court has suggested that state law places <u>no limit</u> on the amount the local agency can assess for the violation. An administrative order to pay the fine may be appealed de novo before the Superior Court or by a writ petition under Code of Civil Procedure section 1094.5.[459, 460]

In addition to the general authority to adopt administrative fines and penalties, state law now provides an additional tool against unlicensed commercial cannabis activity. Cities may adopt an ordinance that immediately imposes an administrative fine for the violation of "building, plumbing, electrical, or other similar structural, health and safety, or zoning requirements, if the violation exists as a result of, or to facilitate, the unlicensed cultivation, manufacturing, processing, distribution, or retail sale of cannabis for which a license is required.[461] However, a city must allow for a reasonable amount of time to correct or

456 Gov. Code, § 53069.4, subd. (a)(1).

457 See Gov. Code, § 36900(c) (setting out fines for local building and safety code violations as $130, $700, and $1,300 for first, second and third violations, respectively, within one year).

458 Gov. Code, §§ 53069.4, subd. (a)(1), 36900, subd. (b), 25132, subd. (b).

459 See also *County of Los Angeles v. City of Los Angeles* (1963) 219 Cal.App.2d 838, 844 (so long as penalty in validly enacted city ordinance does not exceed any maximum limits that are prescribed by its charter, as a freeholders' charter, or Government Code section 36901 as to other cities which are governed by the general laws, then the penalty that is provided in the ordinance prevails).

460 *Martin v. Riverside County Dept. of Code Enforcement* (2008) 166 Cal.App.4th 1406, 1411; *County of Humboldt v. Appellate Division of Superior Court* (2020) 46 Cal.App.5th 298, 312.

461 Gov. Code, § 53069.4, subd. (a)(2)(B).

remedy the violation if: (1) a tenant possesses the property that is subject to the fine, (2) the property owner can provide evidence that the rental lease agreement prohibits the commercial cannabis activity, (3) the landlord did not know the tenant was engaging in unlicensed commercial cannabis activity, and (4) the landlord was not given actual notice of the unlicensed commercial cannabis activity through a complaint, property inspection, or other information.[462]

This additional tool can be helpful for cities dealing with the proliferation of cannabis grow operations in residential neighborhoods. Previously, cities could impose administrative fines for violations of local ordinances pertaining to building, plumbing, electrical, or other similar structural issues that created no immediate danger to health or safety only after providing a reasonable time to cure the violations. Now, no opportunity to cure violations related to the unlicensed commercial cannabis activity is required unless all three criteria in Government Code section 53069.4, subdivision (a)(2)(E) are satisfied.

Given the strictly monetary nature of administrative fines as an enforcement tool, and the high value of each cannabis plant that is cultivated, cities may find that even repeated imposition of such fines against illegal cannabis businesses may fail to achieve compliance or closure. Cities may find that recalcitrant illegal operators are willing to pay the fine as the "cost of doing business" or simply ignore the process altogether, necessitating more extreme measures. In addition, it is sometimes difficult to identify the person who is actually cultivating the cannabis plants because they may only be at the location sporadically and often do not have identification.

PRACTICE TIP: *A strategy some cities have adopted to combat illegal cannabis cultivation with administrative fines is to specify that each plant cultivated in excess of the number allowed represents a separate violation, meaning each grow may result in hundreds of fines. Cities can also impose higher fine amounts if they classify the offence as a misdemeanor, which avoids the fine limits set by state law for "violations that would otherwise be infractions." Charter cities may also argue that increased penalty amounts are authorized under the municipal affairs doctrine. In addition, ordinances can be crafted to make the owner on title to the property liable for the fines. This makes it more likely that an offender can be identified and deters property owners from allowing someone else to illegally grow cannabis on their property.*

Even with the proper administrative fines ordinance, the availability of administrative appeal rights, including seeking writ relief, could make this particular tool more cumbersome than other enforcement options. An ordinance with increased fine amounts will result in raising the stakes in the administrative appeals, and it will correspondingly increase the legal scrutiny of the process. The administrative appeals process should be carefully constructed and carried out to ensure that the enforcement efforts will withstand the litigation.

