LEWIS BRISBOIS BISGAARD & SMITH LLP
GARY K. BRUCKER, JR., SB# 238644
E-Mail: Gary.Brucker@lewisbrisbois.com
CARSON P. BAUCHER, SB# 298884
E-Mail: Carson.Baucher@lewisbrisbois.com
LANN G. MCINTYRE, SB # 106067
E-Mail: Lann.McIntyre@lewisbrisbois.com
550 West C Street, Suite 1700
San Diego, California 92101
Telephone: 619.233.1006
Facsimile: 619.233.8627

Attorneys for Petitioner/Plaintiff
UL CHULA TWO LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

UL CHULA TWO LLC,

Petitioner/Plaintiff,

vs.

CITY OF CHULA VISTA, a California public entity; CHULA VISTA CITY MANAGER, and DOES 1-20,

Respondents/Defendants,

MARCH AND ASH CHULA VISTA, INC.; TD ENTERPRISE LLC; and DOES 23 through 50,

Real Parties In Interest.

Case No. 37-2020-00041554-CU-WM-CTL
[Related To Case Nos. 2020-00041802-CU-MC-CTL; 37-2020-00033446-CU-MC-CTL]

PETITIONER/PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION AND STAY OF DECISION

Hearing Date:	April 30, 2021
Time:	9:00 a.m.
Judge:	Hon. Richard E. L. Strauss
Dept.:	C-75
Action Filed:	November 13, 2021
Trial Date:	None Set

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I. INTRODUCTION

Petitioner and plaintiff UL Chula Two LLC ("Petitioner") applied to respondent and defendant City of Chula Vista (hereafter, and collectively with respondent and defendant Chula Vista City Manager, the "City") for a retail storefront cannabis business license on or about January 18, 2019. On August 27, 2019, following a protracted background check and interview process, Petitioner scored 900.3—the highest of any retail storefront applicant in the City's District One. Only the two highest scoring applicants in each of the City's districts advance to the next stage of the licensing process. Petitioner fully expected to advance to the next stage.

On May 6, 2020, more than another eight months later, the City issued a notice of decision denying Petitioner's application. The City did so on the basis of an alleged civil zoning violation by one of Petitioner's principals (Willie Senn) that took place in the City of San Diego over eight years earlier, which the City determined was unlawful "commercial cannabis activity." In support of its finding, the City relied upon a stipulated judgment in *City of San Diego v. The Holistic Café, Inc.* (*Holistic Café*), San Diego Superior Court, Case No. 37-2012-00087648-CU-MC-CTL.

The City's decision was as baffling as it was arbitrary, capricious, and contrary to law. Although the City erred in numerous ways, for purposes of this motion, Petitioner focuses only on the City's clear legal error. The City erred when it concluded that the Holistic Café, a lawful, *nonprofit medicinal* cannabis storefront, engaged in unlawful "commercial cannabis activity" because it (along with Mr. Senn) settled a civil action alleging zoning violations that were wholly unrelated to "commercial cannabis activity," let alone cannabis in any way, shape, or form.

By denying Petitioner's application, the City excluded its most qualified applicant who, today, operates the most successful commercial cannabis storefront in the City of San Diego. Unless the Court orders injunctive relief, the City will permit real parties in interest from *other districts* to take Petitioner's place in the City's District One, which will cause irreparable harm not only to Petitioner, but to the residents of the City's District One. Because any harm to the City is substantially outweighed by harm to Petitioner, which is likely to prevail for the reasons discussed below, a preliminary injunction should issue. Additionally, the Court should enter a stay of the City's order denying Petitioner's application under Code of Civil Procedure § 1094.5(g).

II. FACTUAL SUMMARY

A. Proposition 215, Proposition 64, And The City's Regulatory Scheme

The citizens of the state of California passed Proposition 215 in 1996, which decriminalized possession and cultivation of cannabis for medicinal purposes. Proposition 215 was followed by Senate Bill 420 in 2003, which among other things, authorized the California Attorney General's Office to issue guidelines related to the distribution of medicinal cannabis through nonprofit cooperatives. (Health & Saf. Code, § 11362.81, subd. (d).)

