

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]

~~[PROPOSED]~~ JUDGMENT

**Petition for Writ of Mandate Filed:**  
November 13, 2021

Judge: Hon. Richard E. L. Strauss  
Dept.: C-75  
Action Filed: November 13, 2021  
Hearing Date: May 21, 2021

1 The above-entitled action came on regularly for hearing in Department 75 of the above-  
2 entitled court on May 21, 2021, the Honorable Richard E. L Strauss, Judge, presiding. Gary K.  
3 Brucker, Jr. of Lewis Brisbois Bisgaard & Smith LLP appeared for petitioner UL Chula Two LLC  
4 (“Petitioner”). Alena Shamos of Colantuono, Highsmith & Whatley, PC appeared for the  
5 respondents City of Chula Vista and Chula Vista City Manager (collectively, “Respondents”).  
6 Heather Riley of Allen Matkins Leck Gamble Mallory & Natsis, LLP appeared for Real Party in  
7 Interest March and Ash Chula Vista, Inc. (“March and Ash”). Philip Tencer of TencerSherman  
8 LLP appeared for Real Party in Interest TD Enterprise LLC (“TD”, or along with March and Ash,  
9 “Real Parties in Interest”).

10 After consideration of the Administrative Record, the briefs filed by the parties, and the  
11 oral arguments of counsel:

12 **THE COURT FINDS AS FOLLOWS:**

13 1. Petitioner’s motion for writ of administrative mandamus is denied for the reasons  
14 stated in the Court’s May 21, 2021 Minute Order, which ruling constitutes the Court’s Statement  
15 of Decision as set forth therein. A true and correct copy of the minute order is attached hereto as  
16 Exhibit A.

17 2. Pursuant to the Parties’ stipulation and by operation of law, Petitioner’s first cause  
18 of action for traditional mandamus and Petitioner’s third cause of action for declaratory and  
19 injunctive relief are subsumed within Petitioner’s second cause of action for administrative  
20 mandamus. As a result, and as is reflected in the Court’s May 21, 2021 Minute Order, Petitioner  
21 dismissed the first and third causes of action upon the Court’s inquiry, thereby disposing of all  
22 causes of action.

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment shall be for  
24 and in favor of Respondents and Real Parties In Interest.

25 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

26 1. The relief prayed for by Petitioner is DENIED.

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2. Respondents and Real Parties in Interest shall recover their costs in this action in the amount of \$ \_\_\_\_\_, as allowed by law.

DATED: June 17, 2021

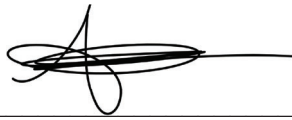


Honorable Richard E. L. Strauss  
Judge of the Superior Court

Respectfully submitted and so stipulated,



By: \_\_\_\_\_  
Gary K. Brucker, Jr., Esq.  
Attorneys for Petitioner UL Chula Two LLC



By: \_\_\_\_\_  
Alena Shamos, Esq.  
Attorneys for Respondents City Of Chula Vista  
And Chula Vista City Manager



By: \_\_\_\_\_  
Philip Tencer, Esq.  
Attorneys for Real Party in Interest TD Enterprise  
LLC



By: \_\_\_\_\_  
Heather Riley, Esq.  
Attorneys for Real Party in Interest March And  
Ash Chula Vista, Inc.

# EXHIBIT A

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 05/21/2021

TIME: 09:00:00 AM

DEPT: C-75

JUDICIAL OFFICER PRESIDING: Richard E. L. Strauss

CLERK: Blanca Delgado

REPORTER/ERM: Stephanie Bryant CSR# 13160

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00041554-CU-MC-CTL** CASE INIT.DATE: 11/13/2020

CASE TITLE: **UL CHULA TWO LLC vs CITY OF CHULA VISTA [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

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**EVENT TYPE:** Motion Hearing (Civil)

MOVING PARTY: UL CHULA TWO LLC

CAUSAL DOCUMENT/DATE FILED: Motion for Preliminary Injunction, 01/19/2021

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**EVENT TYPE:** Hearing on Petition

MOVING PARTY: UL CHULA TWO LLC

CAUSAL DOCUMENT/DATE FILED: Motion - Other MOTION FOR WRIT OF MANDATE, 04/02/2021

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**APPEARANCES**

Gary K Brucker, Jr, counsel, present for Petitioner,Plaintiff(s) via remote video conference.

Alena Shamos, counsel, present for Defendant,Respondent(s) via remote video conference.

HEATHER S RILEY, counsel, present for Defendant,Interested Party(s) via remote video conference.

Phillip Tencer, counsel, present for Real Party in Interest, via Remote Audio Appearance.

