Fourth Civil Number D079215

# In the Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

UL CHULA TWO LLC,

*Plaintiff and Appellant,*

v.

CITY OF CHULA VISTA,

*Defendant and Respondent.*

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Appeal from the Superior Court of the State of California
For the County of San Diego
Case No. 37-2020-00041554-CU-WM-CTL
The Honorable Richard E. L. Strauss, Dept. 75

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## APPELLANT'S OPENING BRIEF

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| COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE | COURT OF APPEAL CASE NUMBER: D079215 |
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| APPELLANT/<br>PETITIONER: UL CHULA TWO LLC<br>RESPONDENT/<br>REAL PARTY IN INTEREST: CITY OF CHULA VISTA, ET AL. | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**<br>*(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE | |

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1. This form is being submitted on behalf of the following party (*name* ): Petitioner and Plaintiff UL Chula Two LLC

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest *(Explain):* |
|---|---|
| (1) UL Holdings, Inc. | Ownership interest |
| (2) Will Senn | Ownership interest |
| (3) CVC Holding LLC | Ownership interest |
| (4) Chetan Abrol | Ownership interest |
| (5) | |

☐ Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: December 21, 2021

Lann G. McIntyre
(TYPE OR PRINT NAME)

*/s/ Lann G. McIntyre*
(SIGNATURE OF APPELLANT OR ATTORNEY)



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## INTRODUCTION

UL Chula Two, LLC ("UL Chula") appeals from the denial of its petition for writ of administrative and traditional mandate, and for declaratory and injunctive relief, after the City of Chula Vista (the "City") rejected UL Chula's application for a license to operate a retail commercial cannabis storefront.

Willie Senn, one of UL Chula's principals, operates the most successful cannabis storefront retailer in the City of San Diego and one of the most successful cannabis retailers in California, all of which are licensed. When the City enacted an

ordinance permitting, licensing and regulating "Commercial Cannabis Activities" in the City in March 2018, UL Chula applied for a license to operate a retail storefront commercial cannabis business. Although UL Chula scored the highest of all applicants in District One, the City denied UL Chula's application. The basis for the denial was Mr. Senn's alleged involvement in operating a medicinal cannabis storefront in 2010 to 2012 in the City of San Diego, which was the subject of allegations of civil *zoning* violations that were never adjudicated or admitted.

Under the plain terms of the City's Municipal Code ("CVMC"), there was no evidence to support the City's denial of the application, or the Hearing Officer's Statement of Decision affirming that decision on appeal. While the CVMC gave the City the discretion to deny licenses if an applicant had been sanctioned for a material violation of a law or regulation related to commercial cannabis activity or had been involved in unlawful commercial cannabis activity, there were no laws or regulations related to commercial cannabis activity. The term "Commercial Cannabis Activity" did not come into existence until 2016, after the State of California passed Proposition 64, which legalized commercial and adult recreational cannabis use. Yet, the Hearing Officer and the trial court upheld the license denial, concluding there was evidence that Mr. Senn engaged in "unlawful cannabis activity in 2010-2012," based on an alleged zoning violation in operating a medicinal cannabis dispensary.

The sole evidence the City relied upon was hearsay and allegations that were never adjudicated or admitted, and even if considered, the evidence related to alleged civil *zoning* violations, not a law regulating commercial cannabis activity. The zoning laws did not mention commercial or medicinal cannabis.

In addition to abusing its discretion by making findings not supported by the evidence and a decision not supported by the findings, UL Chula was deprived of a fair trial. The Hearing Officer—the City Manager—was advised at the appeal hearing by a deputy attorney in the City Attorney's office, while the City was simultaneously represented by another deputy attorney in the City Attorney's office, without any evidence the two had been properly screened. In addition, the deputy attorney representing the City had been actively involved in developing the language of the City's cannabis regulations, which unfairly and unduly influenced and biased the Hearing Officer. The City Manager would naturally be inclined to adopt the City's interpretation of the CVMC. The Hearing Officer's Statement of Decision reflected that bias, resulting in the denial of a fair hearing.

UL Chula deserves a fair hearing and a decision supported by the findings, and findings supported by the evidence. The denial of its petition for writ of administrative and traditional mandate and motion for preliminary injunction was prejudicial and should be reversed.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. UL Chula's application for a retail commercial cannabis license.

On March 16, 2018, the City adopted Ordinance Number 3418, which added Chapter 5.19 to the Chula Vista Municipal Code (CVMC), in order to permit, license, and regulate commercial cannabis activity within the City. (CVMC, § 5.19.010.) {AR00385–00428.}[1] Pursuant to CVMC Chapter 5.19, any person who desires to engage in lawful commercial cannabis activity or to operate a commercial cannabis business within the City's jurisdiction must have a valid "State License" and a valid "City License." (CVMC, § 5.19.030, subd. (A).) The City specifically distinguished "commercial" cannabis from "medicinal" cannabis or "medicinal cannabis product"; the terms are separately defined in CVMC section 5.19.020. Indeed, the City's licensing scheme for commercial cannabis activities expressly excludes medicinal cannabis activities from commercial cannabis storefront activities. (See, e.g., CVMC, § 5.19.090, subd. (A) ["A Storefront Retailer shall not Sell Medicinal Cannabis or Medicinal Cannabis Products"].)

Only eight storefront licenses were available in the City, two for each of the City's four districts. (CVMC, § 5.19.040,

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[1] Citations to documents contained in the Certified Administrative Record are described as {AR (page)}. Citations to documents in the Appellant's Appendix are described as [(vol.) AA (page)].

subd. (A).) UL Chula applied for a retail storefront license in the City's District One. {AR00001.} The City had a two-phase licensing application process. (CVMC, § 5.19.050.) Phase One involved a set of threshold qualifying criteria, a criminal background check, and a merit-based scoring system. (CVMC, § 5.19.050, subd. (A)(7).) The City also enacted Cannabis Regulations (Regs.), which were intended to "clarify and facilitate implementation of CVMC Chapter 5.19." (Regs., § 0501, subds. (A)–(D).)[2] The Cannabis Regulations describe the experience and liquid asset requirements for applicants, and the requirements for a business plan, operating plan, fingerprinting, and a background check. (Regs., § 0501, subds. (E)–(I).) {AR000359–000361.}

The application and CVMC section 5.19.050(A)(1)(j), required one of UL Chula's principals to sign an affirmation and consent affirming that he "has not conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other jurisdiction." {AR00112–00114.} Mr. Senn signed the affirmation and consent. {*Ibid*.} Contemporaneously, and in order to be fully transparent, UL Chula's counsel disclosed to the City a stipulated judgment involving Mr. Senn on December 14, 2012 in the *Holistic Café* matter. {*Ibid*.} The Holistic Café was a nonprofit mutual benefit corporation organized in compliance with Attorney General guidelines for the lawful distribution of medicinal cannabis

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[2] See AR00355–000384.

by collectives and cooperatives. {AR00187, 00260, 00263.} [1 AA 605.]

