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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**

14 UL CHULA TWO LLC,
15
16 Petitioner/Plaintiff,
17
18 vs.
19 CITY OF CHULA VISTA, a California
20 public entity; CHULA VISTA CITY
21 MANAGER, and DOES 1-20,

22 Respondents/Defendants,

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

26 Real Parties In Interest

CASE NO. 37-2020-00041554-CU-MC-CTL
[Related Case Nos. 2020-00041802-CUMC-
CTL; 37-2020-00033446-CU-MC-CTL]
[IMAGED FILE]

**TD ENTERPRISE LLC’S OPPOSITION TO
PETITIONER UL CHULA TWO LLC’S
MOTION FOR PRELIMINARY
INJUNCTION**

[Assigned for All Purposes to:
Judge: Hon. Richard E. L. Strauss, Dept C-75]

Hearing Date: March 26, 2021
Time: 9:00 a.m.
Dept.: C-75

Complaint Filed: November 13, 2020

27 Real Party in Interest TD Enterprise LLC (“TD”) oppose Petitioner and Plaintiff UL
28 Chula Two LLC’s (“Petitioner”) Motion for a Preliminary Injunction. As explained below and as
also explained in the opposition brief concurrently filed by the City of Chula Vista, which is
incorporated herein by reference, Petitioner cannot show it is likely to prevail on the merits, it has
failed to demonstrate irreparable harm, and it has failed to explain why monetary damages would

1 not suffice, all of which are prerequisites for a preliminary injunction.

2 **I. INTRODUCTION**

3 Through this lawsuit, Petitioner seeks to overturn a decision by the City of Chula Vista
4 (“City”) that denied Petitioner a single license to open a cannabis retail storefront in Chula Vista’s
5 District 1. By way of its preliminary injunction motion, Petitioner seeks an injunction that is
6 twice as broad as the ultimate relief that it seeks in this litigation. Petitioner asks this Court to
7 issue a preliminary injunction that encompasses not one - but both District 1 licenses. Moreover,
8 Petitioner fails to explain how monetary damages would not suffice. As such, for the reasons
9 explained in greater detail herein, Petitioner’s request should be denied because: 1) the scope of
10 the requested preliminary injunction is impermissibly overbroad insofar as it seeks a greater
11 restraint than is necessary for the ultimate relief being sought or that can be reasonably expected
12 if it ultimately prevails in this litigation; and 2) Petitioner concedes that money damages would
13 compensate it.

14 **II. BACKGROUND**

15 **A. The City’s Cannabis License Application Process**

16 Chapter 5.19 to the Chula Vista Municipal Code (“CVMC”) states that any person who
17 desires to engage in lawful commercial cannabis activity or to operate a commercial cannabis
18 business within the City’s jurisdiction must have a valid State License and a valid City License.
19 CVMC, § 5.19.030.

20 This case concerns one type of cannabis license: a storefront cannabis retail license. The
21 CVMC permits each of the City’s four districts to issue two (2) storefront cannabis retail licenses,
22 for a total of eight (8) storefront cannabis retail licenses across the City. CVMC § 5.19.040(A).
23 Applicants were permitted to apply for only one (1) storefront retail license per District, and no
24 more than four (4) storefront retail licenses City-wide. (See City of Chula Vista Cannabis
25 Regulations (“Regs”) § 0501(C)(1).)

26 Because the City received more applications than available licenses in each District, and
27 in order to “mitigate the negative impacts bought by unregulated Commercial Cannabis Activity”
28 (CVMC, §5.19.010), the City used a merit-based scoring system to determine which applicants

1 would be permitted to move forward with final permitting and licensing (the “Merit Process”).
2 The Merit Process was “Phase One” of the City’s selection process. At the end of Phase One, the
3 top two scoring storefront retail applicants in each District would proceed to Phase Two of the
4 licensing process in that District. (Regs § 0501(N)(2)(a).) Upon obtaining final approval during
5 Phase Two, an applicant would be issued a conditional City approval, which allows the applicant
6 to take all actions necessary to obtain a City License and commence commercial cannabis
7 business. (CVMC § 5.19.050(B)(7).)

