

ORDINANCE NO. 1538

AN ORDINANCE OF THE CITY OF BANNING AMENDING CHAPTER 5.33 OF TITLE 5 OF THE BANNING MUNICIPAL CODE RELATED TO THE PROCESS FOR ISSUING CANNABIS RETAILER REGULATORY PERMITS, AND RELATED APPEALS, AND MAKING A DETERMINATION PURSUANT TO CEQA

WHEREAS, on November 13, 2018, the City Council adopted Ordinance 1527 (later renumbered as Ordinance 1532), which added Chapter 5.33 to the Municipal Code to establish procedures for the issuance of regulatory permits to cannabis retailers. At the same meeting, the City Council also adopted Ordinance 1531 which added Chapter 17.54 to the Zoning Code to allow for the issuance of conditional use permits to cannabis retailers; and

WHEREAS, Ordinance 1531 provides that only one cannabis retailer for every 10,000 residents may lawfully operate in the City, with any fraction of that ratio being rounded down to the nearest whole number. Based on Banning's current population, three cannabis retailers will be permitted to operate in the City. Staff was therefore tasked with creating a fair process to select the three retailers that will be permitted to operate in the City; and

WHEREAS, staff has drafted procedures to process cannabis retailer regulatory permits and has determined that the fairest approach would be for the eligible applicants to be selected through a lottery process; and

WHEREAS, Chapter 5.33 does not include provisions allowing for the selection of the cannabis retailers through a lottery, nor appeal procedures for those applicants who are not eligible to participate in the lottery; and

WHEREAS, additional revisions are needed to Chapter 5.33 to conform with the procedures that staff has drafted for processing the cannabis regulatory permit applications; and

WHEREAS, this Ordinance is not subject to the California Environmental Quality Act ("CEQA") pursuant to the State CEQA Guidelines Section 15060(c)(3), because it is not a project as defined by the CEQA Guidelines Section 15378. Adoption of the Ordinance does not have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Further projects subject to the Ordinance will require a discretionary permit and CEQA review, and will be analyzed at the appropriate time in accordance with CEQA. This Ordinance is also exempt from review under the CEQA and the State CEQA Guidelines Section 15061(b)(1) which exempts a project from CEQA if the project is exempt by statute. Business and Professions Code section 26055(h) provides that Division 13 (commencing with Section 21000) of the Public Resources Code does not apply to the adoption of an ordinance, rule, or regulation by a local jurisdiction that

requires discretionary review and approval of permits, licenses, or other authorizations to engage in commercial cannabis activity. Pursuant to that exemption, the City is providing that discretionary review for applications for cannabis conditional use permits will be required to include any applicable environmental review pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Code Amendment. The City Council hereby amends Section 5.33.010 (Definitions.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) to revise the definition of “Applicant” and add a new definition for “Eligible property”, in alphabetical order, to read as follows:

““Applicant” means the business entity that is the owner and operator of the cannabis business that is applying for a cannabis regulatory permit pursuant to this Chapter.”

““Eligible property” or “Eligible properties” means any property located within the Highway Serving Commercial zone that meets the location requirements set forth in Chapter 17.54.”

SECTION 2. Code Amendment. The City Council hereby amends Section 5.33.020 (Cannabis Regulatory Permit Required.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) in its entirety to read as follows:

“A. No person shall establish, or operate a cannabis business within the City unless the person has:

1. A valid business license;
2. A valid permit issued by the City pursuant to this Chapter;
3. A valid conditional use permit issued pursuant to Chapter 17.54;

and

4. A valid license issued by the Bureau to conduct the specific commercial cannabis activity that is being conducted on the premises.

B. Each cannabis business shall obtain a separate permit. Permits are nontransferable and will only be issued to the entity that will own and operate the cannabis business.

C. Any permit that is issued shall not go into effect unless a conditional use permit is also issued by the City Council pursuant to Chapter 17.54 of the Banning Municipal Code.

D. A permit issued pursuant to this Chapter is valid for a term of one (1) year from the date of issuance. Renewal terms shall not exceed one (1) year.”

SECTION 3. Code Amendment. The City Council hereby renumbers Section 5.33.040 (Cannabis Regulatory Permit Application Requirements.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) as Section 5.33.030, and amends the new Section 5.33.030 in its entirety to read as follows:

“A. An owner of a cannabis business may apply for a permit, on behalf of a cannabis business, by filing an application with the City Manager.