462 Gov. Code, § 53069.4, subd. (a)(2)(E).
As mentioned earlier in this Guide, some personal cultivation is permitted under the AUMA.
Although Government Code section 53069.4 defines "local agency" by reference to the Government Code section 54951 (the Brown Act), which includes "city, whether general law or chartered," case law supports the argument that charter cities may impose different penalties. See *Los Angeles County v. City of Los Angeles* (1963) 219 Cal.App.2d 838, 844 ("So long as such penalty does not exceed any maximum limits prescribed by its charter … the penalty provided in the ordinance prevails.").

B. Administrative Abatement

1. Inspection Warrants

Cities may seek an inspection warrant to inspect a facility suspected of harboring unlicensed commercial cannabis activity for zoning or building and safety code violations.[463] Inspection warrants must be supported by an affidavit that particularly describes the location to be inspected and the purpose of this inspection,[464] and the warrant will issue upon the finding that either reasonable legislative or administrative standards for inspection are satisfied, or there is reason to believe the facility is out of compliance.[465] Refusal to permit an inspection pursuant to an inspection warrant is a misdemeanor.[466]

Inspection warrants can be an effective tool for cities to uncover a variety of potential violations at unlawful cannabis facilities. Once a violation is discovered, cities may then pursue abatement, through summary means if warranted (see also the discussion in subsection III.B.3., below). This assumes that the city has, by ordinance, declared the violation to be a nuisance, as it is broadly authorized to do under state law.[467]

As with other remedies, inspection warrants can be combined with other approaches, such as administrative fines, if building code violations are discovered, which are subject to increased fines.[468]

2. Abatement Warrants

An abatement warrant is an inspection warrant, as described above, that allows city staff to execute an abatement order that the city issued through its own administrative abatement procedures. There is no express statutory law regarding the issuance of abatement warrants; however, case law has clearly established that abatement warrants are properly issued pursuant to the statutory construct delineated for inspection warrants in the Code of Civil Procedure.[469] A valid abatement warrant can protect a city and its code enforcement officers from liability based on due process concerns.[470]

A city should carefully follow the procedures in its municipal code that authorize the city to abate. Following those procedures ensures the city complies with due process. The proposed abatement warrant should describe the city's anticipated abatement actions with as much specificity as possible.

PRACTICE TIP: *When seeking an inspection warrant or an inspection and abatement warrant, be sure to identify all the city personnel that will be present during the inspection conducted under the warrant such as fire, police, building official, etc. Also note that police are generally held to higher standards than code enforcement officers. See People v. Tillery (1989) 211 Cal.App.3d 1569.*

463 Civ. Proc. Code, § 1822.50, et seq.
464 Civ. Proc. Code, § 1822.51.
465 Civ. Proc. Code, § 1822.52.
466 Civ. Proc. Code, § 1822.57.
467 Gov. Code, § 38771.
468 Gov. Code, § 36900, subd. (c).
469 *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 246; *Gleaves v. Waters* (1985) 175 Cal.App.3d 413, 420.
470 *Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 458.

PRACTICE TIP: *Inspection Warrants are specifically intended for ensuring compliance with health, safety, building, zoning, and environmental regulations. They should not be used as a substitute by law enforcement to bypass the requirement for a search warrant. When there is probable cause to believe that criminal activity is occurring beyond the scope of what an inspection warrant covers, local officials should seek a search warrant to conduct their investigation.*

3. Summary Abatement

In addition to generally declaring zoning and other municipal code violations to constitute a nuisance per se, cities should expressly declare that unlicensed commercial cannabis activity constitutes a nuisance or that any operation in violation of its regulations is a public nuisance subject to abatement.

