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Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

UL CHULA TWO LLC,

Petitioner/Plaintiff,

v.

CITY OF CHULA VISTA, a California public entity; CHULA VISTA CITY MANAGER, and DOES 1 through 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
Unlimited Jurisdiction

(Case assigned to Hon. Richard E. L. Strauss, Dept. C-75)

[IMAGED FILE]

RESPONDENTS CITY OF CHULA VISTA AND CHULA VISTA CITY MANAGER'S OPPOSITION TO EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

Hearing Date:	February 4, 2021
Hearing Time:	9:00 a.m.
Department:	C-75

Complaint Filed: November 13, 2020

Respondents and Defendants City of Chula Vista and the Chula Vista City Manager (together, the "City") oppose Petitioner and Plaintiff UL Chula Two LLC's ("Petitioner") *ex parte* Application for a Temporary Restraining Order. ("TRO App.") Petitioner cannot show it is likely to prevail on the merits, nor has it demonstrated it will suffer irreparable harm which would merit *ex parte* relief.

I. INTRODUCTION

Petitioner is an unsuccessful applicant dissatisfied with the City's review process for granting licenses to storefront cannabis retailers in Council District 1. However much Petitioner may disagree with the City's decision not to award it a license, that decision was reached after a complete administrative review and appeal, and the City's determinations were amply supported by substantial evidence. The City is entitled to deference in interpreting its own municipal code (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667), and upholding the well-reasoned decision of the City supports the separation of powers and inter-branch comity.

As a preliminary matter, the Court should deny the proposed restraining order because it is unduly broad in its scope, in that it seeks to prevent the City and its agents, etc., from "taking or failing to take any action that would in any way interfere with the full and fair consideration of Petition's application … including but … not limited to, halting the issuance of any other cannabis licenses in the City's First District." The temporary restraining order, if entered by this Court as worded, will place the City at risk of violating it unknowingly. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) ¶ 9:525.2, citing *Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1169 ["Overbroad, vague or generally phrased injunctions are avoided because contempt will not lie."])

The result of such an order would halt the entire District 1 application process, delay the opening of cannabis retailers in that district for months past the conclusion of this litigation, and cause significant harm to other retail cannabis licensees, resulting in irreparable harm to the City and Real Parties in Interest, March and Ash Chula Vista, Inc. and TD Enterprise LLC ("Real Parties"). Conversely, there is no harm to Petitioner other than some alleged financial harm — the entirely

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speculative advantage of being the "first to market." The balance of harms is against Petitioner's ill-conceived *ex parte* application.

II. STATEMENT OF FACTS

On March 16, 2018, the City enacted Ordinance No. 3418, adding Chula Vista Municipal Code ("CVMC") Chapter 5.19 "To Regulate Commercial Cannabis." The purpose of Ordinance No. 3418 was "to adopt a comprehensive set of requirements, restrictions, and robust enforcement procedures with regard to cannabis activity within the City in order to protect public safety, health, and other law enforcement interests." (*Id.* at p. 2.)

Chapter 5.19 established a mandatory license for engaging in legal commercial cannabis activity in the City. (CVMC § 5.19.030.) Relevant here, the City restricted the number of "Storefront Retailers" in the City to eight, two for each of the City's four Council Districts. (CVMC § 5.19.040.) It also established a two-phase application process for issuing cannabis licenses. During Phase I, applicants had to comply with a long and strict list of application requirements, including sufficient management experience and assets, a viable business plan, and a site plan. (CVMC § 5.19.050, subd. (A).) Phase I also calls for a discretionary review by the Finance Director and "completion of any and all required background checks" by the Chief of Police. (CVMC § 5.19.050, subd. (A)(5).) Following the background check, the Police Chief has discretion to reject Phase 1 applications for a variety of reasons, including:

> f. The Applicant, or any Owner of the Commercial Cannabis Business, Officer, or Manager **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.
>
> g. The Applicant, or any **Owner of the Commercial Cannabis Business, Officer, or Manager has conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity in the City or any other jurisdiction**.

(CVMC § 5.19.050, subd. (A)(5)(f) and (g); emphasis added.)

