

**Case No. D079215**

In the Court of Appeal, State of California

FOURTH APPELLATE DISTRICT, DIVISION ONE

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**UL CHULA TWO LLC,**  
*Plaintiff and Appellant*

vs.

**CITY OF CHULA VISTA,**  
*Respondent and Appellant.*

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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

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**MOTION TO STRIKE PORTIONS OF  
APPELLANT'S OPENING BRIEF**

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## **MOTION**

### **To the Honorable Presiding Justice and Associate Justices of Division One of the Fourth District Court of Appeal:**

Respondents, City of Chula Vista, March and Ash Chula Vista, Inc. and TD Enterprise, LLC (collectively, “Respondents”) move to strike these sections of Plaintiff and Appellant UL Chula Two, LLC’s (“UL Chula”) Opening Brief as constituting impermissible extra-record evidence :

- “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.]” (AOB at p. 16.)
- “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.]” (AOB at p. 29.)
- “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.]” (AOB at p. 43.)

- “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.” (AOB at p. 48.)
- “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.] 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] . . . to give more credence to [Ms. McClurg’s] arguments when deciding [Petitioner’s] case.’” (AOB at pp. 48–49.)

- “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.” (AOB at p. 51.)

UL Chula presents these purported facts on appeal for the Court’s consideration, despite the trial court refusing to take judicial notice of the same as outside of the administrative record (2-AA-1138; *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101 (*Pomona Valley*)). UL Chula does not move for notice here, and may not base its appeal on evidence never considered by the trial court.

Respondents therefore request the Court grant this motion to strike or, alternatively, decline to consider the inadmissible evidence presented in Appellant’s Opening Brief.

DATED: March 24, 2022

**COLANTUONO, HIGHSMITH &  
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/s/ Alena Shamos

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DATED: March 24, 2022

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DATED: March 24, 2022

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## **MEMORANDUM**

### **I. INTRODUCTION**

Despite the trial court rejecting Plaintiff and Appellant UL Chula Two, LLC's ("UL Chula") attempts to present extra-record evidence in this administrative mandamus case, UL Chula presents those same facts in its Opening Brief ("AOB"). These purported facts were and are inadmissible, as writs of administrative mandate are decided solely on the record before the administrative agency. Thus, Defendant and Respondent City of Chula Vista, and Real Parties in Interest March and Ash Chula Vista, Inc. and TD Enterprise, LLC (collectively, "Respondents") move to strike references to this improper evidence from the AOB.

### **II. FACTUAL AND PROCEDURAL BACKGROUND**

A complete statement of facts is included in the Joint Respondents' Brief, filed concurrently, and incorporated by reference. (RB at pp. 15–23.) On April 2, 2021, UL Chula submitted a Request for Judicial Notice to the trial court supporting its Motion for Writ of Mandate. (1-AA1570–571.) The Request for Judicial Notice sought to admit 28 exhibits not part of the administrative record. (1-AA–572–797.) Respondents objected (2-AA-848–850; see also 2-AA-1124–1127 [UL Chula's reply to objections] ), and the trial court denied the request (2-AA-1138).



### **III. ARGUMENT**

#### **a. UL Chula May Not Introduce Extra-Record Evidence on Appeal**

As discussed in the Joint Respondents' Response Brief (RB. at pp. 33–35), Respondents' Opposition to the Petition for Writ of Mandate (2-AA-824–826), and Respondents' Objections to the Request for Judicial Notice (2-AA-848–850), UL Chula's extra record evidence is inadmissible. "'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, supra*, 55 Cal.App.4th at p. 101.) "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.)

Petitioners 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); see also *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595 (*Fort Mojave*).) 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." (*Ibid.*)

UL Chula does not move for judicial notice on appeal, and assumes the Court will reverse the trial court's decision to exclude extra-record evidence. (AOB at pp. 43–44.) As the Joint Respondents' Brief notes, the trial court's decision was proper, not an abuse of discretion, and should be upheld on appeal. (RB at pp. 33–35.) Thus, references to the excluded evidence to support UL Chula's other arguments on appeal are improper and should be stricken.

#### **IV. CONCLUSION**

Respondents respectfully ask this Court to strike or disregard the facts and arguments in Appellant's Opening Brief based on inadmissible, extra-record evidence.

DATED: March 24, 2022

**COLANTUONO, HIGHSMITH  
& WHATLEY, PC**

*/s/ Alena Shamos*

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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 **MOTION TO STRIKE PORTIONS OF APPELLANT'S OPENING BRIEF** on the interested parties in this action addressed as follows:

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/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

Court of Appeal for the State of California,

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

Our File No.: 33020-0009

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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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