Summary abatement is an emergency abatement done without an abatement warrant or any administrative due process. Cities may establish procedures for the summary abatement of commercial cannabis facilities that constitute a nuisance and may attach liens against such facilities to account for abatement expenses.[471] While summary abatement may be considered an inherent power of a city, ideally each city should have a code provision authorizing summary abatement.

Summary nuisance abatement is authorized in emergency situations involving the physical safety of the populace.[472] It is also justified in situations involving exigent circumstances such as the destruction of evidence. Cities must be cautioned, however, that while they have broad authority to declare certain activity to be a nuisance, ultimately such a declaration may have to survive judicial scrutiny, even in the realm of unlawful cannabis activity.[473]

If the circumstances warrant summary abatement, the question then becomes what abatement acts are appropriate to address the violation, such that the city's action is not overly broad in scope and thus more likely to be found unlawful. Cities should limit summary abatement to alleviating only imminently dangerous conditions. Summary abatement may include disposal of cannabis, the boarding up of property, or other alternative measures discussed later in this chapter.

Whenever a city exercises its summary abatement powers, due process requires that a city must provide the party responsible for the nuisance with a post-abatement hearing to contest the validity of the summary abatement. While many cities have a code provision authorizing summary abatement, most do not have clear procedures outlining the notice and hearing procedures to occur after completion of summary abatement.

Nuisance abatement procedures may also provide for the imposition of special assessments on unlicensed commercial cannabis facilities that constitute a nuisance.[474] Cities may provide that the prevailing party at nuisance abatement

471 Gov. Code, § 38773.
472 *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718–19.
473 *Allen v. City of Lake* 71 F.Supp.3d 1044, 1052 (N.D. Cal. 2014).
474 Gov. Code, § 38773.5, subd. (a).

proceedings are entitled to collect attorneys' fees.[475]

C. Notice and Order to Vacate (Also Known As "Red-Tagging")

If a city's code enforcement officials determine that a commercial cannabis business is in violation of local or state building codes, and such violation(s) render the structure unsafe for human occupancy, then "red-tagging" may be warranted. Red-tagging is not specifically defined in state law, or in all local ordinances, but is generally understood to refer to a notice and order to vacate, and is often paired with an order to repair or demolish, as a means of abating the nuisance caused by the unsafe condition of the building.

The authority to red-tag is derived from both state and local law, with the latter based on cities' well-established police power to enact and enforce ordinances to protect the public health, safety, and welfare of their residents.[476] Standards relating to fire and life safety, structural safety, and access compliance are governed by the California Building Standards Code,[477] which applies to all occupancies in California, along with local amendments adopted by state agencies and ordinances implemented by local jurisdictions' governing bodies. In addition to setting forth notice requirements, Section [116.1] of the Building Code provides that structures that are "dangerous to human life or the public welfare or that involve illegal or improper occupancy or inadequate maintenance, shall be taken down and removed or made safe, as the building official deems necessary and as provided for in this section. A vacant structure that is not secured against entry shall be deemed unsafe." While this language does not expressly authorize local building officials to vacate a structure, it provides broad authority to order that structures be made safe, as the building official may deem necessary.

The determination of whether a building is unsafe under California Building Code section 116.1 is within the discretion of the building official. Common conditions of a commercial cannabis business that may render it unsafe are unpermitted construction (especially unpermitted electrical modifications that pose an increased fire hazard), and ingress and egress blockages (including unapproved security doors that prevent emergency egress).

A red tag may also be issued in connection with revocation of a certificate of occupancy. California Building Code section R110.5 authorizes the building official to suspend or revoke a certificate of occupancy "where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code." California Building Code section R110.1

475 Gov. Code, § 38773.5, subd. (b).
476 Cal. Const., art. XI, § 7.
477 Cal. Code Regs., tit. 24.

provides that no building may be used or occupied until the building has a certificate of occupancy, meaning that upon revocation of a certificate of occupancy a building must be vacated. Further, Section 116.1 of the Building Code provides that structures that "involve illegal or improper occupancy…shall be…made safe, as the building official deems necessary and as provided for in this section."

