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8 SUPERIOR COURT OF CALIFORNIA
 9 COUNTY OF SAN DIEGO

10 CITY OF SAN DIEGO, a municipal
 corporation,
 11 Plaintiff,
 12 v.
 13 DARRYL COTTON, an individual, and
 14 DOES 1 through 50, inclusive,
 15 Defendants.

Case No. 37-2016-00005526-CU-MC-CTL

MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
EX PARTE APPLICATION BY
 PLAINTIFF, CITY OF SAN DIEGO,
 FOR TEMPORARY RESTRAINING
 ORDER AND ORDER TO SHOW
 CAUSE WHY PRELIMINARY
 INJUNCTION SHOULD NOT BE
 GRANTED

IMAGED FILE

Date: March 3, 2016
 Time: 8:30 a.m.
 Dept.: C-70
 Judge: Hon. Randa Trapp
 Complaint Filed: February 18, 2016
 Trial Date: None set

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INTRODUCTION

Plaintiff City of San Diego moves this Court to issue a temporary restraining order and preliminary injunction against Defendants to restrain each of them from violating the San Diego Municipal Code (SDMC) by operating or maintaining a marijuana dispensary at 6176 Federal Boulevard, in the City of San Diego (PROPERTY) in violation of local zoning laws.

STATEMENT OF FACTS

Defendant DARRYL COTTON (COTTON) is the owner of record of the PROPERTY. See Sperry Decl. ¶ 5, and Lodged Exhibit 1. As owner of the PROPERTY, COTTON is a “Responsible Person” per SDMC section 11.0210 and strictly liable for all code violations existing at the PROPERTY per SDMC section 121.0311.

The PROPERTY is located in a Community-Office CO-2-1 zone in the City of San Diego. See Sperry Decl. ¶ 11; Lodged Exhibit 2. The permitted uses in this zone are listed in SDMC sections 131.0520 and 131.0522, and corresponding Table 131-05B. The operation or maintenance of a marijuana dispensary, cooperative, or collective is *not* one of the enumerated permitted uses.

On October 21, 2015, the City’s Development Services Department Code Enforcement Division (CED) investigated a marijuana dispensary operating at the PROPERTY in violation of local zoning laws. See Sperry Decl. ¶ 4.

In February of 2016, San Diego Police Detective James Hunter (Detective HUNTER) went to the PROPERTY in an undercover capacity to purchase marijuana. When he entered the dispensary he could smell the odor of marijuana. See Hunter Decl. ¶ 8. While inside the product room, Detective HUNTER saw a large display case containing marijuana, THC infused edibles, and concentrated cannabis. He also observed a menu with pricing and different types of marijuana or THC products, a cash register, an ATM, and a female employee. He completed the transaction with the female employee. See Hunter Decl. ¶ 10. Detective HUNTER purchased 2.3 grams of marijuana for \$25, and was given additional grams of marijuana and a marijuana cigarette for free for being a first time customer. See Hunter Decl. ¶ 11 and Lodged Exhibit 3.

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1 Defendants' conduct is in direct contravention of local zoning laws prohibiting precisely
2 this activity. The dispensary is not a permitted use, however Defendant COTTON continued to
3 operate and maintain a dispensary at the PROPERTY in violation of local zoning laws. The Court
4 is asked to immediately order a TRO against all responsible parties pending further hearings for
5 preliminary and permanent injunction, including civil penalties as allowed by law.

6 ARGUMENT

7 A. FEDERAL, STATE AND LOCAL LAWS PROHIBIT DEFENDANTS FROM
8 OPERATING AT THE PRESENT LOCATION

9 1. **Federal Law:** Under the federal Controlled Substances Act (CSA), 21 U.S.C.A. § 801
10 et seq., it is unlawful to manufacture, distribute, dispense and possess marijuana. Marijuana
11 continues to be federally classified as a Schedule I substance, as it has a high potential for abuse,
12 no accredited medical use and a lack of accepted safety. 21 U.S.C.A. § 812. Additionally, there is
13 no medical necessity defense to the CSA's prohibitions. *United States v. Oakland Cannabis*
14 *Buyers' Cooperative*, 532 U.S. 483, 491 (2001). The operation of a marijuana dispensary is a
15 violation of federal law.