California voters passed Proposition 64 in 2016, which legalized commercial and adult recreational cannabis use, and gave each locality the discretion to allow commercial cannabis activities within their jurisdiction. Proposition 64 was followed by Senate Bill 94 in 2017, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), which established California's regulatory and licensing system for the cultivation, manufacture, distribution, and sale of cannabis for medicinal and adult use. (Bus. & Prof. Code, §§ 26000 *et seq*.)

On March 6, 2018, the City adopted Ordinance No. 3418,[1] which added Chapter 5.19 to the Chula Vista Municipal Code (CVMC), in order to permit, license, and regulate commercial cannabis activity within the City. (CVMC, § 5.19.010.) Pursuant to CVMC Chapter 5.19, any person who desires to engage in lawful commercial cannabis activity or to operate a commercial cannabis business within the City's jurisdiction must have a valid "State License" and a valid "City License." (CVMC, § 5.19.030.)

The City established a two-phase licensing application process. (CVMC, § 5.19.050.) Phase One involved a set of threshold qualifying criteria, a criminal background check, and a merit-based scoring system. (CVMC, § 5.19.050, subd. (A)(7).) The City also enacted Cannabis Regulations (Regs),[2] which were intended to "clarify and facilitate implementation of CVMC Chapter 5.19." (Regs, § 0501, subds. (A)-(D).) The Regs describe the experience and liquid asset requirements for applicants, and the requirements for a business plan, operating plan, fingerprinting, and a background check. (Regs., § 0501, subds. (E)-(I).)

[1] Ordinance 3418 is attached as Exhibit 1 to the concurrently filed Appendix of Exhibits (App'x).
[2] The Regs are attached as Exhibit 2 to the App'x.

B. Petitioner's Application

Petitioner applied for a retail storefront license in the City's District One. (Ver. Pet. ¶ 23, Ex. 1 to App'x.) On January 18, 2019, as required by the application and CVMC 5.19.050(A)(1)(j), one of Petitioner's principals, Willie Senn, signed an Affirmation and Consent affirming that he "has not conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other jurisdiction." (Ex. 4 to App'x.)

Contemporaneously, counsel for Petitioner voluntarily advised the City of a stipulated judgment involving Mr. Senn that was dated December 14, 2012, in *Holistic Café, supra*. (Ex. 5 to App'x) The complaint alleged various civil zoning violations in the City of San Diego. (Ex. 3 to *id*.) The parties stipulated and agreed in *Holistic Café* that "[n]either this Stipulated Judgment nor any of the statements or provisions contained herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the Complaint." (*Ibid*.)

Despite the disclosed *Holistic Café* matter, on June 10, 2019, the City notified Petitioner that it had successfully completed Phases 1A and 1B, and invited Petitioner to proceed to Phase 1C: the interview. (Ex. 6 to App'x.) An interview was set for July 17, 2019. (Ver. Pet. ¶ 26, Ex. 1 to App'x.) Petitioner successfully completed the interview process. (*Ibid*.)

In total, approximately 136 applications were submitted to the City, 84 of which were for retail storefront licenses. (Ver. Pet. ¶ 21, Ex. 1 to App'x.) Only eight storefront licenses were available (two per each of the City's four districts). (CVMC, § 5.19.040, subd. (A).) The highest initially scored applications proceeded to an interview process (as noted above, Phase 1C) to further assess each scored category, and the City also awarded up to 500 additional points based on the interview. (Ver. Pet. ¶ 22, Ex. 1 to App'x.) Petitioner's total score following the interview was 900.3 points—the highest in the City's District One. (*Ibid*.)

