Case No. D079215

In the Court of Appeal, State of California

FOURTH APPELLATE DISTRICT, DIVISION ONE

UL CHULA TWO LLC,
Plaintiff and Appellant

vs.

CITY OF CHULA VISTA,
Respondent and Appellant.

Appeal From the Superior Court of the State of California
County of San Diego. Case No. 37-2020-00041554-CU-WM-CTL
Honorable Richard E. L. Strauss, Judge Presiding

JOINT RESPONDENTS' BRIEF

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CITY OF CHULA VISTA'S AND THE CHULA VISTA CITY MANAGER'S CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, the undersigned certifies that the below-referenced entities may have an interest in the outcome of this proceeding that the Justices should consider in determining whether to disqualify themselves:

- March and Ash Chula Vista, Inc.
- TD Enterprise, LLC.

DATED: March 24, 2022

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Alena Shamos
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Attorneys for City of Chula Vista and the Chula Vista City Manager

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: D079215
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 214482 NAME: Heather S. Riley FIRM NAME: ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP STREET ADDRESS: 600 West Broadway, 27th Floor CITY: San Diego STATE: CA ZIP CODE: 92101-0903 TELEPHONE NO.: (619) 233-1155 FAX NO.: (619) 233-1158 E-MAIL ADDRESS: hriley@allenmatkins.com ATTORNEY FOR (*name*): March and Ash Chula Vista, Inc.	SUPERIOR COURT CASE NUMBER: 37-2020-00041554-CU-MC-CTL
APPELLANT/ PETITIONER: UL CHULA TWO LLC RESPONDENT/ REAL PARTY IN INTEREST: CITY OF CHULA VISTA, ET AL.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): March and Ash Chula Vista, Inc.

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)	March and Ash Chula Vista Holdings, LLC	Entity is majority owner of March and Ash Chula Vista, Inc.
(2)	Blake Marchand	Owner of March and Ash Chula Vista Holdings, LLC
(3)	Breton Peace	Owner of March and Ash Chula Vista Holdings, LLC
(4)	Kristi Kelly	Owner or March and Ash Chula Vista, Inc.
(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: March 22, 2022

Heather S. Riley
(TYPE OR PRINT NAME)

▶ 
(SIGNATURE OF APPELLANT OR ATTORNEY)

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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION One	COURT OF APPEAL CASE NUMBER: D079215
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 173818 NAME: Philip C. Tencer FIRM NAME: TencerSherman LLP STREET ADDRESS: 12520 High Bluff Drive, Suite 230 CITY: San Diego STATE: CA ZIP CODE: 92130 TELEPHONE NO.: 858-408-6900 FAX NO.: E-MAIL ADDRESS: phil@tencersherman.com ATTORNEY FOR (*name*): TD Enterprise LLC	SUPERIOR COURT CASE NUMBER: 37-2020-004155-CU-WM-CTL
APPELLANT/ PETITIONER: UL CHULA TWO LLC RESPONDENT/ REAL PARTY IN INTEREST: CITY OF CHULA VISTA	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [✖] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): TD ENTERPRISE 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)		
(2)		
(3)		
(4)		
(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: March 23, 2022

Philip C. Tencer
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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I. INTRODUCTION

UL Chula Two, LLC ("UL Chula"), is an unsuccessful applicant dissatisfied with the review process conducted by the City of Chula Vista ("City") for granting licenses to storefront cannabis retailers. Objecting to the City's decision not to award it a license, UL Chula appealed to the City Manager, then the San Diego Superior Court, and now to this Court. At each stage, UL Chula failed to meet its burden to demonstrate that the City abused its discretion. The decision to deny UL Chula's application occurred after a complete and thorough administrative process and appeal, and the City's determination was amply supported by substantial evidence in the record. Since the City is entitled to deference in interpreting its own municipal code, upholding the City's well-reasoned decision supports the separation of powers and upholds inter-branch comity. Therefore, the City, March and Ash Chula Vista, Inc. and TD Enterprise, LLC (collectively, "Respondents") request this Court affirm the trial court's judgment denying the Verified Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief ("Petition") in its entirety.

II. FACTUAL AND PROCEDURAL HISTORY

a. THE CITY REGULATES COMMERCIAL CANNABIS

On March 16, 2018, the City enacted Ordinance No. 3418, which added Chapter 5.19 ("To Regulate Commercial Cannabis") to the Chula Vista Municipal Code ("CVMC"). (2-AA-1080–1123.)[1] The purpose of Chapter 5.19 was "to mitigate the negative impacts brought by unregulated Commercial Cannabis Activity … ." (CVMC § 5.19.010.)

CVMC Chapter 5.19 established a mandatory license program for engaging in legal Commercial Cannabis Activity in the City. (CVMC § 5.19.030.) Relevant here, the City restricted the number of "Storefront Retailers" in the City to eight, two for each of the City's four Council Districts. (CVMC § 5.19.040.) It also established a two-phase application process for obtaining a cannabis license. During Phase I, which is at issue in this case, applicants must comply with a strict list of application requirements, including demonstrating sufficient management experience and financial assets, as well as providing a viable business plan and site plan. (CVMC § 5.19.050, subd. (A).) The process included a provisional background review, followed by an interview, which confirmed the applicant's relevant

[1] Citations to the Appellants' Appendix filed with this Court on December 21, 2021, are in the form "[Volume]–AA-[Bates Page(s)]."

experience/qualifications, assets, business plan and operating plan. (AR00363 [Chula Vista Cannabis Regulations, § 0501, subd. (N)(1)].)[2]

Phase I then called for a discretionary review by the Finance Director and "completion of any and all required background checks" by the Chief of Police. (CVMC § 5.19.050, subd. (A)(5).) Following the in-depth secondary background check, the Police Chief could reject Phase I applications for many reasons, including:

> f. The Applicant, or any Owner of the Commercial Cannabis Business, Officer, or Manager 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.
>
> g. The Applicant, or any Owner of the Commercial Cannabis Business, Officer, or Manager has conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other jurisdiction.

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[2] In accordance with California Rules of Court, Rule 8.123, the Administrative Record of proceedings will be lodged with this Court concurrently with the filing of this Respondents' Brief. The Administrative Record is cited to herein as "AR[Bates Page(s)]."

