Fourth Civil Number D079215

In the Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

UL CHULA TWO LLC,

Plaintiff and Appellant,

v.

CITY OF CHULA VISTA,

Defendant and Respondent.

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

APPELLANT'S REPLY BRIEF

LEWIS BRISBOIS BISGAARD & SMITH LLP
Lann G. McIntyre, SBN 106067
lann.mcintyre@lewisbrisbois.com
Gary K. Brucker, Jr., SBN 238644
gary.brucker@lewisbrisbois.com
Anastasiya Menshikova, SBN 312392
anastasiya.menshikova@lewisbrisbois.com
550 West C Street, Suite 1700
San Diego, California 92101
Telephone: 619.233.1006
Facsimile: 619.233.8627

Attorneys for Plaintiff and Appellant
UL CHULA TWO LLC

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INTRODUCTION

UL Chula Two, LLC ("UL Chula"), has consistently demonstrated that the denial of its application for a license was, from the start, based on *allegations* that were never proven, admitted or stipulated to and that did not fit the disqualifying definitions in the Chula Vista Municipal Code ("CVMC"). Respondents, with admirable frankness, admit that the amalgamation of unadjudicated, never proven "information" presented to the City of Chula Vista (the "City") "was *instrumental* in the City's decision to deny UL Chula's application." (Respondents' Brief ("RB"), at p. 37, emphasis

added.) Indeed, the City's position that it was justified in denying UL Chula a license because the City Manager decided Mr. Senn had been "sanctioned" by the City of San Diego (RB, at p. 22), vividly illustrates the City of Chula Vista's approach to licensing matters, with the City acting as judge, jury and executioner in deciding the truth of mere allegations made but never proven and certainly not admitted. While a municipality is entitled to interpret its own municipal code, it may not do so in a manner that constitutes an abuse of discretion such as occurred here.

The City acted arbitrarily, capriciously and contrary to the law when it relied on alleged zoning violations that by definition could not meet the definitions of the disqualifications the City relied on, and denied UL Chula's application for a retail storefront cannabis license on the basis of rank and unreliable hearsay in a hearing that was stacked against UL Chula as a result of the hearing officer's bias. The trial court's denial of UL Chula's petition for writ of mandate should be reversed.

LEGAL ARGUMENT

I. UL Chula Did Not Waive the Right to Present Legal Theories Demonstrating Fundamental Error in the City's and Trial Court's Decisions.

Respondents contend UL Chula did not present to the City Manager at the administrative appeal hearing the argument 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." (RB, at p. 28.)

Accordingly, Respondents argue, UL Chula has failed to exhaust its administrative remedies and cannot raise the argument "for the first time on review." (*Id.* at p. 29.) Not so.

Respondents rely on *Niles v. Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, but *Niles* involved an administrative hearing under the Administrative Procedures Act ("APA"). (*Id.* at p. 787.) This case is not governed by the APA.

Furthermore, during the administrative hearing UL Chula raised the distinction between commercial and medicinal cannabis laws, and the fact that commercial cannabis laws did not exist at the time of the zoning violations. {AR 000126, 219, 220, 235, 237.} The issue was fairly subsumed within this discussion. The City's attempts at splitting hairs to preclude review of this issue is unavailing.

Finally, even if not raised during the administrative hearing, the issue is purely a question of law based on undisputed facts and may be raised for the first time outside the administrative hearing. (*Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1344.) Consideration of this issue does no violence to the exhaustion of remedies argument on which the City inaptly relies.[1]

[1] The merits of the distinction between medicinal and commercial cannabis are discussed *infra* at Section III(B).

II. The Trial Court Erred In Rejecting Extra Record Evidence.

UL Chula submitted evidence in the trial court support of its petition for writ of mandamus derived from a California Public Records Act ("PRA") request that showed the City uniformly rejected applicants who were alleged to have violated laws unrelated to the regulatory schemes legalizing commercial cannabis activity at the State and local level. [1 Appellant's Appendix ("AA") 570-571; 692-797.] The trial court declined to consider this evidence as "outside the administrative record." [2 AA 1138.]

