

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

**OPPOSITION TO APPELLANT'S
MOTION FOR JUDICIAL NOTICE**

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

Defendant and Respondent City of Chula Vista (“City”), and Real Parties in Interest March and Ash Chula Vista, Inc. and TD Enterprise, LLC (collectively “Respondents”) submit their Opposition to Plaintiff and Appellant UL Chula Two, LLC’s (“UL Chula”) Motion for Judicial Notice (the “Motion”) under California Rules of Court, rule 8.54(a)(3). UL Chula’s Opening Brief (“AOB”) attempted to present inadmissible, extra-record evidence in this administrative mandamus case, leading Respondents to move to strike the AOB’s offending portions. UL Chula now belatedly files this Motion, asking the Court to admit the same improper evidence. These documents are not subject to judicial notice because they are extra-record evidence introduced to contradict the Administrative Record, and because they are irrelevant. This Court should therefore deny the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A complete statement of facts is included in the Joint Respondents’ Brief (“RB”), filed March 24, 2022, and incorporated herein by reference. (RB at pp. 15–23.)

On April 2, 2021, UL Chula submitted a Request for Judicial Notice (“RJN”) to the trial court supporting its Motion for Writ of

Mandate. (1-AA-570–571.) The RJN 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 RJN (2-AA-1138).

On December 21, 2021, UL Chula filed its AOB which relied on the same extra-record evidence the trial court declined to consider. Respondents objected, and moved to strike the offending portions of the AOB. (Respondent’s Motion to Strike Portions of AOB (“Motion to Strike”), at pp. 4–6.) UL Chula now asserts the Motion to Strike was mooted by this later filed Motion, itself merely a belated attempt to admit the same improper evidence denied by the trial court. (Opposition to Motion to Strike, at pp. 4–6 .) The Motion seeks consideration of a list of cannabis business applicants (1-AA-603), the articles of incorporation for the Holistic Café (1-AA-605), amendments to the judgment against Holistic Café (1-AA-667–668), San Diego ordinances and municipal code sections (1-AA-607–628, 630–665), City meeting minutes (1-AA-670–690), and City notices as to other rejected applicants (1-AA-692–797). (Motion at p. 7–8.)

II. ARGUMENT

A. UL CHULA'S EXTRA-RECORD EVIDENCE SHOULD BE REJECTED

UL Chula's extra record evidence is inadmissible. (RB at pp. 33–35; Motion to Strike at pp. 9-10; 2-AA-824–826; 2-AA-848–850.)

“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.) “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.) 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.* [emphasis added].)

UL Chula has failed — consistently — to demonstrate why these documents could not have been presented during the administrative hearing in the exercise of reasonable diligence, or to argue they represent emergent facts. (Code Civ. Proc., § 1094.5, subd (e).) For example, UL Chula oddly asserts that noticing the Holistic Café's articles of incorporation (1-AA-605) and amended judgment with the City of San Diego (1-AA-667–668) will demonstrate the "City's improper and untimely notice hampered UL Chula's ability to prepare for the administrative hearing regarding the application for a retail commercial cannabis license." (Motion at p. 11.) UL Chula provides no explanation for this statement. More important, as in the trial court, UL Chula fails to clarify why documents dated August 10, 2009 and May 3, 2019 (1-AA-605, 667–668), which were uniquely in UL Chula's possession, could not have been presented at a June 10, 2020 hearing. (2-AA-1067.) Similarly, the notices to other applicants all predate the administrative hearing. (1-AA-692–797.) If UL Chula was unprepared for the administrative hearing, it needed

to ask for a continuance at that time. (RB. at pp. 31–32¹.) It cannot cure that error with new evidence now.

B. UL CHULA’S EVIDENCE IS IRRELEVANT

Documents must be relevant to the material issue to be judicially noticeable. (*People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415,422, fn. 2; *Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 157, fn. 4.) Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only relevant material may be noticed.” (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257; see *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4 [notice denied because relevance not shown].)

Beyond being inadmissible extra-record evidence, UL Chula makes no effort to establish the documents it seeks to admit are relevant. The Court should therefore decline to notice material that “has no bearing on the limited legal question at hand.” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1144, fn. 5; see also *Schifando v. City of Los*

¹ UL Chula did not ask for a continuance despite the Notice of Hearing clearly stating it could do so by submitting an email request to the City Manager. (AR00129, 2-AA-924 [Notice of Hearing]; AR00231, 2-AA-995 [UL Chula’s counsel indicating readiness to proceed with hearing]; see generally AR00225–00301, 2-AA-989–1065 [transcript of hearing].)

Angeles (2003) 31 Cal.4th 1074, 1089 [declining to notice irrelevant material]; *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194 [same].) Relevant evidence tends to “prove or disprove [a] disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) Evidence is relevant if it tends to “logically, naturally and by reasonable inference... establish material facts” (*People v. Fields* (2009) 175 Cal.App.4th 1001, 1016.)

Evidence the City rejected other applicants (1-AA-692–797) is irrelevant to the issue at hand, namely, whether the hearing officer properly found UL Chula failed to carry its burden during the administrative hearing to show error in the City’s rejection of UL Chula’s application. (See RB at pp. 46–49.) So, too, the list of cannabis business applicants (1-AA-603), documents related the Holistic Café (1-AA-605, 667–668), and City meeting minutes (1-AA-670–690) have no bearing. None were presented at the administrative hearing, and none bear on whether UL Chula carried its burden at that hearing.

Finally, to the extent this Court takes judicial notice of any documents, such notice must be limited to the existence of the records, and does not include notice of the truth of the matters stated therein. (*Magnolia Square Homeowners Ass’n v. Safeco Ins. Co. of America* (1990) 221 Cal.App.3d 1049, 1056; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 145–146 [hearsay statements in court records not judicially noticeable.]; *People v. Long* (1970) 7 Cal.App.3d

586, 591 [“While the courts take judicial notice of public records, they do not take notice of the truth of matters stated therein”].)

As the Joint Respondents’ Brief notes, the trial court’s decision to exclude this evidence was proper, not an abuse of discretion, and should be upheld on appeal. (RB at pp. 33–35.) Admitting the excluded evidence now is improper and the Motion should be denied. The Court is under no obligation to take judicial notice of evidence rejected by the trial court and should decline to do so here. (See Evid. Code, § 459, subd. (a) [“reviewing court **may** take judicial notice of any matter specified in Section 452,” emphasis added].) Moreover, as UL Chula tacitly acknowledges, denying its Motion should also lead the Court to grant the Motion to Strike. (Opposition to Motion to Strike, at pp. 4–6.)

III. CONCLUSION

UL Chula’s proffered documents constitute inadmissible extra-record evidence and they are irrelevant to this appeal. Respondents therefore respectfully ask this Court deny UL Chula’s Motion.

DATED: April 21, 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 April 22, 2022, I served the document(s) described as **OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE** on the interested parties in this action addressed as follows:

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/s/ Lourdes Hernandez

Lourdes Hernandez

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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

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California Court of Appeal, Fourth
Appellate District Division 1

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STATE OF CALIFORNIA
California Court of Appeal, Fourth
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Case Number: **D079215**

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

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Date

/s/Lourdes Hernandez

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