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This being the time set for oral argument on the above entitled motion(s), the Court issued its tentative ruling on May 20, 2021,

The Court hears oral argument and CONFIRMS as **MODIFIED** the tentative ruling as follows:

Petitioner UL Chula Two LLC's Motion for Writ of Mandate is denied.

Petitioner has pled two claims for writ of mandate, one for administrative mandate and one for traditional mandate. This petition focuses on the claim for administrative mandate. Petitioner contends that Respondent City of Chula Vista abused its discretion in denying the application for a cannabis license. The claim for traditional mandate does not appear applicable since Petitioner is not seeking to require Respondent to undertake a ministerial duty. There is no analysis on this claim in the moving papers.

Abuse of discretion is established if the court determines that the agency's decision is not supported by the findings or the findings are not supported by the evidence. (CCP § 1094.5(b).) The court must exercise its independent judgment where an administrative decision substantially affects a fundamental vested right (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; CCP

§ 1094.5(c).) In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; CCP § 1094.5(c).)

Petitioner's first argument is that the civil zoning violations at issue in the *Holistic Caf&#233;* matter do not constitute unlawful Commercial Cannabis Activity. The Notice of Decision rejecting Petitioner's application states that William Senn, Petitioner's principal, had been adversely sanctioned or panelized for a material violation of state or local laws or regulations related to Commerical Cannabis Activity. (CVMC § 5.19.050(A)(5)(f).) The second reason stated was that Mr. Senn "conducted, facilitated, caused, aided, abetted, suffered, or concealed unlawful Commercial Cannabis Activity..." when he was involved in unlawful Commercial Cannabis Activity in the City of San Diego from 2010-2012. (CVMC § 5.19.050(A)(5)(g); AR 119-122.) Petitioner concedes he was operating a medicinal cannabis storefront (*Holistic Caf&#233;*) and agreed to resolve the matter by entering into a stipulated judgment with the City of San Diego. (AR 196.) However, Petitioner challenges the finding that a medicinal cannabis storefront falls within the definition of "Commerical Cannabis Activity" as set forth by the Chula Vista Municipal Code.

Here, Petitioner has not met its burden to establish that operation of a medicinal marijuana storefront does not fall under the definition of "Commercial Cannabis Activity." Pursuant to the CVMC, this is defined as "the commercial Cultivation, possession, furnishing, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of Cannabis or Cannabis Products." (CVMC § 5.19.020.) Petitioner does not identify any language which would exclude the sale medicinal cannabis from being subsumed into the definition of Commercial Cannabis Activity. The fact that other sections are specific to medicinal marijuana does not exclude it from rules which have broader application.

Petitioner's contention that CVMC § 5.19.050 (A)(5)(f) is not disqualifying because Respondent applied an overbroad interpretation unconvincing. *Holistic Caf&#233;* was cited for zoning violations related to the Commercial Cannabis Activity, which is specific ineligibility under the Municipal Code. The record reflects that Mr. Senn was operating the marijuana business illegally. (AR 158-164, 186-203.) Thus, Petitioner's argument that the statute might exclude applicants who were cited for mundane violations unrelated to the cannabis business is irrelevant.

The argument that Mr. Senn was not engaged in "unlawful Commercial Cannabis Activity" is unpersuasive. Petitioner argues that it is irrational to interpret all commercial cannabis activity as being illegal because no commercial cannabis activity is permitted under Federal law. Petitioner asserts that the plain language must mean that commercial activity that would be unlawful after the enactment of Prop 64 in 2016. Thus, Petitioner would like to apply a future standard to past conduct. There is no authority for this argument nor would it reasonable to apply such a standard. Doing so would lead to absurd results. In addition, this argument ignores the definition of "jurisdiction" within the CVMC which limits it to areas where commercial cannabis takes place. (CVMC §§ 5.19.040(A)(1)(e)(i) and (B)(5).)

The second argument is that the City's findings were not supported by the evidence. As a preliminary issue, Petitioner does not cite to any authority that the evidence presented was insufficient in the proceedings before the City. Specifically, there is no authority that the City improperly relied upon hearsay evidence in the appeal. The fact that Petitioner did not approve of the evidence relied upon by the City in the appeal does not mean the decision was not supported by the evidence. The little authority that was provided is inapplicable. Govt. Code § 11513(d) precluding hearsay applies only to state agencies. In *Layton v. Merit System Commission* (1976) 60 Cal.App. 3d. 58, the analysis involved an

agency's internal procedural. Neither arise from fact comparable to the instant situation. Without applicable authority, this argument is not a sufficient basis to grant the writ of mandate.