The City does not argue the evidence was not admissible. (RB, at p. 34.) Rather, the City contends only that UL Chula did not show the trial court abused its discretion in declining to consider the evidence. (*Ibid.*) However, UL Chula did demonstrate an abuse of discretion. The trial court gave no reason for its decision not to consider the PRA evidence. [2 AA 1138.] UL Chula demonstrated it could not, in the exercise of reasonable diligence, have produced the PRA documents at the hearing. [1 AA 558, 569.] The decision to serve the PRA request was prompted by the City's findings in denying the license. [*Id.* at p. 569.] It was not until then that industry gossip that the City denied other applicants on the same or similar grounds became relevant and prompted the request. [*Ibid.*]

The trial court gave no indication it was relying on Code of Civil Procedure section 1094.5, subdivision (e), or that it

considered the rule that allows augmentation of the administrative record. Given the unrebutted showing UL Chula made that the PRA evidence was relevant and, in the exercise of reasonable diligence, could not have been produced at the hearing before the City, the trial court abused its discretion in refusing to admit that evidence.

III. The City Improperly Denied UL Chula's Application.

A. The alleged civil zoning violation was not a proper basis for disqualifying UL Chula.

Respondents acknowledge UL Chula's transparency in advising the City with its original license application of the allegations by the City of San Diego and the Stipulated Judgment, even providing the Superior Court case number. (RB, at p. 37.) However, Respondents claim UL Chula did not advise the City of certain information that turned out to be "instrumental in the City's decision to deny UL Chula's application." (*Ibid.*) That "information," consists of the following disputed "facts":

- Mr. Senn "illegally operated" the Holistic Café marijuana dispensary for several years in a zone that did not permit that use
- Mr. Senn failed to cease the "illegal operation" in response to a City of San Diego Notice of Violation
- The Holistic Café's landlord sought to terminate the tenancy based on the "illegal operation" of a marijuana dispensary

(RB, at p. 37.)

The City describes UL Chula as having "failed to advise the City" of these "facts." (RB, at p. 37.) However, the Holistic Café matter *was* disclosed at the time UL Chula submitted its original license application. {AR00113.}[2] UL Chula further informed the City these allegations were denied then and affirmed Mr. Senn's continued denial of the zoning violation allegations. {*Ibid.*}

As explained in the opening brief, Mr. Senn had valid reasons for disputing he had engaged in any illegal operations and to dispute the landlord's effort to terminate Holistic Café's tenancy based on an "illegal operation" of a marijuana dispensary. (Appellant's Opening Brief ("AOB"), at pp. 37-38.) During the 2010-2012 timeframe, the law was unsettled on the question of whether it was lawful for local governments to use zoning regulations to ban legal medicinal cannabis storefronts. It was not until 2013 that the California Supreme Court answered that question in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729.

In light of the risk posed by the unsettled legal landscape it made sense for both parties to stipulate to a judgment that allowed the judgment to be amended in the future if the law were to change. In fact, the judgment was amended in May 2019 to permit the defendants to engage in cannabis activities. [1 AA 667-668.] The judgment expressly provided that neither the "Stipulated Judgment nor any of the provisions contained therein

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[2] Citations to documents contained in the Certified Administrative Record are described as {AR(page)}.

shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint." {AR00197; 2 AA 967.} The Stipulated Judgment expressed that its terms were the result of the "Parties wish to avoid the burden and expense of further litigation and according have determined to compromise and settle their differences." {*Ibid.*} There is simply no support for the City's explanation that the City's background investigation disclosed illegal operations or that the actions taken by the City could be viewed as Mr. Senn having been "adversely sanctioned or penalized" for such operations. (RB, at p. 37.) *None* of the "information" the City reviewed during its background investigation has ever been adjudicated or proven or admitted to be true, and the City abused its discretion in denying the license on the basis of unproven allegations and terms reached solely as a compromise.

In addition to the absence of evidence that Mr. Senn had been sanctioned or penalized, there was also no evidence that Mr. Senn had engaged in unlawful "Commercial Cannabis Activity" as a condition for denial under CVMC section 5.19.050(A)(5), subsections (f) and (g), because it was not until 2016 that "commercial cannabis activity" was defined and made lawful after passage of Proposition 64, and in 2018 by the City. (See AOB, at pp. 41-42.) The City seeks to avoid the absence of "unlawful Commercial Cannabis Activity" with the *ipse dixit* that "Commercial Cannabis Activity is defined to include the commercial distribution, delivery or sale of marijuana." (RB, at p. 40.) That is no answer at all to the fact that in 2012,

the term "commercial cannabis activity" was undefined and had no legal meaning.