16 2. **State Law:** The Compassionate Use Act (CUA) was approved by California voters in
17 1996 and is codified at Health & Safety Code section 11362.5. The CUA is intended to "ensure
18 that seriously ill Californians have the right to obtain and use marijuana for medical purposes
19 where that medical use is deemed appropriate and has been recommended by a physician." Health
20 & Safety Code § 11362.5(b)(1)(A). The purpose of the CUA was to provide partial immunity for
21 the possession and cultivation of marijuana to two groups of people: qualified medical marijuana
22 patients and their primary caregivers. *People v. Mentch*, 45 Cal. 4th 274, 277 (2008). The CUA
23 did not "legalize" marijuana or dispensaries for its distribution. *Ross v. Raging Wire*
24 *Telecommunications*, 42 Cal. 4th 920, 927-28 (2008).

25 Likewise, the Medical Marijuana Program (MMP), codified in Health & Safety Code
26 sections 11362.7 through 11362.83, provides limited protection from criminal prosecution. The
27 MMP provides that "[q]ualified patients, persons with valid identification cards and the
28 designated primary caregivers, who associate within the State of California in order to

1 collectively or cooperatively cultivate marijuana for medical purposes, shall not solely on the
2 basis of that fact be subject to state criminal sanctions.” Health & Safety Code § 11362.775.

3 The California Court of Appeal has upheld injunctions against marijuana dispensaries
4 operating in violation of local zoning laws. *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153
5 (2009); *City of Corona v. Naulls*, 166 Cal. App. 4th 418 (2008); and *County of Los Angeles v.*
6 *Hill*, 192 Cal. App. 4th 861 (2011). In these cases, the Courts of Appeal confirmed that neither
7 the Compassionate Use Act nor the Medical Marijuana Program preempts a city’s enactment or
8 enforcement of land use, zoning, or licensing laws as they apply to marijuana dispensaries.

9 Most importantly, in a unanimous decision, in *City of Riverside v. Inland Empire Patients*
10 *Health and Wellness Center, Inc.*, 56 Cal. 4th 729, 752 (2013), the California Supreme Court
11 confirmed that there is no state preemption over local municipalities completely banning
12 dispensaries through zoning laws. The Supreme Court thoroughly analyzed the CUA and MMP
13 on the question of local preemption and confirmed the previous analysis and holdings of *Kruse*
14 and *Hill*. The Court recognized that local police power derives from Article XI, section 7, of the
15 California Constitution, and explained that “[t]his inherent local police power includes broad
16 authority to determine, for the purposes of public health, safety and welfare, the appropriate uses
17 of land within a local jurisdiction’s borders, and preemption by state laws is not lightly
18 presumed.” *Id.* at 738. The Court concluded that “[n]othing in the CUA or the MMP expressly or
19 impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate
20 the use of its land, including the authority to provide that facilities for the distribution of medical
21 marijuana will not be permitted to operate within its borders.” *Id.*

22 3. **Local Law - SDMC**: SDMC Chapters 11 through 15 contained in the Land
23 Development Code (LDC)¹ establish the City’s zones, which regulate all land use in the City.
24 SDMC Chapter 14 addresses regulated uses and Chapter 15 contains zoning regulations
25 pertaining to Planned Districts. The LDC establishes use categories and subcategories for
26 permitted uses. Within each zone, the Code indicates which land uses are permitted as of right
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28 ¹ SDMC § 111.0101 (a) Chapters 11 through 15 of the City of San Diego Municipal Code shall be known collectively, and may be referred to, as the Land Development Code.

