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F I L E D
Clerk of the Superior Court No Fee GC §6103
MAY 12 2016
By: S. Klais-Trent, Deputy
'16 MAY 12 AM 11:00

Attorneys for Plaintiff

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

CITY OF SAN DIEGO, a municipal corporation,

Plaintiff,

v.

DARRYL COTTON, an individual, and
DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2016-00005526-CU-MC-CTL

PLAINTIFF, CITY OF SAN DIEGO'S,
REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ORDER
TO SHOW CAUSE WHY A PRELIMINARY
INJUNCTION SHOULD NOT BE
GRANTED

IMAGED FILE

Date: May 20, 2016
Time: 10:30 a.m.
Dept: C-61
Judge: Hon. John S. Meyer
Complaint filed: February 18, 2016
Trial Date: None Set

INTRODUCTION

Plaintiff, City of San Diego, replies to the opposition by Defendant DARRYL COTTON to the City's application for a preliminary injunction prohibiting COTTON from maintaining or operating a marijuana dispensary at 6176 Federal Boulevard, in the City of San Diego, State of California or anywhere in the City of San Diego, California without a Conditional Use Permit.

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1 ARGUMENT

2 A. Defendant Darryl Cotton is Strictly Liable for Maintaining a Marijuana
3 Dispensary Operating in Violation of the San Diego Municipal Code.

4 Plaintiff City of San Diego (City) brings its action against Defendant DARRYL COTTON
5 (COTTON) because COTTON is the owner of the property located at 6176 Federal Boulevard, in
6 the City of San Diego (PROPERTY). See Notice of Lodgment in Support of Plaintiff City of San
7 Diego’s Motion for Preliminary Injunction, previously filed on April 28, 2016 (NOL), Exhibit 1.
8 As the property owner, COTTON maintained a marijuana dispensary “Pure Meds” at the
9 PROPERTY, which was operating in a zone that prohibits the operation or maintenance of a
10 marijuana dispensary, cooperative, or collective. See Request for Judicial Notice in Support of
11 Plaintiff City of San Diego’s Motion for Preliminary Injunction, previously filed on April 28,
12 2016 (RJN), Nos. 6-8.

13 In this case, the PROPERTY is located in a Community-Office (CO-2-1) zone. SDMC
14 sections 131.0520, 131.0522 and corresponding Table 131-05B govern the permitted uses in a
15 CO-2-1 zone. Medical marijuana consumer cooperatives, the subject of the City’s Complaint, are
16 not permitted and as such, they are a prohibited use at the PROPERTY. See RJN, No. 9,
17 Declaration of Rowdy Sperry (Decl. Sperry) 3:12-16.

18 To operate or maintain a marijuana dispensary, cooperative, or collective in a CO-2-1
19 zone constitutes a violation of the San Diego Municipal Code (SDMC). See RJN, Nos. 5-8. As
20 the property owner, COTTON is strictly liable for all code violations existing at the
21 PROPERTY. See RJN, No. 1. Also, as the property owner, COTTON is deemed a “Responsible
22 Person” pursuant to SDMC section 11.0210.

23 A “Responsible Person” is a person who a Director determines is
24 responsible for causing or maintaining a public nuisance or a
25 violation of the Municipal Code or applicable state codes. The term
26 “Responsible Person” includes **but is not limited to** a property
owner, tenant, person with a Legal Interest in real property or
person in possession of real property.

27 SDMC § 11.0210, emphasis added, See RJN, No. 2.

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1 Strict liability situations arise frequently where the property owner does not affirmatively
2 act to violate the regulations but fails to manage the property responsibly. Essentially, a property
3 owner's responsibility arises from the mere fact of ownership.

4 Thus, whether the context be civil or criminal, liability and the duty
5 to take affirmative action flow not from the landowner's active
6 responsibility for a condition of his land that causes widespread
7 harm to others or his knowledge of or intent to cause such harm but
8 rather, and quite simply, from his very possession and control of the
9 land in question.

10 *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1983) 153 Cal. App. 3d 605, 622
11 (citation omitted). "It was recognized that such legislation may, in particular instances, be harsh,
12 but we can only say again what we have so often said, that this court cannot set aside legislation
13 because it is harsh." *Shevlin-Carpenter Co. v. State of Minn.*, 218 U.S. 57, 70 (1910). The
14 regulations in San Diego's Land Development Code regulate property to protect the public
15 welfare. All property owners with property in the City of San Diego are subject to these
16 regulations and must abide by them to protect the overall general welfare.