(CVMC § 5.19.050, subd. (A)(5)(f) and (g).) In 2019, the City passed regulations for CVMC Chapter 5.19, including a comprehensive administrative appeal procedure. (AR00355–00384.)

b. UL CHULA'S APPLICATION, DENIAL, AND APPEAL

UL Chula applied in 2019 to be a Storefront Retailer in all four City Council Districts, including District 1 (Application ID no. 57074), the location at issue in this appeal. (AR00001–00116; 1-AA-30, ¶ 79 [Petition for Writ of Mandate].) As part of its District 1 application, UL Chula's principals, including William Senn, certified under penalty of perjury they "ha[d] not conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City of Chula Vista or in any other jurisdiction." (AR00112.) Mr. Senn's affirmation came with a letter from UL Chula's counsel notifying the City of a "stipulated judgment" with the City of San Diego ("San Diego") in *City of San Diego v. The Holistic Café, Inc. et al.*, Case No. 37-2012-00087648-CU-MC-CTL, which the letter described as containing no admission or adjudication of the civil case filed by San Diego against Mr. Senn and the Holistic Café. (2-AA-907–908.) UL Chula also included with its application a resume for Mr. Senn, in which Mr. Senn listed himself as founder of Holistic Café (April 2009 – November 2012), which he described as "[o]perating in Hillcrest without issue since its inception." (2-AA-877.)

On June 10, 2019, the City notified UL Chula of the impending interview process, and requested payment of the required fee for the Police Chief's in-depth Secondary Background Review. (2-AA-912.) In that letter, the City warned UL Chula that review of its application was not yet approved and reserved the right to reject the application based on applicable law and the City's police power authority. (*Ibid*.)

On May 6, 2020, the City issued a Notice of Decision rejecting UL Chula's application because Mr. Senn had been sanctioned by San Diego "for violations of laws or regulations related to unlawful Commercial Cannabis Activity" and because Mr. Senn "was involved in unlawful Commercial Cannabis activity in the City of San Diego from approximately 2010 to 2012." (CVMC § 5.19.050, subd. (A)(5)(f), (g); 2-AA-914–917.) The City's denial was based on Mr. Senn's unlawful operation of the Holistic Café, a marijuana dispensary, in San Diego from 2010 to 2012, and San Diego's subsequent sanctions. (AR00158–00203.)

UL Chula timely appealed the City's decision to deny a Storefront Retailer license. (AR00123–00127.) Based on the appeal request, UL Chula understood the scope of the City's denial as UL Chula's paperwork focused solely on the San Diego violations and advanced several arguments raised in this subsequent litigation. On May 26, 2020, the City provided notice to UL Chula that its administrative hearing would be on June 10, 2020. (2-AA-923–924.)

The City sent an amended notice on May 28, 2020, indicating that (due to the COVID-19 pandemic) the hearing would take place virtually via WebEx. (2-AA-925–926.) UL Chula did not object at any point on the basis that the notice was untimely, nor did UL Chula ask for a continuance — although the Notice of Hearing stated that UL Chula could request a continuance by submitting an email request to the City Manager. (2-AA-924 [Notice of Hearing]; 2-AA-995 [UL Chula's counsel indicating readiness to proceed with hearing]; see generally 2-AA-989–1065 [transcript of hearing].)

On June 5, 2020, the City provided UL Chula with a copy of the evidence the City intended to use at the hearing, consisting of 16 exhibits. (AR00132–00214 .) That same day, UL Chula filed its appeal brief, which further demonstrated that UL Chula understood the City's decision was based on illegal operation of the Holistic Café. (2-AA-978–987.)

At the June 10, 2020 administrative appeal hearing, City Manager Gary Halbert ("City Manager") acted as the hearing officer, advised by Deputy City Attorney Simon Silva. (2-AA-1067.) Mr. Senn appeared for UL Chula along with counsel. (*Ibid.*) The City was represented by Deputy City Attorney Megan McClurg. (*Ibid.*) Chula Vista Police Department Sergeant Mike Varga, Development Services Director Kelly Broughton and Mathew Eaton of HdL Companies were all present and testified for the City. (*Ibid.*) Sergeant Varga testified about the background check conducted into

Mr. Senn and the unlawful operation of the Holistic Café. (2-AA-1005–1039.) Sergeant Varga also testified, without objection, that San Diego conducted cannabis enforcement using zoning regulations, rather than criminal sanctions, in and around 2012. (2-AA-1028–1029.) UL Chula presented no evidence at the hearing. (2-AA-997.)

c. THE CITY'S EXHIBITS

The City Manager received 16 exhibits presented by the City into evidence. (AR00132–00214; 2-AA-1067–1072.) Exhibits 1–7 and 14–16 were received by stipulation. (2-AA-995–996, 1067.) UL Chula objected to Exhibits 8-13. (2-AA-1008–1030.)

The exhibits that UL Chula opposed, which included records from San Diego and the San Diego Superior Court, showed that Holistic Café obtained a business license in San Diego by falsely representing its businesses activity as "the sale of herbal remedy teas and health products." (City Appeal Ex. 10, 2-AA-1059 and Ex. 12, AR00170.) At some point, San Diego and Holistic Café's landlord learned Holistic Café was an illegal marijuana dispensary. Holistic Café's landlord initiated an unlawful detainer action to evict the illegal dispensary. (City Appeal Ex. 12, 2-AA-944–953.) The "Three Day Notice to Surrender Possession," dated February 12, 2012, stated, "[y]ou are required to surrender possession of the premises as you are in violation of zoning laws of the City of San Diego for operating a medical marijuana dispensary and selling marijuana.

Due to illegal activity, you must cease operation and vacate the premises." (City Appeal Ex. 12, 2-AA-951.)

Holistic Café continued its illegal operations despite the start of an unlawful detainer action. On May 14 and May 17, 2012, San Diego conducted limited inspections of the Holistic Café premises. (City Appeal Exs. 8 and 9; AR00158–00171.) On May 16, 2012, San Diego Code Enforcement asked for permission to conduct a more in-depth inspection, which Jessica McElfresh, acting as Holistic Café's Counsel, declined to allow. (City Appeal Ex. 11, AR00172–00173; see also 2-AA-936 [identifying Ms. McElfresh as agent of Holistic Café].)

The inspections resulted in San Diego issuing the Holistic Café a Notice of Violation on May 22, 2012, for operating an unpermitted marijuana dispensary in violation of the San Diego zoning code. (City Appeal Ex. 8, 2-AA-936–942.) The Notice of Violation directed Holistic Café to address numerous code violations, the first being to "[c]ease operating the Marijuana Dispensary." (City Appeal Ex. 8, 2-AA-940 [emphasis in original].)

Despite receiving the Notice of Violation, Holistic Café continued to operate, which forced San Diego to file a nuisance abatement action on December 14, 2012. (City Appeal Ex. 13, 2-AA-955–964.) The subject Complaint alleged that Mr. Senn, as Chief Executive Officer of the Holistic Café, conducted unlawful cannabis activity by operating the Holistic Café "as a marijuana dispensary,

which is also commonly known as a collective or cooperative … within the City of San Diego." (City Appeal Ex. 13, 2-AA-956, ¶ 5.)