1 and which are permitted subject to certain conditions. This scheme is similar to other cities. See
2 *City of Claremont*, 177 Cal. App. 4th at 1168; *City of Corona*, 166 Cal. App. 4th at 431-33. Both
3 cases clearly state that when marijuana dispensaries are not included among the uses of land
4 enumerated in a city's zoning code, they are presumptively prohibited.

5 **B. A BAN OF MARIJUANA DISPENSARIES IS A VALID USE OF POLICE**
6 **POWER, AND DEFERENCE SHOULD BE GIVEN TO THE CITY'S**
7 **INTERPRETATION OF ITS OWN ZONING LAWS.**

8 Every intendment is in favor of the validity of zoning ordinances and it is presumed that
9 the enactment as a whole is justified under the police power and adopted to promote the public
10 health, safety, morals and general welfare. *City of Long Beach v. Cal. Lambda Chapter of Sigma*
11 *Alpha Epsilon Fraternity*, 255 Cal. App. 2d 789, 794 (1967). Specifically, under Article XI,
12 section 7 of the California Constitution, "[a] county or city may make and enforce within its
13 limits all local, police, sanitary, and regulations not in conflict with general laws." *City of*
14 *Riverside*, 56 Cal. 4th at 742.

15 In this case, the City has determined that the operation of a marijuana dispensary,
16 cooperative or collective is not a permitted use in the zone where the PROPERTY is located.
17 Sperry Decl. ¶ 11. This Court should not second-guess this decision. As stated in *In re Ellis*, 25
18 Cal. App. 2d 99, 103 (1938), "The courts have no power to dictate to the Council as to how the
19 city should be zoned." Likewise, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*
20 *Inc.*, 467 U.S. 837, 844 (1984), the United States Supreme Court recognized that deference
21 should be given to an administrative agency's permissible construction of a statute. The Court of
22 Appeal in *City of Long Beach* stated:

The legislative determination with reference to a regulation of the
use of property, or the restriction of such a use will be given great
weight in any judicial inquiry into the validity of the enactment, and
courts will not interfere with the discretion of law-making bodies
unless it is clear that needless oppression is imposed and
constitutional rights are invaded. The very enactment of the
ordinance per se furnishes prima facie evidence of the existence of
those facts and conditions which made the ordinance reasonable
and necessary.

27 *City of Long Beach*, 255 Cal. App. 2d at 795.

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1 Judicial review of interpretation and application of local zoning ordinances is subject to
 2 “the fundamental rule that interpretation of the meaning and scope of a local ordinance is, in the
 3 first instance, committed to the local agency. Under well-established law, an agency's view of the
 4 meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous or
 5 unauthorized.” *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1015 (2000). This Court
 6 should similarly defer to the City’s police power and uphold the City’s zoning laws which
 7 prohibit dispensaries at the Property. Deference should also be given to the City’s interpretation
 8 and application of its own local ordinances.

9 Under long-standing law, mere proof of the zoning violation constitutes sufficient
 10 showing for issuance of an injunction. When a city seeks to enforce a valid local zoning
 11 ordinance by injunction, the court’s inquiry is limited to whether a zoning violation exists. *City*
 12 *and County of San Francisco v. Burton*, 201 Cal. App. 2d 749, 756-57 (1962). No proof of a
 13 public nuisance per se or in fact is required. *Id.* A violation of a valid zoning ordinance by itself
 14 constitutes a sufficient showing for the issuance of injunctive relief. *City of Santa Clara v. Paris*,
 15 76 Cal. App. 3d 338, 341-42 (1977); *City and County of San Francisco v. Padilla*, 23 Cal. App.
 16 3d 388, 401 (1972); *City of Los Altos v. Barnes*, 3 Cal. App. 4th 1193, 1198 (1992); *City of San*
 17 *Mateo v. Hardy*, 64 Cal. App. 2d 794 (1944); *City of Stockton v. Frisbie & Latta*, 93 Cal. App.
 18 277 (1928). Most important, the California Supreme Court has opined that there is no state
 19 preemption over municipalities completely banning marijuana dispensaries through zoning laws.