C. The Denial And Appeal

On May 6, 2020 the City issued a Notice of Decision rejecting Petitioner's Application. (Ex. 7 to App'x.) The City cited two sections of CVMC 5.19.050 as the basis for its decision:

a. First, the City cited CVMC § 5.19.050(A)(5)(f), stating, Mr. Senn "has been adversely sanctioned or penalized by the City . . . for a material violation of state or local

laws or regulations related to Commercial Cannabis Activity . . . ." It went on to claim that "The City of San Diego sanctioned William [*sic*] Senn for violations of laws or regulations related to unlawful Commercial Cannabis Activity."

b. Second, the City cited CMVC § 5.19.050(A)(5)(g), stating, Mr. Senn has "conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other Jurisdiction . . . ." It went on to claim that "William [*sic*] Senn was involved in unlawful Commercial Cannabis Activity in the City of San Diego from approximately 2010 to 2012."

To be clear, the cursory Notice of Decision did not mention *Holistic Café* or any of the particular facts or evidence that the City relied upon in reaching its conclusions in the Notice of Decision.

The Notice of Decision gave Petitioner until May 21, 2020 to appeal the decision. On May 21, 2020, Petitioner timely filed a Consolidated Request to Appeal with the City of Chula Vista. (Ex. 8 to App'x.) A hearing was held on June 10, 2020, and the City served its "Findings and Statement of Decision with Regard to Appeal of Notice of Decision Rejecting Application for Cannabis License" ("Final Decision") on August 26, 2020. (Ex. 10 to App'x.) The Final Decision denied Petitioner's appeal and concluded "the evidence shows the City reasonably and properly denied Appellant's application." (*Ibid*.)

On September 3, 2020, Petitioner sent a written request for the administrative record of the June 10, 2020 appeal proceedings. (Ex. 11 to App'x.) The administrative record has not yet been received. (Brucker Dec. ¶ 2.)

D. The City Allows Applicants From Other Districts To Invade District One

Because the City denied *every* applicant in its District One, the City permitted March and Ash Chula Vista, Inc. (from District Two) and TD Enterprise LLC (from District Four) to change districts, select new locations in District One, and move to Phase II of the application process. (Brucker Dec. ¶¶ 3-4, Ex. 14 to App'x.) March and Ash Chula Vista, Inc. and TD Enterprise LLC are real parties in interest herein. (Brucker Dec. ¶ 5.) Although the City was open to a stipulation providing for certain of the relief requested in this motion, the real parties in interest disagreed on the appropriate scope of relief, and the parties were unable to reach a stipulation. (*Id*.)

III. A PRELIMINARY INJUNCTION SHOULD ISSUE

Under California Code of Civil Procedure § 526, a preliminary injunction is appropriate when *any* of the following appear by way of a verified complaint and/or declarations: (1) the plaintiff is entitled to the relief demanded; (2) continuance of some action would produce waste, irreparable injury, or render a judgment ineffectual; (3) pecuniary compensation is inadequate relief; and/or (4) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. (Code Civ. Proc., § 526.) California courts have consistently said that the general purpose of preliminary injunctive relief is to "preserve the status quo" until a final determination of the merits of the action. (*Continental Banking Co. v. Katz* (1968) 68 Cal.2d 512, 528; *Lubavitch Congregation v. City of Long Beach* (1990) 217 Cal.App.3d 1388, 1391.)

A trial court will consider two factors when determining whether to issue a preliminary injunction: (1) "the likelihood that the plaintiff will prevail on the merits of the case at trial" and (2) "the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants the preliminary injunction." (*Abrams v. Saint John's Hosp. Health Center* (1994) 25 Cal.App.4th 628, 635-36; *14859 Moorpark Homeowners' Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402.) "[T]he greater the . . . showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.)

A. Petitioner Is Likely To Succeed On The Merits

A court may grant a preliminary injunction upon a showing that it is "reasonably probable that the moving party will prevail on the merits." (*San Francisco Newspaper Printing Co., Inc. v. Super. Ct.* (1985) 170 Cal. 3d 438, 442.) Under this standard, all that is required is that the moving party establish a "reasonable probability" (not certainty) that the moving party will succeed on the merits. (*Baypoint Mortg. Corp. v. Crest Premium Real Estate etc. Tr.* (1985) 168 Cal.App.3d 818, 824.) Although the Petition describes five separate grounds for relief, each of which alone entitles Petitioner to relief, for purposes of this motion (and because the record is not yet complete), Petitioner will focus only on the first ground.