Consistent with the aforementioned evidence, the Complaint alleged that the illegal marijuana dispensary operated between 2010 and 2012, and continued to do so despite the February 12, 2012 three-day notice and San Diego's May 22, 2012 Notice of Violation. (City Appeal Ex. 13, 2-AA-957–960, ¶¶ 12–33.) Paragraph 15 of the Complaint alleges:

> [San Diego Municipal Code ("SDMC")] section 1512.0305 and corresponding Table 1512-031 list the permitted uses in the CN-lA zone in the Mid-City Communities Planned District where the PROPERTY is located. The operation or maintenance of a marijuana dispensary, collective, or cooperation is not one of the listed permitted uses in the SDMC section or table.

(City Appeal Ex. 13, 2-AA-958.) Paragraph 16 further asserts that "[t]he operation or maintenance of a marijuana dispensary is not a permitted use in any zone designation under the SDMC." (*Ibid*.) The Complaint thus prayed for an injunction to restrain and enjoin Mr. Senn's illegal use. (City Appeal Ex. 13, 2-AA-963–964.)

Holistic Café and Mr. Senn ultimately entered into a stipulated judgement with San Diego, which did not constitute an admission or an adjudication of the nuisance abatement action.

(City Appeal Ex. 13, 2-AA-966–973.) The stipulated judgment did, however, enjoin Mr. Senn from operating a marijuana dispensary, required closure of the Holistic Café, and payment of civil penalties. (City Appeal Ex. 13, 2-AA-968–970, ¶¶ 6–12.) The Stipulated Judgment, Complaint, and Notice of Violation, establish that San Diego sanctioned Holistic Café for its illegal operation. (City Appeal Ex. 8, 2-AA-936–942 and Ex. 13, 2-AA-966–973.) The City Manager ultimately determined the documents were relevant and admissible and therefore, he accepted them into evidence. (2-AA-1070–1071.)

d. THE CITY MANAGER'S DECISION

Based on the briefs, the evidentiary documents and oral testimony, the City Manager concluded that San Diego had sanctioned Mr. Senn for his illegal cannabis operation in violation of the SDMC. The City Manager therefore issued findings denying UL Chula's appeal and ruling that UL Chula had not met its burden to show the City's decision was erroneous. (City Appeal Ex. 8, 2-AA-936–942; CVMC § 5.19.050, subds. (A)(5)(f), (g); 2-AA-1067–1072.)

e. PROCEEDINGS IN THE TRIAL COURT

UL Chula filed its Petition for Writ of Mandate in San Diego Superior Court on November 13, 2020. (1-AA-10.) The Petition asserted a multitude of theories for overturning the City's decision, including:

1) Civil zoning violations are not disqualifying under the CVMC as a matter of law (1-AA-19–24);
2) The City abused its discretion by failing to exercise its discretion to allow UL Chula's application to proceed despite the disqualifying criteria (1-AA-24–27);
3) The City denied UL Chula fair notice by not disqualifying its application earlier (1-AA-27);
4) The City's hearing procedures violated UL Chula's due process rights by providing insufficient notice and having the City Attorney's Office act in dual roles as advisor and advocate (1-AA-27–29); and
5) The City's findings were not supported by substantial evidence, because "Commercial Cannabis Activity" does not include the sale of medicinal cannabis and any evidence presented was inadmissible hearsay (1-AA-19–24).

Following briefing from the Parties and a hearing on May 21, 2021, the trial court rejected UL Chula's arguments and denied the Petition in its entirety. (2-AA-1135–1138.) With regard to the argument that medicinal marijuana sales cannot be unlawful Commercial Cannabis Activity, the trial court explained that "Petitioner has not met its burden to establish that operation of a medicinal marijuana storefront does not fall under the definition of 'Commercial Cannabis Activity.' …. Petitioner does 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 court also found there was ample evidence to support a finding that Mr. Senn was engaged in unlawful Commercial Cannabis Activity and that "[t]he record reflects that Mr. Senn was operating the marijuana business illegally." (*Ibid.*) The trial court similarly rejected the argument that unlawful Commercial Cannabis Activity could only apply to conduct after 2016, noting "[t]here is no authority for this argument nor would it [be] reasonable to apply such a standard. Doing so would lead to absurd results." (*Ibid.*)

The trial court determined the City's findings were supported by substantial evidence. (2-AA-1136–1137.) None of the authorities cited by UL Chula limited the City's ability to consider hearsay evidence. (*Ibid.*) The court similarly rejected the argument "that it was an abuse of discretion for the Police Chief to exercise the discretion specifically granted by the [Chula Vista] Municipal Code." (2-AA-1137.)

Regarding due process, the trial court first noted there was no evidence Ms. McClurg had acted as both an advocate and advisor in the same proceeding, or that she was the primary advisor to the City Manager. (2-AA-1137.) Nor was the notice deficient in informing UL Chula of the basis for the City's denial. (*Ibid.*) The court recognized that the notice of hearing was untimely, but concluded that "Petitioner waived its right to object by not raising this issue

previously." (2-AA-1138, citing *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.)

On appeal, UL Chula abandons some of its arguments from the trial court, but continues to maintain that:

1) Only inadmissible hearsay supports the City's decision (AOB at p. 32–34);
2) A civil zoning violation before 2016 was not unlawful Commercial Cannabis Activity as a matter of law (AOB at p. 34–38, 41–43);
3) Medicinal cannabis sales are not Commercial Cannabis Activity under the CVMC (AOB at pp. 38–39);
4) The City abused its discretion by failing to exercise discretion (AOB at p. 44–46); and
5) UL Chula was denied a fair hearing because the City Attorney's Office served as both advisor and advocate to the City Manager (AOB at p. 46–50).[3]

Appellant's Opening Brief also argues the trial court erred in rejecting its request to judicially notice two dozen documents that were not included in the administrative record. (AOB at pp. 43–44.) As discussed, *infra*, each contention is without merit, and the trial court's ruling should be affirmed.

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[3] Arguments not raised in Appellant's Opening Brief are, of course, waived for purposes of appeal. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453)

III. STANDARD OF REVIEW

The standard of review on an administrative writ from a quasi-judicial determination is familiar. "[W]hile mandamus is not available to control the discretion exercised by a public official or board, it is available to correct an abuse of discretion by such party." (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 395.) Review in the trial court was limited to the record before the City in denying UL Chula's application and appeal (Code Civ. Proc., § 1094.5), and the trial court was asked to determine only whether the City followed the law. (Code Civ. Proc., § 1094.5, subd. (b); *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist.* (2017) 11 Cal.App.5th 1235, 1244.) The City's "findings are presumed to be supported by the administrative record." (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 443 (*Harrington*) [emphasis added].) All "reasonable doubt" must be resolved "in favor of the findings and decision," and "[i]nferences may constitute substantial evidence as long as they are the product of logic and reason rather than speculation or conjecture." (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 616; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1101.)