17 In this case, it does not matter that COTTON's tenant(s) operated the marijuana
18 dispensary, which they operated without a Conditional Use Permit in violation of zoning laws.
19 That COTTON owned the property and maintained the marijuana dispensary operating in
20 violation of the zoning laws renders COTTON strictly liable for the code violation existing at the
21 PROPERTY. Firstly, COTTON is strictly liable for maintaining the marijuana dispensary which
22 his tenant(s) operated without a Conditional Use Permit. *See* RJN, No. 9, Decl. Sperry 3:18-23.
23 Secondly, COTTON, as the Responsible Person and owner of the PROPERTY, is strictly liable
24 for maintaining all code violations existing at his PROPERTY. In February of 2016, an
25 undercover San Diego Police Department (SDPD) Detective Hunter bought marijuana for \$25
26 from the unpermitted marijuana dispensary operating at the PROPERTY. *See* RJN, No. 10,
27 Declaration of James Hunter (Decl. Hunter) 3:11-18. Furthermore, on April 6, 2016, SDPD
28 Officers executed a search warrant for drug trafficking at the PROPERTY. *See Declaration of*
Marisela Cooper in Support of Plaintiff City of San Diego's Motion for Preliminary Injunction,
previously filed on April 28, 2016 (Decl. Cooper) 2:21-22. At the PROPERTY, the SDPD

1 Officers located a marijuana dispensary and confiscated approximately 300 marijuana plants that
2 COTTON admitted belonged to him. *See* Decl. Cooper 2:23-27 and 3:1-9.

3 **B. Plaintiff Seeks to Enjoin Violations of the San Diego Municipal Code Which**
4 **Provide for Injunctive Relief**

5 A violation of a valid zoning or building ordinance may be enjoined by seeking an
6 injunction from a court of equity. *County of San Diego v. Carlstrom*, 196 Cal. App. 2d 485, 491
7 (1961). SDMC section 121.0311 provides that the designated Code Enforcement Official may
8 seek injunctive relief as a remedy for violations of the Land Development Code. *See* RJN, No. 1.
9 Likewise, section 12.0202(a) explicitly provides that any provision of the Municipal Code “may
10 be enforced by injunction issued by the Superior Court upon a suit brought by The City of San
11 Diego.” *See* RJN, No. 3.

12 Under long-standing law, mere proof of the zoning violation constitutes sufficient
13 showing for issuance of an injunction. *City of Santa Clara v. Paris*, 76 Cal. App. 3d 338, 341-42
14 (1977); *City and County of San Francisco v. Padilla*, 23 Cal. App. 3d 388, 401 (1972); *City of*
15 *Los Altos v. Barnes*, 3 Cal. App. 4th 1193, 1198 (1992); *City of San Mateo v. Hardy*, 64 Cal. App.
16 2d 794 (1944); *City of Stockton v. Frisbie & Latta*, 93 Cal. App. 277, 290 (1928). When a city
17 seeks to enforce a valid local zoning ordinance by injunction, the court’s inquiry is limited to
18 whether a zoning violation exists. *City and County of San Francisco v. Burton*, 201 Cal. App. 2d
19 749, 756-757 (1962).

20 Defendant asserts that the PROPERTY has been vacant since SDPD cleared out the
21 PROPERTY during the execution of the search warrant. However, the facts that SDPD
22 Officers executed a search warrant for drug trafficking at the PROPERTY, located a
23 marijuana dispensary at the PROPERTY, and subsequently confiscated approximately 300
24 marijuana plants that belonged to COTTON does not absolve Defendant COTTON of
25 liability as a Responsible Person for maintaining an unpermitted marijuana dispensary at the
26 PROPERTY.

27 “Voluntary discontinuance of alleged illegal practices does not remove the pending
28 charges of illegality from the sphere of judicial power or relieve the court of the duty of

1 determining the validity of such charges where by the mere volition of a party the challenged
2 practices may be resumed.” *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920,
3 929 (1976). If voluntary discontinuance of an alleged illegal practice does not remove the
4 pending charges or relieve the court of its duty, then neither would an involuntary
5 discontinuance of illegal practices remove the pending charges or relieve the court of the
6 duty of determining the validity of such charges where by the mere volition of a party, the
7 challenged practices may be resumed. Defendant COTTON is still a party to the lawsuit the
8 City lodged in its Complaint. The marijuana dispensary may be resumed at the PROPERTY
9 if the Court does not grant an injunction.

