

1 Gina M. Austin (SBN 246833)  
Email: gaustin@austinlegalgroup.com  
2 Tamara M. Leetham (SBN 234419)  
Email: tamara@austinlegalgroup.com  
3 AUSTIN LEGAL GROUP, APC  
3990 Old Town Ave, Ste A-112  
4 San Diego, CA 92110  
Phone: (619) 924-9600  
5 Facsimile: (619) 881-0045

FILED  
CLERK OF SUPERIOR COURT  
CENTRAL DIVISION  
2016 NOV -8 PM 2:11  
CLERK SUPERIOR COURT  
SAN DIEGO COUNTY, CA

6 Attorneys for Petitioner and Plaintiff  
Living Green Cooperative  
7

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

10 LIVING GREEN COOPERATIVE,  
11 California Co-operative corporation;

12 Petitioner and Plaintiff,

13 vs.

14 CITY OF SAN DIEGO, a California  
15 municipal corporation; and Does 1 through  
16 10, inclusive,

17 Defendants and Respondents,  
18

CASE NO. 37-2016-00039309-CU-MC-CTL

VERIFIED PETITION FOR WRIT OF  
MANDATE FOR VIOLATION OF  
GOVERNMENT CODE SECTION 65906  
[CODE CIV. PROC. §§ 1060, 1085, 1094.5]

AND  
COMPLAINT

[IMAGED FILE]

19  
20 Petitioner Living Green Cooperative, Inc. ("Living Green" or "Petitioner") files this  
21 Petition for Writ of Mandate and Complaint ("Petition") against defendant and respondent City  
22 Of San Diego ("City") and Does 1 through 10 inclusive (collectively "Respondents") as  
23 follows:

24 I. INTRODUCTION

25 1. This case arises from the City Planning Commission's refusal to issue a  
26 conditional use permit for a medical marijuana consumer cooperative at 4417 Rainier Ave., San  
27 Diego, California 92120 (the "Property") despite Petitioner's compliance with all applicable City  
28 land use rules and regulations.

AUSTIN LEGAL GROUP, APC  
3990 Old Town Ave, Ste A-112  
San Diego, CA 92110

BY FAX



1 Green is the applicant for CUP No. 1333320. Petitioner has standing to bring this action because  
2 (1) Petitioner as the applicant for CUP No. 1333320 has been impacted by the City's action; (2)  
3 Petitioner objected to the City's action; (3) Petitioner leases the Property in the City.

4 10. Defendant and Respondent City is a California municipal corporation the  
5 boundaries of which are located in San Diego County, California.

6 11. Petitioner is ignorant of the true names and capacities of Respondents named  
7 herein as Does 1 through 10, inclusive, and therefore names those Respondents by such  
8 fictitious names. Petitioner will amend this Petition and Complaint to allege their true names  
9 and capacities when they are ascertained. On information and belief, each of the fictitiously  
10 named Respondents is responsible in some manner for the matters alleged herein.

11 12. On information and belief, at all times mentioned herein each Respondent was the  
12 agent, employee, partner, joint venture, or affiliated governmental entity of each of the other  
13 Respondents and, in doing the things herein alleged, acted within the course and scope of such  
14 agency, employment, partnership, or joint venture with the knowledge and consent of each of the  
15 other Respondents. Each Respondent has authorized, ratified, and approved the acts of each  
16 remaining Respondent.

#### 17 IV. STATEMENT OF FACTS

18 13. On or about April 18, 2013, Petitioner entered into a 3 year Property lease with an  
19 additional 2 year option.

20 14. On or about July 4, 2014, Petitioner submitted a CUP No. 1333320 to the City for  
21 approval to operate a Medical Marijuana Consumer Cooperative ("MMCC") at the Property (the  
22 "Project").

23 15. On August 1, 2014,<sup>1</sup> the City deemed CUP No. 1333320 complete. On the  
24 deemed complete the Project was zoned IL-3 and there was no "public park" to consider as a  
25 factor in approving or denying CUP No. 1333320. The CUP was subsequently reviewed by  
26 various City departments.

27 16. On or about November 24, 2014, the City determined that all issues were cleared

28 <sup>1</sup> The deemed complete date was erroneously listed as June 12, 2014 in the August 11, 2016 Planning Commission Staff Report.