Statutory authority applicable to red-tagging unsafe structures can also be found in the Health and Safety Code. An enforcement agency is authorized to "institute appropriate action or proceeding to prevent, restrain, correct, or abate the [Building Code] violation or nuisance," with less than 30 days' notice if deemed necessary, in situations involving "an immediate threat to the health and safety of the public or occupants of a structure."[478] Whenever the enforcement agency has determined, after inspection, that the building is substandard, it is authorized to commence proceedings to abate the violation by repair, rehabilitation, vacation, or demolition of the building.[479] Note that this provision expressly authorizes an order to vacate.

Cities should also rely on their own applicable municipal code provisions when ordering that properties determined to be unsafe be vacated and secured. A city may adopt distinct red-tagging procedures in its nuisance abatement ordinance or adopt local amendments to the aforementioned California Building Code authorities and procedures. Having an ordinance that makes it a misdemeanor to fail to comply with an order to vacate a property deemed to be unsafe can be a potent enforcement tool.

Whatever code sections are relied upon in issuing a notice of violation and order to vacate, it is important to ensure due process is afforded, even in an emergency situation.[480]

PRACTICE TIP: *Cities should not rely solely on notice requirements in the California Building Code (§§116.3-116.4) to ensure due process is afforded in the red-tagging process. Supplemental procedures, including hearing and appeal rights, should be enacted and followed.*

PRACTICE TIP: *The Fire Marshal, as the Fire Code official, also has authority to "red tag" a building and order it vacated under California Fire Code section 110, if the conditions are deemed unsafe due to "hazardous conditions that present imminent danger" to persons in the building. These may include conditions such as unsafe exposed electrical wiring, overloaded electrical outlets and extension cords, large accumulations of combustible materials, and lack of ingress and egress. In a civil injunction/nuisance action, courts place great weight on the declaration of a Fire Marshal when the Fire Marshal outlines the life safety conditions they observed that could cause imminent harm.*

D. Disconnection of Utilities

Cities may also consider alternative tools to gain compliance or prohibit unlawful cannabis business operations. One such tool may be the

478 Health & Saf. Code, § 17980, subd. (a).

479 Health & Saf. Code, § 17980, subd. (c)(1).

480 *Wyss v. City of Hoquiam* 111 Fed. Appx. 449, 451 (9th Cir. 2004). See also *Soranno's Gasco, Inc. v. Morgan* 874 F.2d 1310, 1318 (9th Cir. 1989).

disconnection of utility services. Some cities, which have their own utilities department providing water or power services, may consider turning off an unlawful cannabis business's utility services if the city has a local ordinance providing such authority. However, some businesses may bring in generators or seek power from other sources to stay open. State law also authorizes disconnection of utilities "in case of emergency where necessary to eliminate an immediate hazard to life or property" or where the utility connection has been made without the required certificate of occupancy.[481] As with any administrative provision in the California Building Code, the authority to disconnect utilities can be amended or supplemented by ordinance.

PRACTICE TIP: *An ordinance expressly authorizing this enforcement tool is advisable to provide notice to the utility subscriber. In other contexts, California law is clear that notice must be provided prior to turning off a utility service.*[482]

E. Permit Modification, Suspension, or Revocation

Cities that allow and regulate commercial cannabis businesses typically issue licenses or permits, and condition those licenses or permits on requirements and restrictions specified by ordinance. Such requirements should be considered an essential part of an effective regulatory and enforcement system governing commercial cannabis activity at the local level, and are clearly within cities' inherent authority, as recognized by MAUCRSA.[483]

