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Attorneys for Petitioner/Plaintiff Darryl Cotton

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

DARRYL COTTON, an individual,

Petitioner/Plaintiff,

v.

CITY OF SAN DIEGO, a public entity; and
DOES 1 through 25,

Respondents/Defendants,

CASE NO: 37-2017-00037675-CU-WM-CTL

MEMORANDUM IN SUPPORT OF EX
PARTE APPLICATION FOR (1)
ALTERNATIVE WRIT OF MANDATE AND
ORDER TO SHOW CAUSE WHY
PEREMPTORY WRIT SHOULD NOT
ISSUE, AND (2) THE SCHEDULING OF A
HEARING AND EXPEDITED SCHEDULE
FOR VERIFIED PETITION FOR WRIT OF
MANDATE

[IMAGED FILE]

Assigned to:
Hon. Eddie C. Sturgeon, Dept. C-67

Date: October 31, 2017
Time: 8:30 a.m.
Dept.: C-67

Petition Filed: October 6, 2017
Trial Date: Not Set

REBECCA BERRY, an individual;
LARRY GERACI, an individual; and
ROES 1 through 25,

Real Parties In Interest.

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MEMORANDUM IN SUPPORT OF EX PARTE APPLICATION FOR (1) ALTERNATIVE WRIT OF
MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE, AND (2)
THE SCHEDULING OF A HEARING AND EXPEDITED SCHEDULE FOR VERIFIED PETITION FOR
WRIT OF MANDATE

INTRODUCTION

Plaintiff/petitioner Darryl Cotton ("Cotton") brings this writ petition and ex parte application to compel respondent/defendant City of San Diego ("City") to recognize Cotton as the sole applicant on a Conditional Use Permit ("CUP") application originally filed and pursued for Cotton's solely-owned real property by Cotton's former prospective business partner, Larry Geraci ("Geraci"), and Geraci's associate, Rebecca Berry ("Berry").

Cotton is the sole owner of and sole interest holder in the real property for which the CUP application was filed. Cotton previously requested the City proceed with the application under his own name after Cotton terminated his agreement with Geraci (Cotton has never had an agreement or any other business relationship with Berry directly). The City has arbitrarily and capriciously refused to remove Berry from the CUP application even though Cotton is the only person under the law who meets the express statutory definition of an applicant with respect to the CUP application.

By this ex parte application, Cotton seeks: (1) an alternative writ of mandate directing the City to recognize Cotton as the sole applicant with respect to Conditional Use Permit Application - Project No. 520606 ("Cotton Application") for a CUP to operate a Medical Marijuana Consumer Cooperative ("MMCC") at Cotton's property and to process the Cotton Application with Cotton as the sole applicant; and (2) an order to show cause why a peremptory writ should not issue. As explained below, Cotton requests a peremptory writ be issued at the hearing on this application. In the alternative, Cotton requests the Court schedule an expedited hearing and briefing schedule on Cotton's verified petition for writ of mandate.

The relief Cotton seeks in his writ petition and in this ex parte application is proper because he has no other plain, speedy, or adequate legal remedy. There are no other administrative processes or legal channels by which Cotton can compel the City to recognize his beneficial right to be recognized as the sole applicant on the Cotton Application.

1 Unless the Court issues an order directing the City to recognize Cotton as the applicant
2 on the Cotton Application, Cotton will be irreparably harmed by being forced to abdicate his
3 right to control who may beneficially use his property, as permitted under both state and
4 federal law. In addition, Cotton will lose the “first-mover” advantage he currently enjoys as a
5 leading applicant to operate a marijuana dispensary in the San Diego market and Cotton will be
6 forced to abandon his year-old application and resubmit under a new, entirely different, and
7 potentially lengthier regulatory scheme being implemented on January 1, 2018.