Although a court must generally determine whether the agency's actions and findings were supported by substantial evidence, that is not the case where, as here, the permit applicant failed to carry its burden during the administrative hearing:

> Had the [City] decided in [UL Chula's] favor, its findings would have to be supported by substantial evidence. But the [City] decided [UL Chula] failed to carry [its] burden of proof. ... The determination that a party has failed to carry [its] burden of proof is, by its very nature, not required to be supported by substantial evidence, or any evidence at all. It is the lack of evidence of sufficient weight and credibility to convince the trier of fact that results in such a determination.

(*Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 576 (*Hauser*); *see also*, *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224.) UL Chula therefore had "the burden of demonstrating [its] entitlement to the [license]." (*Hauser, supra,* 20 Cal.App.5th at p. 576.) UL Chula had no vested right to a cannabis license, and therefore, is not entitled to a *de novo* hearing on the merits of its license application. (*Id.* at p. 575, citing Code Civ. Proc., § 1094.5, subd. (b).)

The Court of Appeal applies the same standard as the trial court in reviewing the administrative agency's factual determinations. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219.) To the extent the administrative decision rests on a hearing officer's interpretation or application of an ordinance, this Court applies its independent

judgment, while still giving deference to an agency's interpretation of its own ordinances. (*Ibid.*)

> An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, ... the binding power of an agency's **interpretation** of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.

(*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 [original emphasis].)

IV. ARGUMENT

a. UL CHULA WAIVED ISSUES PRESENTED HERE BY FAILING TO ARGUE THEM DURING THE ADMINISTRATIVE APPEAL

UL Chula argues that the phrase "unlawful Commercial Cannabis Activity" cannot apply to Mr. Senn's activities with the Holistic Café because he was selling medicinal, not commercial, cannabis. (AOB at p. 38–39.) Even if UL Chula's argument were correct — it is not, for the reasons discussed in Section IV(c)(iii), *infra* — it did not present this issue to the City Manager during the administrative appeal and thus failed to exhaust its administrative remedies. Exhaustion of remedies is jurisdictional in the sense that

it is a fundamental requirement of judicial review, which may not proceed in its absence. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1151; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.) "Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510.)

Issues not presented at an administrative hearing cannot be raised for the first time on review. (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787 (*Niles Freeman Equipment*).) "The exhaustion doctrine … operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to 'exhaust' the remedy available to them in the course of the proceeding itself." (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 341.) Jurisdictional issues may be raised for the first time on appeal (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339–340). However, the City did in fact raise the issue of UL Chula's failure to exhaust before the trial court, so this appeal is not the first time the concern has been flagged. (2-AA-829.)

An exhaustion requirement is inferred where detailed administrative procedural requirements "provide affirmative

indications of the Legislature's desire" that agencies be allowed to consider in the first instance issues raised during that process. (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1271.)

> Requiring initial resort to an administrative procedure in such situations can be understood as vindicating legislative intent to provide another avenue for resolving disputes, which might be frustrated if that mechanism could be routinely avoided. The exhaustion doctrine also recognizes and gives due respect to the autonomy of the executive and legislative branches, and can secure the benefit of agency expertise, mitigate damages, relieve burdens that might otherwise be imposed on the court system, and promote the development of a robust record conducive to meaningful judicial review. [Citations] [A]bsent an exhaustion rule, a litigant might have an incentive to "sandbag" — in other words, to "avoid securing an agency decision that might later be afforded deference" by sidestepping an available administrative remedy.

(Hill RHF Housing Partners, L.P. v. City of Los Angeles (2021) 12 Cal.5th 458, 478–479)

CVMC Chapter 5.19 and the concomitant Cannabis Regulations (AR00354–384) provide for a full administrative appeal, including defined machinery for the submission of the appeal,

evidence to be considered, standards of review, issues to be considered, and a formal notice of appeal determination which includes notice of "the right of the appellant to seek judicial review of the City Manager's appeal determination." (*Ibid.*) This detailed procedure outlines the City's intent that all issues related to the denial of a cannabis license be considered by the City's administrative review process in the first instance.

Here UL Chula failed to present its argument that unlawful Commercial Cannabis Activity under the CVMC did not include the sale of medicinal marijuana during the administrative appeal. (AOB at p. 39–41; 2-AA-919–921, 978–987.) UL Chula attacks the City's conclusion on this point as erroneous, but never gave the City the opportunity to consider it. Because UL Chula failed to exhaust its remedies, this Court lacks jurisdiction over this issue. (*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878, 885 [affirming judgment for agency in assessment challenge for failure to exhaust].)

UL Chula notes it was not given timely notice of the administrative hearing (AOB at p. 17), and may assert that any failure to exhaust administrative remedies is therefore excused. The City's Cannabis Regulations require notice 20 days before the appeal hearing, and UL Chula only received 14 days' notice. However, the trial court properly determined that UL Chula waived any argument that notice of the administrative appeal hearing was untimely

because UL Chula failed to object to the late notice or ask for a continuance, despite being informed of its ability to do so in the Notice of Hearing. (2-AA-926.)

As the trial court noted " '[i]t is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion.' " (2-AA-1138, citing *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) UL Chula was required to object to the late notice at the hearing and request a continuance at that time. It did neither (see 2-AA-995), and thus waived any such defect in notice. (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 342–343; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697–698.).

UL Chula was required to raise all of its issues in the proper forum — the appeal to the City Manager during the administrative hearing — before attempting to argue those points in this litigation. Its failure to do so robs this court of jurisdiction of its argument regarding medicinal cannabis.

b. THE TRIAL COURT PROPERLY REJECTED EXTRA RECORD EVIDENCE

UL Chula argues that the trial court improperly excluded extra-record evidence offered by UL Chula to support its Petition. (AOB at pp. 41–43.) It asserts certain evidence derived from a California Public Records Act ("PRA") request should have been

admitted under the exception in Code of Civil Procedure section 1094.5, subdivision (e) for evidence that could not with reasonable diligence have been presented at the administrative hearing. (AOB at p. 43.) UL Chula is wrong.

"The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101 (*Pomona Valley*).) "Section 1094.5 contains **limited** exceptions to this rule. 'It is error for the court to permit the record to be augmented, in the absence of a proper preliminary foundation ... showing that one of these exceptions applies.'" (*Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881 [emphasis added].) "Determination of the question of whether one of the exceptions applies is within the discretion of the trial court, and the exercise of that discretion will not be disturbed unless it is manifestly abused."(*Pomona Valley, supra*, 55 Cal.App.4th at p. 101.)

A petitioner may present extra-record evidence in administrative mandate cases only "[w]here the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent … ." (Code Civ. Proc., § 1094.5, subd (e).) Even then, a court reviewing the record for substantial evidence is limited to "remanding the case to be

reconsidered in the light of that [new] evidence … ." (*Ibid.*) "Remand under Code of Civil Procedure section 1094.5, subdivision (e) for consideration of post-decision evidence generally has been limited to truly new evidence, of emergent facts." (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595 (*Fort Mojave*).)