The *Holistic Café* complaint alleged civil zoning violations of the San Diego Municipal Code in the City of San Diego against the Holistic Cafe. {AR00186–00195.} All but two of the code sections allegedly violated involved structural, electrical, and signage requirements, each of which were easily correctable by calling a contractor. The other two code sections—San Diego Municipal Code sections 121.0302 and 1512.0305—related to zoning rules in the City of San Diego's Mid-City Communities Planned District. [1 AA 607–628.] The City of San Diego contended that a medicinal cannabis storefront was not specifically listed as a permitted use under these zoning rules. {AR00186–00195.}

Despite having legal and factual defenses available in 2012, the defendants, including Mr. Senn, decide to settle the matter and entered into a stipulated judgment that did not include any admission of liability. {AR00196–00203.} The stipulated judgment provided: "[n]either this Stipulated Judgment nor any of the statements or provisions contained herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint." {*Id.* at p. 00197.}

In the stipulated judgment, the parties referred to the uncertainty in the law regarding whether local governments could even use zoning regulations to ban legal medicinal cannabis storefronts (i.e., the then-pending case of *City of Riverside v.*

*Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 761–762 (*City of Riverside*)), and provided that the stipulated judgment could be amended in the future if the law were to change. {AR00199.} Consistent with that provision, in May 2019, the Superior Court in *Holistic Café* amended the judgment to specifically permit the defendants therein to engage in cannabis activities. [1 AA 667–668.]

With knowledge of the *Holistic Café* matter, on June 10, 2019, the City notified UL Chula that it had successfully completed Phases 1A and 1B, and invited UL Chula to proceed to Phase 1C (the interview) on July 17, 2019. {AR00118.} Following the interview, UL Chula's total score was 900.3 points—the highest of any applicant for a retail storefront license in the City's District One. {*Id.* at p. 00156.}

### B. The City denies UL Chula's application.

Ten months later, the City issued a Notice of Decision rejecting UL Chula's application. {AR00119–00122.} The City cited two sections of CVMC section 5.19.050 as the basis for its decision.

First, the City cited CVMC section 5.19.050(A)(5)(f), stating Mr. Senn:

> [H]as been adversely sanctioned or penalized by the City ... for a material violation of state or local laws or regulations related to **Commercial Cannabis Activity**….

{AR00119–00122, bold added.}

It went on to claim that:

> The City of San Diego sanctioned William [*sic*] Senn for violations of laws or regulations related to **unlawful Commercial Cannabis Activity**.

{AR00119–00122, bold added.}

Second, the City cited CMVC section 5.19.050(A)(5)(g), stating Mr. Senn has:

> [C]onducted, facilitated, caused, aided, abetted, suffered, or concealed **unlawful Commercial Cannabis Activity** in the City or any other Jurisdiction . . . ."

{AR00119–00122, bold added.}

The City went on to claim that "William [*sic*] Senn was involved in **unlawful Commercial Cannabis Activity** in the City of San Diego from approximately 2010 to 2012." {AR00119–122, bold added.}

The Notice of Decision did not mention *Holistic Café* or any of the particular facts or evidence that the City relied upon in reaching its conclusions. {AR00119–00122.}

Because the City denied every applicant in District One, the City invited real parties in interest March and Ash Chula Vista, Inc. (from District Two) and TD Enterprise LLC (from District Four) (collectively "real parties in interest") to change districts, select new locations in District One, and move to Phase II of the application process. [1 AA 603.]

### C. UL Chula appeals the decision pursuant to the City's procedures.

The City's application procedures provided for an appeal process, including a hearing requirement. (CVMC, § 5.19.050, subd. (A)(6); Regs., § 0501, subd. (P)(2)(b).) {AR00366–00367, 00398.} UL Chula timely filed a consolidated request to appeal with the City. {*Id.* at pp. 00123–00127.} On May 26, 2020, the City sent notice of a hearing on June 10, 2020. {*Id.* at pp. 00128–00131.} Rather than providing the requisite 20 days' notice, the notice was served 15 days prior to the scheduled hearing. (Regs. § 0501(P)(2)(a).) {AR00367.} In addition, the notice required evidence intended to be presented at the hearing to be disclosed to the City Manager no less than five days before the hearing. {AR00129, AR00131.}

On Friday, June 5, 2020, the City emailed its evidence to UL Chula, which consisted of 16 exhibits, under a cover letter misdated May 21, 2020. {AR00132–00133.} The email was not sent until late in the afternoon on June 5, 2020, the Friday before the June 10, 2020 hearing (which was already on shortened notice). {*Id.* at pp. 00213–00214.} [1 AA 568.] This was the first time the City disclosed that it was relying upon the allegations in *Holistic Café* as the basis to deny UL Chula's application. {AR00132, AR00213.} [1 AA 567.]

Also, on June 5, 2020, UL Chula submitted a brief on appeal arguing: (1) the rejection of its application was impermissibly vague and violated due process in that it did not

disclose any of the facts or evidence that the City relied upon in rejecting the application; (2) there were no laws related to commercial cannabis activity in 2010 to 2012 in the City of San Diego; (3) to the extent the City's decision was related to *Holistic Café*, there is no relevant, admissible evidence that Mr. Senn engaged in unlawful commercial cannabis activity; and (4) that the City should exercise its discretion and set aside the Notice of Decision on equitable grounds. {AR00215–00224.}

A hearing was held on June 10, 2020, with the City Manager serving as the Hearing Officer. A Deputy City Attorney, Simon Silva, was present as an advisor to the City Manager, and another Deputy City Attorney, Megan McClurg, was present as counsel for the City. {AR00225–00228.} Testimony was given by witnesses for the City, including Chula Vista Police Department Sergeant Mike Varga, Development Services Director Kelly Broughton and Mathew Eaton of HdL Companies. {*Id.* at pp. 00225–00283.}

The City's evidence was admitted, over UL Chula's objections. {AR00228–00301.} The City introduced Exhibit 8—a City of San Diego notice of violation; Exhibit 9—two photographs of the Holistic Café; Exhibit 10—San Diego Business Tax information; Exhibit 11—an email declining an inspection; Exhibit 12—an unlawful detainer complaint; and Exhibit 13—a complaint and stipulated judgment. {*Id.* at pp. 00132–00214.} Each of these exhibits were objected to because they were unreliable hearsay, lacked foundation, were not relevant and

were not authenticated. {*Id.* at pp. 00245–00246, 00250–00255, 00257, 00260–00262.} Sergeant Varga had no personal knowledge of any of the documents, could not authenticate them, and could not lay a foundation to establish the documents are what they purport to be. {See, e.g., *id.* at pp. 00245–00256.}

UL Chula presented no evidence or testimony at the hearing because the City's impermissibly vague Notice of Decision prejudiced UL Chula's ability to prepare for the hearing, which itself was scheduled on less than legally sufficient notice under the City's Cannabis Regulations. [1 AA 568.]

### D. The City denies the appeal in a written Statement of Decision.

The City served its "Findings and Statement of Decision with Regard to Appeal of Notice of Decision Rejecting Application for Cannabis License" ("Statement of Decision") on August 26, 2020. {AR00302–00309.} The Statement of Decision denied UL Chula's appeal and concluded "the evidence shows the City reasonably and properly denied Appellant's application." {*Id.* at p. 00307.}

The Hearing Officer's Statement of Decision, which omitted the key term "commercial," found that:

> The City of Chula Vista Municipal Code has two sections that address the denial of a license for Unlawful Cannabis Activity, CVMC section 5.19.050(A)(5)(f) and (g). . . .