Petitioner applied to be a Storefront Retailer in District 1. However, on May 6, 2020, the City issued a Notice of Decision rejecting the Application because one of its principals had been "sanctioned" by the City of San Diego "for violations of laws or regulations related to unlawful

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Commercial Cannabis Activity." (CVMC § 5.19.050, subd. (A)(5)(f), (g); TRO App, Exh. E, 7.) Petitioner appealed, but presented no evidence that contradicted the City's prior decision. (TRO App., Exh. E, 10, p. 1.) On August 26, 2020, the City Manager issued a final determination and denied the appeal. (*Ibid.*) Nearly five months later on January 19, 2021, Petitioner moved for a preliminary injunction, with a hearing now set for April 30, 2021. Petitioner filed the TRO App. thereafter.

The City initially supported a stipulated stay on the final issuance of any storefront cannabis license in District 1, subject to the agreement of Real Parties. The City first proposed a temporary stay, enjoining the City from issuing any City cannabis storefront retailer license, pursuant to CVMC section 5.19.040, in City Council District 1. That language was then modified to address objections raised during discussions, and the City circulated a revised stipulation proposing an agreement for a temporary stay, enjoining the City from issuing more than one (1) City cannabis storefront retailer license in City Council District 1. Both alternatives were ultimately rejected by on or more parties to the action. (Declaration of Alena Shamos in Support of City's Opposition ("Shamos Dec.").)

The proposed stay was part of a stipulation setting the briefing and hearing schedule in this action. The City's intent was to expeditiously proceed on the merits and avoid wasting resources by engaging in interim *ex parte* and motion procedures. However, negotiations over the terms of the stay were protracted, resulting in a June 2021 merits hearing, as well as the instant hearing and the pending preliminary injunction motion. The injunction Petitioner now seeks is far broader than the language to which the City was willing to agree, and is too vague to implement.

III. ARGUMENT

The injunction standard is familiar: "[T]he question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) Although an *ex parte* application does not require an evidentiary hearing, "[e]ntry of any type of injunctive relief has been described as a delicate judicial power, to be exercised with great caution. [Citation] This is doubly true when granting relief on an expedited basis using an ex parte request for a temporary restraining

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order rather than a properly noticed preliminary injunction." (*Newsom v. Superior Court of Sutter County* (2020) 51 Cal.App.5th 1093, 1097.) The Court may only issue a temporary restraining order where "[i]t appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice." (Code Civ. Proc., § 527, subd (c).) "A court will not grant ex parte relief 'in any but the plainest and most certain of cases'" and "should deny an ex parte application absent the requisite showing." (*People ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 257.)

"It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but mandatory." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1471 (*O'Connell*).) Petitioner must therefore meet a higher burden of proof. (*Ibid.*) An injunction cannot be granted "to prevent the execution of a public statute by officers of the law for the public benefit" or prevent the lawful "execution of a public office." (Code Civ. Proc., § 526, subd. (b)(4); Civ. Code, § 3423, subd. (d) & (f).) Courts lack jurisdiction to enjoin the implementation and enforcement of "validly adopted constitutional ordinances." (*Xiloj-Itzep v. City of Agoura Hills* (1994) 24 Cal.App.4th 620, 635.)

Petitioner erroneously relies on *Landmark Holding Group, Inc. v. Superior Court* (1987) 193 Cal.App.3d 525 (*Landmark*) to argue the burden at an *ex parte* hearing is low and that temporary restraining orders should be liberally granted. (TRO App., p. 5.) Not so. *Landmark* did not address the burden of proof or factors to be considered on an *ex parte* application for a temporary restraining order. Rather, *Landmark* addressed whether a ruling on an *ex parte* application triggered the timeframe to bring a peremptory challenge under Code of Civil Procedure section 170.6. (*Id.* at p. 528.) While generally characterizing the nature of *ex parte* applications, the court was not rendering any opinion on the merits of the application itself. *Landmark* is inapplicable here.