Cities seeking to enforce their local license or permit requirements by modifying, suspending, or revoking the authorization based on non-compliance with those requirements should have an ordinance that establishes the process for doing so. In accordance with principles of due process, the ordinance should provide for notice regarding the nature of the violation and grounds for the proposed action (e.g., additional conditions, a monetary penalty, suspension, or revocation of the license), and afford an opportunity for a hearing. Depending on the severity or frequency of the violation(s), cities may be justified in seeking revocation, rather than a lesser form of discipline against the cannabis licensee. Absent a clear abuse of discretion, courts will generally defer to the city's discretion regarding the level of punishment imposed.[484]

Aside from local cannabis licenses or permits, it may be possible and prudent to revoke, suspend, or modify other city approvals, licenses, or permits. For example, the operation of a non-compliant cannabis business by a tenant may be a basis to take action against the business license or a conditional use permit for the property. A property owner may decide to take action to eject a tenant or otherwise cooperate with the city's efforts in order to avoid the revocation, suspension, or modification. Depending on the level of

481 California Building Code, § 112.3.

482 Pub. Util. Code, §§ 10010, 10010.1 (notice required by a public utility prior to termination of light, heat, water, or power for a delinquent account). But see *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 664 (addressing discontinuation of telephone service involving illegal activity, without notice to the subscriber, upon a finding of probable cause by a magistrate; ". . . the rule should provide at the least that in order to justify summary action the magistrate must find that there is probable cause to believe not only that the subject telephone facilities have been or are to be used in the commission or facilitation of illegal acts, but that the character of such acts is such that, absent immediate and summary action in the premises, significant dangers to public health, safety, or welfare will result.").

483 Bus. & Prof. Code, § 26200, subds. (a)–(b) (providing in part that MAUCRSA shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under MAUCRSA, including "business license requirements," nor to supersede or limit existing local authority to enforce "local license, permit, or other authorization requirements.")

484 *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 790 ("In reviewing the severity of the discipline imposed, we look to the correctness of the agency's decision rather than that of the trial court. The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated." (Citations omitted.))

involvement or culpability of the property owner for the illegal activity, these may be additional means of placing pressure on a bad actor.

PRACTICE TIP: *While cities are afforded broad discretion in determining the appropriate penalty for license violations, a decision to impose severe discipline is more likely to be upheld if preceded by unsuccessful attempts to gain compliance or other aggravating factors. For instance, if the totality of circumstances includes warning letters, or attempts by the cannabis business licensee to avoid detection of violations, it is unlikely a court would deem revocation an abuse of discretion.[485] Cities should generally avoid "accumulating" violations in order to impose a more severe penalty than applicable to a first offense under governing regulations. In a case involving an ABC licensee, Walsh v. Kirby,[486] this practice was found to violate both applicable statutory authority and due process. The court stated, "Petitioner complains of a practice whereby the department accumulated evidence of recurring sales of distilled spirits below established minimum retail prices, each sale constituting a different but essentially identical violation, before it filed its accusation charging the licensee with the whole series of violations and assessing concomitant cumulative penalties. Such practice, petitioner contends among other things, constitutes an arbitrary exercise of the statutory grant of authority and offends due process limitations. We agree and annul the imposition of cumulative penalties in the instant circumstances." The Walsh court noted, however, that it expressed no view on whether such a practice "would be arbitrary if exercised against a licensee who, the record would show, was a habitual offender and unwilling to conform."[487]*

F. State Law Administrative Enforcement

Each of California's three licensing agencies with cannabis oversight authority (Department of Cannabis Control, California Department of Food and Agriculture and California Department of Public Health) were previously empowered to issue a citation to a licensee or unlicensed person for any violation of MAUCRSA or its implementing regulations. However, after July 12, 2021, the DCC is the enforcement agency.[488] MAUCRSA establishes the basic elements of the associated administrative process, including provisions requiring the licensing authority to follow specified notice and hearing requirements, and consider certain factors in assessing administrative fines. The potential fines are steep: up to $5,000 per violation by a licensee and up to $30,000 per violation by an unlicensed