The City also claims the fact the City meant for its regulations to include pre-2016 activity because it generally states the City's desire to "mitigate the negative impacts brought by unregulated Commercial Cannabis Activity," does not aid the City. (RB, at p. 40.) CVMC section 5.19.050(A)(5), subsections (f) and (g) address "unlawful" commercial cannabis activity. To determine that an applicant has engaged in "unlawful" commercial cannabis activity, commercial cannabis activity must have been recognized as a lawful activity, which it was not until 2016 by the State.

B. The sale of medicinal cannabis is not subsumed in the definition of commercial cannabis activity.

To be disqualified under the City's regulations, a finding of unlawful "Commercial Cannabis Activity" is required. (CVMC, § 5.19.050(A)(5), subs. (f) and (g).) Medicinal cannabis is not included within the definition of "commercial" cannabis as is shown by the fact the City's regulations separately define "commercial" and "medicinal" cannabis, separately prohibit the sale of medicinal cannabis by commercial cannabis storefront retailers, and require a separate license for medicinal cannabis– an "M-License." (See, e.g., CVMC, § 5.19.090, subd. (A); § 5.19.020.) The City contends there is no legal or factual distinction between the sale of "commercial" and "medicinal" cannabis for purposes of this litigation. (RB, at pp. 42-43.) Not so.

The City's argument that medicinal cannabis sales are subsumed within the definition of Commercial Cannabis activity depends on ignoring the City's regulations that repeatedly distinguish between the two. This interpretation also violates the well-established rule of statutory construction that dictates that the specific must control over the general. (*Rossco Holdings v. Cal.* (1989) 212 Cal.App.3d 642, 652.) The City's regulatory scheme treats medicinal cannabis as separate from commercial cannabis, requiring separate licenses and excluding medicinal cannabis from commercial cannabis sales activities. The Holistic Café was not a commercial cannabis dispensary and it was not involved in the sale of commercial cannabis. The specific prohibition on medicinal cannabis sales in commercial cannabis storefronts demonstrates that medicinal cannabis sales are not subsumed within general commercial cannabis sales.

The City's final argument is that courts should defer to the city's interpretation of its own code if there is any ambiguity. (RB, at p. 45.) However, there is no evidence the City interpreted the code with respect to the distinction between medicinal and commercial cannabis sales. Indeed, the City's Statement of Decision reflects the complete absence of any such distinction having been made by the City Manager, who simply looked at

"Unlawful Cannabis Activity," while ignoring the term "Commercial" used by the regulations. {AR00304-00305.}[3]

There was no evidence in the record to support that the City ever addressed the differences between medicinal and commercial cannabis when it decided Mr. Senn had engaged in unlawful Commercial Cannabis Activity and was therefore disqualified from obtaining a license.

C. The City Manager's Findings Were Not Supported by Substantial Evidence.

Although the technical rules of evidence were not required to be followed in the City's administrative proceedings, the City still required that the evidence be relevant and reliable. (2 AA 1077; Chula Vista Cannabis Regulations, § 0501, subd. (P)(2)(c).) The City Manager relied on hearsay evidence consisting of Exhibits 8-13 (over UL Chula's objections) that culminated in the City of San Diego's Complaint that was resolved by the Stipulated Judgment. {AR00306.} This was the only evidence the City Manager relied on to establish that UL Chula was properly found to be in violation of CVMC Section 5.19.050(A)(5), subsections (f) and (g). Hearsay evidence is inadmissible for the

[3] The trial court made the same error when it concluded UL Chula had not identified language that would exclude the sale of medicinal cannabis from the definition of "Commercial Cannabis Activity." [2 AA 1136.]

very reason that it is inherently unreliable. The evidence relied on by the City is not substantial evidence to support its decision.

The City argues that despite the lack of relevant and reliable evidence to support the City's decision, UL Chula put on no evidence and thus did not sustain its burden of proof. (RB, at p. 46.) UL Chula, however, did meet its burden of proof because the evidence the City put on was not sufficient evidence to support the City's rejection of its application.