A. The Balance of Harms Weighs in the City's Favor

Where a party seeks to enjoin "public officers or agencies from performing their duties," the petitioner is required to "make a significant showing of irreparable injury." (*Tahoe Keys Prop. Owners Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) Here, Petitioner's harms are merely speculative, whereas the damage to the City and Real Parties will be

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concrete and immediate.

A damages claim would be adequate to compensate Petitioner if it loses business. Petitioner consistently claims that the harm it seeks to avert relates to losing a "first-to-market advantage." (TRO App., p. 6.) This is precisely the type of harm that cannot justify invoking this Court's equitable powers. Any harm Petitioner will purportedly incur could be remedied by damages. (Code of Civ. Proc., § 526, subd.(a)(4) & (5).)

Further, Petitioner's predicted harm is entirely speculative and unlikely to come about, as Petitioner has presented no evidence that licenses are expected to be issued in District 1 prior to the April 30, 2021 preliminary injunction hearing. The threat of irreparable harm must be imminent as opposed to a mere theory of harm. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal. App. 4th 1069, 1084.) Injunctive relief properly issues only where "the right to be protected is clear, injury is impending and so immediately likely as only to be avoided by issuance of the injunction." (*East Bay Municipal Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126.) Petitioner presents no evidence it would be "first to the market," even if given a slot and allowed to proceed with Phase II licensing today. Petitioner's delay in bringing this *ex parte* application also demonstrates that any harm it may suffer is not imminent. (See *O'Connell, supra*, 141 Cal.App.4th at p. 1481 [claim of imminent injury from not receiving high school diplomas, raised shortly before graduation, could have been made earlier in the school year, which supported denial of injunctive relief].) Petitioner delayed five months after its administrative appeal was denied before seeking an injunction, showing the alleged harm is not so imminent as to justify a temporary restraining order. Finally, Petitioner cites no factual or legal basis for its perceived entitlement to be the first Storefront Retailer to open in District 1. Petitioner may not obtain a temporary restraining order to protect a right that does not exist, and it has no right to open first in District 1 under any set of facts.

In contrast, the City, Real Parties and the public will be irreparably harmed by issuing any form of injunctive relief, especially since, barring some unforeseen event, at least one of Real Parties can open a storefront retail location once this litigation is complete. The injury produced by the proposed injunction would be immediate, certain, and widespread as the entire application process in

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District 1 would be halted. The City has spent its time, funds and resources in the Phase II application process. And the Real Parties have taken expensive steps to perfect their applications, including purchasing or renting properties, hiring architects and engineers to draft and submit site plans, and conducting site assessments. The City, in turn, has reviewed their plans, provided comment, and posted public notices as required, all of which Petitioner seeks to undo.

Preventing the City from moving forward with the licensing process also thwarts the City's ability to regulate and control land use, zoning and business licensing. (*3570 East Foothill Boulevard v. City of Pasadena* (C.D. Cal. 1995) 912 F.Supp. 1257, 1262-1263.) The "interest [of cities] in attempting to preserve the quality of urban life is one that must be accorded respect." (*Young v. American Mini Theaters, Inc.* (1976) 427 U.S. 50, 71; *Lydo Enterprises, Inc. v. City of Las Vegas* (9th Cir. 1984) 745 F.2d 1211, 1213.) The sooner the cannabis license application process is completed, the greater the City's certainty that cannabis retailers in District 1 are operating in a manner that is safe for its residents.

B. Petitioner Has Not Demonstrated a Likelihood of Success on the Merits

Although Petitioner's application should be denied based on the balance of harm alone, Petitioner has also not shown it is likely to prevail on the merits. The gravamen of Petitioner's claim is that the City interpreted its own municipal code too broadly when finding the prior judgment against Petitioner for operating a cannabis dispensary in violation of San Diego's zoning laws was potentially disqualifying. (CVMC § 5.19.050, subd. (A)(5).) However, the City's interpretation of its own municipal code is entitled to deference from the courts. (E.g., *California Hotel & Motel Assn. v. Industrial Welfare Com*. (1979) 25 Cal.3d 200, 211–212.) "[Administrative bodies] have the ordinary authority … to resolve, in the first instance, ambiguities in the interpretation and application of [governing] statutes … ." (*Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement* (2020) 9 Cal.5th 1032, 1070.) Petitioner also misunderstands the standard of review at this stage. Review is limited to the record before the City in denying Petitioner's application and appeal (Code Civ. Proc., § 1094.5), and determines only whether the City followed the law, and if its actions and findings were supported by substantial evidence. (*Friends of Outlet Creek v. Mendocino County Air Quality Management Dist.* (2017) 11 Cal.App.5th 1235, 1244.) The

