Appealing City of Los Angeles Commercial Cannabis License Denials

As of January 1, 2018, all cannabis dispensaries and cultivators in the City of Los Angeles must possess a state and local license to engage in commercial cannabis activity, with local approval for activities occurring within the City of Los Angeles ("City") coming from the newly established Department of Cannabis Regulation ("DCR"). Given the deluge of applications that the DCR and state licensing authority are expected to receive, and the limited number of licenses the City will issue, there will no doubt be more losers than winners and successfully securing licensure for many may turn on promptly appealing local and state denials. Below, we discuss the general parameters for appealing denials at the City and state administrative levels and, in the event those processes are exhausted without success, the basic steps for securing an applicant's rights to judicial "writ" review to try and overturn those denials.

Local Appeal to the City of Los Angeles Department of Cannabis Regulation and Cannabis Regulation Commission

The administrative procedure for denied applications for commercial cannabis activity appeals submitted to the City of Los Angeles is governed by the recently-enacted Article 4 to Chapter X of the Los Angeles Municipal Code Ordinance No. 185343 (the "Municipal Code"). As with most local agency decisions, the appeal procedures set forth in the Municipal Code must be followed and exhausted before judicial review, if necessary, can be sought.

Denied Applications for Priority Processing by Existing Medical Marijuana Dispensaries

Unlike new applicants, for existing medical marijuana dispensaries, or "EMMDs," there will be a critical opportunity to apply fo Proposition M Priority Processing of their license application by the DCR for the first 60 days after DCR starts accepting applications. If an EMMD is deemed eligible for Proposition M Priority Processing, then the DCR shall issue a Temporary Approval to the EMMD, which allows the EMMD to maintain the limited immunity from prosecution afforded by Proposition D even after Proposition D's repeal. In addition to getting to the front of the line for the license application process and maintaining limited immunity, there are other advantages to receiving Temporary Approval under Priority Processing, includin a waiver of certain zone, distance and sensitive use restrictions that will be applicable to non-EMMD retail license applicants. To receive this Temporary Approval, the EMMD must be able to show that all Proposition D requirements are met by the EMMD as of January 1, 2018.

DCR shall determine whether an EMMD is eligible for Priority Processing. The decision will be made without a hearing, but shall be based on written findings. If DCR determines that the EMMD is not eligible, then the EMMD will have 15 days from th date of the mailing of DCR's decision to appeal to the City of Los Angeles Cannabis Regulation Commission (the "Commission") pursuant to the appeal procedures set forth in Section 104.10 of the Municipal Code, which are discussed in more detail below.

Being denied eligibility for Priority Processing by both DCR and the Commission has immediate and significant repercussions First, the EMMD must immediately cease all commercial cannabis operations and shall not be entitled to Proposition D limited immunity. In addition, the EMMD will not be given grandfathered status and will have to apply for a license by filing an application in the "new applicant line." Accordingly, EMMDs that are denied Priority Processing will need to consider whether seek judicial review of the denial by filing a lawsuit in Los Angeles Superior Court for issuance of a "writ of mandate" to keep operating and overturn the adverse decision on Priority Processing. Applicants for Non-Retailer licenses can also seek Temporary Approval – and can challenge denial of Temporary Approval – through a process that is similar to the process available for EMMD applicants. The writ of mandate process is discussed in more detail below.

General Appeal Process for Denied Commercial Cannabis

License Applications by the City of Los Angeles

Whether or not an applicant receives Priority Processing and/or Temporary Approval, a City license is necessary to engage in commercial cannabis business activity in the City of Los Angeles. Once the application is submitted to the City, DCR shall determine if the application is complete. If DCR determines it is incomplete, it will either reject the application or request additional information from the applicant. DCR will dictate how much time an applicant has to supply the additional information, and a failure to provide the requested information within the allotted time will result in the application being deemed automatically abandoned.

The applicant will no have no right to make an appeal to the Commission if DCR rejects the application or deems it abandoned for failure to provide additional information, and the applicant must file a new application. Alternatively, if the applicant believed that DCR lacked grounds to reject the application or that DCR's information request was unreasonable (suggesting that a new application would be similarly rejected), then the applicant will need to consider seeking judicial review by filing a lawsuit in Los Angeles Superior Court for issuance of a writ of mandate to compel DCR to consider the application complete and compel review of the application's merits. The writ of mandate process is discussed in more detail below.