{AR00304.}

The Hearing Officer acknowledged that in order to be found in violation of CVMC section 5.19.050(A)(5)(f), there must be "a city, county, or state law or regulation related to Commercial Cannabis Activity." {AR00304.} The Hearing Officer also acknowledged that there was no "specific state licensing" or "local licensing of cannabis dispensaries" at the time of the allegations against the Holistic Café in 2010 to 2012. {*Ibid*.}

Nonetheless, the Hearing Officer relied upon Sergeant Varga's belief that cannabis dispensaries were regulated in the City of San Diego as "unpermitted businesses." {AR00304.} The Hearing Officer considered a San Diego Municipal Code section that set forth a list of allowable "uses" and prohibited any "use" that was not listed. {*Ibid*.} The Hearing Officer concluded, without describing evidentiary support, that the Holistic Café was operating as a "marijuana dispensary." {*Ibid*.} The Hearing Officer interpreted San Diego Municipal Code section 1512.0305, subdivision (a) as not allowing operation of a marijuana dispensary because such a "use" was not listed as a permitted use. {*Ibid*.}

Sergeant Varga, however, testified he was not involved in the investigation of the Holistic Café in the 2010 to 2012 timeframe and had no personal knowledge of the information contained in Exhibits 8 through 13. {AR00270.} He was a police officer with the Chula Vista Police Department and was not "that familiar" with San Diego Municipal Code section 1512.0305 regarding use regulations for commercial zones. {*Id.* at p. 00272.}

His general understanding was that in the 2010 to 2012 timeframe, the City of San Diego "didn't have certain laws on the books," and instead, "they were using existing laws, for example, zoning regulations, uh, to enforce um, basically illegal marijuana dispensaries or collectives." {*Id.* at p. 00264.}

Sergeant Varga also testified he had no personal knowledge of any of the allegations made in the civil complaint. {AR00273.} He agreed there were no specific findings or allegations regarding the violation of a specific regulation or law relating to commercial cannabis activity in the complaint or stipulated judgment. {*Id.* at p. 00274.} He also was not aware of any specific San Diego Municipal Code alleged to have been violated involving the regulation of commercial cannabis activity. {*Ibid.*}

Nonetheless, the Hearing Officer concluded Mr. Senn's "conduct violated the San Diego Municipal Code which was related to Commercial Cannabis Activity and his cannabis license applications were properly denied pursuant to CVMC 5.19.505(A)(5)(f)." {AR00304.}

Regarding CVMC section 5.19.050(A)(5)(g), the Hearing Officer interpretated that section as relating to Mr. Senn's "involvement in unlawful Commercial Cannabis Activity" and concluded Mr. Senn was President and CEO of Holistic Café, which was operating as an unpermitted marijuana dispensary." {AR00305.} Consequently, the Hearing Officer concluded, "[t]he record shows [Mr. Senn] was engaged in "Unlawful

Cannabis Activity" and his applications were properly denied pursuant to CVMC section 5.19.505(A)(5)(g). {*Ibid.*}

The Statement of Decision also concluded the City's evidence (Exhibits 8 to 13) was admissible because it was "relevant" and "reliable." {AR00305.} The Hearing Officer identified the "issue" as "whether [Mr. Senn] was involved in Unlawful Cannabis Activity or violated a law involving Unlawful Cannabis," again omitting the statutory text verbiage "commercial." {*Ibid.*} The Hearing Officer concluded the evidence showed Holistic Café was operating as "an unpermitted marijuana dispensary" and therefore the evidence was relevant. The Hearing Officer also determined the exhibits were reliable because they were "in a logical sequence," and "of the kind that reasonable persons rely on in making decisions." {*Id.* at p. 00306.} Finding that Mr. Senn had the burden to demonstrate error and did not meet his burden, the Hearing Officer concluded the claim of error did not support granting the appeal. {*Ibid.*}

Finally, the Hearing Officer declined to exercise his discretion to not consider the allegations that Mr. Senn engaged in "Unlawful Cannabis Activities," because allegations of "Unlawful Cannabis Activities are serious allegations," and because UL Chula did not present any witnesses, including Mr. Senn. {AR00306.}

### E. UL Chula files a petition for writ of administrative and traditional mandamus, complaint for injunctive and declaratory relief and a motion for preliminary injunction.

On November 13, 2020, UL Chula filed a petition for writ of administrative and traditional mandamus and complaint for injunctive and declaratory relief ("petition"). [1 AA 10–34.] The petition described the application process, the City's denial of all applicants with civil zoning law violations, and the denial of UL Chula's application based upon alleged violations of civil zoning laws for having engaged in unlawful "commercial cannabis activity." [*Ibid*.] UL Chula sought a writ of administrative and traditional mandate and also declaratory and injunctive relief requesting that the City set aside its Notice of Decision and Statement of Decision and permit UL Chula to proceed to Phase Two of the application process and restraining the City from issuing any other cannabis licenses in the City or declaring null and void any licenses already issued. [*Id.* at p. 33.] UL Chula amended the complaint to name as defendants TD Enterprise LLC and March and Ash Chula Vista, Inc. [*Id.* at pp. 266–267.]

UL Chula's motion for preliminary injunction sought to maintain the status quo pending the court' decision on its petition. [1 AA 271–289.] UL Chula maintained it was likely to succeed on the merits because civil zoning violations were not disqualifying as a matter of law. [*Id.* at pp. 279–289.] Furthermore, the equities favor an injunction given the high likelihood of harm to UL Chula that would result if the licensing

process proceeded, and UL Chula would have lost the distinct advantage of being "first-to-market." [*Id.* at pp. 286, 291.]

UL Chula filed an ex parte application for a temporary restraining order restraining the City from issuing any cannabis storefront retailer a license in District One until the court ruled on UL Chula's motion for preliminary injunction, which the court granted. [1 AA 293–519.]

The court also advanced the hearing on the motion for preliminary injunction to be heard at the same time as UL Chula's petition for mandamus relief and complaint for declaratory and injunctive relief. [1 AA 520–521.]

### F. UL Chula moves for an administrative or traditional writ of mandamus.

UL Chula filed a motion in support of its petition for writ of administrative or traditional mandate. [1 AA 539–569.] UL Chula argued the City abused its discretion in rejecting UL Chula's application for a license. [*Id.* at p. 551.]

First, UL Chula asserted the Holistic Café was a nonprofit mutual benefit corporation organized in compliance with the 2003 Attorney General guidelines for the lawful distribution of medicinal cannabis by collectives and cooperatives. [1 AA 551–553.] There were no zoning ordinances barring a medicinal cannabis storefront or a commercial cannabis storefront in 2012. [*Id.* at p. 551.] There were no state or local licensing laws or regulations related to commercial cannabis activity until 2016,

four years after the stipulated judgment in *Holistic Café*. [*Ibid*.] As a matter of law, the civil zoning violations in *Holistic Café* did not constitute unlawful "commercial cannabis activity," and could not support the City's decision to deny UL Chula's application for a license. [*Ibid*.] Furthermore, the allegations of the complaint were never adjudicated, and the stipulated judgment expressly provided it did not include an admission of liability. [*Id.* at p. 553.] {AR00196.} Neither CVMC section 5.19.050(A)(5)(f) or (g) applied to the lawful medicinal cannabis activity alleged in *Holistic Café*. [1 AA 554–555.]