On appeal, UL Chula does nothing more that make the conclusory statement that the extra-record evidence was admissible, and fails to demonstrate the trial court manifestly abused its discretion when declining to consider the evidence. (AOB at p. 43.) The vast majority of documents offered pre-dated the City's initial denial on May 6, 2020. With reasonable diligence, UL Chula could have produced those documents during the administrative appeal. As a result, none reflected "truly new evidence, of emergent facts" and the trial court properly declined to consider them. (*Fort Mojave, supra*, 38 Cal.App.4th at p. 1595.)

c. THE CITY PROPERLY DENIED UL CHULA'S APPLICATION

i. REGULATION OF CANNABIS DISPENSARIES IS WITHIN THE CITY'S POLICE POWER

The City has the right to regulate the operation of cannabis dispensaries within its borders. The operation of a cannabis dispensary is a land use. (*City of Riverside v. Inland Empire Patients*

Health & Wellness Center, Inc. (2013) 56 Cal.4th 729; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 (*City of Claremont*); *City of Vallejo v. NCORP4, Inc*. (2017) 15 Cal.App.5th 1078, 1081, 1088 (*City of Vallejo*).) And a city's regulation of cannabis dispensaries is a land use function that falls well within its police power. (*City of Vallejo, supra*, 15 Cal.App.5th at pp. 1081, 1088.) Accordingly, the City need not license cannabis dispensaries within its limits, and may place reasonable restrictions on granting such licenses. (CVMC § 5.19.010; see Bus. & Prof. Code, § 26200, subd. (a)(1); *City of Vallejo, supra,* 15 Cal.App.5th at. pp. 1081–1082 ["[s]tate law permitting medicinal marijuana use and distribution does not preempt 'the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions.'"])[4]

[4]The California Legislature reinforced local zoning authority over dispensaries enacting the Medicinal and Adult Use Cannabis Regulation and Safety Act [Cal. SB 94 and AB 133 (2017)], which provides that State law does not "supersede or limit existing local authority for… local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements." (Bus. & Prof. Code, § 26200 (a)(1).)

One such reasonable restriction is the ability to deny a license to applicants who have violated local laws by running illegal dispensaries. Such activities show an applicant has a history of flouting municipal law, presenting a potential risk to the health and safety of a city's residents. (See *City of Vallejo, supra,* 15 Cal.App.5th at. pp. 1086 ["[P]ast compliance shows a willingness to follow the law, which suggests future lawful behavior."]; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1181 ["It is from this fundamental [police] power that local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety and welfare."]) Here, Mr. Senn operated a cannabis dispensary illegally and continued to do so despite a pending unlawful detainer action and receipt of a Notice of Violation from San Diego. The City could, and did, correctly refuse him a license.

ii. MR. SENN'S PRIOR PROSECUTION FOR ZONING LAW VIOLATIONS DISQUALIFIED UL CHULA

UL Chula argues the City could not deny its license application based on Mr. Senn's illegal operation of a marijuana business in San Diego and the resulting abatement action filed by San Diego. (AOB at pp. 34–39, 41–43.) Not so. The City acted well within its discretion in disqualifying UL Chula under CVMC section 5.19.50, subdivisions (A)(5)(f) and (g). UL Chula's deliberate misreading of San Diego's zoning code does not detract from the

fact that Mr. Senn was operating a marijuana dispensary in violation of local law and was "adversely sanctioned or penalized" by San Diego for such operation. (CVMC § 5.19.050, subd. (A)(5)(f).)

Although UL Chula advised the City of the Stipulated Judgment between Mr. Senn and San Diego with its application, UL Chula did not disclose all of the pertinent information uncovered during the City's more in-depth background investigation. (See 2-AA-907–908.) Specifically, UL Chula failed to advise the City that Mr. Senn illegally operated the Holistic Café marijuana dispensary for several years, through at least 2012, in a zone that did not permit the use. San Diego issued at least one notice of violation and, following Mr. Senn's failure to cease the illegal operation, filed a civil action to abate the illegal use. (See 2-AA-936-942, 955–973; CVMC § 5.19.050, subd. (A)(5)(f) and (g).) This information, plus the fact that several months before San Diego issued the Notice of Violation, the Holistic Café's landlord sought to terminate the tenancy based on the illegal operation of a marijuana dispensary onsite, was instrumental in the City's decision to deny UL Chula's application. (2-AA-951.)

The California Constitution confers police power to local government and their electors to determine the allowable land uses within their jurisdictions. (Cal. Const., art. XI, § 7; *Vill. of Euclid, Ohio v. Ambler Realty Co*. (1926) 272 U.S. 365, 392 [zoning regulations expressly within city's police power]; *IT Corp. v. Solano County Bd. of*

Supervisors (1991) 1 Cal.4th 81, 89 (*IT Corp.*) ["The power of cities and counties to zone land use in accordance with local conditions is well entrenched."]) "When use of a parcel violates applicable zoning rules, the responsible agency may obtain abatement—i.e., removal of the violation and restoration of legal use." (*IT Corp., supra*, 1 Cal.4th at p. 89.) That is what occurred in 2012, when San Diego filed a Complaint against Mr. Senn and the Holistic Café and sought to enjoin them "from operating or maintaining a marijuana dispensary, cooperative, or collective" because "[t]he operation or maintenance of a marijuana dispensary is not a permitted use in any zone designation under the SDMC." (2-AA-958, ¶ 16.)

UL Chula's argument that Mr. Senn was not involved in unlawful Commercial Cannabis Activity because San Diego's zoning laws did not expressly ban marijuana dispensaries misunderstands how zoning laws function and is without merit. (AOB at p. 36.) California "courts have recognized permissive zoning as a valid method of prohibiting dispensaries." (*Urgent Care Medical Services v. City of Pasadena* (2018) 21 Cal.App.5th 1086, 1095.) Under permissive zoning, "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a permissible use, it follows that such use is impermissible." (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433 (*City of Corona*); see also *City of Claremont, supra*, 177 Cal.App.4th 1153.) San Diego's permissive zoning code did not allow operation of the Holistic Café; hence the numerous

administrative and legal steps San Diego took to shut down the illegal business as a "non-permitted, non-conforming use." (*City of Corona*, *supra*, 166 Cal.App.4th at p. 420; see also City Appeal Ex. 8, 2-AA-936–942; Ex. 12, 2-AA-951; Ex. 13, 2-AA-955–964.)