Once an application is considered complete, all applicants, except for EMMDs, must pass a pre-licensing inspection and must give notice to certain interested parties that the application is complete and will be the subject of a public hearing. With respect to a license for retailer commercial cannabis activity, DCR must, within 60 days of the date DCR deems the application and inspection complete, either deny the license or make a recommendation to the Commission to issue the license. DCR may deny the application upon written findings, but without hearing, for certain reasons described in Section 104.06(a) of the Municipal Code. If DCR denies the application, then the applicant will have 15 days from the date of the mailing of DCR's decision to appeal to the Commission pursuant to procedures set forth in Section 104.10 of the Municipal Code. These appeal procedures are discussed in more detail below.

If DCR recommends approval of the application, then the application goes to the Commission for a decision following a public hearing. The Commission's decision to approve or deny the application will be based on the DCR's recommendation of approval, any written information submitted to the Commission, and oral testimony at the public hearing. The Commission may deny the application, approve the application or conditionally approve the application. The Commission's denial or conditional approval can be appealed to the Los Angeles City Council within 15 days from the date of the mailing of the Commission's decision. The appeal procedures are pursuant to Section 104.10 of the Municipal Code, as discussed in more detail below. The application process for Non-Retailer licenses is similar to the process described above.

Specific City of Los Angeles Appeal Procedures and Timeframes

As mentioned above, EMMDs that do not receive Priority Processing can appeal to the Commission. Also, license applicants can appeal the DCR's or Commission's adverse decisions on their applications. The procedure for each type of appeal is set forth in Section 104.10 of the Municipal Code, and is essentially the same.

All appeals must be filed with the DCR (even if appealing a decision by the Commission). The appeal must be filed within 15 calendar days of the date of the mailing of the written decision that is being appealed. Any appeal not filed within this 15-day period will be automatically rejected as untimely. This timeframe is particularly short and demands swift action because it could take five days or more for the mailed decision to be received by the applicant, leaving the applicant with significantly less than 15 days to prepare an appeal. Thus, it is imperative that applicants diligently review their mail each day and be ready to prepare their appeal on an expedited time frame in the event of an adverse decision.

In addition to the short timeline to prepare an appeal, the Municipal Code requires that the appeal set forth the specific basis upon which the applicant claims that the decision maker (either the DCR or the Commission) erred or abused its discretion. Thus, it will not be sufficient for an applicant to simply submit a letter to DCR stating that the adverse decision is being appealed; rather, the appeal should provide an explanation of all the factual and/or legal grounds that the applicant believes should be considered by the appellate body. Although the appellate body has the discretion to consider oral testimony during a hearing on the appeal (discussed below), it is possible that the appellate body will refuse to consider any new grounds for error that the applicant failed to include in the written appeal. Given the importance of the written appeal document, and in light of the small window of time in which to prepare it, it is recommended that applicants have counsel retained in advance who can be ready to prepare a

timely and thorough appeal. Applicants are also required to give written notice of their appeal to certain interested parties that the license denial is being appealed and will be the subject of a public hearing.

Appeals will be transmitted to the appellate body (either the Commission or the City Council) along with the lower body's file and any report the lower body prepares in response to the appeal's allegations of error. The Municipal Code is silent on how quickly the appeal must be transmitted to the appellate body. In the event it appears that the DCR is unreasonably delaying the transmission of the appeal, the applicant will want to consider filing a lawsuit in Los Angeles Superior Court for issuance of a writ of mandate to compel DCR to transmit the appeal to the appropriate appellate body. The writ of mandate process is discussed in more detail below.

Appeals to the Commission will be given a public hearing within 60 days of the Commission's receipt of the appeal. Appeals to the City Council will be given a public hearing within 15 Council meeting days of the Council's receipt of the appeal. In either case, the failure of the appellate body to act within the prescribed time period shall be deemed a denial of the appeal.

Within 30 days of closure of the hearing, the appellate body may reverse or modify, in whole or in part, any decision of the lower level decision maker. The appellate body must issue written findings supported by the evidentiary record. If the appellate body fails to issue a decision within 30 days of the closure of the hearing, then the appeal will be deemed to be denied.

Denials of appeals can be immediately challenged by filing a lawsuit in Los Angeles Superior Court for issuance of a writ of mandate. The writ of mandate process is discussed in more detail below.

Appealing Denied City Applications by Way of a Writ of Mandate Filed in the Los Angeles Superior Court

As discussed above, there may be instances when a license applicant, after exhausting all otherwise available procedures, must seek relief from the Los Angeles Superior Court by way of a writ of mandate. Generally, there are two types of writ petitions that are commonly sought: a traditional writ of mandate pursuant to California Code of Civil Procedure section 1085 (CCP 1085), and administrative mandamus pursuant to California Code of Civil Procedure section 1094.5 (CCP 1094.5). Although the requirements and procedures for these writ petitions differ in some important respects, they both are designed to obtain a court order compelling the respondent – in this case the DCR, the Commission, or the City Council – to take a specified action.