B. A cannabis business may only submit one application. If a cannabis business has multiple owners, only one owner may submit an application on behalf of the cannabis business. Multiple cannabis businesses may submit an application to operate at the same eligible property in the City. However, consistent with Section 17.54.030(B), a cannabis business shall not be permitted to operate at multiple locations in the City, nor shall a cannabis business be issued a permit if any owner or person with a financial interest in the cannabis business is also an owner or has a financial interest in any other cannabis business that is operating in the City or that has obtained a permit to operate in the City.

C. No person shall knowingly make a false statement of fact or knowingly omit any information that is required in the permit application.

D. Applications shall not be accepted or processed unless the applicant pays the nonrefundable application fee in the amount to be established by resolution of the City Council.

E. Applications will be accepted by appointment only and the applicant must adhere to the application procedures adopted by resolution of the City Council.

F. The application shall be on a form approved by the City Manager and shall include, but not be limited to, the following:

1. The type of cannabis business the applicant seeks to operate in the City, a description of the commercial cannabis activity that will be conducted on the premises, and a general description of the products that will be sold on or from the premises.

2. A description of the statutory entity or business form that will serve as the legal structure for the cannabis business; a copy of its formation and organizing documents, including, but not limited to, articles of incorporation, certificate of amendment, statement of information, articles of association, bylaws, partnership agreement, operating agreement, and fictitious business name statement; and the name and address of its agent for purposes of service of process.

3. A list of every fictitious business name the cannabis business is operating under.
4. The legal name of the applicant.
5. The current name and primary and secondary telephone numbers and email addresses of at least one twenty-four (24) hour on-call manager to address and resolve complaints and to respond to operating problems or concerns associated with the cannabis business.
6. If applicable, the business trade name (“DBA”) of the cannabis business.
7. A list of the license types and the license numbers issued by any licensing authority to the applicant, or any other owner of the cannabis business, including the date the license was issued, the date the license will terminate and the licensing authority that issued the license.
8. Whether the applicant, or any owners of the cannabis business, have been denied a license or have had a license suspended or revoked by any licensing authority. The applicant shall identify the type of license applied for, the name of the licensing authority that denied the application, and the date of denial.
9. The assessor’s parcel number and the physical address of the premises where the cannabis business will be conducted, the telephone number for the premises, and the website address and email address of the cannabis business. If the cannabis business will be conducted on a lot that is vacant at the time that the application is submitted, then the applicant shall amend the application at such time that a physical address and telephone number is issued for the cannabis business.
10. The cannabis business’ federal employer identification number.
11. The physical address of any other premises owned or operated by the applicant, or any other owner of the cannabis business, and a brief summary of the business operations at each premises.
12. A complete list of every owner of, or person with a financial interest in, the cannabis business. Each individual named on this list shall submit the following information:
 - a) Their full name.
 - b) Their title within the applicant entity, if applicable.
 - c) Their date of birth and place of birth.
 - d) Their social security number or individual taxpayer identification number.

- e) Their mailing address.
- f) Their home, business, or mobile telephone number and email address.
- g) Their current employer.
- h) Their percentage of ownership interest held in the applicant entity, or other financial interest held in the applicant entity.
- i) Whether the individual has an ownership or a financial interest in any other cannabis business licensed by a licensing authority.
- j) A copy of the individual's government-issued identification that includes the name, date of birth, physical description and picture of the owner or person with a financial interest in the cannabis business.
- k) A copy of the DOJ and NCIC fingerprint background check for each owner and person with a financial interest in the cannabis business procured through the Banning Police Department.
- l) If applicable, a copy of any certificate of rehabilitation issued under Penal Code section 4852.01 or dismissal issued pursuant to Penal Code section 1203.4 or 1203.41.
- m) If applicable, a detailed description of any suspension or revocation of a cannabis related license or sanctions for unlicensed or unlawful cannabis activity by a state or local governmental agency against the applicant, or any of its owners or persons with a financial interest in the cannabis business, or any business entity in which the applicant or any of its owners or person with a financial interest in the cannabis business was an owner or officer within the five (5) years immediately preceding the date of the application.
- n) If applicable, a detailed description of any civil and/or criminal suit and/or judgment relating to unlawful cannabis activity against the applicant or any of its owners or person with a financial interest in the cannabis business, or a business entity in which the applicant or any of its owners or persons with a financial interest in the cannabis business was an owner or officer within the five (5) years immediately preceding the date of the application.

13. A copy of the applicant's application with the Bureau to operate a cannabis retailer in the City.

14. A list of all owners, managers, and employees that are authorized to carry concealed weapons.

15. A written, notarized statement from the owner of the property where the cannabis business will operate evidencing unqualified consent to the applicant

operating a cannabis business on the property. The statement must specify the street address (unless the property is a vacant lot) and assessor's parcel number for the premises. The statement shall also contain the name, business address, email address and telephone number of the property owner(s) (whether business entity or individual). If applicable, a copy of the rental agreement shall also be provided.