10 **C. When a Municipality Seeks to Enjoin Violations of a Statute, it Need Only Show a**
11 **Reasonable Probability of Prevailing on the Merits at Trial.**

12 A preliminary injunction is an appropriate means for a municipality to prevent further
13 violations of a local ordinance pending final judgment in an action pending trial.

14 In this case, the City has established a reasonable probability of prevailing on the merits at
15 trial. Land Development Investigator Rowdy Sperry found internet and print advertising
16 implicating “Pure Meds” in the operation of a marijuana dispensary at the PROPERTY. *See* RJN,
17 No. 9, Decl. Sperry 2:15-27. In February of 2016, while working in an undercover capacity,
18 Detective James Hunter purchased \$25 worth of marijuana from the unpermitted dispensary
19 located at the PROPERTY. *See* RJN, No. 10, Decl. Hunter 3:11-18. Furthermore, on April 6,
20 2016, SDPD Officers executed a search warrant for drug trafficking at the PROPERTY. *See* Decl.
21 Cooper 2:21-22. At the PROPERTY, the SDPD Officers located a marijuana dispensary and
22 confiscated approximately 300 marijuana plants that COTTON admitted belonged to him. *See*
23 Decl. Cooper 2:23-27 and 3:1-9.

24 **D. Defendant Darryl Cotton Will Not Suffer Grave or Irreparable Harm From the**
25 **Issuance of an Injunction.**

26 Once a rebuttable presumption arises in favor of the plaintiff, a defendant is required to
27 prove that the issuance of a preliminary injunction will cause them to suffer grave or irreparable
28 harm. *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 72. An order to cease unlawful acts does not

1 constitute irreparable harm. *People ex rel. Dep't. of Indus. Relations v. Morehouse*, 74 Cal. App.
2 2d 870, 875 (1946). Where the defendants cannot demonstrate grave or irreparable harm, the
3 Court need not balance the relative actual harms to the parties. *IT Corp. v. County of Imperial*, 35
4 Cal. 3d at p. 72.

5 **E. Plaintiff City is Not Prosecuting Defendant for Violating Federal Laws.**

6 The City's Complaint against COTTON is for zoning violations. It is well recognized that
7 a City has the power to enact its own land-use regulations, including banning marijuana
8 completely if it so chooses in the public's interest. *City of Riverside v. Inland Empire Patients*
9 *Health and Wellness Center, Inc.*, 56 Cal. 4th 729, 738 (2013). In *City of Riverside v. Inland*
10 *Empire Patients Health and Wellness Center, Inc.*, 56 Cal. 4th 729, 738 (2013), the California
11 Supreme Court confirmed that there is no state preemption over local municipalities completely
12 banning dispensaries through zoning laws.

13 In this case, the City holds COTTON liable for maintaining the marijuana dispensary
14 operating at the PROPERTY in violation of the City's zoning laws.

15 **F. Law Enforcement Authorities May Enforce the Court's Orders.**

16 Law enforcement officers may enforce the Court's orders. SDMC section 12.0201
17 provides: "A violation of any of the provisions or failing to comply with any of the mandatory
18 requirements of this Code shall constitute a misdemeanor . . ." See RJN, No. 3. Penal Code
19 section 166(a)(4) likewise provides that "a person guilty of any of the following contempts of
20 court is guilty of a misdemeanor . . . Willful disobedience of the terms as written of any process
21 or court order . . . lawfully issued by a court, including orders pending trial."

22 Law enforcement officers may arrest anyone who commits a misdemeanor in their
23 presence. "A peace officer . . . , without a warrant, may arrest a person whenever...the officer has
24 probable cause to believe that the person to be arrested has committed a public offense in the
25 officer's presence." Penal Code § 836(a)(1).

26 If a defendant does not comply with the Court's orders, law enforcement officers, upon
27 observing the marijuana dispensary operating in violation of the SDMC and Court Order, have
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1 the power to arrest any persons and their agents who are violating the law. This is not a
2 warrantless search or violation of Fourth Amendment rights.

3 **CONCLUSION**

4 Defendant misunderstands the laws applicable to this zoning violation case. Defendant is
5 strictly liable for all zoning code violations existing at his property. The City may make and
6 enforce zoning regulations within its borders. The operation of a marijuana dispensary in a zone
7 where it is not permitted should be immediately enjoined for the benefit and safety of the City's
8 residents.

9 Dated: May 11, 2016

JAN I. GOLDSMITH, City Attorney

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11 By 
12 Onuoma Omordia
13 Deputy City Attorney

14 Attorneys for Plaintiff
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