20 **C. A TEMPORARY RESTRAINING ORDER IS NECESSARY AS THE PUBLIC’S**
 21 **SAFETY IS JEOPARDIZED**

22 The actual harm to the City and its residents if immediate interim relief is denied far
 23 exceeds any possible harm to Defendants if relief is granted. There is clear harm to the public
 24 when individuals or entities are allowed to ignore a law of general applicability that aims to
 25 protect neighborhoods and compatibility of adjacent land uses. In *Pettit v. City of Fresno*, 34 Cal.
 26 App. 3d 813, 823 (1973), the Court held:

27 [A]ll the residents of the community have a protectable property
 28 and personal interest in maintaining the character of the area as
 established by comprehensive and carefully considered zoning

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plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property.

There are compelling reasons why the Court should immediately grant injunctive relief in this case. Defendants show no willingness to abide by local zoning law and the immediate need for an injunction to protect local residents is compelling. Law enforcement has determined that marijuana dispensaries increase the likelihood of crime. Community members complain about marijuana dispensaries selling other illegal drugs and negatively affecting the community. *See* Hunter Decl. ¶¶ 4-6.

If Defendants are allowed to continue operating and maintaining a marijuana dispensary, they will undercut the legitimate and lawful objectives underlying state and local law and continue to present an unwarranted public safety risk. Absent immediate relief, the City is denied the ability to act in the best interests of the community or protect it from the detrimental effects of this unlawful business. Citizens justifiably expect that state laws and local zoning laws designed to protect their safety, comfort and quality of life will be enforced. Absent a temporary restraining order, this justifiable expectation is unjustifiably frustrated.

D. AN INJUNCTION IS PROPER IN THIS CASE

1. When a Municipality Seeks to Enjoin a Violation of a Statute, it Need Only Show a Reasonable Probability of Prevailing on the Merits at Trial

A preliminary injunction is an appropriate means for a municipality to prevent further violations of a local ordinance pending final judgment in an action pending trial. *City of Stockton*, 93 Cal. App. at 277. Traditionally, courts employ a two-pronged test when deciding whether to issue a preliminary injunction. First, the judge considers the likelihood of the plaintiff's prevailing on the merits at trial. Second, the judge evaluates the relative harm to the plaintiff if the injunction is denied, balanced against the harm to the Defendant if the injunction is issued. *See Continental Baking Co. v. Katz*, 68 Cal. 2d 512, 528 (1968); *Pleasant Hill Bayshore Disposal, Inc. v. Chip-it Recycling, Inc.*, 91 Cal. App. 4th 678, 695 (2001); Civ. Proc. Code § 526(a).

However, where a governmental entity seeks to enjoin violations of a statute or ordinance that specifically authorizes injunctive relief, a presumption arises in the City's favor:

1 Where a governmental entity seeking to enjoin the alleged violation
2 of an ordinance which specifically provides for injunctive relief
3 establishes that it is reasonably probable it will prevail on the
4 merits, a rebuttable presumption arises that the potential harm to the
5 public outweighs the potential harm to the defendant.

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

7 The court explained its reasoning:

8 Where a legislative body has enacted a statutory provision
9 proscribing a certain activity, it has already determined that such
10 activity is contrary to the public interest. Further, where the
11 legislative body has specifically authorized injunctive relief against
12 the violation of such a law, it has already determined (1) that
13 significant public harm will result from the proscribed activity, and
14 (2) that injunctive relief may be the most appropriate way to protect
15 against that harm.

16 *Id.* at 70. See also *City of Los Altos v. Barnes*, 3 Cal. App. 4th 1193 (1992).