16. If the applicant is the landowner upon which the premises is located, a copy of the title or deed to the property.

17. Evidence that the cannabis business will be compliant with the location restrictions set forth in Business and Professions Code section 26054(b) and the zoning restrictions set forth in Title 17 of the Banning Municipal Code.

18. A premises diagram which meets the requirements set forth in Section 5006 of Title 16 of the California Code of Regulations, as the same may be amended from time to time.

19. The proposed hours of operation.

20. Authorization and consent for City staff and the Police Department to seek verification of the information contained within the application.

21. An agreement whereby the applicant and the cannabis business:

a) Release the City of Banning, its agents, officers, elected officials, employees and attorneys, from any and all claims, injuries, damages or liabilities of any kind arising from any repeal or amendment of this Chapter or any other provision of the Banning Municipal Code, and any arrest or prosecution of the owners, managers, agents, employees, members or volunteers of the cannabis business for violation of state or federal laws; and

b) Defend, indemnify and hold harmless the City of Banning, and its agents, officers, elected officials, employees, and attorneys from and against any and all claims or actions brought by adjacent or nearby property owners or any other parties for any damages, injuries or other liability of any kind arising from the operation of the cannabis business.

22. Attestation to the following statement: Under penalty of perjury, I hereby declare that the information contained within and submitted with the application is complete, true and accurate. I understand that a misrepresentation of fact, whether intentional or not, is cause for rejection of this application, denial of the permit, or revocation of a permit issued.

G. Nothing in this section is intended to limit the City Manager's ability to request additional information the City Manager deems necessary or relevant to determining a cannabis business' suitability for a permit. An applicant shall provide any additional information requested by the City Manager no later than seven (7) days after the request, unless otherwise specified by the City Manager."

SECTION 4. Code Amendment. The City Council hereby adds a new Section 5.33.040 (Lottery.) to Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) to read as follows:

“A. City staff shall establish and conduct a lottery for determining which cannabis businesses will (1) be issued a cannabis regulatory permit, and (2) be eligible to apply for a cannabis conditional use permit pursuant to the provisions of Chapter 17.54.

B. The City Council shall adopt a resolution setting forth the procedures that will be followed in conducting the lottery, and the steps to be included in a schedule that will be prepared for the receipt and review of applications for cannabis retail regulatory permits. The City Manager is hereby authorized to make any necessary changes to the lottery procedures and steps to be included in the schedule as he or she deems appropriate.”

SECTION 5. Code Amendment. The City Council hereby renumbers Section 5.33.060 (Decision on Cannabis Regulatory Permit.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) as Section 5.33.050, and amends the new Section 5.33.050 in its entirety to read as follows:

A. The City Manager, in consultation with Chief of Police, shall evaluate all completed applications that are submitted by the application deadline and determine whether the applicant can participate in the lottery. The applicant shall be ineligible to participate in the lottery, if the City Manager determines that one or more of the following conditions exist:

1. The applicant has not paid all fees required for consideration of the application.
2. The application is incomplete, filed late, or is otherwise not responsive to the requirements of this Chapter.
3. The application contains a false or misleading statement or omission of a material fact.
4. The applicant, or any owner or person with a financial interest in the cannabis business, is not at least twenty-one (21) years old.
5. The applicant, or any owner or person with a financial interest in the cannabis business, has unpaid and overdue administrative penalties imposed for violations of the Banning Municipal Code.
6. The applicant, or any owner or person with a financial interest in the cannabis business, has an unpaid civil judgment imposed for violation(s) of the Banning Municipal Code.

7. The applicant, or any owner or person with a financial interest in the cannabis business is delinquent on any fee, charge for service or tax levied by the State of California or the City.

8. The applicant, or any owner or person with a financial interest in the cannabis business, has, within the five (5) years preceding the date the application is filed with the Community Development Director, been (1) convicted of engaging in unlawful commercial cannabis activity, (2) issued an uncontested administrative citation by a city, county, or city and county for engaging in unlawful cannabis-related activity, or (3) been the subject of a lawsuit for engaging in unlawful cannabis-related activity in which the applicant or owner was not the prevailing party.

9. The applicant, or any owner or person with a financial interest in the cannabis business, has been denied a license or permit or other authorization to engage in commercial cannabis activity by a state or local licensing or permitting authority, for any reason other than the fact that the applicant was not selected for a limited number of licenses or permits, but would have otherwise qualified to obtain the license or permit.