UL Chula fixates on the Stipulated Judgment not constituting an admission or adjudication of the civil case against Holistic Café. (AOB at pp. 36–37.) The CVMC does not require a judgment or admission for disqualification. (CVMC § 5.19.050, subd. (A)(5).) Rather, it disqualifies an applicant who "conducted, facilitated, caused, aided, abetted, suffered, or concealed" or "has been adversely sanction or penalized… for" unlawful Commercial Cannabis Activity. (*Id.*, subd. (A)(5)(f) and (g).) As noted, the Stipulated Judgment enjoined Mr. Senn from operating a marijuana dispensary, required closure of the Holistic Café, and payment of civil penalties. (City Appeal Ex. 13, 2-AA-968–970, ¶¶ 6–12.) Together, the Stipulated Judgment, Complaint, and the Notice of Violation established that San Diego sanctioned Holistic Café for its illegal operation. (City Appeal Ex. 8, 2-AA-936–942 and Ex. 13, 2-AA-966–973.) And the evidence at the administrative hearing demonstrated Mr. Senn was engaged in unlawful Commercial Cannabis Activity from 2010 to 2012 by operating the Holistic Café. (AR00132–00214.)

UL Chula argues "[t]he term 'commercial cannabis activity,' was first defined by the State of California after passage of

Proposition 64 in 2016, and by the City upon enactment of its cannabis regulatory scheme in 2018. Before then, UL Chula claims that the term 'unlawful Commercial Cannabis Activity' had no legal significance." (AOB at pp. 41–42.) On that basis, UL Chula asserts that unlawful activity before 2016 may not serve as the basis for the City's decision. (AOB at pp. 35, 41–42.) However, the argument that CVMC section 5.19.050, subdivisions (A)(5)(f) and (g) must be interpreted as applying "only to activity after 2016" simply does not follow. (AOB at p. 42.) Commercial Cannabis Activity is defined to include the commercial distribution, delivery or sale of marijuana, exactly the conduct for which Mr. Senn was sanctioned for by San Diego. (CVMC § 5.19.020.)

That the phrase "Commercial Cannabis Activity" includes conduct meeting that definition prior to the passage of Ordinance 3418 is made apparent in the second paragraph of Chapter 5.19, which states "in an effort to mitigate the negative impacts brought by unregulated Commercial Cannabis Activity, the City now desires to permit, license, and fully regulate Commercial Cannabis Activities within the City." (CVMC § 5.19.010.) The City undoubtedly maintains the discretion to draft an ordinance that allows cannabis dispensaries while requiring a certain amount of experience and disqualifying anyone who engaged in past unlawful cannabis activity. (Bus. & Prof. Code, § 26200, subd. (a)(1); *City of*

Vallejo, supra, 15 Cal.App.5th at p. 1086.) That such a system might winnow otherwise qualified applicants does not invalidate it.

iii. THE SALE OF MEDICAL CANNABIS FALLS WITHIN THE DEFINITION OF "COMMERCIAL CANNABIS ACTIVITY"

UL Chula argues the sale of medicinal cannabis is not covered in the definition of Commercial Cannabis Activity under the CVMC. (AOB at pp. 39–41.) As explained above, UL Chula failed to exhaust its remedies on this issue, and has waived the argument. Nevertheless, should the Court elect to consider this argument on the merits, the claim also fails because UL Chula's proposed dichotomy between "medicinal" cannabis activity on the one hand, and "commercial" cannabis activity on the other, finds no support in the municipal code.

> Specifically, the CVMC defines "Cannabis" as:
>
> [A]ll parts of the Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from cannabis.

(CVMC § 5.19.020.)

This definition is completely consistent with the definition of Cannabis in the California Uniform Controlled Substances Act (Health & Saf. Code, § 11018) and the Medicinal and Adult Use Cannabis Regulation and Safety Act ("MAUCRSA") (Bus. & Prof. Code, § 26001, subd. (f).)[5]

Consistent with MAUCRSA, CVMC section 5.19.20 also defines "Commercial Cannabis Activity" as "the commercial cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of Cannabis or Cannabis Products." The term "sale" is not limited to for-profit transactions, but means "any transaction whereby, for any consideration, title to Cannabis or Cannabis Products is transferred from one person to another… ." (*Ibid*.; see also Bus. & Prof. Code, § 26001, subd. (k).)

Likewise, CVMC section 5.19.20 defines "Medicinal Cannabis" as "Cannabis or a Cannabis Product for use pursuant to the Compassionate Use Act of 1996 (Proposition 215), found at Section 11362.5 of the California Health and Safety Code, by a medicinal

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[5] As set forth in Health and Safety Code section 11032, "where reference is made to the term 'marijuana' in any law not in this division, unless otherwise expressly provided, it means cannabis **as defined in this division**." (Emphasis added.) Accordingly, cannabis and marijuana can be used interchangeably.

cannabis patient in California who possesses a physician' s recommendation." (*Ibid.* [emphasis added]; Bus. & Prof. Code, § 26001, subd. (ai) (1).) Medicinal Cannabis is a subset of Cannabis, not a different category, and the sale or transfer of Medicinal Cannabis is a form of Commercial Cannabis Activity. In the context of cannabis, "'[s]ell,' 'sale,' and 'to sell' include any transaction whereby, for any consideration, title to cannabis or cannabis products is transferred from one person to another." (Bus. & Prof. Code, § 26001, subd. (as).) There is no legal or factual distinction between the **sale** of "commercial" and "medicinal" cannabis for purposes of the legislation and/or this litigation.

The lack of a distinction between medicinal and commercial cannabis in the CVMC is further confirmed by the existence of "M-Licenses" which are "a State License for Commercial Cannabis Activity involving Medicinal Cannabis." (CVMC § 5.19.020 [emphasis added]; see also Bus. & Prof. Code, § 26001, subd. (ae).) Under both the CVMC and MAUCRSA, Commercial Cannabis Activity expressly embraces both medicinal and non-medicinal licenses:

> "State License" means a License issued by the state of California, or one of its departments or divisions, under State Laws to engage in Commercial Cannabis Activity. License includes both an "A-license" (adult use) and an

"M-license" (medicinal use), as defined by State Laws, as well as a testing laboratory license.

(CVMC § 5.19.20.)

UL Chula relies on a distinction that does not exist. As the trial court correctly noted, 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. The fact that other sections are specific to medicinal marijuana does not exclude it from rules which have broader application." (2-AA-1136.)

Moreover, any alleged distinction certainly did not exist between 2010 and 2012, when San Diego was seeking to end Mr. Senn's illegal operation at the Holistic Café. Courts recognized at the time that, despite whatever exception to California's marijuana laws existed under the Compassionate Use Act (Health & Saf. Code, § 11362.5 et seq.) for nonprofit medicinal marijuana sales, the sale or transfer of marijuana by a medical dispensary was still a sale, which required the dispensary to pay sales tax. (*People v. Baniani* (2014) 229 Cal.App.4th 45, 55 ["even those who do not make a profit from selling medical marijuana must pay taxes on the sales"].)