Petitions to challenge the denial of EMMD Priority Processing or the denial of a license application will likely be governed by CCP 1094.5 and 1094.6, because the Municipal Code requires a hearing and the taking of evidence prior to the City's final decision. Pursuant to CCP 1094.6, the petition must be filed no later than the 90th day following the date on which the City's decision becomes final. Where a decision was issued, the 90 day period will run from the date the decision is issued. Applicants should remember, however, that the City's appellate body (either the Commission or the Council) may fail to hold a timely hearing or may fail to issue a timely decision. As discussed above, when this happens the law deems there to be a decision of denial. For example, if the Council fails to issue a decision on an appeal of license denial by the Commission within 30 days of closure of the hearing on appeal, then the 90 day period pursuant to CCP 1094.6 will begin running on the 31st day following the closure of the hearing on the appeal. These complicated timelines should be carefully calendared in advance by applicants and their counsel.

Petitions to challenge the DCR's failure to process an application or failure to transmit an appeal to the appropriate appellate body will likely be governed by CCP 1085, because the petition seeks to compel the performance of the DCR's ministerial duty. While there does not appear to be any statutory deadlines by which to file a writ petition under CCP 1085 to compel performance by DCR, applicants should file the petition without undue delay. Failure to act promptly could result in the court denying the petition on the basis that the applicant sat on its rights and consequently should be barred from proceeding under the doctrine known as "laches."

Writ procedure can be complicated and therefore a detailed discussion is outside the scope of this article. Appeals of denials of writ petitions are also outside the scope of this article. It is recommended that applicants retain counsel to handle the filing and hearings on writ petitions.

Appealing Denials by the State of California

Bureau of Cannabis Control

An applicant seeking to engage in commercial cannabis activity in the City of Los Angeles must possess not only a license from the City, but also from the state licensing body. State licensure is controlled by the Bureau of Cannabis Control ("BCC" or "Bureau"), the lead agency in developing regulations for medical and adult-use cannabis in California. The following discussion pertains to appealing applications denied by the BCC.

Temporary License Applications Based on Local Authorization

Applicants who obtain a valid license or other authorization from the City of Los Angeles (or applicable local authority) to engage in commercial cannabis activity may submit applications for temporary or "conditional" licenses to the Bureau to engage in commercial cannabis for a period of 120 days. This license may be extended by the Bureau for additional 90-day periods if a complete application for an annual license has been submitted to the Bureau prior to the initial expiration date of a temporary license. A temporary license does not obligate the Bureau to issue a non-temporary license nor does it create a right to an extension of a temporary license.

Annual License Applications and Priority Licensing

On December 8, 2017, the Bureau launched its online licensing system for accepting applications for commercial cannabis licenses for retailers, distributors, microbusinesses, testing laboratories and cannabis events. Licensees must demonstrate overall fitness for licensure, including a full financial disclosure and disclosure of past criminal convictions. Among other application requirements, an applicant must also possess a valid local permit, license or other authorization to engage in commercial cannabis activity.

Similar to EMMDs, "Priority" licensing is available for applicants that can effectively demonstrate grandfather status, i.e., that they operated in compliance with the Compassionate Use Act ("CUA") prior to September 1, 2016. Proof of such eligibility for priority licensing can be established by (1) evidence of operation in compliance with the CUA prior to September 1, 2016 or (2) the applicant's name appearing on the City of Los Angeles' list of Medical Marijuana Businesses ("MMBs") provided to the Bureau in response to a request from the Bureau under Business and Professions Code section 26054.2.

If the Bureau determines that additional information is needed in order to process an application, the Bureau will make a written request to the applicant for additional information and set a deadline for submission of the information. In setting the deadline, the Bureau will take into account the complexity of the information requested and the ease with which the information can be obtained and provided to the Bureau by the applicant. The Bureau will also notify applicants if it determines that an application is incomplete. Applicants will be provided one year from the date of the Bureau's notice to correct any deficient application, after which time the application will be deemed abandoned under Business and Professions Code section 142.

Appealing Denials of Commercial Cannabis Licenses by the BCC

The Bureau is empowered to deny an application for a multitude of reasons, including, but not limited to, making material misrepresentations on an application, denying the Bureau access to the premises, failing to correct deficiencies in an application, the denial of a license, permit or other authorization to engage in commercial cannabis activity by a state or local licensing authority, and felony convictions involving fraud, deceit or embezzlement.

A licensing authority may also suspend or revoke a license when a local agency has notified the licensing authority that a licensee within its jurisdiction is in violation of rules and regulations relating to commercial cannabis activities, and the licensing authority, through an investigation, has determined that the violation is grounds for suspension or revocation of the license. Upon suspension or revocation of a license, the licensing authority shall inform the

Bureau. The Bureau shall then inform all other licensing authorities. Upon any other enforcement action against a licensee, the licensing authority shall notify all other licensing authorities.