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City Manager produced a lengthy and well-reasoned decision, amply supported by substantial evidence. (TRO App., Ex. E, 10 [Decision on Appeal].) And Petitioner has no vested right in the cannabis license. (*Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 575, citing Code Civ. Proc., § 1094.5, subd. (b).) Petitioner may not have a *de novo* hearing on the merits of its license application, and has not demonstrated it is likely to prevail here.

C. The Law Abhors Forfeitures

Preventing Real Parties from moving forward with the application process will cause a substantial forfeiture based on the significant investments they and the City have made. Civil Code section 3369 provides: "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law."

"A forfeiture is '[t]he divestiture of property without compensation or the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." (*Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1364.) Forfeitures are interpreted against Petitioner in this situation. Civil Code section 1442 provides: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (*Lowe v. Ruhlman* (1945) 67 Cal.App.2d 828, 832.) "[T]he law does not favor forfeitures and that a forfeiture will be enforced only where no other interpretation is reasonably possible." (*Ibid.*)

D. Any Temporary Restraining Order Should Be Narrowly Tailored

If the Court issues a restraining order, it should be far more narrowly tailored than what Petitioner has submitted. Petitioner's proposed order is vague and unenforceable. "An injunction must be sufficiently definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a standard for the court to use in ascertaining an alleged violation of the injunction." (*People ex rel. Dept. of Transportation v. Maldonado* (2001) 86 Cal.App.4th 1225, 1234.) "An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application exceeds the power of the court." (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651.) Here, Petitioner requests the Court issue an order enjoining the City:

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> [F]rom 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…. Compliance with this order includes, but is not limited to, halting the issuance of any other cannabis licenses in the City's First District.

(Petitioner's Proposed Order) Were such an order issued, the City would have no guidance on which conduct is prohibited and which compelled. For example, may the City continue to process Real Parties' Phase II applications, or must it halt any processing? Must it process a Phase II application for Petitioner, so Petitioner may open on equal footing with the other Storefront Retailer in District 1 should it succeed? The City is left to guess.

Even if Petitioner could make the requisite showing for issuing a temporary restraining order, which it cannot, an order staying the ultimate issuance of licenses is all that is required. Such an order would allow the City to continue processing applications, since only the final issuance of a District 1 license could actually damage Petitioner.

IV. CONCLUSION

Petitioner has not made the showing necessary to justify the extraordinary step of issuing a temporary restraining order. The mere act of suing does not entitle Petitioner to bring the City's licensing process to a grinding halt and delay the opening of any Storefront Retailers for many months. Petitioner cannot demonstrate it will suffer irreparable harm or succeed on the merits, and the countervailing damage to the City and Real Parties will be immediate and severe. The City respectfully requests the Court deny Petitioner's ex parte application.

DATED: February 3, 2021

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PROOF OF SERVICE

UL Chula Two LLC v. City of Chula Vista, et al.
San Diego Superior Court Case No.: 37-2020-00041554-CU-WM-CTL
Our File No. 33020.0009

I, Shoeba Hassan, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 E. Colorado Boulevard, Suite 850, Pasadena, California 91101-2109. My email address is: shassan@chwlaw.us. On February 3, 2021, I served the document(s) described as **RESPONDENTS CITY OF CHULA VISTA AND CHULA VISTA CITY MANAGER'S OPPOSITION TO EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER** on the interested parties in this action addressed as follows:

By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on February 3, 2021 from the court authorized e-filing service at OneLegal.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on February 3, 2021, at Pasadena, California.

Shoeba Hassan

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