The City attempts to skirt the utter lack of reliable and substantial evidentiary support for the City's determination by attempting to distinguish cases cited in UL Chula's opening brief for the proposition that uncorroborated hearsay is not substantial evidence, even if admissible under the regulatory scheme. (RB, at pp. 47-48.) The attempts at distinguishing those cases is unavailing. The City does not address the inherently unreliable nature of the hearsay evidence the City Manager considered in violation of the CVMC's allowance of hearsay *if* "relevant and of the kind that reasonable person rely on in making decisions." (2 AA 1077.)

Finally, the City resorts to the official records exception to the hearsay rule to argue the evidence was admissible. (RB, at p. 48.) The City relies on criminal cases that allowed proof of a prior conviction by a certified document from prior court proceedings to show that the City could consider the Holistic Café Stipulated Judgment as evidence of a sanction imposed by the City of San Diego. (*Ibid.*) Here, however, the court records were

not certified. More importantly, they were not evidence of anything illegal because the Stipulated Judgment expressly denied the truth of any of the allegations made and stated its terms were entered into solely as a compromise to avoid the uncertainty and expense of further litigation. Therefore, the City's contention that the Stipulated Judgment was evidence of a penalty imposed by the City of San Diego is without foundation. (RB, at p. 48.) The City's argument that San Diego's Notice of Violation and the unlawful detainer action, alone, "demonstrated that Mr. Senn engaged in unlawful Commercial Cannabis Activity" suffers from the same infirmity. The City Manager's findings and decision were not supported by substantial evidence.

D. The City Abused Its Discretion.

The City failed to exercise its discretion. The City argues it did not abuse its discretion by failing to exercise its discretion when it rejected UL Chula's application without making the necessary factual findings to support its reasons for rejecting the application. The City responds to this position by regurgitating its arguments that it had "ample reason" to deny UL Chula's application because Mr. Senn was previously involved in "unlawful Commercial Cannabis Activity." (RB, at p. 50.)[4]

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[4] The City cites *City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1086, for the proposition that past compliance suggests future lawful behavior. (RB, at p. 50.) The reference is inapt in light of the fact the very same City of San Diego that was a party to the Stipulated Judgment now licenses Mr. Senn's operations. {AR00025-27, 29-30, 32-40, 65-68, 126.}

As demonstrated *infra* and in UL Chula's opening brief, this "reason" is unsupported by the evidence. The City does not address the lack of a bridge between the raw evidence and the City's ultimate decision in the form of factual findings.

E. The Administrative Hearing Violated Due Process.

A fair tribunal in which the decision maker is free from bias is a due process right guaranteed to the parties. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.) Violation of the right to a fair tribunal can be demonstrated by circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin, supra,* at p. 47.)

The City responds that there is nothing in the administrative record that demonstrates bias or unfairness by the City Manager. (RB, at p. 52.) The City argues UL Chula must point to "specific evidence" of "extreme facts" for UL Chula to demonstrate a due process violation. (*Id.* at p. 54.) However, that is not the standard. "[T]he rule against bias has been framed in terms of probabilities, not certainties." (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021.) There is no requirement that the applicant prove actual bias. (*Id.* at p. 1022.) Thus, an "unacceptable probability" of actual bias alone "is enough to show a violation of the due process right to fair procedure." (*Ibid.*)

Here, UL Chula has shown an "unacceptable probability" of actual bias. UL Chula has shown that the City Manager knew the attorney who served as the City's attorney in the hearing, Ms. McGlurg, was instrumental in drafting the ordinance that was codified as CVMC section 5.19.010 et seq. [1 AA 670-690.] That same attorney advocated for an incorrect legal standard, "unlawful cannabis activity" rather than "unlawful *commercial* cannabis activity." {AR00239-240, 243, 296.} And, the City Manager adopted that incorrect legal standard in its decision. {AR00302-303.} The City Manager erroneously conflated the terms "cannabis activity" and "commercial cannabis activity" at least 10 times. {AR00303-306.} That the same attorney with a lengthy history of acting as the City's legal advisor in crafting the applicable regulatory language was defending the City against alleged violations of that code before the same City Manager who knew of her historical role is sufficient to show a "particular combination of circumstances creating an unacceptable risk of bias." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 221.) The bias or prejudice on the part of the City Manager has been clearly established with concrete facts.