Moreover, medicinal cannabis is not commercial cannabis. [1 AA 553.] The City separately defines "medicinal" cannabis. [*Ibid*.] The City's definition of prohibited cannabis activity describes only "commercial" cannabis activity and expressly prohibits a commercial storefront retailer from selling medicinal cannabis. [*Ibid*.] In addition, only purely hearsay evidence was presented at the hearing and such evidence could not support the findings. [*Id.* at pp. 556–557.]

Second, while the City has discretion to reject a Phase One applicant for any of the reasons listed in CVMC section 5.19.050(A)(5), it did not exercise its discretion, but rather uniformly rejected applicants with any connection to a violation of laws unrelated to commercial cannabis activity. [1 AA 557–558.] Whether a municipality could use civil zoning laws to bar medicinal cannabis storefronts was hotly contested until finally settled in 2013 by the California Supreme Court in *City of*

*Riverside, supra,* 56 Cal.4th 729. [*Id.* at p. 552.] Failing to exercise its discretion and instead using strictly a connection to a violation of a civil zoning law to eliminate otherwise qualified applicants, was an abuse of discretion.

Third, UL Chula argued it was denied a fair hearing because the City Attorney's Office acted as both adviser to and advocate for the City, without adequate screening to guarantee the necessary separation between the dual roles. [1 AA 559–562.] In addition, Deputy City Attorney Megan McClurg, who served as counsel for the City, played an integral role in drafting what was eventually codified as CVCM section 5.19.010 et seq. [*Id.* at p. 560.] The City Manager, who also served as the Hearing Officer, was present during Ms. McClurg's presentations to the City Council and would naturally be inclined to give more credence to her arguments regarding the purpose, meaning and application of the CVCM. [*Id.* at pp. 560–561.] This inclination was demonstrated by the City Manager's use of language regarding the text of the statute that mimicked Ms. McClurg's improper use of the term "cannabis activity," without the qualifying term "commercial." The Hearing Officer was impermissibly biased, and UL Chula was denied due process and a fair hearing. [*Id.* at pp. 559–562.]

The City and real parties in interest March and Ash Chula Vista, Inc. and TD Enterprise LLC (jointly referred to in this instance as "the City") filed a joint opposition to the petition for writ of mandate. [2 AA 811–841.] They argued San Diego's

permissive zoning code did not allow operation of the Holistic Café, and on that basis, the City was justified in refusing Mr. Senn a license. [*Id.* at pp. 827–828.]

The City also argued the sale of medical cannabis falls within the definition of "commercial cannabis activity" because there is no distinction between the sale of commercial cannabis and medical cannabis. [2 AA 829–830.]

In further opposition, the City argued the City Manager's findings were supported by substantial evidence. [2 AA 832.] According to the City, UL Chula did not meet its burden of proof because it put on no evidence. The City dismissed the need for non-hearsay evidence, contending hearsay is competent evidence in an administrative proceeding and the documents the City presented were admissible under the official records exception to the hearsay rule. [*Id.* at pp. 832–833.]

The City contended it did not abuse its discretion by not exercising its discretion, but rather did exercise its discretion in denying a license to UL Chula. [2 AA 834.]

Finally, the City argued there was no evidence of impropriety in having Ms. McClurg represent the City because there was no evidence of impropriety cited and there was no need for screening or a "due process wall." [2 AA 834–835.]

In reply, UL Chula established that the City's position that it could correctly refuse Mr. Senn a license because he engaged in "past unlawful cannabis activity" was incorrect because it

misreads the text of the CVMC, which requires unlawful *commercial* cannabis activity, not just any activity that is unlawful in the abstract, like civil zoning law violations. [2 AA 860.]

Furthermore, the City's contention that medicinal sales are the same as commercial sales is unsupported by the CVMC. The term "commercial" applies to the "sale" of cannabis and requires a commercial sale of cannabis to constitute "Commercial Cannabis Activity." [2 AA 861–862.] Medicinal cannabis is separately defined by the City because it is different from commercial cannabis. The CVMC could have, but does not include "Medicinal Cannabis" within the defined term "Commercial Cannabis Activity." [*Id.* at p. 862.]

In addition, the City's regulatory scheme, to make sense, must be read to mean commercial cannabis activity that is unlawful under the commercial cannabis laws first enacted in 2016. Otherwise, the City's concurrent requirement that an applicant have at least 12 consecutive months of experience "operating a lawful Commercial Cannabis Business in a jurisdiction permitting such Commercial Cannabis Activity" would be untenable. [2 AA 863.]

Regarding the City's contention that pure hearsay evidence is sufficient to constitute substantial evidence to support the City Manager's decision, the law is to the contrary; uncorroborated hearsay, *alone,* cannot constitute substantial evidence, even in an administrative proceeding that does not require the technical

rules of evidence be applied. [2 AA 863.] If, however, the strictly hearsay evidence the City provided was properly considered, it only confirmed that the Holistic Café was a nonprofit mutual benefit medical cannabis storefront and therefore not engaged in "commercial cannabis activity," as that term is defined by the City's code. [*Ibid.*]

The City's failure to exercise any discretion by uniformly rejecting all applicants who faced government scrutiny of some kind shows the City indeed did not consider and exercise discretion as to all of the factors it was required to consider in accepting or rejecting applications under the City's regulatory scheme. [2 AA 864–865.]

In light of the dual roles played by the City's deputy attorneys at the hearing, the City had the burden of proving adequate screening measures were in place, and the City did not meet that burden. [2 AA 865–866.] There was an unacceptable risk of bias given Ms. McClurg's close working relationship with the City Manager and his deputy in drafting the City's cannabis laws. This presented an incurable violation of due process and warranted overturning the City Manager's Statement of Decision. [*Ibid.*]

### G. The court denies the petition for writ of mandamus and motion for preliminary injunction.

After hearing argument, the court denied UL Chula's petition for writ of mandamus and motion for preliminary injunction. [2 AA 1135–1138.]

The court concluded UL Chula had not identified any language that would exclude the sale of "medicinal cannabis" from being subsumed in the definition of "Commercial Cannabis Activity." [2 AA 1136.] The court further concluded Mr. Senn was cited for zoning violations relating to "Commercial Cannabis Activity," which made him ineligible for a license. [*Ibid.*]

The court rejected the plain language of the CVMC as applying only to commercial cannabis activity that was unlawful after Proposition 64 was enacted in 2016 because that would be "to apply a future standard to past conduct." [2 AA 1136.]

Regarding the insufficiency of the evidence to support the findings, the court found no applicable authority to support the contention that the evidence submitted was insufficient. [2 AA 1136–1137.] The court considered the argument that the City refused to exercise its discretion as "regurgitation" of previously made arguments. [*Id.* at p. 1137.]