Counter to UL Chula's assertion, the CVMC prohibition on Storefront Retailers selling Medicinal Cannabis does not mean the sale of Medicinal Cannabis is not Commercial Cannabis Activity. (AOB at p. 40.) The City also prohibits Storefront Retailers from making deliveries (CVMC, § 5.19.090, subd. (B)), as these activities

are restricted to Non-Storefront Retailers. (*Id.* § 5.19.040, subd. (D) ["Storefront Retailer City Licenses shall be limited to A-Licensees only. All other City License types may be available to A-Licensees and M-Licensees."]) The CVMC has no distinction between Medicinal Cannabis and Commercial Cannabis, only Storefront Retailers and Non-Storefront Retailers. The illegal operation of a medical marijuana dispensary is unlawful Commercial Cannabis Activity, and Mr. Senn and the Holistic Café's activities served as a proper basis for the City to deny UL Chula's application.

Finally, to the extent there may be ambiguity in the CVMC, courts defer to a city's interpretation of its own code. (E.g., *California Hotel & Motel Assn. v. Industrial Welfare Com*. (1979) 25 Cal.3d 200, 211–212.) "[Administrative bodies] have the ordinary authority … to resolve, in the first instance, ambiguities in the interpretation and application of [governing] statutes … ." (*Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement* (2020) 9 Cal.5th 1032, 1070.) "Greater deference should be given to an agency's interpretation where '"the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion."' (*Harrington, supra,* 16 Cal.App.5th at p. 435.) Given the situation at hand, and given the substantial evidence in the record that supports the City's

interpretation of its own code, the judgment of the trial court should be affirmed.

d. THE CITY MANGER'S FINDINGS WERE PROPER

UL Chula argues that the City Manager's ruling was not supported by substantial evidence, asserting "[t]here 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)." (AOB at pp. 34.) Not so. First, UL Chula is challenging the City Manager's determination following the administrative hearing to deny its appeal. At that hearing, UL Chula had the burden to show error in the City's rejection of its application. (2-AA-1077 [Chula Vista Cannabis Regulations, § 0501, subd. (P)(2)].) The City Manager referenced this requirement multiple times in his Notice of Decision. (2-AA-1067–1072.) UL Chula put on no evidence, and thus did not sustain its burden of proof.

Second, UL Chula repeatedly asserts that the evidence presented by the City Attorney's office at the hearing was hearsay. The trial court properly determined that the formal rules of evidence did not apply to the hearing. (2-AA-1136.) Chula Vista's Cannabis Regulations, section 0501, subdivision (P)(2)(c) states that the "hearing shall not be conducted according to technical rules of procedure and evidence applicable to judicial proceedings. Evidence that might otherwise be excluded under the California

Evidence Code may be admissible if it is relevant and of the kind that reasonable persons rely on in making decisions." (2-AA-1077.) Hearsay, where permitted by statute, is competent evidence in an administrative proceeding. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1244.)

UL Chula cites to the much older case of *Walker v. San Gabriel* (1942) 20 Cal.2d 879, 881–882 (*Walker*) for the proposition that "even if the administrative procedure allowed for flexibility, uncorroborated hearsay, without more, cannot constitute substantial evidence." (AOB at p. 33.) However, *Walker* states that "hearsay, **unless specially permitted by statute**, is not competent evidence… ." (*Walker, supra,* 20 Cal.2d at p. 881 [emphasis added].) Appellant ignores that portion of the *Walker* decision to UL Chula's detriment.

The other authorities cited by UL Chula are equally inapposite. Government Code section 11513, subdivision (d) only applies to state agencies. (Gov. Code, §§ 11500; 11501; *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538 [relying on Gov. Code, § 11513]; *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 597 [citing cases dealing with state agencies or where hearsay was inadmissible].) In *Layton v. Merit System Commission* (1976) 60 Cal.App.3d 58, 67, the burden was on the city to justify an employee's suspension by a preponderance of the evidence under that agency's own grievance procedure. The

commission did not hold a hearing, and erroneously determined that the employee had the burden of proof. (*Ibid.*) In that case, hearsay was **not** authorized by the city's grievance procedure. (*Id.* at pp. 67–68.) Here, the burden was on UL Chula at the administrative hearing and hearsay was specifically allowed by the CVMC if "relevant and of the kind that reasonable persons rely on in making decisions." (2-AA-1077.)

Finally, even if the formal rules of evidence applied, the documents presented to the City Manager (AR00132–00214) were admissible under the official records exception to the hearsay rule. (Evid. Code, § 1280; 2-AA-1010–1011.) For example, documentary evidence of a sanction, such as the penalties imposed on the Holistic Café by San Diego (2-AA-968–970, ¶¶ 6–12), is admissible to show that the sanction occurred. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1066 [abstract of judgment]; *People v. Wheeler* (1992) 4 Cal.4th 284, 300 fn. 13 [misdemeanor conviction].)

Similarly, San Diego's Notice of Violation (2-AA-936–942) and the unlawful detainer action (2-AA-944–953) demonstrate that Mr. Senn had engaged in unlawful Commercial Cannabis Activity. Sergeant Varga's testimony demonstrated that San Diego addressed illegal dispensaries through the zoning code enforcement process in 2012. (2-AA-1028–1029.) Thus, the City Manager had ample, uncontroverted evidence that Mr. Senn had been sanctioned for unlawfully running a marijuana dispensary. The City Manager thus

correctly found that UL Chula could not meet its burden on appeal. (Chula Vista Cannabis Regulations, § 0501, subd. (P)(4); AR00369.)

e. THE CITY DID NOT ABUSE ITS DISCRETION

Next, UL Chula argues the City abused its discretion by not exercising its discretion to approve UL Chula's application. (AOB at pp. 44–46.) UL Chula is mistaken. The City properly exercised its discretion and denied UL Chula's application because the City found Mr. Senn had been involved in and sanctioned for unlawful Commercial Cannabis Activity in San Diego as explained in depth in this brief.

However, UL Chula actually argues that the City exercised its discretion to make the "wrong call," which is not a valid basis for issuing a writ of mandate. "Although a court may order a government entity to exercise its discretion in the first instance when it has refused to act at all, the court will not 'compel the exercise of that discretion in a particular manner or to reach a particular result.' [Citation.]" (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1555.) UL Chula cannot relitigate by writ the wisdom of the City's discretionary acts.

UL Chula incorrectly cites to *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga Assn.*), for the proposition that the City had to make "additional factual findings to demonstrate its reasons to reject the application." (AOB at p. 45.) *Topanga Assn.*, which dealt the need for findings in

the adjudicatory decision of an agency, includes no such requirement. In fact, the City Manager made detailed findings denying UL Chula's appeal, satisfying the mandate of the *Topanga Assn.* decision. (*Topanga Assn., supra,* 11 Cal.3d at pp. 514–515; 2-AA-1067–1072.)