CONCLUSION

For the foregoing reasons, UL Chula respectfully requests the court reverse the trial court's judgment denying the Verified Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief.

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

Lann. G. McIntyre

Gary K. Brucker

Anastasiya V. Menshikova

Attorneys for Plaintiff and Appellant
UL CHULA TWO LLC

CERTIFICATE OF COMPLIANCE WITH RULE 8.204

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

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

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

3. This appellant's reply brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 3,147 words, including footnotes.

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

Executed at San Diego, California, on April 28, 2022.

/s/ Lann G. McIntyre
Lann G. McIntyre

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

I, Janis Kent, state:

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

On April 28, 2022, I served the following document described as **APPELLANT'S REPLY BRIEF** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

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

Executed on April 28, 2022, at San Diego, California.

/s/ Janis Kent
Janis Kent

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

Alena Shamos
Matthew Christopher Slentz
Colantuono, Highsmith & Whatley, PC
440 Stevens Avenue, Suite 200
Solana Beach, CA 92075
Attorneys for Defendants and Respondents
City of Chula Vista and Chula Vista City Manager
(*Via TrueFiling*)

Heather S. Riley
Rebecca Helene Williams
Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys for Real Party in Interest and Respondent
March and Ash Chula Vista, Inc.
(*Via TrueFiling*)

Philip Charles Tencer
TencerSherman LLP
12520 High Bluff Drive, Suite 240
San Diego, CA 92130
Attorneys for Real Party in Interest and Respondent
TD Enterprise LLC
(*Via TrueFiling*)

David Chad Kramer
Vincente Sederberg LLP
633 West 5th Street, 26th Floor
Los Angeles, CA 90071
Attorneys for Real Party in Interest and Respondent
TD Enterprise LLC
(*Via TrueFiling*)

San Diego County Superior Court
The Honorable Richard E. L. Strauss (Dept. SD-75)
330 W. Broadway
San Diego, CA 92101
(*Via Overnight Mail)*

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

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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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Case Number: **D079215**
Lower Court Case Number: **37-2020-00041554-CU-WM-CTL**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Lourdes Hernandez Colantuono, Highsmith & Whatley, PC	lhernandez@chwlaw.us	e-Serve	4/28/2022 6:09:10 PM
David Kramer Vicente Sederberg LLP	d.kramer@vicentesederberg.com	e-Serve	4/28/2022 6:09:10 PM
Philip Tencer TencerSherman LLP 173818	phil@tencersherman.com	e-Serve	4/28/2022 6:09:10 PM
John Kaup Allen Matkins Leck Gamble Mallory & Natsis LLP	JKAUP@ALLENMATKINS.COM	e-Serve	4/28/2022 6:09:10 PM
Alena Shamos Colantuono, Highsmith & Whatley, PC	ashamos@chwlaw.us	e-Serve	4/28/2022 6:09:10 PM

216548			
Lann Mc Intyre Lewis Brisbois Bisgaard & Smith LLP 106067	lann.mcintyre@lewisbrisbois.com	e-Serve	4/28/2022 6:09:10 PM
Pam Lewis Allen Matkins Leck Gamble Mallory & Natsis LLP	plewis@allenmatkins.com	e-Serve	4/28/2022 6:09:10 PM
Matthew Slentz Colantuono, Highsmith & Whatley, PC 285143	mslentz@chwlaw.us	e-Serve	4/28/2022 6:09:10 PM
Gary Brucker Lewis Brisbois Bisgaard & Smith LLP	gary.brucker@lewisbrisbois.com	e-Serve	4/28/2022 6:09:10 PM
Anastasiya Menshikova Lewis Brisbois Bisgaard & Smith LLP	anastasiya.menshikova@lewisbrisbois.com	e-Serve	4/28/2022 6:09:10 PM
Heather Riley Allen Matkins Leck Gamble Mallory & Natsis LLP 214482	hriley@allenmatkins.com	e-Serve	4/28/2022 6:09:10 PM

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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.

4/28/2022

Date

/s/Janis Kent

Signature

McIntyre, Lann (106067)

Last Name, First Name (PNum)

Lewis Brisbois Bisgaard & Smith, LLP

Law Firm