1. Civil Zoning Violations Are Not Disqualifying As A Matter Of Law

The City's sole basis for rejecting Petitioner's application was an alleged civil zoning violation from 2012 that the City incorrectly determined was disqualifying pursuant CVMC §§ 5.19.050(A)(5)(f) and (g). Subdivision (f) states:

> The Applicant, an Owner, a Manager, and/or an Officer has been adversely sanctioned or penalized by the City, or any other city, county, or state, for a material violation of state or local laws or regulations related to Commercial Cannabis Activity or to pharmaceutical or alcohol licensure."

Subdivision (g) states:

> The Applicant, an Owner, a Manager, and/or an Officer has conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other jurisdiction.

The alleged civil zoning violation from 2012—long after medicinal cannabis was legalized by Proposition 215 in 1996 and well before commercial cannabis was legalized by Proposition 64 in 2016—involved the Holistic Café. It was a medicinal cannabis storefront that the City of San Diego sought to close by asserting various zoning ordinance violations.

To be clear, none of the ordinances that the City of San Diego accused the Holistic Café of violating actually barred a medicinal cannabis storefront (or even used the words marijuana or cannabis for that matter).[3] Specifically, the complaint in *Holistic Café* alleged violations of San Diego Municipal Code ("SDMC") §§ 1512.0305, 129.0202, 129.0302, 129.0802, 121.0302, 129.0111, 129.0314, 146.0104. (Ex. 12 to App'x.) Nearly all of these code sections relate to structural, electrical, and signage requirements, each of which would have been easily curable. But the City of San Diego also claimed, incorrectly, that Sections 121.0302 and 1512.0305 prohibited medicinal cannabis storefronts.

Together, SDMC §§ 121.0302 and 1512.0305 enact zoning rules for zone CN-1A in the City of San Diego's Mid-City Communities Planned District.[4] Table 1512-03I therein lists all permitted uses for buildings located in zone CN-1A and excludes all other uses (as opposed to

[3] In fact, the City of San Diego did not amend its zoning rules to address medicinal cannabis until March 25, 2014, with the passage of Ordinance No. O-20356.

[4] A copy of the Municipal Code in effect at the time is attached as Exhibit 13 to the App'x.

identifying excluded uses). Notably, Table 1512-03I specifically allows for the operation of drug stores, pharmacies, liquor stores, bakeries, confectioneries, florists, variety stores, food stores, and dry goods stores without any reference to the types of products sold therein. Yet, the City of San Diego contended in *Holistic Café* that a medicinal cannabis storefront was not specifically listed as a permitted use. By this flawed logic, the City of San Diego could have also challenged any café because the words "coffee," "tea," and "scones" were also not specifically listed.

Moreover, during this 2010-2012 time period, localities and medical cannabis advocates hotly debated and litigated whether local governments could use zoning regulations to ban legal medicinal cannabis storefronts with varying results. (See *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 [local governments cannot ban]; *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) 207 Cal.App.4th 601 [local governments cannot ban]; and *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 [local governments can ban].) It was not until 2013 that the California Supreme Court decided *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 761-762, which ruled that local governments could ban medical cannabis storefronts.

In any event, despite having several legal and factual defenses available to them at the time, on December 14, 2012, the defendants in *Holistic Café*, including Mr. Senn, decided to settle the matter and entered into a stipulated judgment that did ***not*** include any admission of liability. Then, on May 3, 2019, the Superior Court in *Holistic Café* amended the judgment so as to specifically permit the defendants therein to engage in commercial cannabis activities. (Ex. 9 to App'x.) More importantly for purposes of this motion, the City committed clear legal error when it concluded that the *Holistic Café* matter was a basis for rejecting Petitioner's application.