Further, the City's initial denial stated the precise reasons the City was denying the application. (2-AA-917.) And as discussed, the City had ample reason to deny UL Chula's application because Mr. Senn was previously involved in unlawful Commercial Cannabis Activity. (See *City of Vallejo, supra,* 15 Cal.App.5th at. pp. 1086 ["[P]ast compliance shows a willingness to follow the law, which suggests future lawful behavior."]) UL Chula's argument, that because the City **could** have ignored Mr. Senn's disqualifying activities, the City was therefore **required** to grant UL Chula a license unless it articulated additional reasons for denial, finds no support in either law or logic.

f. THE ADMINISTRATIVE HEARING DID NOT VIOLATE DUE PROCESS

UL Chula argues that the administrative hearing violated its due process rights because the City Attorney's Office served as both counsel for the City and as advisor to the hearing officer. (AOB at pp. 46–51.) However, UL Chula fails to meet its burden to show bias or prejudice. (*Breakzone Billiards*, *supra*, 81 Cal.App.4th at p. 1237.)

> Our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decision maker to prove the same with concrete facts: " 'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals.

(*Id.* at p. 1237.) So, too, here. UL Chula's pique at being denied a license cannot serve as the basis for a due process violation. It must allege specific facts showing clear prejudice or bias. As the trial court noted, UL Chula's "argument relies on the court accepting its interpretation of the law in finding there was a conflict because it presumes a finding that Ms. McClurg was providing erroneous advice on the law… the court is not adopting this finding." (2-AA-1137.)

UL Chula incorrectly relies on *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 813, to argue that Ms. McClurg's role in advising the City Council in prior cannabis-related matters disqualified her from acting on behalf of the City at the appeal hearing. (AOB at pp. 48–49.) *Quintero* was disapproved on this point by the California Supreme Court in *Morongo Band of Mission Indians*

v. State Water Resources Control Bd. (2009) 45 Cal.4th 731 (*Morongo Band*). There, the Supreme Court held that, absent evidence the agency attorney ever acted in both advisory and prosecutorial capacities in any single adjudicative proceeding, or that the adjudicative body ever regarded the agency attorney as its sole or primary legal adviser, an agency attorney acting as adviser and prosecutor in separate matters does not violate due process. (*Id.* at p. 740.) Ms. McClurg did not act as the City Manager's attorney in the administrative appeal and therefore, the *Quintero* case is inapplicable.

Since there is nothing in the administrative record that demonstrates bias or unfairness by the City Manager, especially where – as here – the City Manager had separate legal counsel during the hearing, UL Chula's bald assertion that the City Manager *believed* Ms. McClurg was a subject matter expert on CVMC Chapter 5.19 has no support. (AOB at pp. 48–49.)

To support its erroneous due process argument, UL Chula argues that Ms. McClurg prejudicially omitted the word "commercial" from "unlawful Commercial Cannabis Activity" occasionally during the administrative hearing. (AOB at pp. 49–50.) UL Chula misstates the whole of the record wherein Ms. McClurg repeatedly referred to "Commercial Cannabis Activity" throughout the hearing, including during closing arguments. (2-AA-1007; 1032; 1057.) Appellant also turns a blind eye to its own attorney's

references to "Commercial Cannabis Activity" throughout. (2-AA-999–1002; 1038; 1049–1055; 1060–1062.)

There is no reason to believe that the City Manager was confused on the requirements of CVMC section 5.19.050, subdivisions (A)(5)(g) and (f), particularly since the final decision stated unequivocally that "Appellant'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 5.19.050(A)(5)(f)," and that section 5.19.050, subdivision (A)(5)(g) "focuses on Appellant's involvement in unlawful Commercial Cannabis Activity." (2-AA-1067–1074.)

UL Chula cites no evidence that Ms. McClurg's choice of words resulted in any unfair prejudice. Moreover, UL Chula failed to raise this issue at the administrative hearing, depriving the City of the chance to address any allegedly missed words at the proper time. (*Niles Freeman Equipment, supra*, 161 Cal.App.4th at p. 787 [Issues not presented at administrative hearing cannot be raised for the first time on review].)

Finally, UL Chula argues that the City failed to meet its burden to show adequate separation between the City Attorney's advocacy and advisory roles during the hearing. (AOB at p. 47, citing *Quintero, supra,* 114 Cal.App.4th at p. 813.) Once again, UL Chula fails to meet its burden to show bias or prejudice, and cannot shift the burden onto the City. (*Breakzone Billiards*, *supra*, 81

Cal.App.4th at p. 1237.) The Supreme Court has confirmed that "[t]o show nonfinancial bias sufficient to violate due process, a party must demonstrate actual bias or 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." ' " (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 219.) "[D]ue process violations generally are confined to 'the exceptional case presenting extreme facts.' " (*Ibid.*) The burden is on the party alleging bias to "lay a 'specific foundation;' for suspecting prejudice that would render an agency unable to consider fairly the evidence presented at the adjudicative hearing [citations]; it must come forward with 'specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.' " (*Id.* at p. 221, citing *Morongo Band, supra,* 45 Cal.4th at p. 741.) Here, UL Chula does not point to specific evidence making this an exceptional case, and does not meet its burden to demonstrate a due process violation. The trial court's decision should be affirmed.

V. CONCLUSION

UL Chula failed, both before the trial court and on this appeal, to carry its burden to show an abuse of discretion by the City or the City Manager. The City properly denied UL Chula's application based on Mr. Senn's illegal operation of a marijuana dispensary, an activity the resulted in sanctions from San Diego. The City

Manager's Statement of Decision upholding that denial was supported by the law and substantial evidence, and UL Chula's due process arguments are without merit.

Respondents therefore respectfully request that this Court affirm the trial court's ruling.

DATED: March 24, 2022

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DATED: March 24, 2022

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CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.204(C)(1)

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DATED: March 24, 2022

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PROOF OF SERVICE

UL Chula Two LLC v. City of Chula Vista, et al.

San Diego Superior Court, Case No. 37-2020-00041554-CU-WM-CTL

Court of Appeal for the State of California,

Fourth Appellate District, Division One - Case No.: D079215

Our File No.: 33020-0009

I, Lourdes Hernandez, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 E. Colorado Boulevard, Suite 850, Pasadena, California 91101-2109. My email address is: LHernandez@chwlaw.us. On March 24, 2022, I served the document(s) described as **JOINT RESPONDENTS' BRIEF** on the interested parties in this action addressed as follows:

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Executed on March 24, 2022, at Pasadena, California.

/s/ Lourdes Hernandez

Lourdes Hernandez

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UL Chula Two LLC v. City of Chula Vista, et al.

San Diego Superior Court, Case No. 37-2020-00041554-CU-WM-CTL

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

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

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Lower Court Case Number: **37-2020-00041554-CU-WM-CTL**

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

3/24/2022

Date

/s/Lourdes Hernandez

Signature

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