8 The CVMC and the Regs set forth the specific criteria used by the City to score applicants
9 during the Merit Process, (*see* Regs., § 0501, subd. (N)(1)), as well as the grounds for
10 disqualifying applicants, (*see* CVMC, § 5.19.050(A)(5)(a)-(g)).

11 **B. Unfilled Districts**

12 To account for the possibility of a District not having two (2) eligible applicants (an
13 “Unfilled District”), the Regs permit qualified applicants not selected for licensure in the specific
14 district in which that applicant applied (the “Application District”) to move into an Unfilled
15 District and obtain an open license therein. More specifically, the qualified applicant that
16 received the *highest*-score during Phase One, but which was not selected to proceed to Phase Two
17 in the Application District, is the first applicant invited to move into the Unfilled District:

18 Should qualified applications for unfilled Council Districts be exhausted, any
19 remaining unselected, qualified applications for filled Council Districts will be
20 placed in rank order based on their aggregate score. ***The highest ranked***
21 ***remaining qualified application for a filled Council District that matches the***
22 ***retailer category in an unfilled Council District and that does not have another***
23 ***retailer license application that was selected in that unfilled Council District will***
obtain a signed, notarized statement from the owner(s) of a site located within that
Council District per the requirements of the Phase One application process.

24 (Regs., § (N)(2)(e) (emphasis added).)

25 At the conclusion of Phase One, District 1 remained an Unfilled District. (*See, e.g.,*
26 Declaration of David Kramer (“Kramer Decl.”) Ex. A., June 12, 2020 Ltr. from City to TD
27 Enterprise (“June 12 Letter”) (“...there is currently an unfilled storefront retail license slot in
28 Council District 1.”).)

1 **C. TD Enterprise was Invited to Fill the License Gap in District 1 and Will be**
2 **Permitted to do so Regardless of the Outcome of This Action**

3 TD Enterprise (“TD”) submitted applications for storefront retail licenses in Districts 2
4 and 4, where it received the third-highest score in both of those Districts (and therefore did not
5 qualify for a storefront retail license in either District 2 or 4). TD was the *highest-scoring*
6 applicant in *any district, City-wide*, that did not receive a storefront retail permit in its Application
7 District. Accordingly, per the Regs, TD was the first applicant invited to move its application
8 into District 1, an Unfilled District. In a June 12, 2020 letter from the City, TD was informed:
9 *“Your application is currently the highest ranked remaining qualified storefront retail*
10 *application...[The] City would like to offer you the opportunity to select a site for your*
11 *storefront retail business within unfilled Council District 1.”* (Kramer Decl., Ex. A.)

12 TD promptly accepted the City’s invitation and is one of the two applicants in District 1
13 currently progressing through Phase Two. Because TD scored higher than either Petitioner or the
14 other real party in interest here, Marsh and Ash, TD Enterprise will be one of the two District 1
15 applicants permitted to continue to proceed through Phase Two and obtain storefront retail license
16 in District 1 regardless of the outcome of this litigation.

17 **III. ARGUMENT**

18 To prevail on a preliminary injunction motion, Petitioner must demonstrate that it is more
19 likely than not that (1) Petitioner will ultimately prevail on the merits, and (2) the relative interim
20 harm to the parties from the issuance of the injunction weighs in Petitioner’s favor. (*Butt v. State*
21 *of California* (1992) 4 Cal.4th 668, 677-678.) Satisfying both prongs are necessary for a
22 preliminary injunction. Moreover, “[i]t is well established that when injunctive relief is sought,
23 consideration of public policy is not only permissible but mandatory.” (*O’Connell v. Superior*
24 *Court* (2006) 141 Cal.App.4th 1452, 1471 (O’Connell).) Finally, pursuant to California Code of
25 Civil Procedure, §526, the only statutory basis for this Court issuing a preliminary injunction in
26 this matter is subsection (a)(4), which is “[w]hen pecuniary compensation would not afford
27 adequate relief.” As explained below, Petitioner’s motion fails because its request is overbroad
28 and monetary damages would afford adequate relief.