(a) Holistic Café Did Not Involve "Commercial" Cannabis Activity

Preliminarily, the scope of CVMC §§ 5.19.050(A)(5)(f) and (g) is limited to misconduct surrounding "Commercial Cannabis Activity." This term is defined by the City as follows: ". . . the commercial cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of Cannabis or Cannabis Products." (CVMC, § 5.19.020.) Critically, the City's definition relates only to "commercial" "Cannabis or

Cannabis Products," not "Medicinal Cannabis" or "Medicinal Cannabis Product," which terms are separately defined in CVMC § 5.19.020. Indeed, the City's licensing scheme for commercial cannabis activities expressly ***excludes*** medicinal cannabis activities, thereby confirming an important distinction between what is commercial and what is medicinal under the City's own laws. (See, e.g., CVMC, § 5.19.090 ["A Storefront Retailer shall not Sell Medicinal Cannabis or Medicinal Cannabis Products."].)

Thus, because the Holistic Café was a nonprofit mutual benefit corporation (Ver. Pet. ¶ 75, Ex. 1 to App'x.) organized in compliance with Attorney General guidelines for the lawful distribution of medicinal cannabis (*id*.), neither CMVC §§ 5.19.050(A)(5)(f) nor (g) apply as a matter of law, and the City erred in rejecting Petitioner's application on this basis. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . ."].)

Furthermore, even if the specifically defined term "Commercial Cannabis Activity" could be read as encompassing the nonprofit distribution of medicinal cannabis (it cannot), the alleged civil zoning violations in *Holistic Café* are not disqualifying under CMVC §§ 5.19.050(A)(5)(f) or (g) as a matter of law and the City committed clear legal error in finding the contrary.

(b) CVMC § 5.19.050(A)(5)(g) Does Not Apply

Analyzing subdivisions (f) and (g) out of order helps to explain how both should be read. Subdivision (g) permits the City to reject an applicant if its owner, manager, or officer "conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity."

To avoid absurd results and unintended consequences, the phrase "unlawful Commercial Cannabis Activity" must be read to mean commercial cannabis activities that are unlawful under the regulatory schemes enacted by the State and localities following the passage of Proposition 64 in 2016, and not just any activity that is unlawful in the abstract. For example, under CVMC § 5.19.050(A)(1)(e)(i), the manager of a commercial cannabis license applicant must have "[a] minimum of 12 consecutive months, within the previous five years, as a Manager with managerial oversight or direct engagement in the day-to-day operation of a lawful Commercial Cannabis

Business *in a jurisdiction permitting such Commercial Cannabis Activity*." (CVMC, § 5.19.050(A)(1)(e)(i), italics added.) Yet, there are no jurisdictions permitting lawful commercial cannabis activity anywhere in the United States because *all* cannabis activity is unlawful under Federal law. (See, e.g., 21 U.S.C., § 811.) In fact, even if the City were to ignore Federal law entirely, there were no lawful *commercial* cannabis businesses anywhere in the state of California until its voters passed Proposition 64 in 2016.

Thus, it cannot be that *any* unlawful cannabis activities are disqualifying because that would necessarily lead to the automatic disqualification of every single experienced applicant whose experience in cannabis comes from managing a cannabis business (which is unlawful under Federal Law) or from engaging in any commercial cannabis activities in California before 2016. (See *City of Sanger v. Super. Ct.* (1992) 8 Cal.App.4th 444, 448 [courts should decline to interpret statutes in a manner that would frustrate the purposes of legislation or lead to absurd results].) Rather, for subdivision (g) to make any sense (and to avoid an otherwise direct conflict with CVMC § 5.19.050(A)(1)(e)(i)), subdivision (g) must be interpreted so that the phrase "unlawful Commercial Cannabis Activity" means activities that are unlawful under the regulatory schemes enacted by the State and City after 2016 and 2018, respectively, which is when each jurisdiction first coined the term "Commercial Cannabis Activity" in their respective codes.