485 *Id.* at p. 790.
486 (1974) 13 Cal.3d 95, 98.
487 *Walsh v. Kirby* (1974) 13 Cal.3d 95, 105, fn. 14.
488 Bus. & Prof. Code, § 26031.5.

operator.[489] Additionally, any person engaging in commercial cannabis activity without a license is subject to civil penalties of up to three times the amount of the license fee for each violation, and the court may order the destruction of cannabis associated with that violation in accordance with Section [11479] of the Health and Safety Code.[490]

This enforcement mechanism has the potential to be a highly effective tool against illicit cannabis businesses and non-compliant licensees. Its actual effectiveness, however, will depend on the state's resources to issue and follow through on citations as part of a broader enforcement strategy. That strategy has included coordination with local law enforcement as well as other state entities, such as the California Department of Tax and Fee Administration (CDTFA), in various enforcement efforts. The state may likewise seek to partner with local authorities in exercising its citation authority under Business and Professions Code section 26031.5.

489 *Id.* at subd. (a).
490 Bus. & Prof. Code, § 26038.

APPENDIX I | Criminal Enforcement of Misdemeanors

FIELD CITATION VERSUS COMPLAINT FOR ARREST WARRANT

There are generally two ways to file a misdemeanor case and bring the defendant into court: issuance of a citation or the filing of a long-form criminal complaint.

Issuance of Citation	Long-Form Criminal Complaint
◆ Offense must generally have been viewed in the presence of the officer.[491] ◆ California law limits who can be arrested and booked, rather than immediately issued a citation and released.[492] ◆ A defendant may be arrested where "There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested."[493]	◆ Offenses do not need to be committed in officers' presence and complaint may be employed when the property owner or business owner/entity are the defendants.[494] ◆ Preparation of long-form complaint can assist the prosecuting attorney in identifying issues and making certain tactical decisions, including who to charge, what violations to charge, and how many counts to allege, etc.

491 Pen. Code §§ 836.5, subd. (a), 836, subd. (a)(1); but see e.g. § Veh. Code 40300.5; Pen. Code §§ 243.1, 12031, subd. (a)(1).
492 Pen. Code § 853.6, subd. (i).
493 Pen. Code § 853.6, subd. (i)(7).
494 Pen. Code § 740. See also Pen. Code §§ 948–949 (authority to file complaints in superior court), 950, 952 (form of complaint).

IDENTIFICATION AND SELECTION OF DEFENDANTS

A key to permanently abating illegal activity is to prosecute those that are most directly and ultimately responsible for the criminal activity. As such, it is critical to tailor the approach of the prosecution to the defendants who are responsible for the illegal activity.

- **Business Entity Defendants** Warrants may be used to obtain business records that may disclose the owners or operators. Obtaining and executing search warrants require the participation and cooperation of law enforcement, which cities will have to varying degrees. An inspection warrant can be a useful evidence gathering tool where there is insufficient evidence to obtain a warrant or where law enforcement is not leading the investigation.[495]

- **Property Owner** – A property owner may have an interest in the cannabis business activity, or may simply be allowing the illegal activity to occur as a disinterested landlord. Often property owners collect above-market rent in exchange for allowing the illegal activity to continue. Before filing a criminal complaint against a property owner with no other ascertainable connection to the illegal activity, it is necessary to first put the property owner on notice.[496]

- **Employees** – Prosecution of only employees may lead to an illegal business reopening, with new employees being hired who are unaware of prior arrests.

RESOLUTION OF CRIMINAL PROSECUTION

The primary advantage of a misdemeanor prosecution is placing the defendant on one, two, or three years of summary probation subject to specific terms and conditions related to the violation committed.[497] Because defendants often reoffend, reducing misdemeanors to infractions is not recommended. Pursuing a misdemeanor plea ensures probation is possible. Conditions of probation may include orders to abate outstanding violations and to prevent the recurrence of violations. At a minimum, every probation includes the condition that the defendant must "obey all laws."