1 **A. Petitioner’s request is overbroad**

2 Petitioner seeks a preliminary injunction that would temporarily prohibit the City from
3 issuing any cannabis licenses in the City’s District One. Such a request is impermissibly
4 overbroad. “[T]rial courts should evaluate two interrelated factors when deciding whether or not
5 to issue [a restraining order]. The first is the likelihood that the plaintiff will prevail on the merits
6 at trial. The second is the interim harm that the plaintiff is likely to sustain if the
7 [restraining order] were denied as compared to the harm that the defendant is likely to suffer if the
8 [order] were issued.” (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th
9 1244, 1251 (*citing and quoting IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 69-
10 70)). As explained by the California Supreme Court, “[t]he scope of available preliminary relief is
11 necessarily limited by the scope of the relief likely to be obtained at trial on the merits.”
12 (*Common Cause v. Board of Supervisors* (1989) 49 Cal. 3d 432, 442). Moreover, “[t]he ultimate
13 goal ... in deciding whether a preliminary injunction should issue is to minimize the harm which
14 an erroneous interim decision may cause.” *IT Corp.*, 35 Cal.3d at 73.

15 Here, Petitioner seeks preliminary relief that is greater in scope than what it could obtain
16 if this Court ultimately issues a writ of mandate after a hearing on the merits. As set forth in the
17 operative complaint, Petitioner requests an order requiring the City to issue Petitioner one of the
18 two retail storefront licenses in District 1. Should Petitioner ultimately prevail on the merits,
19 which appears unlikely, the issuance of the writ of mandate will not impact both retail storefront
20 licenses in District 1. Under no scenario set forth in the operative complaint or the request for a
21 Preliminary Injunction, does Petitioner obtain both District 1 retail storefront licenses.
22 Accordingly, any restraint on the ability of the City to move forward on the issuance of *both*
23 District 1 licenses is impermissibly overbroad because it is beyond the relief that Petitioner can
24 obtain—or is even seeking—in this Action.

25 **B. Petitioner concedes that pecuniary compensation affords adequate relief**

26 By way of its motion, Petitioner argues that preliminary relief is necessary because “if the
27 City’s error in denying Petitioner’s application is not corrected now, it is highly unlikely that
28 Petitioner will ever receive a license worth applying for in the future given the substantial time


1 and expense it takes to apply [and] the lost opportunity to be one of the first to market....”
2 (Motion at p. 13). In making this argument, Petitioner concedes that the only harm that it might
3 suffer is monetary. However, under CCP 526(a)(4), Petitioner is not entitled to a preliminary
4 injunction unless monetary damages would be inadequate. Clearly, where one asserts that the
5 damages justifying a preliminary injunction are the costs of reapplying and the lost revenue from
6 not being “first to market,” this constitutes a concession that monetary damages would be more
7 than adequate to compensate Petitioner.

8 **IV. CONCLUSION**

9 For these reasons, TD Enterprise respectfully requests that the Court: 1) deny Petitioner’s
10 request for an injunction on the grounds that it is impermissibly overbroad, or 2) narrow the scope
11 of the proposed injunction so that it only prohibits the City from issuing one of the two District 1
12 licenses before the merits hearing and allowing all other activity in furtherance of licensing to
13 proceed in District 1. This narrowly tailored proposed relief pairs the ultimate relief sought by
14 Petitioner with the proper scope of a preliminary injunction.

15 DATED: March 15, 2021

TENCERSHERMAN LLP

16
17 By: 
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