The court similarly rejected UL Chula's due process violations argument, concluding there was no evidence the same Deputy City Attorney acted as both prosecutor and advisor in the same proceeding, as was the case in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 813 (*Quintero*), disapproved on other grounds in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 740, fn. 2 (*Morongo*). [2 AA 1137.] The court refused to adopt a "finding" that "Ms. McClurg was providing erroneous legal advice." [*Ibid.*]

The court declined to consider evidence outside the administrative record and denied UL Chula's motion for preliminary injunction on the ground that UL Chula had "not met its burden that it is likely to prevail on the merits." [2 AA 1138.]

The court entered judgment on June 17, 2021. [2 AA 1139–1148.] Notice of entry of the judgment was served on July 1, 2021. [*Id.* at pp. 1149–1160.] UL Chula timely appealed on July 6, 2021. [*Id.* at p. 1161.]

## STATEMENT OF APPEALABILITY

The judgment denying UL Chula's petition and motion for writ of administrative mandate is a final, appealable judgment that disposes of all causes of action. (Code Civ. Proc., § 904.1, subd. (a)(1); *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697–698.)

## LEGAL ARGUMENT

### I. Standard of Review.

The Court of Appeal considers whether the agency's findings are supported by substantial evidence and whether the agency committed any errors of law. (*McConville v. Alexis* (1979) 97 Cal.App.3d 593, 598, 600; *Dawn v. State Personnel Bd.* (1979) 91 Cal.App.3d 588, 590, 601.)

Whether an agency's findings support the agency's legal conclusions is a question of law and is reviewed de novo on

appeal. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

An "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

The question whether there was a fair trial before the agency is reviewed de novo. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442–1443; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 168.)

## II. The City Abused Its Discretion in Denying a License to UL Chula.

### A. The City's findings were not supported by substantial evidence and the decision was not supported by the findings.

#### *1. The only evidence relied on to support the finding of unlawful commercial cannabis activity was pure hearsay evidence that cannot support the decision as a matter of law.*

Uncorroborated hearsay, *alone,* cannot constitute substantial evidence, even in an administrative proceeding that does not require the technical rules of evidence be applied. (Gov. Code, § 11513, subd. (d); *Layton v. Merit System Com.* (1976) 60 Cal.App.3d 58, 67.) The Hearing Officer ignored this limitation on hearsay evidence because the City's Cannabis

Regulations did not require that the "technical rules of procedure and evidence applicable to judicial proceedings" be followed, and therefore, the objections were "not applicable." {AR00305.} Instead, the Hearing Officer determined the evidence need only be "relevant and reliable." {*Ibid.*}

Hearsay evidence is inherently unreliable, and therefore is not admissible. Consequently, even if the administrative procedure allowed for flexibility, uncorroborated hearsay, without more, cannot constitute substantial evidence. (*Walker v. San Gabriel* (1942) 20 Cal.2d 879, 881–882 [city abused its discretion in revoking license based solely on hearsay], overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37, 44.)

Even if admissible, the hearsay evidence was not sufficient. Admissibility and substantiality of hearsay evidence are different issues. (*Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 597.) Indeed, "mere admissibility of evidence does not necessarily confer the status of 'sufficiency' to support a finding *absent other competent evidence.*" (*Daniels v. Dept. of Motor Vehicles* (1983) 33 Cal.3d 532, 538, fn. 3, italics added.)

The Statement of Decision does not reference the evidence it relies on in determining Holistic Café was operating as a marijuana dispensary {AR00304} or an "unpermitted marijuana dispensary." {*Id.* at p. 00305.} However, the Statement of Decision rejects the hearsay objections and insufficiency of the evidence arguments made by UL Chula and concludes Exhibits 8-

13 were relevant to show the Holistic Café was operating as an "unpermitted marijuana dispensary." {*Ibid.*} All of the evidence referenced was purely hearsay, and unauthenticated. Indeed, as the Hearing Officer recognized, the hearsay evidence culminated in the complaint (Exhibit 13), which was resolved by the stipulated judgment (Exhibit 13), the allegations of which were specifically *not* admitted. {*Id.* at p. 00306.} There was no non-hearsay evidence to establish the finding that UL Chula was in violation of CVMC section 5.19.050(A)(5), subsections (f) or (g). Therefore, the City's findings are not supported by the evidence.

### *2. There was no evidence of an adverse sanction for a material violation of state or local laws or regulations related to commercial cannabis activity.*

The City Manager and the trial court concluded the City properly denied UL Chula's application because UL Chula "engaged in Unlawful Cannabis Activity." {AR00304–00305.} The City Manager relied upon CVMC section 5.19.050(A)(5), subsection (f) and (g). {*Id.* at pp. 00119–00122.} Subsection (f) provides that applications can be rejected if:

> The Applicant, an Owner, a Manager, and/or an Officer has been adversely sanctioned or penalized by the City, or any other city, county, or state, for a material violation of state or local laws or regulations related to Commercial Cannabis Activity or to pharmaceutical or alcohol licensure.

In sum, to find a basis for rejection of an application under subsection (f), there must be evidence of: (1) a sanction or

penalty; (2) by any city; (3) for a material violation of state or local laws or regulations; (4) *related to* commercial cannabis activity.

CVMC section 5.19.050(A)(5)(g) provides as a disqualifying factor evidence that:

> The Applicant, an Owner, a Manager, and/or an Officer has conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful *Commercial Cannabis Activity* in the City or any other jurisdiction.

(Italics added.)

The sole basis set forth in the Statement of Decision for rejecting UL Chula's application was an alleged civil zoning violation in the *Holistic Café* matter from 2012. {AR00304–00305.} This decision is unsupported by the findings or the law.

The Statement of Decision starts with the finding that there were *no* laws related to commercial cannabis activity in the state or city: "[s]pecific state licensing and local licensing of cannabis dispensaries" did not go into effect until 2016, four years after the City of San Diego entered into a stipulated judgment in *Holistic Cafe*. {AR00304.} That finding, alone, eliminated any basis for the City's denial of a license based on CVMC section 5.19.050(A)(5)(f), which requires a material violation of a law or regulation *related to* commercial cannabis activity.

The Statement of Decision goes on to rely on testimony by Sergeant Varga that "cannabis dispensaries were regulated via zoning laws and in particular in the City of San Diego as unpermitted businesses." {AR00304.} The Hearing Officer reasoned that as a result, Mr. Senn's conduct "violated the San Diego Municipal Code," which the Hearing Officer described as "related to Commercial Cannabis Activity." {*Ibid.*} The Hearing Officer's findings are not supported by the evidence, and the decision is not supported by the findings.