Under this common sense reading of subdivision (g), an alleged violation of the City of San Diego's general zoning ordinances from back in 2012—ordinances that did not expressly ban otherwise lawful, nonprofit, medicinal cannabis storefronts under Senate Bill 420—cannot possibly be deemed an *unlawful* Commercial Cannabis Activity, because that phrase should only apply to activities deemed unlawful under the regulatory schemes enacted by the State and City following the passage of Proposition 64. Had the City intended otherwise, it could have changed the definition of Commercial Cannabis Activity to include nonprofit medicinal cannabis. It did not. The City could have also dropped the term "commercial" so that the disqualification was expanded to any "unlawful Cannabis Activity." It did not. Under the only logical reading of subdivision (g), the City clearly erred in denying Petitioner's application.

(c) CVMC § 5.19.050(A)(5)(f) Does Not Apply Either

With regard to CVMC 5.19.050 § (A)(5)(f), the key language is the phrase "laws or regulations *related to* Commercial Cannabis Activity." (Italics added.) There are two ways to read subdivision (f). The first is the broadest and vaguest way which, unfortunately, is the reading that the City improperly applied. Under the City's misapplication of subdivision (f), the words "laws or regulations" are not limited to the laws or regulations "related to" the regulatory schemes that defined the term "Commercial Cannabis Activity" and made commercial cannabis activity lawful in the State of California and in the City for the very first time. Rather, the City's tortured reading extends to any "laws or regulations" of general application, including laws and regulations that have absolutely nothing to do with the regulation of commercial cannabis activity (or medicinal cannabis activity or even cannabis generally, for that matter).

Under this overbroad and unduly vague reading of subdivision (f), the City could, theoretically, reject an applicant whose otherwise lawful and licensed medicinal cannabis business was sanctioned for violating wage and hour laws. The City could likewise reject an applicant who received a speeding ticket while transporting medicinal cannabis. Or the City could reject an applicant for violating a noise ordinance. It was using this overly broad and unduly vague reading of subdivision (f) that the City erroneously concluded that any civil zoning violation at an otherwise lawful, nonprofit medical cannabis storefront constituted a violation of law "related to Commercial Cannabis Activity."

Alternatively, subdivision (f) can be read consistently with the clear intent of subdivision (g), discussed above, which avoids these kinds of absurd results by interpreting the phrase "state or local laws or regulations related to Commercial Cannabis Activity" to mean those laws and regulations that were enacted along with the regulatory scheme that first defined the term "Commercial Cannabis Activity" (at both the state and local level). This reading provides applicants with fair notice of what is and what is not a disqualifying violation of law because applicants can review the Business and Professions Code and the CVMC and determine whether they have, in fact, violated any of the myriad commercial cannabis laws and regulations enacted following Proposition 64, MAUCRSA, or Ordinance No. 3418.

Under this proper reading of subdivision (f), a violation of the City of San Diego's general zoning regulations that did not expressly exclude otherwise lawful, nonprofit, medicinal cannabis storefronts under Proposition 215, but merely provided for a list of approved zoning uses on which medicinal cannabis was not explicitly listed (but was impliedly so, as discussed above), is not a violation of law *related to* Commercial Cannabis Activity as that phrase should be interpreted.

2. The City's Error Entitles Petitioner To Relief

But for the City's clear legal error, Petitioner would have advanced to the second round of the application process. Having exhausted all available administrative remedies and having no other remedy available, Petitioner brought a Petition and Complaint for declaratory and injunctive relief to compel the City to set aside its decisions dated May 6, 2020 and August 26, 2020 and permit Petitioner to proceed to Phase Two of the license application process. This is an appropriate remedy given the City's error on these discrete issues of law. (Code Civ. Proc., §§ 1085, 1094.5.) Relief is likewise appropriate given the numerous other substantive and procedural violations described in the Petition, however, Petitioner is cognizant that moving for injunctive relief on these other more factually intensive grounds may be premature as the City has yet to prepare the administrative record for this Petition.

In any event, because the City continues to move forward with other applicants, including two that were migrated into District One from other districts (i.e., real parties in interest March and Ash Chula Vista, Inc. and TD Enterprise LLC) (Ex. 14 to App'x), the Court will not be able to award Petitioner meaningful relief unless the Court enjoins the City from issuing any other cannabis storefront licenses in the City's District One and, to the extent that Respondent has already issued such licenses, declares such licenses null and void. Such relief is appropriate here to preserve the status quo. (Code Civ. Proc., § 526, subd. (a)(1)-(5).)

