Commercial Cannabis Permit Program and Overlay District Statutorily Exempt Under CEQA Guideline Section 15183

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On June 13, 2023, the Second Appellate District affirmed the City of Pomona's use of a statutory exemption for its Commercial Cannabis Overlay Permit Program under California Environmental Quality Act (CEQA) Guidelines section 15183, finding that the program required no additional environmental review. The decision in *Lucas v. City of Pomona* is noteworthy for the appellate court's broad interpretation of the statutory exemption,[1] holding that (i) the City's zoning ordinance, General Plan Update, and EIR that does not address "density" may be exempt under CEQA Guidelines section 15183, and (ii) uses, including cannabis-related uses, that are not literally included in an environmental impact report (EIR), may be determined to be sufficiently similar to existing and defined land uses allowed by underlying zoning.

This decision is also noteworthy given the state's year-old requirement that all cannabis operator applicants comply with CEQA.[2]

Background

The City certified an EIR for its General Plan Update, which provided for the development of the City through the year 2035 for cannabis uses, in March 2014. Subsequently, the City adopted ordinances to tax and establish a licensure framework for commercial cannabis uses in 2018 and 2019. These approvals included the Commercial Cannabis Overlay Permit Program (the Project) at issue in this case, which designated locations within the City where cannabis-related land uses would be permitted (the Overlay District).[3] Prior to establishing the Overlay District, the City conducted a multistep analysis that included studying the scientific basis of cannabis as it relates to potential land use impacts, considering community feedback, and studying potential environmental impacts.

When approving the Project, the City determined that the proposed land uses related to commercial cannabis are similar enough to existing and defined land uses within the Pomona Zoning Ordinance and the General Plan Update or were so defined using a Determination of Similarity (DOS) process. [4], [5] The City's DOS findings provided, as relevant to this appeal, that the Project's proposed cannabis use is not of greater intensity or density than similar uses and would not generate more environmental impacts.

In addition to its own investigation and research, the City hired an expert environmental planning firm to prepare the necessary CEQA analysis for the Project, known as Findings of Consistency, which concluded that "no additional environmental review or documentation is required."

The petitioner then challenged the Project, contending the City improperly forewent further environmental review. On appeal, petitioner also argued, among other things, that: (i) the EIR did not address environmental impacts of cannabis use activities because the EIR "does not include either the word 'marijuana' or the word 'cannabis;'" (ii) the Findings of Consistency were "patently erroneous" for claiming the proposed Project "would not . . . alter general land use patterns" because the Project "establishes permissible locations for a land use that has never before existed legally within the City;" and (iii) based on CEQA Guidelines section 15183(b), the City's exemption of the Project was improper because the EIR did not address the Project's "unique and peculiar impacts associated with cannabis-related businesses."

Court Finds Literal Arguments "Miss the Point"

In affirming the trial court's ruling, the Court of Appeal found – under the substantial evidence standard of review – that these arguments "miss[ed] the point" for a myriad of reasons. First, as an initial matter, the decision reiterated that Section 15183 is a statutory provision, and, as such, is "absolute." Unlike categorical exemptions, Section 15183 is not subject to exceptions.

Second, the court determined CEQA Guidelines section 15183 does not require additional environmental review for projects "which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified," except as might be necessary to determine whether there are project-specific significant effects. Of particular importance to the court was the fact that Section 15183 was promulgated under the authority of Public Resources Code section 21083.3, which provides that a public agency needs to examine only those environmental effects that are peculiar to the project and were not addressed or were insufficiently analyzed as significant effects in the prior EIR.

Third, for Section 15183 to apply, a project must be "consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified." "Consistent" is defined as "the density of the proposed project is the same or less than the standard expressed for the involved parcel in the general plan, community plan, or zoning action for which an EIR has been certified, and that the project complies with the density-related standards contained in that plan or zoning."

Thus, Section 15183(a) required the Project to be "consistent with the development density established by existing zoning, community plan, or general plan policies" – here, the Pomona Municipal Code, Pomona Zoning Ordinance, California Building Code, the City's General Plan Update, and the certified EIR. Any environmental impacts associated with the Project would be similar to those anticipated in the General Plan Update and EIR, taking into consideration applicable municipal code and zoning requirements. No additional CEQA environmental review shall be required so long as the Project would not result in any new or increased significant environmental impacts or mitigation beyond those identified in the EIR based on the General Plan Update.

In disagreeing with petitioner's "literal argument," the court found that, despite the fact that "density" or the exact phrase "density-related standards" was not included in the zoning ordinances, General Plan Update, and EIR, it does not necessarily mean that those topics were not discussed with different verbiage. Additionally, a review of the administrative record shows "land use distribution and density" and "zone density/intensity" are, in fact, discussed in the EIR. Furthermore, the DOS expressly provided that the 6 proposed commercial cannabis uses share “characteristics common with, and not of greater intensity, density or generate more environmental impact, than those uses listed in the land use district in which it is to be located.”

It should be noted, the court concluded that the Project merely imposes an overlay use on existing zoning; it does not guarantee anyone the automatic right to establish a cannabis-related business, but rather, provides the option to apply for a cannabis business permit. In that sense, the Project does not cause project-specific effects that are “peculiar” to it. The DOS specifically undertook this analysis and concluded, based “on the entirety of its research into commercial cannabis permit types and their associated land use activities,” that cannabis uses were sufficiently similar to existing uses allowed by the underlying zoning. This research and effort spent constitute substantial evidence supporting the City’s determination that commercial cannabis-related uses within the Overlay District do not alter the general land use patterns because they fall within the uses permitted by the underlying zoning.

Conclusion

All in all, this appellate decision provides helpful guidance on the application of CEQA Guidelines 15183’s *statutory* exemption, to be deferentially reviewed for substantial evidence.
The *Lucas* decision also seemed to clarify that an exemption determination for a particular new use not previously identified in the land use plans and related EIR is acceptable so long as it can be confirmed that the project had similar intensity and land use activity characteristics as the previously analyzed and identified uses.

FOOTNOTES

[1] In order to qualify for a CEQA Guidelines § 15183 exemption, the following findings must be made: (i) the project is consistent with the development density established by existing zoning, community plan or general plan policies for which an EIR was certified; (ii) there are no project specific effects which are peculiar to the project or its site; (iii) here are no project specific impacts which the applicable General Plan, Community Plan or zoning regulation failed to analyze as significant effects; (iv) there are no potentially significant off-site and/or cumulative impacts which the related General Plan, Community Plan or zoning regulation EIR failed to evaluate; and (iv) there is no substantial new information which results in more severe impacts than anticipated by the related General Plan, Community Plan or zoning regulation EIR

[2] A prior article on this requirement can be found here.

[3] The Overlay District is further divided into subareas where cannabis-related uses are allowed and grouped by zoning designations and cannabis use permits. The City planned to award up to eight commercial cannabis permits. This Overlay District does not grant all property owners the right to operate a cannabis-related business, but it does grant property owners in such districts the right to apply for a cannabis permit.

[4] The DOS process applies to any land use in the City that is not specifically listed in the zoning ordinance.

[5] Specifically, the 6 commercial cannabis uses determined to be similar to existing land use classifications for business practices are: (i) cannabis cultivation is similar to raising crops; (ii) cannabis distribution is similar to distributing plants; (iii) cannabis manufacturing is similar to

manufacturing, compounding, processing, or packaging of products; (iv) cannabis retail is similar to retail stores; (v) cannabis retail storefronts are similar to retail storefronts; and (vi) cannabis lab testing is similar to laboratory testing.

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