

**FILED**

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***NHC SLO, LLC v. City of San Luis Obispo, et al., 21CV-0734***

SAN LUIS OBISPO SUPERIOR COURT  
BY Frances O'Donnell  
Frances O'Donnell, Deputy Clerk

**Hearing: Demurrer to Amended Petition**

**Date: February 2, 2023**

**TENTATIVE RULING**

**Background**

In January 2019, Petitioner NHC SLO, LLC applied for a cannabis operator permit by filing a Commercial Cannabis Business Operators Permit Application (the Application) with Respondent, the City of San Luis Obispo (the City). (See Request for Judicial Notice [RFJN], Ex. 3.)<sup>1</sup> At that time, Helios Dayspring was Petitioner's chief executive officer and managing member and signed a declaration on its behalf for the issuance of the permit. (*Id.* at Ex. 3, p. 0035.)

On October 22, 2019, Respondents granted the issuance of a permit, subject to Petitioner's compliance with the applicable Municipal Code provisions.

On October 20, 2020, Dayspring transferred his interest in Petitioner to Valnette Garcia. (Pet., ¶ 20, and Ex. F. at NHCSLO000046.)

On or around July 28, 2021, Dayspring entered into a plea agreement with the United States Attorney's Office in the Central District of California. (Pet., Ex. H, at NHCSLO000078-000107.) Dayspring pleaded guilty to bribing an elected San Luis Obispo County Supervisor from 2016 to 2019, and attempting to bribe a San Luis Obispo County mayor, as well as violations of the federal tax code. (Pet., Ex. H, NHCSLO000089-97.)

On October 6, 2021, Respondents terminated the permit, and issued a notice of automatic disqualification to Petitioner. (Pet., Ex. E.) The reason cited for this action was Petitioner's submission of false or misleading information in obtaining and maintaining the permit. The revelations in Dayspring's plea agreement, in Respondents' view, rendered certain representations made by Petitioner in the Application false and misleading.

On October 19, 2021, the City issued its final memorandum of decision, reaffirming the automatic disqualification of Petitioner. (Pet., Ex. H.)

On December 23, 2021, Petitioner filed this lawsuit. On July 15, 2022, after the Court sustained Respondents' demurrer to the petition with leave to amend, Petitioner filed an amended petition again asserting one cause of action for "writ of mandate, prohibition, and declaratory relief."

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<sup>1</sup> Respondents' request for judicial notice is granted. (Evid. Code, § 452, subs. (b)-(d).)

Now before the Court is Respondents' demurrer to the amended petition. Respondents demur on the basis that the first cause of action is barred as a matter of law because it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The Court is not in receipt of an opposition; a proof of service of the Demurrer is on file.

### **Legal Authority**

Mandamus proceedings are subject to the general rules of pleading applicable to civil actions. (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271.) A demurrer tests the legal sufficiency of the allegations in a complaint. It raises issues of law, not fact, regarding the complaint's form or content. (Code Civ. Proc., §§ 422.10, 589; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.)

With this action, Petitioner challenges the City's automatic disqualification of Petitioner's permit. The standard of review in ordinary mandamus is highly deferential. (See *Carrancho v. Cal. Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1265 ["Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test."].)

Petitioner's challenge involves the interpretation of the Municipal Code, and the City is entitled to deference in its interpretation of its municipal code. (See, e.g., *Communities for a Better Env't. v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1107 [Courts "extend considerable deference to an administrative agency's interpretation of . . . the regulatory scheme which the agency implements or enforces."].)

### **Discussion**

The Court sustained Respondents' demurrer to the original petition, concluding that it did not allege facts showing the City failed to follow the Municipal Code and its own policies and procedures in terminating Petitioner's cannabis permit, and noting that Petitioner did not dispute that Dayspring acted with unclean hands in securing the permit.

Petitioner's amended petition is nearly identical to its original petition. The only new factual allegations are found in paragraphs 97-99,<sup>2</sup> in which Petitioner argues that the City engaged in selective enforcement of its Municipal Code because Dayspring "provided financial capital for all three successful cannabis retail business permits within the City of San Luis Obispo; however, the other two permit holders, Megan's Organic Market and SLO Cal Roots lied to the

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<sup>2</sup> The remaining new paragraphs in the amended petition consist of legal arguments. (Am. Pet., ¶¶ 5, 106-132, 139-141.)

City about Helios Dayspring's financial and other involvement in those entities." (Am. Pet., ¶ 97.) Petitioner further alleges that, when the City became aware that these other business permit applicants "relied on Helios Dayspring to help fund their applications, the City only selected NHC SLO for termination," which Petitioner contends is "prima facie evidence of arbitrary and capricious acts." (*Id.* at ¶¶ 98, 99.)

Respondents argue that Petitioner fails to allege that the other applicants were required to disclose the identity of third parties who provided "financial capital," as Petitioner alleges Dayspring did for these other applicants. There are no allegations in the amended petition that any of these other cannabis operators engaged in felony bribery or tax evasion such that the City would have grounds to terminate any permits issued to them. Moreover, even if the City "selectively enforced" its Municipal Code, selective enforcement is not a doctrine supporting a claim for affirmative relief against the City, inasmuch as Petitioner does not allege it is part of a protective class.

The Court sustains the demurrer on the merits of the arguments asserted by Respondent. Furthermore, the Court may treat Petitioner's failure to oppose the demurrer as an admission that it is meritorious. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410; Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group 2022) Ch. 9(I)-C, 11 9:105.10.)

#### **ORDER (TENTATIVE)**

The demurrer to the first amended petition is sustained without leave to amend. Respondents shall serve notice of the ruling.