B. The Balance Of Hardships Weighs Strongly In Favor Of An Injunction

1. Petitioner Will Be Irreparably Harmed Unless The City Is Enjoined

"Irreparable harm" means a "'wrong[] of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard . . . .'"

(*Donahue Schriber Realty Grp., Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1184, quoting *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285.)

(a) A Wrong Of A Repeated And Continuing Character

The City only permits eight storefront licenses—two for each of the City's four districts. (CVMC, § 5.19.040, subd. (A).) Petitioner incurred the substantial time and expense necessary to source and secure a location in the City's District One, and then applied for one of the two licenses in January 2019, at the cost of thousands of dollars. To date, Petitioner has invested $56,900 toward its license for a retail storefront. (Senn Dec. ¶ 5.) Out of an abundance of caution, and to ensure that its substantial investment was not wasted, Petitioner disclosed the *Holistic Café* matter to the City with its application on January 18, 2019 in case the City viewed it as a disqualifying event. (Ex. 5 to App'x.) Rather than issue a rejection at that time, the City allowed Petitioner's application to advance to the interview stage and then ranked Petitioner the highest, most qualified applicant in the City's District One, all the while extracting more incremental fees. Only after doing so did the City abruptly deny Petitioner's application on May 6, 2020 and, after securing more fees on appeal, rubber stamped the denial on appeal.

Since that date, the City has allowed two applicants from *other* districts, who did not qualify to advance to stage two in their original districts (i.e., real parties in interest), to migrate into District One and advance to Phase II of the application process there. If these two applicants are issued licenses, no open spots will remain for Petitioner. Further, the application process has proceeded at a snail's pace since day one. Should the City open up more licenses in the future, and that is not certain at all, it could take years before Petitioner is granted a license. And then, even if Petitioner is granted what would be a third or even fourth license in the City's District One, it will have a difficult time competing against already established "first-to-market" competitors with a loyal customer base. (Cf. *Donahue, supra,* 232 Cal.App.4th at 1185 ["customers choose to shop at a particular location based on custom and habit . . . a shopping center's success depends on customer goodwill and a desire to return to the same location out of habit and loyalty."].) This is particularly true in the cannabis industry. (Senn Dec. ¶¶ 3-6.)

Long story short, if the City's error in denying Petitioner's application is not corrected now, it is highly unlikely that Petitioner will ever receive a license worth applying for in the future given the substantial time and expense it takes to apply, the lost opportunity to be one of the first to market, and the uncertainty facing applicants following the City's multiple, cumulative errors in the application process laid out in the Petition.

(b) Inability To Quantify Loss

Petitioner's principal, Willie Senn, operates a network of cannabis business in California under the brand name Urbn Leaf. (Senn Dec. ¶¶ 1-2.) Urbn Leaf Bay Park is amongst the most successful cannabis businesses in San Diego and the State of California. (*Id.*) It is because of this depth and breadth of experience that Petitioner was able to put forward a strong application and score the highest of any retail storefront applicant in the City's District One. (*Id.* ¶ 5.)

While Petitioner fully expects an Urbn Leaf store in the City's District One to perform with success similar to that of its Bay Park store and its stores throughout California, the fact of the matter is that there are barriers to quantifying loss when it comes to new enterprises. (See, e.g., *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892, 907 ["[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.'" (Citations.)]; see also *Engle v. Oroville* (1965) 238 Cal.App.2d 266, 273 ["Because of a justifiable doubt as to the success of new and untried enterprises, more specific evidence of their probable profits is required than where the claim is for harm to an established business."].) Because of these barriers, the only safe way to preserve Petitioner's rights is to maintain the status quo until the Court rules on the Petition.