The San Diego Municipal Code relied upon by the City was a zoning code that described uses of property that were allowed by the City. (San Diego Municipal Code, § 1512.0305, subd. (a).) The City of San Diego's zoning laws did not ban lawful, nonprofit medicinal cannabis storefronts such as the Holistic Cafe that were approved in 2003 under the guidelines issued by the California Attorney General's office and codified in Health and Safety Code section 11362.81, subdivision (d). The City of San Diego's zoning laws did not reference cannabis dispensaries at all. They were not "regulations," "relating to commercial cannabis activity," as required by the CVMC. (CVMC, § 5.19.050, subd. (A)(5)(f).) It was undisputed at the hearing, as the Hearing Officer noted, there were no laws related to licensing of commercial cannabis activity in the state or city in 2010 to 2012. {AR00304.}

The findings are unsupported by the evidence for another, threshold reason, that the Statement of Decision ignores. None of

the allegations in the complaint were ever adjudicated. They were simply allegations. The stipulated judgment expressly denied any admission or adjudication of any of the allegations in the complaint:

> The Parties wish to avoid the burden and expense of further litigation and accordingly have determined to compromise and settle their differences in accordance with the provisions of this Stipulated Judgment. *Neither this Stipulated Judgment nor any of the statements or provisions contained herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint.*

{AR00197, italics added.}

The allegations of the complaint were never proven or admitted; they were nothing more than allegations, which are not evidence. (*Buccella v. Mayo* (1980) 102 Cal.App.3d 315, 324–325 [allegations in pleadings do not constitute evidence].)

Indeed, UL Chula's application to the City for a license was accompanied by a letter describing the *Holistic Café* matter and expressly reaffirming Mr. Senn's denial of the allegations at the time and his continued denial of the allegations of zoning violations. {AR00113.}

There was good reason for not admitting liability to a violation of the civil zoning laws. During the 2010 to 2012 time period, there was significant uncertainty about whether local governments could use zoning regulations to ban legal medicinal cannabis storefronts. (See *City of Lake Forest v. Evergreen*

*Holistic Collective* (2012) 203 Cal.App.4th 1413 [local governments cannot ban], review granted May 16, 2012, S201454; *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) 207 Cal.App.4th 601 [local governments cannot ban], review granted Sept. 19, 2012, S204663; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 [local governments can ban].)

It was not until 2013 that the California Supreme Court decided *City of Riverside, supra,* 56 Cal.4th 729, 761–762, which held that local governments were not prevented from banning medical cannabis dispensaries, even though the State had decriminalized such facilities.

Although in 2012 Mr. Senn had ample defenses to the allegations in the *Holistic Café* complaint, both parties had incentive to settle the complaint without an admission of liability at least in part in light of the substantial doubt about the ability of the City to prove its allegations of a civil zoning violation. Indeed, the stipulated judgment made specific reference to the uncertainty in the law (i.e., the then-pending *City of Riverside* case), and included a provision that allowed the stipulated judgment to be amended in the future if the law were to change.[3] {AR00199.}

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[3] Consistent with that provision, the superior court in *Holistic Café* amended the judgment on May 3, 2019, to specifically permit the defendants therein to engage in cannabis activities. [1 AA 667–668.]

The City's determination that the Holistic Café had been sanctioned for violation of a law or regulation related to commercial cannabis activity is without any support in the evidence. As the Supreme Court instructs, a settlement without more is not a conclusive, final judicial determination of liability. (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 306, 308, 311.) Thus, there is no evidence of a "sanction" imposed for a "material violation of a law or regulation related to commercial cannabis activity." (CVMC, § 5.19.050, subd. (A)(5)(f).) The only evidence was of a compromise agreement to pay money *without* admission or adjudication of any material violation of law or regulation.

#### *3. There was no evidence of unlawful "commercial cannabis activity."*

##### a. Commercial cannabis is not the same as medicinal cannabis.

A violation of both CVMC section 5.19.050(A)(5)(f) and (g) requires a finding of unlawful "Commercial Cannabis Activity." Subsection (f) requires a finding of a "material violation of state or local laws or regulations related to *Commercial Cannabis Activity*." (Italics added.) Subsection (g) also requires involvement in unlawful "*Commercial Cannabis Activity*" in the City or any other jurisdiction.

The Hearing Officer's Statement of Decision ignored the "commercial" cannabis activity requirement and found generally that some "unlawful" cannabis activity had taken place:

> The record shows Appellant engaged in *Unlawful Cannabis Activity* and, as a result, his cannabis license applications were properly denied. . . .

{AR00304–00305, italics added.}

The Statement of Decision applies the wrong legal standard and there was no evidence in the record to support this finding,

The term "Commercial Cannabis Activity" is defined by the City as follows: ". . . the commercial cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of Cannabis or Cannabis Products." (CVMC, § 5.19.020.)

The Statement of Decision does not address the significant differences between "commercial" cannabis and "medicinal" cannabis. The trial court also incorrectly found UL Chula "did not identify any language which would exclude the sale [of] medicinal cannabis from being subsumed into the definition of Commercial Cannabis Activity." [2 AA 1136.]

The City's regulations themselves make clear that "commercial" cannabis activity does not include "medicinal cannabis." CVMC section 5.19.020 separately defines "commercial" and "medicinal cannabis" and "medicinal cannabis product." Indeed, the City's licensing scheme for commercial cannabis activities expressly prohibits commercial cannabis storefronts from selling medicinal cannabis and products. (See, e.g., CVMC, § 5.19.090, subd. (A) ["A Storefront Retailer shall not Sell Medicinal Cannabis or Medicinal Cannabis Products"].)

A separate license is required to sell Medicinal Cannabis—an "M-License," which involves "a cannabis product for use pursuant to the Compassionate Use Act of 1996 (Proposition 215)." (CVMC, § 5.19.020.)

The Holistic Café was a nonprofit mutual benefit corporation organized in compliance with Attorney General guidelines for the lawful distribution of medicinal cannabis by collectives and cooperatives. {AR00187, AR00260, AR00263, AR00304.} [1 AA 605.] It was not a commercial cannabis dispensary, nor was it involved in the sale of commercial cannabis. Thus, Mr. Senn could not have been found to have engaged in "Commercial Cannabis Activity" under either CMVC section 5.19.050(A)(5), subsections (f) or (g), as a matter of law.

b. "Commercial Cannabis Activity" was not legally defined until 2016, and the 2012 events could not qualify as unlawful commercial cannabis activity.

To gauge whether an applicant has engaged in *unlawful* commercial cannabis activity, commercial cannabis activity must have been recognized as a lawful activity.

Under federal law, commercial cannabis activity was and remains unlawful. The term "commercial cannabis activity," was first defined in 2016 by the State of California after passage of Proposition 64, and by the City in 2018 upon enactment of its cannabis regulatory scheme. Before then, the term "unlawful Commercial Cannabis Activity" had no legal significance because

it was not until 2016 that commercial cannabis businesses became lawful.

Analyzing the disqualifying factor of "unlawful Commercial Cannabis Activity" as applying only to activity after 2016 is consistent with the City's additional requirements for license applicants that the manager of a commercial cannabis license applicant must have "[a] minimum of 12 consecutive months, within the previous five years, as a Manager with managerial oversight or direct engagement in the day-to-day operation of a *lawful Commercial Cannabis Business* in a jurisdiction permitting such Commercial Cannabis Activity." (CVMC, § 5.19.050, subd. (A)(1)(e)(i), italics added.) Experience in a *lawful* commercial cannabis activity could only accrue after 2016, when "commercial cannabis activity" was first defined and made lawful.

