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Respondents and Defendants City of Chula Vista and the Chula Vista City Manager (together, the "City") and Real Party in Interest, March and Ash Chula Vista, Inc. ("M&A"), oppose Petitioner and Plaintiff UL Chula Two LLC's ("Petitioner") Motion for a Preliminary Injunction. Petitioner cannot show it is likely to prevail on the merits, nor has it demonstrated it will suffer irreparable harm which would merit injunctive 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 Court affords deference to the City 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 interbranch comity.

As a preliminary matter, the Court should deny the proposed preliminary injunction 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 ... include[ing], but not limited to, halting the issuance of any other cannabis licenses in the City's District One." (Mot., p. 15.) Akin to Petitioner's application for Temporary Restraining Order, the preliminary injunction, 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, M&A and TD Enterprise LLC (collectively, the "Real Parties"). Conversely, there is no harm to Petitioner other than some alleged financial harm — the entirely speculative advantage of being the

injunction.

### 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.)

"first to market." The balance of harms is against Petitioner's ill-conceived motion for preliminary

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 may 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, William Senn, had been "sanctioned" by the City of San Diego "for violations of laws or regulations related to unlawful Commercial Cannabis Activity."

(CVMC § 5.19.050, subd. (A)(5)(f), (g); Mot., Exh. 7.) Mr. Senn had been cited by the City of San Diego in 2012 for maintaining an unlawful cannabis dispensary within the city in violation of San Diego zoning laws. (Mot., Exh. 12.)

Petitioner timely filed a notice of appeal on May 21, 2020. (Mot., Exh. 8.) On May 26, 2020, the City provided notice to Petitioner that its hearing would be on June 10, 2020. (Pet., ¶ 30.) On June 5, 2020, the City provided Petitioner with a copy of the evidence it intended to use at the hearing. (Pet., ¶ 31.) The same day, Petitioner filed its appeal brief, which demonstrated Petitioner understood the City's decision to be based on the illegal operation of the Holistic Café in San Diego. (Pet., ¶ 31)].) At the June 10, 2020 administrative appeal hearing, Petitioner presented no evidence that contradicted the City's prior decision. (Mot., Exh. 10, p. 1.) Nor did Petitioner object, at any point, that notice was untimely or ask for a continuance, despite the Notice of Hearing informing it of the ability to request one. (*Ibid.*; Pet., ¶ 32; Exh. H thereto].) On August 26, 2020, the City Manager issued a final determination and denied the appeal. (Mot., Exh. 10, p. 1.) Petitioner filed this action in November 2020, and moved for preliminary injunction on January 19, 2021, setting the hearing for April 30, 2021 nearly ten months after the appeal hearing. As part of this Court's ex parte issuance of a more narrowly tailored temporary restraining order ("TRO") at the February 4, 2021 hearing, the Court also advanced the hearing on Petitioner's preliminary injunction from April 30, 2021 to March 26, 2021 to limit the duration of that TRO.

As pointed out in its opposition to the TRO, 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, under 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 one or more parties to the action. (Declaration of Alena Shamos in Support of City's Opposition to TRO filed February 3, 2021 ("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, the previous *ex parte* application and this hearing on a preliminary injunction. The injunction Petitioner now seeks is far broader than the language to which the City was willing to agree and the Court was willing to order in the TRO, and, even more importantly, 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.) "Entry of any type of injunctive relief has been described as a delicate judicial power, to be exercised with great caution." (Newsom v. Superior Court of Sutter County (2020) 51 Cal.App.5th 1093, 1097.)

"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.)

### 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 concrete and immediate.

The law is well-settled that a threat of irreparable harm must be imminent as opposed to a

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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 motion 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 an injunction. 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 an injunction to protect a right that does not exist, and it has no right to open first in District 1 under any set of facts.

Moreover, even if Petitioner is able to prove lost profits with reasonable certainty, a damages claim would be adequate to compensate Petitioner for such harm. Petitioner consistently claims that the harm it seeks to avert relates to losing a "first-to-market advantage." (Mot., p. 12.) 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).)

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 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. Petitioner now proposes the Court find those efforts "null and void" at extreme financial loss to the Real Parties and the City. (Mot., p. 15.)

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, courts defer to a city's interpretation of its own municipal code. (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 City Manager produced a lengthy and well-reasoned decision, amply supported by substantial evidence. (Mot.,

Exh. 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.

# The City Properly Determined Mr. Senn's Prior Prosecution for Zoning Laws Violations Disqualified Petitioner

The only merits argument Petitioner raises in support of its request for a Preliminary Injunction is its challenge to the City's denial of its license application based on Mr. Senn's illegal operation of a marijuana business in the City of San Diego, and the resulting abatement action filed by San Diego. The City acted well within its discretion in disqualifying Petitioner under CVMC section 5.19.50, subdivisions (A)(5)(f) and (g). (See Mot., pp. 6–11.) Petitioner's attempt at a backward reading of San Diego's zoning code does not detract from the fact that Mr. Senn was operating a marijuana dispensary in violation of local law and was "adversely sanctioned or penalized" by the City of San Diego for such operation. (CVMC § 5.19.050, subd. (A)(5)(f).)

Although Petitioner provided the City with the Stipulated Judgment between Mr. Senn and the City of San Diego, it did not disclose the information uncovered by the City's further background investigation. In that investigation, the City discovered that Mr. Senn illegally operated the Holistic Café marijuana dispensary beginning in 2009 and through at least 2012 in San Diego, in a zone in which such use was not permitted. As a result of that investigation, the City of San Diego issued at least one notice of violation, and following Mr. Senn's failure to cease the illegal operation filed a civil action to abate the illegal use. (See Mot., Exh. 12; see, CVMC § 5.19.050, subd. (A)(5)(f) and (g).)