All accusations against licensees shall be filed by the licensing authority within five years after the performance of the act or omission alleged as the ground for disciplinary action.

Upon denial of an application, the Bureau must notify the applicant in writing stating the reasons for the denials and the right to a hearing to contest the denial. Applicants must submit a written request for hearing that is postmarked within 30 calendar days of service of the denial letter. It is critically important to submit this request for an appeal within the 30 timeframe since, if the written request for a hearing is not postmarked within such timeframe, the BCC will deem the applicant's right to a hearing as waived. Upon receipt of a timely written request for hearing, the Bureau must set a date for the hearing in accordance with Chapter 5 of the Government Code.

Review of Appeals by the Marijuana Control Appeals Panel

The Marijuana Control Appeals Panel ("MCAP" or "Panel"), consisting of three members appointed by the Governor, is the appellate body tasked with reviewing appeals filed by aggrieved persons from decisions by the Bureau issuing, denying, transferring, conditioning, suspending or revoking a license. The Panel may only consider evidence already considered by the Bureau or the licensing authority and review is limited to the following questions:

(1) Whether the bureau or any licensing authority has proceeded without or in excess of its jurisdiction;

(2) Whether the bureau or any licensing authority has proceeded in the manner required by law;

(3) Whether the decision is supported by the findings; or

(4) Whether the findings are supported by substantial evidence in the light of the whole record.

In all appeals, the Panel shall enter an order either affirming or reversing the decision of the licensing authority. When the order reverses the decision of the licensing authority, the Panel may direct the reconsideration of the matter in light of its order and may direct the licensing authority to take such further action. In appeals where the Panel finds that there is relevant evidence which could not have been produced or which was improperly excluded before the licensing authority, it may enter an order remanding the matter to the licensing authority for reconsideration in light of that evidence.

Judicial Review and Further Appeal of State Licensing Denials by Way of Writ of Mandamus

If applicants are not satisfied with the Panel's decision on appeal, applicants, or any person affected by a final order of the panel, including a licensing authority, may seek judicial review of the final order by way of a writ of mandamus. However, unlike denials by the City, which my be reviewed by the Superior Court, an applicant seeking to review a state denial is obligated to apply for review in either the California Supreme Court or California Court of Appeal for the appellate district in which the proceeding arose.

Regardless which reviewing court is chosen, applicants must act quickly upon receipt of notice of a denial to perfect their right to writ review. Specifically, applicants who desire to appeal the Panel's final order must apply for appellate review within 30 days after the filing of the final order. Decisions of the Bureau that have been appealed and final orders of the Panel are not effective during the time a writ petition is pending; however, the filing of a petition and the pendency of a writ petition does not itself stay or suspend the order, rule, or decision of a licensing authority. Nevertheless, an applicant may request the appellate court before which the writ petition is filed to stay or suspend, in whole or in part, the order, rule, or decision of the licensing authority pending the adjudication of the writ petition.

Writ review would most likely would be governed by the mandamus procedures provided under California Code of

Civil Procedure section 1094.5, and should be confined to the same four questions considered by the Panel discussed above, plus the further consideration as to "whether there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the licensing authority." Nevertheless, the scope of judicial review is proscribed by statute and the reviewing court may not hold a trial de novo, take evidence, or exercise its independent judgment on the evidence. Similarly, findings and conclusions of the licensing authority on questions of fact are deemed conclusive and final, and are not subject to judicial review. Following briefing and oral argument at the judicial hearing, the reviewing court must enter judgment either affirming or reversing the decision of the licensing authority, or remand the case for further proceedings before the licensing authority.

Given the limited scope of judicial review applicable to final orders by the BCC and Panel, applicants should strongly consider retaining an experienced attorney to assist with all levels of appeal to ensure compliance with submission requirements and create a comprehensive evidentiary record in the event writ review is necessary.

Takeaways & More Information

Proposition M has ensured that recreational marijuana is likely here to stay. However, the current licensing scheme and the City's intent to place a cap on new applicant retailer licenses – roughly 400 licenses City-wide – means that the window of opportunity to enter this market won't. As such, applicants seeking to cash in on commercial cannabis should be prepared to promptly and diligently respond in the event their applications meet with denials at the City and/or state level. For more information about commercial cannabis regulation and for help with an appeal, please contact us.

You may also visit the following:

- City of Los Angeles Department of Cannabis Regulation
- Bureau of Cannabis Control (BCC)
- California Cannabis Portal

This article was prepared by John Mills, Farooq Mir, Salvatore Zimmitti and Aaron Lachant.

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