Under this analysis, an alleged violation of the City of San Diego's general zoning ordinances from 2012—ordinances that did not expressly ban otherwise lawful, nonprofit, medicinal cannabis storefronts under Health and Safety Code section 11362.81, subdivision (d) (Senate Bill 420)—cannot possibly be deemed an unlawful "Commercial Cannabis Activity," because that phrase should only apply to activities deemed unlawful under the regulatory schemes enacted by the State and City following the passage of Proposition 64 in 2016. Had the City intended otherwise, it could have changed the definition of commercial cannabis activity to include nonprofit medicinal

cannabis. It did not. The City could have also dropped the term "commercial" so that the disqualification was expanded to any "unlawful Cannabis Activity." It did not. Consequently, there was no evidence to support the determination that UL Chula was disqualified from obtaining a license.

### B. The trial court abused its discretion by failing to exercise its discretion.

#### *1. The Public Records Act evidence should have been considered.*

Pursuant to Public Record Act requests, UL Chula learned that the City uniformly rejected applicants under CVMC section 5.19.050(A)(5)(f) and (g) that were alleged to have violated laws that were not related to the regulatory schemes that legalized commercial cannabis activity at the State and local level (going so far as to disqualify applicants who merely worked at otherwise lawful medicinal cooperatives in the City of San Diego). [1 AA 692–797.] UL Chula requested judicial notice of this evidence. [*Id.* at pp. 570–571.] The trial court declined to consider this evidence as "outside the administrative record," without further explanation. [2 AA 1138.]

This relevant evidence is admissible pursuant to Code of Civil Procedure section 1094.5, subdivision (e). (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 771–772 [extra-record evidence may be introduced if that evidence could not with reasonable diligence have been presented at the administrative hearing]; see also *Western States Petroleum Assn.*

*v. Superior Court* (1995) 9 Cal.4th 559, 575, fn. 5.) The evidence should have been considered and its improper exclusion prejudiced UL Chula.

### *2. The City did not exercise discretion in unilaterally denying all applicants, including UL Chula, without making the necessary findings required by law.*

The City is required, pursuant to CVMC section 5.19.050(A)(5), to exercise its discretion when rejecting any Phase One Application: "Phase One Applications *may* be rejected by the Police Chief for any of the following reasons in his/her discretion." (Italics added.)

Under CVMC section 5.19.050(A)(1)(e)(i), an applicant's manager must have "[a] minimum of 12 consecutive months, within the previous five years, as a Manager with managerial oversight or direct engagement in the day-to-day operation of a lawful Commercial Cannabis Business in a jurisdiction permitting such Commercial Cannabis Activity." {AR00394–00403.}

Considering that the City demands qualified and experienced applicants, whose experience comes from operating a business that is still illegal to this day under federal law, the City should have exercised its discretion in choosing the most qualified applicant (such as UL Chula, which scored the highest in the City's District One), rather than the applicant that was

lucky or clandestine enough to avoid government scrutiny. The Holistic Café was neither clandestine nor lucky. It operated in plain view of Code enforcement at 415 University Avenue in the heart of Hillcrest. {AR00248.} The City abused its discretion in failing to exercise any discretion by rejecting UL Chula's application without making additional factual findings to demonstrate its reasons to reject the application. (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra,* 11 Cal.3d at p. 515 [agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision"].)

Such reasons would have required, for example, findings tied to the express purpose of the licensing codes and regulations in permitting, licensing, and fully regulating commercial cannabis activities in the City. (*People v. Amdur* (1954) 123 Cal.App.2d Supp. 951, 964 ["The granting or denying of permits ... must be based upon considerations related to public health, safety, comfort, morals or the promotion of the general welfare, and the law requires uniform nondiscriminatory and consistent administration"].)

An example would be findings that UL Chula would likely create negative impacts and secondary effects, danger and disruption for City residences and businesses, and therefore its license application should be rejected. No such findings were ever made. Nor could such findings ever be made for UL Chula. As UL Chula's application materials showed, Mr. Senn is a highly experienced and well-qualified applicant. {AR00025–00027,

AR00029–00030, AR00032–00040, AR00126.} That is to say, Mr. Senn's operations are licensed by the very same City of San Diego that was a party to the stipulated judgement in *Holistic Café*. {*Ibid*.} Surely, such licensure would not have occurred had Mr. Senn been likely to create negative impacts, secondary effects, danger, or disruption to the City of San Diego. In fact, the City of San Diego expressly determined the contrary in issuing him a conditional use permit. {*Id.* at pp. 00065–00068.} The City should have considered these qualifying facts, which led to UL Chula being objectively scored as the most qualified applicant in the City's District One. It did not.

## III. UL Chula Was Denied a Fair Hearing.

The City's appeal process violated UL Chula's due process right to a fair tribunal "in which the judge or other decision maker is free of bias for or against a party." (*Morongo, supra,* 45 Cal.4th at p. 737.) Where an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*People v. Harris* (2005) 37 Cal.4th 310, 346; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.) On appeal, this issue is reviewed de novo. (*Rosenblit v. Superior Court, supra,* 231 Cal.App.3d at pp. 1442–1443.)

UL Chula was deprived of a fair tribunal because Deputy City Attorney Simon Silva served as the adviser to the Hearing

Officer (i.e., City Manager Gary Halbert), and Deputy City Attorney Megan McClurg served as counsel for the City, with no evidence they had been properly screened. {AR00302.}

Although a "city attorney's office may 'act[] as an advocate for one party in a contested hearing while at the same time serving as the legal adviser for the decision maker'" without violating the other party's right to a fair tribunal, "performance of both roles" offends due process when: (1) adequate measures to screen the Deputy City Attorney serving as prosecutor and the Deputy City Attorney serving as adviser are absent; or (2) the deputy serving as prosecutor becomes a "primary legal adviser" to the decision maker. (*Quintero, supra,* 114 Cal.App.4th 810, 813, citations and quotation marks omitted.) The City has the burden of demonstrating adequate screening measures were taken. (See *ibid.* [clarifying that the respondent City of Santa Ana had the "burden of showing the required separation"].) Here, the City produced no evidence that the City Attorney's Office employed adequate screening measures to guarantee the necessary separation between its dual roles of adviser and advocate.

The trial court rejected UL Chula's contention that the City Attorney's office had a conflict because the Deputy City Attorney roles were not comparable to those in the *Quintero* case cited by UL Chula. [2 AA 1137.] The City, however, agreed that the type of conflict it had was permissible only when adequate screening measures are in place. [*Id.* at p. 834.] The City had the burden of

demonstrating such measures were in place, but produced no evidence they were. Furthermore, although Ms. McClurg did not act as the City Manager's attorney in the administrative appeal, she had a lengthy history of acting as the City's legal advisor in developing the language of the CVMC that governed the application process. [1 AA 670–690.] Ms. McClurg was defending the City against alleged violations of that same code, before the same City Manager, who was aware of her involvement in drafting that code.