As this Court is aware, the California Constitution confers police power to local government and their electors to determine the allowable land uses within their jurisdictions. (Cal. Const., art. XI, § 7; *Vill. of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 392 [zoning regulations expressly within city's police power]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 (*IT Corp.*) ["The power of cities and counties to zone land use in accordance with local conditions is well entrenched."].) "When use of a parcel violates applicable zoning rules, the

responsible agency may obtain abatement—i.e., **removal of the violation and restoration of legal use**." (*IT Corp., supra*, 1 Cal.4th at p. 89 [emphasis added].) And, as stated in San Diego's December 14, 2012 Complaint against Mr. Senn and Holistic Café, San Diego sought to enjoin them "from operating or maintaining a marijuana dispensary, cooperative, or collective" because "[t]he operation or maintenance of a marijuana dispensary is not permitted use in any zone designation under the SDMC." (Mot., Exh. 12.)

There is no dispute the City of San Diego's zoning code is permissive. (Mot., Exh. 13.) And California "courts have recognized permissive zoning as a valid method of prohibiting dispensaries." (*Urgent Care Medical Services v. City of Pasadena* (2018) 21 Cal.App.5th 1086, 1095 [emphasis added].) Under permissive zoning "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a permissible use, it follows that such use is impermissible." (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433 (*City of Corona*) [emphasis in original]; see also *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.)

And, as early as 2008, well before the City of San Diego's abatement action against Mr. Senn, California Courts were already holding that a marijuana dispensary operating in a zone in which it was not expressly permitted to operate violated the law and was subject to abatement as a "non-permitted, non-conforming use." (City of Corona, supra, 166 Cal.App.4th at p. 420.)

Petitioner's argument that the City abused its discretion by misreading its own municipal code fails.

### C. Any Injunction Should Be Narrowly Tailored

If the Court issues a preliminary injunction, 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 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.

(Motion, p. 15; Proposed Order p. 2) 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 the City immediately begin processing a Phase II application for Petitioner, so Petitioner may open on equal footing with the other Storefront Retailer in District 1 should the Court ultimately decide – over the strong objections of the City and Real Parties – in favor of Petitioner? The City is left to guess.

Similarly, Petitioner goes too far in asking the Court to find the licenses issued to Real Parties "null and void," which would be incredibly damaging to Real Parties. Even if Petitioner could make the requisite showing for issuing a preliminary injunction, which it cannot, an order staying the ultimate issuance of licenses until after the Court has the opportunity to consider the matter in full at the merits hearing on June 18, 2021, is all that is required here. Such an order would allow the City to continue processing applications, since only the final issuance of a District 1 license could arguably damage Petitioner.

### IV. CONCLUSION

Petitioner has not made the showing necessary to justify the extraordinary step of issuing a preliminary injunction. The mere act of filing a lawsuit 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 and/or succeed on the merits, and the countervailing damage to the City and Real Parties will be immediate and severe. The City and M&A respectfully request the Court deny Petitioner's Motion in its entirety and vacate the February 11, 2021 Order.

	1	DATED: March 15, 2021	COLANTUONO, HIGHSMITH & WHATLEY, PC
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	3		Matthew Slents
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	6		CITY MANAGER
	7	DATED: March 15, 2021	ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
	8 9		Hohuy
<b>(</b> )	10		HEATHER S. RILEY Attorney for Real Party In Interest MARCH AND ASH CHULA VISTA, INC.
9 <b>,</b> ΡΟ	11		THE THE PAST CHOLD VISITE, INC.
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# Colantuono, Highsmith & Whatley, PC 790 E. COLORADO BOULEVARD, SUITE 850

PASADENA, CA 91101-2109

### 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 March 15, 2021, I served the document(s) described as RESPONDENTS CITY OF CHULA VISTA'S, CHULA VISTA CITY MANAGER'S AND REAL PARTY IN INTEREST MARCH AND ASH CHULA VISTA, INC.'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION 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.
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 15, 2021, at Pasadena, California.

Shoeba Hassan

# 

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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

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### CASE INFORMATION

### **ORDER DETAILS**

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Code § 6103

**Court Name:** San Diego County, Order Type: eFiling-eService Superior Court of Filing order #: California 16011136 **Court Branch:** Central - Civil Date/Time Submitted: 3/15/2021 3:31 PM PT Case Title: UL CHULA TWO LLC **Client Billing Code:** 33020.0009 vs CITY OF CHULA VISTA [IMAGED] **Contact Name:** Shoeba Hassan Civil - Unlimited **Case Category:** Alena Shamos **Attorney Name:** Case Type: Misc Complaints -**Email Notification:** Contact Other **Special Instructions:** Exempt from Filing Case #: 37-2020-00041554-

### **DOCUMENTS**

Document Type	Document Title	Pages Uploaded
Opposition - Other	RESPONDENTS CITY OF CHULA VISTAS, CHULA VISTA CITY MANAGER AND REAL PARTY IN INTEREST MARCH AND ASH CHULA VISTA, INC.'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION	17
Stipulation - Other	STIPULATION AND [PROPOSED] ORDER SETTING A SCHEDULE FOR BRIEFING AND HEARING ON THE MERITS	7

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