17 Here, the City seeks to enjoin violations of the SDMC which specifically provide for
18 injunctive relief. SDMC section 12.0202(a) provides that any provision of the Municipal Code
19 “may be enforced by injunction issued by the Superior Court upon a suit brought by The City of
20 San Diego.” RJN No. 3. Similarly, SDMC section 121.0311 provides that the designated Code
21 Enforcement Official may seek injunctive relief as a remedy for violations of the Land
22 Development Code. RJN No. 1. The standard for the issuance of an injunction as articulated by
23 the Court in *IT Corp.* has clearly been met in this case.

24 Furthermore, the declarations and exhibits presented by the City overwhelmingly establish
25 a reasonable probability of prevailing on the merits at trial. The Defendants are in violation of
26 local municipal code provisions. RJN Nos. 5-7. These violations were observed by trained
27 individuals and are well documented. This gives rise to a rebuttable presumption that the potential
28 harm to the public outweighs the potential harm to the Defendants, giving the Court ample
justification to issue immediate injunctive relief.

2. Defendants Will Not Suffer Grave or Irreparable Harm from the Issuance of an Injunction

Once a rebuttable presumption arises in favor of the Plaintiff, Defendants are required to prove that the issuance of a preliminary injunction will cause them to suffer grave or irreparable

1 harm. *IT Corp.*, 35 Cal. 3d at 72. In this case, Defendants cannot show grave and irreparable
 2 harm. An order to cease unlawful acts does not constitute irreparable harm. *People ex rel. Dep't.*
 3 *of Indus. Relations v. Morehouse*, 74 Cal. App. 2d 870, 875 (1946) [no harm to property owner
 4 where "no attempt to compel Defendant to do any specific particular act other than to cease
 5 violating the law in the operation of her premises."]. Any perceived or asserted economic harm to
 6 Defendants resulting from the injunction does not establish grave or irreparable harm. *IT Corp.*,
 7 35 Cal. 3d at 75. As the Defendants cannot demonstrate grave or irreparable harm, the Court need
 8 not balance the relative actual harms to the parties. *Id.* at 72. Instead, the Court should order the
 9 Defendants to follow the law.

10 **3. Injunctive Relief is Proper to Enforce any Violations of the San Diego**
 11 **Municipal Code**

12 A city may regulate land use pursuant to its police powers by the enactment of zoning and
 13 building ordinances. *See Sullivan v. Los Angeles*, 116 Cal. App. 2d 807, 810 (1953); *Miller v.*
 14 *Board of Pub. Works*, 195 Cal. 477, 490 (1925). A violation of a valid zoning or building
 15 ordinance may be enjoined by seeking an injunction from a court of equity. *County of San Diego*
 16 *v. Carlstrom*, 196 Cal. App. 2d 485, 491 (1961).

17 Where the personal welfare and the property rights of a large
 18 number of the inhabitants of a city or town would be detrimentally
 19 affected by a violation of a police or sanitary regulation, whether
 20 the ordinance provides other means for its enforcement or not, such
 city or town may itself appeal to a court of equity by means of the
 forceful and singularly effective writ of injunction to restrain such
 violation or to cause the wrongful effect thereof to be removed.

21 *City of Stockton*, 93 Cal. App. at 290 (parenthetical omitted). Consequently, the City of San Diego
 22 may properly seek a preliminary injunction against Defendants' violations of the SDMC.

23 **CONCLUSION**

24 The City has a clear right to use its land use powers to regulate dispensaries. Local zoning
 25 laws are clear that marijuana dispensaries are not a permitted use at the location where
 26 Defendants are maintaining and operating a dispensary business. Defendants' actions must be

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1 enjoined to provide the protection the public deserves and expects. Plaintiff respectfully requests
2 that immediate injunctive relief be granted to prohibit Defendants from operating or maintaining a
3 marijuana dispensary in violation of zoning ordinances.

4 Dated: February 24th 2016

JAN I. GOLDSMITH, City Attorney

6 By Onu Omordia
7 Onu Omordia
8 Deputy City Attorney

9 Attorneys for Plaintiff

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