10. The applicant, or any owner or person with a financial interest in the cannabis business is employed by the City's police department or the City's Community Development Department.

11. The applicant, or any of owner or persons with a financial interest in the cannabis business, has been convicted of any crime set forth in Business and Professions Code section 26057(b)(4), Fish and Game Code sections 12025 or 12025.1, Penal Code section 186.22 or any other offense which is substantially related to the qualifications, functions, or duties of the cannabis business for which the application is made. In determining whether such offense is "substantially related," the City Manager shall consult with the City Attorney and thereafter apply the analysis set forth in section 5017 of Title 16 of the California Code of Regulations, as the same may be amended from time to time.

12. The premises or the operation of the applicant's cannabis business, as described in its application, would fail to comply with any provision of the Banning Municipal Code, or any state law or regulation.

13. Operation of the cannabis business in the manner proposed poses a threat to the public health, safety or welfare, or violates any provision of this Chapter.

B. If none of the above-referenced conditions exist, the City Manager, or his or her designee, shall notify the applicant that the cannabis business is eligible to participate in the lottery. If any of the above-referenced conditions exist, the City Manager shall notify the applicant that the cannabis business has been denied the opportunity to participate in the lottery and has been denied a cannabis regulatory permit. Any notice of denial shall set forth the reasons of denial and advise the applicant of the right to contest the denial pursuant to the procedures set forth in

Section 5.33.060.

C. Within seven (7) business days of the lottery being conducted, the City Manager, or his or her designee, shall issue a cannabis regulatory permit to the first three (3) retailers that were selected in the lottery and shall notify the applicants that they are eligible to apply for a cannabis conditional use permit. The applicants that were not the first three (3) retailers selected in the lottery will be placed on a waiting list in the order that they were selected in the lottery. These applicants will not be issued or denied a permit, but rather will remain on the waiting list in the event that an additional spot opens up to obtain a cannabis regulatory permit.

D. If a cannabis regulatory permit is issued to an applicant, but a cannabis retailer conditional use permit pursuant to Chapter 17.54 is not approved within one year from the issuance of a permit under this chapter, the permit issued under this Chapter shall be void.”

SECTION 6. Code Amendment. The City Council hereby adds a new Section 5.33.060 (Lottery Appeals.) to Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) to read as follows:

A. If an applicant is denied the opportunity to participate in the lottery due to the applicant’s failure to submit a complete application by the required deadline, failure to satisfy the criteria for issuance of a permit, or for any other reason, the applicant may appeal this decision in writing. The written appeal shall be filed with the Community Development Department, by the deadline set forth in a resolution adopted by the City Council, and shall be accompanied by an appeal fee. After the deadline to appeal has passed, the decision to deny the cannabis regulatory permit shall be deemed final, and may no longer be appealed.

B. In the event an appeal is timely filed, the lottery shall not be conducted until the appeal is heard. Upon receipt of a timely appeal, the Community Development Director shall make arrangements for the selection of a hearing officer to conduct the appeal hearing. Not less than seven (7) days prior to the appeal hearing, the Community Development Director shall notify the City Manager, Chief of Police, and the appellant of either: (1) the name of the administrative law judgment who will serve as the hearing office, (2) the names of three qualified attorneys or retired Superior Court or Appellate Court judges submitted to the Community Development Department by a reputable firm providing mediators and arbitrators to serve as a panel from which the hearing officer will be selected, or (3) any other option determined by the City to serve as a fair and impartial process to hear the appeal. The City shall decide which of the three options specified above will be used for the appeal, and the Community Development Director shall notify the City Manager, Chief of Police, and appellant of the option that will be used. If the second option is selected by the City, then within three (3) days of the date of mailing the notice of the available panel, the City Manager, Chief of Police, or the appellant may notify the Community Development Director in writing that he or she elects to remove one of the three potential hearing officers. The Community Development Director shall then request the mediation and arbitration firm

to select one of the remaining names on the list as the designated hearing officer for the appeal hearing. The hearing officer shall be fair and impartial and shall have no bias for or against the City Manager, Chief of Police, or the appellant.

C. At the appeal hearing, the hearing officer shall receive oral and written evidence from the City Manager and the appellant. The hearing officer shall have authority to administer oaths to those persons who will provide oral testimony. The evidence presented need not comply with the strict rules of evidence set forth in the California Evidence Code but shall be the type of evidence upon which reasonable and prudent people rely upon in the conduct of serious affairs. The hearing officer shall have broad authority to control the proceedings and to provide for cross examination of witness in a fair and impartial manner. The City Manager shall have the burden of proof to establish by clear and convincing evidence the facts upon which his or her decision is based. The appeal hearing shall be recorded by audio recording. Any party may, at its sole cost and expense, utilize the services of a certified court reporter to prepare the verbatim record of the hearing. If a court reporter is used, the transcript prepared shall be made available for purchase to both parties. The hearing officer may continue the appeal hearing from time to time, but only upon written motion of a party showing good cause for the continuance.