1 and the Project was exempt from the California Environmental Quality Act ("CEQA").

2 17. The City municipal code provides a 10 day noticing period of the right to appeal a  
3 CEQA exemption. It further requires the applicant to post the Notice of Right to Appeal  
4 ("NORA") at the Project location. The City drafts the NORA and gives it to the applicant  
5 (Petitioner) for posting. The City drafted Petitioner's NORA and requested Petitioner post the  
6 NORA on November 26, 2014. The City notified Petitioner that the NORA appeal period would  
7 expire on December 12, 2014.

8 18. As required by the City, Petitioner posted the NORA at the Project location (the  
9 Property) between November 26, 2014 and December 12, 2014.

10 19. As of December 12, 2014, the City had not received any appeal to the CEQA  
11 exemption. The City should have immediately set the Project to go to the hearing officer on  
12 expiration of the NORA appeal period.

13 20. On December 15, 2014, the City notified Petitioner that it was requiring Petitioner  
14 to post a second NORA due to a scrivener's error the City made in drafting the first NORA.  
15 Specifically, the NORA has the Property address listed in at least two locations on the NORA and  
16 the NORA is also physically posted at the Property address. When the City drafted the November  
17 26, 2014 NORA, it made a one digit error in the address in one location on the NORA. The  
18 address was correct in other locations on the NORA and was also correctly posted at the Property.

19 21. On or about December 13, 2016, the City provided Petitioner a second NORA and  
20 informed Petitioner that it must post this second NORA and that the new appeal deadline was  
21 December 26, 2014.

22 22. On December 23, 2014, 3 days prior to the second NORA appeal deadline, the  
23 Project's CEQA exemption was appealed. This appeal would not have occurred but for the City's  
24 improper request that Petitioner post the second NORA and restart the NORA appeal period.

25 23. On February 12, 2015 the City Council unanimously overruled the NORA appeal.

26 24. By March 10, 2015, the City had cleared all issues and the Project was finally set  
27 to go to the City hearing officer.

28 25. On March 10, 2015, the City notified Petitioner it would recommend the City

1 Planning Commission deny CUP No. 1333320 because the Project lacked the 1000' separation  
2 between a MMCC and a Public Park required the City municipal code. At some point after  
3 Petitioner was improperly forced to post the second NORA, a member of the public identified an  
4 area called the Mission Valley Riparian Open Space Area as a "public park." MMCC's cannot be  
5 within 1000' of a "public park." The Mission Valley Riparian Open Space Area is within 1000'  
6 of the Project as the crow flies.

7 26. The City municipal code defines a "public park" as "a publicly owned area that is  
8 designated as a park." (SDMC §113.0103.) The adopted community plan, the Navajo  
9 Community Plan, distinguishes "public park" as a separate use from "open space" within the  
10 definition of "public open space."

11 27. While the Mission Valley Riparian Open Space Area is City owned, it is not  
12 intended for use by the general public and is designated Open Space in the Navajo Community  
13 Plan. The Mission Valley Riparian Open Space Area is not a "public park" and there have been  
14 no findings that it is a "public park."

15 28. On April 22, 2015, the City hearing officer denied CUP No. 1333320 based on  
16 proximity to the Mission Valley Riparian Open Space Area.

17 29. On April 28, 2015, Petitioner appealed the denial to the City Planning Commission  
18 on the grounds of factual error and new information. The appeal hearing was scheduled for  
19 October 29, 2015. It was subsequently continued to December 10, 2015 at Petitioner's request.

20 30. During this time, the City was considering new methodology for measuring the  
21 1000' separation. If approved, this new measuring methodology would mean the Project would  
22 be outside of the 1000' separation from the Mission Valley Riparian Open Space.

23 31. On December 10, 2015, the City Planning Commission heard Petitioner's appeal  
24 and the appeal of a different MMCC project, the Mission Valley Project. City staff had also  
25 determined the Mission Valley Project was within 1000' of a "public park" and was also  
26 recommending denial of that project.

27 32. The City Planning Commission voted to continue the Mission Valley Project  
28 indefinitely to determine whether the new measurement provisions of the City zoning ordinance

1 would be approved. If approved, the new distance measurements would create a distance greater  
2 than 1000' from the public park for the Mission Valley Project.