Finally, the third argument is that the City refused to exercise its discretion in not rejecting Petitioner. CVMC § 5.19.050(A)(5) states "Phase One Applications may be rejected by the Police Chief for any of the following reasons in his/her discretion." The analysis here is a regurgitation of the arguments made previously. There is no new argument that it was an abuse of discretion for the Police Chief to exercise the discretion specifically granted by the Municipal Code.

#### Due Process Violations

Petitioner argues that its due process rights were violated because Deputy City Attorney Simon Silva served as the advisor to the hearing officer and Deputy City Attorney Megan McClurg served as counsel for Respondent. In *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737 the Supreme Court discussed the standard for due process before a fair tribunal as follows:

When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46,.) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*People v. Harris* (2005) 37 Cal.4th 310, 346,; see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 ["When due process requires a hearing, the adjudicator must be impartial."].) Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin, supra*, at p. 47, 95 S.Ct. 1456.)

Petitioner contends that the City Attorney's office had a conflict by both providing services as a legal advisor and an advocate in the same proceeding. In support of this argument, Petitioner cites to *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 813. In *Quintero*, the Court of Appeal relied on the fact that the specific Deputy City Attorney at issue had acted as both a prosecutor and advisory in the same proceeding. In addition, the same Deputy City Attorney had become the primary legal advisor to the personnel board. (*Morongo Band, supra* at 740.) There is no evidence here that Deputy City Attorneys' roles were comparable to those cited in the case. Further, Petitioner's argument relies on the court accepting its interpretation of the law in finding there was a conflict because it presumes a finding that Ms. McClurg was providing erroneous advice on the law. As discussed above, the court is not adopting this finding.

The court does not find that the City provided insufficient time and notice in violation of Petitioner's due process rights. Petitioner claims its due process rights were violated because sufficient notice of the hearing was not provided and that the initial basis for rejection of the application lacked substantive information.

The Notice of Decision states the basis for the denial. It identifies that an applicant or owners was adversely sanctioned or penalized for a material violation of state or local laws or regulations and identified the party and the time frame of the violations. (AR 119-120) The fact that Petitioner was surprised that Respondent viewed the operation of the Holistic Caf&#233; as disqualifying does not mean the notice was insufficient. Petitioner essentially argues that it was lulled into a false sense of security since it had disclosed the stipulated judgment in the Holistic Caf&#233; case. However, this was information for evaluation and investigation by Respondent. There is also no indication that

Respondent's process did not comply with the CVMC. There is no indication in the rules that disclosure in and of itself precluded further inquiry such that Petitioner was somehow reasonable in its position.

With regard to the timing of the hearing, Petitioner waived its right to object by not raising this issue previously. "It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion." (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) Petitioner was aware the notice was shorter than required and took no action. The Cannabis Regulations include a provision for continuances. (Chula Vista Cannabis Regulations § 0501(P)(2)(a).) Although the notice cited to the incorrect section, the Notice of Appeal identified the applicable basis for seeking a continuance. (AR 131.) Thus, Petitioner has no reasonable basis to argue it was prejudiced by the lack of notice in this proceeding.

Petitioner/Plaintiff UL Chula Two, LLC's Motion for Preliminary Injunction and Stay of Decision is denied. UL Chula Two has not met its burden that it is likely to prevail on the merits.

The court declines to consider evidence outside the administrative record.  
The court will hear from the parties as to whether there are any outstanding claims if the tentative rulings are confirmed and, if so, how to proceed.

**Upon inquiry of the Court, Attorney Brucker dismisses the remaining claims not addressed in the Court's Tentative Ruling.**

**Following further discussion, by agreement of parties and approval of the Court, the Court's Tentative Ruling is deemed the Statement of Decision.**

**The Court denies the request to extend the stay in this matter.**

IT IS SO ORDERED:



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Judge Richard E. L. Strauss



**CALIFORNIA STATE COURT PROOF OF SERVICE**  
UL CHULA TWO v. CITY OF CHULA VISTA, a California public entity, CITY MANAGER  
OF CHULA VISTA, et al.  
Case No. 37-2020-00033884-CU-CT-CTL

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to this action. My business address is 550 West C Street, Suite 1700, San Diego, CA 92101.

On May 28, 2021, I served true copies of the following document(s):

(1) [PROPOSED] JUDGMENT

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

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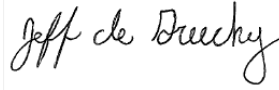
*Attorneys for March and Ash Chula Vista, Inc.*

The documents were served by the following means:

☒ (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, I caused the documents to be sent from e-mail address Jeff.deGruchy@lewisbrisois to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

3 Executed on May 28, 2021, at San Diego, California.

4 

5 Jeff de Gruchy