D. The hearing officer may uphold or reverse the decision of the City Manager. Within seven (7) days of the conclusion of the appeal hearing, the hearing officer shall render his or her decision and make written findings supporting the decision. He or she shall send the decision to the Community Development Director. Upon receipt of the hearing officer's decision, the Community Development Director shall send a copy of it to the City Manager and the appellant, along with a proof of mailing. The hearing officer's decision shall be final."

SECTION 7. Code Amendment. The City Council hereby renames Section 5.33.070 (Approval of Cannabis Regulatory Permit with Conditions.) as "City Manager Authority." and amends Section 5.33.070 in its entirety to read as follows:

"A. The City Manager is authorized to adopt policies, rules, and procedures to implement and interpret this Chapter, and is further authorized to waive any requirements set forth in this Chapter so long as the requirement being waived is applied equally to all applicants.

B. Upon approval of a permit or renewal of a permit, the City Manager may impose conditions in excess of the requirements set forth in this Chapter including, but not limited to, conditions relating to the operation of any cannabis business and restrictions relating to the deployment or use of the types of equipment used on the premises.

C. During the term of any permit, the City Manager may impose additional conditions on a permit when reasonably necessary to abate a violation of the Banning Municipal Code or to protect the public health, safety or welfare.

D. Review of any decision by the City Manager to impose additional conditions on a permit pursuant to this section shall be pursuant to Section 5.33.130.”

SECTION 8. Code Amendment. The City Council hereby amends Subsection E of Section 5.33.080 (Cannabis Regulatory Permit Renewal.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) to read as follows:

“E. The City Manager, in consultation with the Chief of Police, shall evaluate the renewal application and determine whether to renew the permit based on the criteria set forth in Section 5.33.050. In addition, the City Manager, in consultation with the Chief of Police, shall evaluate whether the premises is substantially different from the diagram submitted by the applicant, in that the size, layout, location of common entryways, doorways or passage ways, means of public entry or exit, or limited access areas within the premises is not the same. If the premises is substantially different, the City Manager may deny the renewal application. Review of any decision by the City Manager to deny a request to renew a permit shall be pursuant to Section 5.33.130.”

SECTION 9. Code Amendment. The City Council hereby amends Subsection B of Section 5.33.130 (Initiation of Discipline and Appeals.) of Chapter 5.33 (Cannabis Retailer Regulatory Permits) of Title 5 (Business Licenses and Regulations) to read as follows:

“B. If an application for a permit renewal was denied by the City Manager, or the City Manager revokes or suspends a cannabis regulatory permit, the applicant shall have ten (10) calendar days from the date the notice of the disposition was deposited in the mail within which to appeal the City Manager’s decision to the City Council. If the tenth calendar day falls on a day the City is closed, the time shall be extended to the next business day.”

SECTION 10. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this ordinance or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remainder of this ordinance. The City Council hereby declares it would have adopted this ordinance, and each and every section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 11. Savings Clause. Neither the adoption of this Ordinance nor the repeal of any other ordinance of this City shall in any manner affect the prosecution of any violation of any City ordinance or provision of the Banning Municipal Code, committed prior to the effective date hereto, nor be construed as a waiver of any license or penalty or the penal provision applicable to any violation thereof.

SECTION 12. Certification. The City Clerk shall certify to the adoption of this Ordinance and shall cause it to be published in the manner required by law.

PASSED, APPROVED and ADOPTED by the City Council of the City of Banning on this 8th day of January, 2019.

Arthur L. Welch, Mayor
City of Banning

ATTEST:

Laurie Sampson, Acting Deputy City Clerk
City of Banning, California

**APPROVED AS TO FORM AND
LEGAL CONTENT:**

Kevin G. Ennis, City Attorney
Richards, Watson & Gershon

CERTIFICATION:

I, Laurie Sampson, Acting Deputy City Clerk of the City of Banning, California, do hereby certify that the foregoing Ordinance No. 1539 was duly introduced at a regular meeting of the City Council of the City of Banning held on the 11th day of December, 2018, and was duly adopted at a regular meeting of said City Council on the 8th day of January, 2019 by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

Laurie Sampson, Acting Deputy City Clerk
City of Banning, California