3 33. Petitioner's appeal to denial of CUP No. 1333320 was scheduled to be heard after  
4 the Mission Valley Project. After voting to indefinitely continue the Mission Valley Project, City  
5 staff asked Petitioner if it would also like to be continued to allow it the opportunity to use the  
6 new measurement methodology if it passed. Petitioner agreed to the indefinite continuance and  
7 the City Planning Commission unanimously voted to continue Petitioner's appeal hearing  
8 indefinitely.

9 34. On March 11, 2016, City staff notified Petitioner that the Project Property was  
10 rezoned on July 10, 2015; the zoning had changed from IL-3-1, which allows MMCCs, to CC-3-  
11 6, which does not allow MMCCs. City staff confirmed that the Project would be allowed to  
12 proceed under the IL-3-1 zone because the Project was deemed complete on August 1, 2014, prior  
13 to the zone change. However, the City also stated it would not allow the Project to avail itself of  
14 the new distance measurements, if passed, because the new measurements were not in effect at  
15 the time the Project was deemed complete. The City had no basis under the law for making such  
16 a statement.

17 35. On April 5, 2016, the City Council approved Ordinance 20634. The Ordinance  
18 includes changes to the distance measurements to allow MMCCs to take into account natural  
19 topographical barriers and constructed barriers such as freeways or flood control channels that  
20 would impede direct physical access between the uses. Using Ordinance 20634 as the measuring  
21 methodology, Petitioner would be outside the 1000' separation requirement for MMCCs and  
22 therefore outside of 1000' of the Mission Valley Riparian Open Space Area.

23 36. After Ordinance 20634 was approved, the Project was rescheduled for hearing  
24 before the City Planning Commission on August 11, 2016.

25 37. On August 11, 2016, the City Planning Commission voted 6 to 1 to deny the  
26 Project, CUP No. 1333320, based upon its proximity to the Mission Valley Riparian Open Space  
27 Area. The City used the measurement standards in place prior to passage of Ordinance 20634.

28 38. The City improperly refused to issue Petitioner CUP No. 1333320 and improperly

1 denied the Project when it:

- 2 a. Failed to allow the Project to proceed in its IL-3 zone on the date the CUP  
3 No. 1333320 submittal was deemed complete;
- 4 b. Failed to allow CUP No. 1333320 to proceed without the open space  
5 “park” on the deemed complete date;
- 6 c. In insisting on considering the “public park,” Failed to make proper  
7 findings that the Mission Valley Riparian Open Space Area was a “public park;”
- 8 d. Forced Petitioner to use an older version of the zoning laws without legal  
9 justification.

10 39. If the City had allowed the Project to proceed properly, CUP No. 1333320 would  
11 have been approved.

12 V. FIRST CAUSE OF ACTION

13 Writ Of Mandate – Code of Civil Procedure §1094.5

14 (Against Respondents)

15 40. Petitioner incorporates all preceding paragraphs as if set forth fully herein.

16 41. Respondent City acted arbitrarily, capriciously, and unreasonably, without any  
17 substantial evidence, without advancing any legitimate public purpose, and in a manner which is  
18 inconsistent with the requirements of law, thereby constituting a prejudicial abuse of discretion  
19 when the City Planning Commission denied CUP No. 1333320.

20 42. At no time during the August 11, 2016 public hearing did the City introduce  
21 evidence or support for the “finding” that the Mission Valley Riparian Open Space Area was a  
22 “public park.”

23 43. The City was required to set forth findings on its determination that the Mission  
24 Valley Riparian Open Space Area was a “public park” when it used this determination to deny  
25 CUP No. 1333320.

26 44. At all times mentioned, the City has been able to perform its duties pursuant to  
27 state and local law as those duties relate to the City’s improper denial of CUP No. 1333320.  
28 Notwithstanding such ability, and despite Petitioner’s demand that the City perform its duties, the

1 City failed to follow the law when it denied CUP No. 1333320.

2 45. Petitioner performed any and all conditions and prerequisites prior to filing this  
3 action. Petitioner expressed its objections to the City at all levels of the City's approval process  
4 to no avail. Accordingly, this matter is ripe for judicial review.