Ms. McClurg's service as counsel for the City in the hearing violated due process in light of her role as a drafter of the very code that governed the application and appeals process. Specifically, Ms. McClurg and a member of City Manager Halbert's staff, Deputy City Manager Kelley Bacon, played an integral role in the drafting of Ordinance 3418, eventually codified in CVMC section 5.19.010 et seq. Ms. McClurg and Ms. Bacon gave presentations to the Chula Vista City Council on the proposed ordinance, including their ongoing revisions thereto, no less than four times prior to the Ordinance's adoption. [1 AA 670–690.][4] City Manager Halbert was present each time for these presentations. [*Ibid*.] Given Ms. McClurg's and Ms. Bacon's joint role as drafters of the very code provisions that governed UL Chula's application and subsequent appeal, "[i]t would only be natural for [City Manager Halbert, Ms. Bacon's supervisor] . . .

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[4] These exhibits are admissible pursuant to Code of Civil Procedure section 1094.5, subdivision (e), as discussed *supra*.

to give more credence to [Ms. McClurg's] arguments when deciding [Petitioner's] case." Under these facts, there is an "appearance of unfairness . . . sufficient to invalidate the hearing" on due process grounds. (*Quintero*, *supra*, 114 Cal.4th at p. 816.)

The appearance of unfairness was borne out by the City Manager's adoption of the misleading and incorrect language used by Ms. McClurg and the witnesses she called. {AR00302–00307.} Ms. McClurg and the witnesses she called to testify materially misrepresented what the CVMC says, by describing the Holistic Café as engaging in "unlawful cannabis activity" when the CVMC sections at issue require evidence of "unlawful *commercial* cannabis activity." {*Id.* at p. 00239 [it's the City's position that . . . all applications were rejected based on [UL Chula's] involvement in *unlawful cannabis activity*]; *Id.* at p. 00240 [Sergeant Varga will discuss what led them to believe that "*unlawful activity*" had occurred]; *Id.* at p. 00243 [asking Sergeant Varga if an applicant had been sanctioned for laws related to *cannabis activity,* is that a basis for rejection?]; *Id.* at p. 00296 [the documents suggest we have an issue with "unlawful *cannabis activity*"].}

The Statement of Decision employed the exact same erroneous legal standard advocated for by Ms. McClurg throughout the hearing: "All four applications were denied pursuant to CVMC section 5.19.050(A)(5)(f) and (g) because Appellant was involved in *Unlawful Cannabis Activity*." {AR00302–00303, italics added.} This error in the Statement of

Decision was repeated by the Hearing Officer at least 10 times, which shows that the City impermissibly conflated the terms "cannabis activity" with "*commercial* cannabis activity" as if they had the same meaning under the CVMC when they do not:

- "Appellant . . . made the following claims of error: (1) that he was denied Due Process because the Notices of Decision did not provide sufficient notice as to when the *Unlawful Cannabis Activity* took place. . . . he asks the City to exercise its discretion and not consider the *Unlawful Cannabis Activity* allegations to deny the applications." {AR00303, italics added.}

- "The evidence supports the conclusion Appellant had notice as to the time frame in which he was alleged to have engaged in the *Unlawful Cannabis Activity*." {AR00303, italics added.}

- ". . . Appellant had ample notice that the alleged *Unlawful Cannabis Activities* took place between 2010 and 2012 in the City of San Diego, specifically at the Holistic Café.[5] Thus, he could have presented a defense that he did not engage in any *Unlawful Cannabis Activities* between 2010 and 2012." {AR00304, italics added.}

- "The City of Chula Vista Municipal Code has two sections that address the denial of a license for *Unlawful Cannabis Activity*, CVMC section 5.19.050(A)(5)(f) and (g)." {AR00304, italics added.}

- "The record shows Appellant engaged in *Unlawful Cannabis Activity* and, as a result, his cannabis license applications were properly denied pursuant to CVMC 5.19.505(A)(5)(g)." {AR00305, italics added.}

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[5] The Notice of Decision did not reference the Holistic Café whatsoever. {AR00121.}

- "Here, the issue was whether Appellant was involved in *Unlawful Cannabis Activity* or violated a law involving *Unlawful Cannabis*." {AR00305, italics added.}

- "As a result, the exhibits were relevant to prove Appellant's alleged *Unlawful Cannabis Activities*." {AR00306, italics added.}

Violation of the due process guarantee can be demonstrated by proof of actual bias, and also by demonstrating circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin, supra,* 421 U.S. at p. 47.) In this case, the Hearing Officer heard argument by Ms. McClurg and testimony elicited by Ms. McClurg that repeatedly applied the wrong legal standard. Considering that the City Hearing Officer knew of Ms. McClurg's role in drafting the relevant code sections, it is reasonably probable that UL Chula did not receive an impartial and unbiased adjudication on appeal. *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021 ["the rule against bias has been framed in terms of probabilities, not certainties"].) Under these circumstances, "experience teaches" that the probability of actual bias on the part of the City Manager was high enough to deprive UL Chula of a fair and impartial hearing. (*Withrow,* at p. 47.)

## CONCLUSION

For the foregoing reasons, UL Chula respectfully requests the trial court's denial of its petition for writ of mandate and preliminary injunction be reversed.

Respectfully Submitted,

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**UL CHULA TWO LLC**

## CERTIFICATE OF COMPLIANCE WITH RULE 8.204

I, the undersigned, Lann G. McIntyre, declare that:

1. I am a partner in the firm of Lewis, Brisbois, Bisgaard & Smith LLP, counsel of record for plaintiff and appellant UL Chula Two LLC.

2. This certificate of compliance is submitted in accordance with rule 8.204 of the California Rules of Court.

3. This appellant's opening brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 9,623 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California, on December 21, 2021.

*/s/ Lann G. McIntyre*
Lann G. McIntyre

**PROOF OF SERVICE**
*UL Chula Two LLC v. City of Chula Vista*
Fourth Civil Number D079215

I, Janis Kent, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, Suite 1700, San Diego, California 92101.

On December 21, 2021, I served the following document described as **APPELLANT'S OPENING BRIEF; CERTIFICATE OF INTERESTED PARTIES; and APPENDIX OF EXHIBITS [2-VOLUME]** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

On December 21, 2021, I served the following document described as **APPELLANT'S OPENING BRIEF; CERTIFICATE OF INTERESTED PARTIES; and APPENDIX OF EXHIBITS [2-VOLUME]** by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider and/or U.S. Postal

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 21, 2021, at San Diego, California.

*/s/ Janis Kent*
Janis Kent

**SERVICE LIST**
*UL Chula Two LLC v. City of Chula Vista*
Fourth Civil Number D079215

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San Diego, CA 92101
(*Via Overnight Mail)*

California Supreme Court
Attn: Clerk of Court
350 McAllister Street, Room 1295
San Francisco, CA 94102
(*Via Electronic*)

4811-3840-4092.2

**STATE OF CALIFORNIA**
California Court of Appeal, Fourth Appellate District Division 1

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
California Court of Appeal, Fourth Appellate District Division 1

Case Name: **UL Chula Two LLC v. City of Chula Vista et al.**
Case Number: **D079215**
Lower Court Case Number: **37-2020-00041554-CU-WM-CTL**

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| APPENDIX - JOINT APPENDIX | UL Chula Two Appellant's Appendix Volume 1 of 2 |
| APPENDIX - JOINT APPENDIX | UL Chula Two Appellant's Appendix Volume 2 of 2 |

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12/21/2021

Date

/s/Janis Kent

Signature

McIntyre, Lann (106067)

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Law Firm