2. Any Burden On The City Will Be Negligible

In contrast to shutting Petitioner out of the Chula Vista market or damaging its prospects therein, thereby denying the residents of Chula Vista access to a successful Urbn Leaf storefront, entering an injunction will cause little to no harm to the City. For example, the City has already moved at a snail's pace since first accepting applications two years ago. (Ex. 14 to App'x.) That the City may have to wait a few more months pending a dispositive hearing in this matter to issue licenses is a small price to pay when expediency has not been a concern of the City to date.

To the extent the City claims that delaying the already protracted application process will cost it tax revenue, any such loses would be negated by positive tax revenues derived from an Urbn Leaf location established by Petitioner in Chula Vista. Indeed, in 2019, the Urbn Leaf flagship location in Bay Park, San Diego paid $2,662,164 in sales taxes to the City of San Diego. (Senn Dec. ¶ 2.) Though not yet finalized, Urbn Leaf believes that in 2020, it outperformed its 2019 revenue and sales tax figures. (*Ibid*.) Additionally, any such claim from the City should be viewed with great skepticism given the City's obvious lack of prior diligence in issuing licenses.

As for the real parties in interest that sought to migrate from their respective districts to the City's District One, they were only permitted to do so under section 0501(N)(2)(e) of the Regs, which permits applicants to switch districts once the City concludes that there are not enough qualified applicants to fill a given district's open licenses. Such migration would not have occurred, for at least one of the two applicants, but for the fact that the City improperly rejected Petitioner's application. Neither applicant should have cause to complain to the extent their migration was improper to begin with.[5]

3. The Balance Of The Equities Tips In Favor Of An Injunction

In ruling on an injunction, courts must weigh the likelihood of injury to the plaintiff if the injunction is improperly denied against the likelihood of injury to the defendant if the injunction is improperly granted. (See *Butt v. State of Cal.* (1992) 4 Cal.4th 668, 677-78; *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 441-42.) For Petitioner, denying the injunction will potentially prevent it from ever opening an Urbn Leaf location in Chula Vista, leading to large but potentially incalculable losses. For the City and any applicant awaiting the outcome of this matter, the delay envisioned by a preliminary injunction will be short lived, as the case should be heard promptly following the City's preparation of the administrative record. A short delay (on top of an already delayed process), coupled with what should be a desire by the City to get things right, tips the balance in favor of a narrowly tailored injunction, as requested here.

[5] Real Parties TD Enterprise LLC and March and Ash Chula Vista, Inc. disagree on which of the two applicants would be first in line behind Petitioner for a license in the City's District One if Petitioner prevails in this action. (Brucker Dec. ¶ 5.) Petitioner takes no position on this issue.

IV. THE COURT SHOULD STAY THE CITY'S DECISIONS

Petitioner's second cause of action is for administrative mandate. Under Code of Civil Procedure § 1094.5(g), ". . . the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court . . . . However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest." For the same reasons discussed above, the public interest favors allowing for the most qualified applicant in District One to proceed forward with the licensing process, the equities weigh in favor of Petitioner, and the Court should exercise its discretion to stay the City's May 6, 2020 Notice of Decision and August 26, 2020 Denial of Appeal in order to ensure that Petitioner's "spot in line"—i.e., the status quo—is preserved.

V. CONCLUSION

For the aforementioned reasons, the Court should preliminarily enjoin the City and its agents, officers, employees, and representatives from taking or failing to take any action that would in any way interfere with the full and fair consideration of Petitioner's application for a retail storefront cannabis business license (Application ID 57074). Compliance with the Court's order should include, but not be limited to, halting the issuance of any other cannabis licenses in the City's District One. Further, to the extent that Respondent has already issued such licenses, the Court's order should declare such licenses null and void. For these same reasons, the Court should also stay the City's May 6, 2020 Notice of Decision denying Petitioner's application for a retail storefront cannabis business license (Application ID 57074), as well as its August 26, 2020 decision denying Petitioner's administrative appeal, under Code of Civil Procedure § 1094.5(g).

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Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: 

GARY K. BRUCKER, JR.
Attorneys for Petitioner/Plaintiff
UL CHULA TWO LLC