5 46. Petitioner has exhausted all administrative remedies required in advance of filing  
6 this action or is excused from doing so.

7 47. Petitioner is directly interested in issuance of a writ of mandate because Petitioner  
8 has been, and will be, directly adversely affected by the City's failure to follow the law.

9 48. Good cause exists for this Court to issue a writ of administrative mandate directing  
10 the City to vacate its August 11, 2016 decision denying CUP No. 1333320 and enter a new  
11 decision in its stead approving CUP No. 1333320.

12 49. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law  
13 other than this writ of mandate.

14 50. The findings and determinations sought to be reviewed by this Writ of Mandate  
15 and Complaint were the result of the City's arbitrary or capricious action. As a further proximate  
16 result of the City's actions and omissions, Petitioner has incurred and will incur fees and costs for  
17 attorneys and experts, said fees and costs being legally compensable pursuant to Government  
18 Code section 800 and other provisions of California law including Code of Civil Procedure  
19 section 1021.5.

20 **VI. SECOND CAUSE OF ACTION**

21 Writ Of Mandate- Code of Civil Procedure §1085

22 (Against Respondents)

23 51. Petitioner incorporates all preceding paragraphs as if set forth fully herein.

24 52. The City has a clear, present and ministerial duty to set a project for hearing when  
25 the project applicant has posted a required NORA and the appeal time period has expired.

26 53. Petitioner complied with all legal requirements when it posted the NORA on  
27 November 26, 2014 and had a clear and present right to have the Project heard by the hearing  
28 officer when the NORA expired on December 12, 2016.



1           54.    The City failed to set the Project, CUP No. 1333320, for hearing by the City  
2 hearing officer immediately after December 12, 2016. Instead, the City improperly, arbitrarily,  
3 and capriciously required Petitioner to post a second NORA. The second NORA, unlike the first,  
4 was appealed.

5           55.    Subsequently, and additionally, the City further failed to perform its ministerial  
6 duties by:

7           a.    Failing to allow the Project to proceed in its zone on the date the CUP No.  
8 1333320 submittal was deemed complete. The Project was zoned IL-3 on the  
9 deemed complete date. The City's failure to process CUP No. 1333320 delayed  
10 the Project and the Property was rezoned. The City should have allowed the  
11 Project to proceed as the Property was zoned on the deemed complete date.

12           b.    Failing to allow CUP No. 1333320 to proceed without the open space  
13 "park" on the deemed complete date. The City's failure to set the Project for  
14 hearing with the City hearing officer after the NORA expired without an appeal on  
15 December 12, 2014 unlawfully delayed the Project. When the first NORA appeal  
16 period expired, there was no ultimate determination that the Mission Valley  
17 Riparian Open Space Area was a "public park." However, when the City in  
18 violation of the law forced Petitioner to post a second NORA, the Mission Valley  
19 Riparian Open Space Area became a factor in denying CUP No. 1333320. The  
20 City arbitrarily, capriciously, and in violation of the law, evaluated CUP No.  
21 1333320 with the Mission Valley Riparian Open Space Area when it should have  
22 declined to do so based on the deemed complete date.

23           c.    Forcing Petitioner to use an older version of the zoning laws without legal  
24 justification. The City forced Petitioner to use pre-Ordinance 20634  
25 measurements when determining whether the Mission Valley Riparian Open Space  
26 Area was within 1000' from the Project. Not only did the City improperly use the  
27 Mission Valley Riparian Open Space Area as a factor in denying CUP No.  
28 1333320, it improperly forced Petitioner to use the pre-Ordinance 20634 "as the

1 crow flies measurement” instead of the new measurement methodology in  
2 Ordinance 20634. The City’s improper refusal to allow Petitioner to use  
3 Ordinance 20634 as a basis for measuring the 1000’ separation from the Mission  
4 Valley Riparian Open Space Area resulted in Project denial.

5 56. The City had a ministerial duty to send the Project, CUP No. 1333320, to the  
6 hearing officer on December 12, 2016.

7 57. The City had a ministerial duty to allow the Project to proceed in the zone on the  
8 deemed complete date, without the presence of Mission Valley Riparian Open Space Area as a  
9 factor in Project evaluation. When it forced Petitioner’s Project to be evaluated with the Mission  
10 Valley Riparian Open Space Area, it had a ministerial duty to allow the Project to proceed under  
11 the measurements set forth in Ordinance 20634.