A defendant who violates a condition of probation is subject to the revocation of his or her probation, and to the imposition of additional sanctions. If the defendant violates any term or condition of probation at any time during the probationary period, the defendant may be rearrested, have additional fines imposed, or have additional conditions placed upon the probation.[498] Jail time may be imposed by a court where a defendant's actions are egregious or where the defendant has repeatedly violated terms and conditions of probation imposed by the court.

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495 See Cal. Code Civ. Proc. §§ 1822.50, et seq.

496 See *People v. Greene* (1968) 264 Cal.App.2d 774, 778 (landowner can be criminally charged for the condition of his or her property, and a municipality can demand affirmative acts to remedy the condition of the premises).

497 See Pen. Code, § 1203, subd. (a).

498 Pen. Code, § 1203.2.

Glossary

AUMA: Adult Use of Marijuana Act, adopted by California voters as Proposition 64 effective November 9, 2016.

BSA: Bank Secrecy Act. The BSA requires US financial institutions to assist federal agencies to detect and prevent money laundering.

CBD: Cannabidiol, an extract from cannabis plants.

CDD: Customer Due Diligence. FinCEN's guidelines under the BSA include best practices for CDD.

CDFA: California Department of Food & Agriculture. CDFA governs state licenses for commercial cultivation of cannabis. (Bus. & Prof. Code §26012.)

CDFTA: California Department of Tax and Fee Administration. CDFTA determines certain tax rates relating to commercial cannabis. Cannabis retailers, cultivators, manufactures, and distributors must also register with CDTFA.

CDFW: California Department of Fish & Wildlife. CDFW provides input to CDFA on conditions relating to the cultivation of cannabis. (Bus. & Prof. Code §26060(c).)

CDPH: California Department of Public Health. CDPH governs state licenses for commercial manufacturing of cannabis. (Bus. & Prof. Code §26012.)

CEQA: California Environmental Quality Act. (Public Resources Code §§21000 et seq.)

CSA: Controlled Substances Act (21 USC §§810 et seq.)

CUA: Compassionate Use Act of 1996 adopted by California voters as Proposition 215 effective November 6, 1996. (Health & Safety Code §§11362.5 et seq.)

DCC: Department of Cannabis Control, created by AB 141 in July 2021.

DPR: Department of Pesticide Regulation. DPR helps develop guidelines for the use of pesticides in the cultivation of cannabis and residue in harvested cannabis.

Day Care Center: "[A] child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and schoolage child care centers, and includes child care centers licensed pursuant to Section 1596.951." (Health & Safety Code §1596.76.) Certain locational restrictions relate to day care centers.

FDA: US Food and Drug Administration. The FDA regulates CBD and THC if used as a food or drug additive for humans and animals.

FDB: Food and Drug Branch, within the California Department of Public Health. FDB regulates the topical and ingestible forms of hemp-based CBD.

FinCEN: Financial Crimes Enforcement Network, within the US Department of the Treasury. FInCEN has issued guidelines relating to cannabis-related financial transactions.

Hemp: Hemp and cannabis are the same plants, with hemp plant defined as having less than 0.3% THC. (Health & Safety Code §11018.5(a).)

MAUCRSA: Medicinal and Adult-Use Cannabis Regulation and Safety Act, effective June 27, 2017.

MCSB: Manufactured Cannabis Safety Branch, within the California Department of Public Health. MCSB regulates the manufacture of cannabis.

MMIC: Medical Marijuana Identification Card. An MMIC indicates the holder is a qualified patient or the primary caregiver for a qualified patient and is exempt from sales and use taxes since the cannabis is for medicinal use. (Rev. & Tax. Code §34011(a)(1).)

MMPA: Medical Marijuana Program Act (Health & Safety Code §§11362.7 et seq.), aka SB 420, effective January 1, 2004.

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