12 58. The City failed to perform these duties. The City’s actions lacked evidentiary  
13 support.

14 59. At all times mentioned, the City has been able to perform its duties as those duties  
15 relate to the acts described above and approval of CUP No. 1333320. Notwithstanding such  
16 ability, and despite Petitioner’s demand that the City perform its duties, the City failed to follow  
17 the requirements of the law when it denied CUP No. 1333320. The City’s actions are arbitrary,  
18 capricious and not in accordance with law.

19 60. Petitioner performed any and all conditions and prerequisites to filing this action.  
20 Petitioner expressed its objections to the City at all levels of the City’s approval process to no  
21 avail. Accordingly, this matter is ripe for judicial review.

22 61. Petitioner has exhausted all administrative remedies required in advance of filing  
23 this action, or it is excused from exhausting them.

24 62. Petitioner has no plain, speedy, and adequate remedy at law and is directly and  
25 beneficially interested in issuance of a writ of mandate because Petitioner has been, and will be,  
26 directly adversely affected by the City’s failure the law.

27 63. As a further proximate result of the City’s actions and omissions, Petitioner has  
28 incurred and will incur fees and costs for attorneys and experts, said fees and costs being legally

1 compensable pursuant to Government Code section 800 and other provisions of California law  
2 including Code of Civil Procedure section 1021.5.

3 **THIRD CAUSE OF ACTION**

4 Declaratory Relief – Code of Civil Procedure §1060

5 (Against City)

6 64. Petitioner incorporates all preceding paragraphs as if set forth fully herein.

7 65. Petitioner contends that the City denied the Project in violation of state and local  
8 law because the City failed proceed in a manner required by law including failure to make  
9 adequate findings, forcing Petitioner to use older versions of the municipal code and zoning laws  
10 without legal justification, forcing Petitioner to proceed in a manner inconsistent with the deemed  
11 complete date including zoning designation and use of the Mission Valley Riparian Open Space  
12 as a public park.

13 66. Respondent City denies it proceeded in violation of state and local law and  
14 contends that the Project was properly denied.

15 67. An actual controversy has arisen and now exists between the Petitioner and the  
16 Respondents regarding their respective rights and duties pursuant to the Project and CUP No.  
17 133320.

18 68. Petitioner desires a judicial determination and declaration of the parties' respective  
19 rights and duties pursuant to Code of Civil Procedure section 1060, including a declaration of  
20 whether the City failed to proceed in a manner required by the law when it denied the Project.  
21 Such a declaration is necessary and appropriate at this time.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Petitioner prays for relief as follows:

24 1. A peremptory writ of mandate commanding Respondent vacate and set aside the  
25 City Planning Commission's August 11, 2016 decision denying CUP No. 1333320 and enter a  
26 new decision in its stead approving CUP No. 1333320.

27 2. That Petitioner recover its' reasonably attorneys' fees pursuant to Code of Civil  
28 Procedure section 1021.5 and/or Government Code section 800 and/or any other applicable law.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. For a declaration that the City failed to proceed in a manner required by the law when it denied the Project CUP No. 1333320.

4. For such other relief as the Court deems just and proper.

Dated: November 7, 2016

AUSTIN LEGAL GROUP, APC

By: *Tamara Leetham*  
Gina M. Austin/Tamara Leetham  
Attorneys for Living Green Cooperative

AUSTIN LEGAL GROUP, APC  
3990 Old Town Ave, Ste A-112  
San Diego, CA 92110

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28


**VERIFICATION**

I, Cary Weaver, declare:

I am an officer and director of Living Green Consumer Cooperative, Inc., a California consumer cooperative corporation and am authorized to make this verification on its behalf.

I have read the foregoing Petition for Writ of Mandamus and Complaint and know the contents thereof. I declare the allegations contained therein are true to my knowledge, except as to those matters which are alleged on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this verification was signed on November 7, 2016 in San Diego, California.

  
Cary Weaver

AUSTIN LEGAL GROUP, APC  
3990 Old Town Ave, Ste A-112  
San Diego, CA 92110