8 II

9 FACTUAL BACKGROUND

10 A. Parties, Property, and Initial Application

11 Cotton has been the sole record owner of and interest holder in the real property located
12 at 6167 Federal Boulevard San Diego, California 92114 (“Property”) at all relevant times.
13 (Declaration of Darryl Cotton (“Cotton Decl.”), ¶ 3; VP Ex. 1.¹)

14 In or around August 2016, Geraci first approached Cotton and expressed interest in
15 purchasing the Property because it was potentially eligible to be used for the operation of a
16 Medical Marijuana Consumer Cooperative (“MMCC”). (Cotton Decl. ¶ 4.) Geraci
17 represented that for the Property to run as a MMCC, a Conditional Use Permit (“CUP”) must
18 be issued by the City – a process that takes several months. (Cotton Decl. ¶¶ 5-6.) However,
19 Geraci represented that there was a zoning issue at the Property that must be resolved before
20 the Cotton Application could be filed. (Cotton Decl. ¶ 6.) Geraci stated that he has special
21 expertise in acquiring CUP permits for MMCCs and was uniquely qualified to resolve the
22 zoning issue preventing the filing of the application on Cotton’s Property. (Cotton Decl. ¶ 6.)

23 Over the next several months, Cotton and Geraci engaged in lengthy negotiations over
24 the terms for potential sale of the Property and ultimately reached agreement on several key
25 terms. However, these deal points were never reduced to a fully integrated written agreement.

26 _____
27 ¹ All references to “VP Ex.” or “VP Exs.” are to the exhibits attached to Cotton’s Verified Petition for Writ of
Mandate [Code Civ. Proc. § 1085] filed on October 6, 2017.

1 (Cotton Decl. ¶¶ 9-14.)

2 On or about October 31, 2016, while negotiations were ongoing, Geraci asked Cotton
3 to execute an Ownership Disclosure Statement, which is a required part of all CUP
4 applications. (Cotton Decl. ¶ 8.) Geraci said that Cotton had to sign the form in order to
5 provide Geraci with the ability to prepare the Cotton Application for the Property. (Cotton
6 Decl. ¶ 8.) The Ownership Disclosure Statement form that Geraci induced Cotton to sign
7 inaccurately stated that that Cotton had leased the Property to Berry. (Cotton Decl. ¶ 8; VP Ex.
8 1 [reflecting that Berry was listed as “Tenant/Lessee” of the subject Property.]) In fact, Cotton
9 and Berry have never entered into any agreement, written or otherwise, with respect to the
10 Property and Cotton has never met Berry personally. (Cotton Decl. ¶ 8.) Nonetheless, Geraci
11 indicated that Berry was his trusted employee who was familiar with the MMCC CUP process
12 and that she was involved in Geraci’s other MMCC dispensaries. (Cotton Decl. ¶ 8.) In other
13 words, Geraci represented that Berry was his agent and would act on his behalf. (Cotton Decl.
14 ¶ 8.) Based on Geraci’s representations, Cotton executed the Ownership Disclosure Statement
15 that Geraci provided him. (Cotton Decl. ¶ 8.)

16 Over the weeks and months that followed, Cotton repeatedly reached out to Geraci for
17 information regarding the resolution of the zoning issue, the CUP application, and the status of
18 the agreement documents Geraci was supposed to have prepared to evidence the parties’
19 agreement with respect to the Property and the MMCC. (Cotton Decl. ¶ 11.) Geraci
20 continuously failed to act in good-faith in providing information to Cotton and dealing with
21 Cotton. (Cotton Decl. ¶¶ 11-13.) For instance, on or about March 16, 2017, Cotton first
22 discovered that Geraci had filed the Cotton Application back on October 31, 2016, before the
23 parties had finalized their agreement regarding the Property and in direct contravention of
24 Geraci’s express representations to Cotton that the zoning issued needed to be resolved before
25 the Cotton Application could be filed. (Cotton Decl. ¶ 13.)

26 / / / / /

1 Due to Geraci's bad faith actions and breaches of the parties' agreement to negotiate in
2 good faith, Cotton emailed Geraci on March 21, 2017 to confirm that their agreement was
3 terminated and that Geraci had no interest in the Property. (Cotton Decl. ¶ 13.) A few days
4 later, Geraci's attorney emailed Cotton and indicated that Geraci intended to continue to pursue
5 the Cotton Application under his and Berry's name. (Cotton Decl. ¶ 14.) Cotton immediately
6 responded and reiterated that neither Geraci nor his agents have any right to the Property.
7 (Cotton Decl. ¶ 15.)

8 On September 22, 2017, Cotton, through his attorneys, demanded the City remove
9 Berry from the Cotton Application and to process it for Cotton, the sole record owner of the
10 Property. (Cotton Decl. ¶ 17; VP Ex. 4 [letter from Cotton's attorney David Demian to
11 Firouzeh Tirandazi].)

12 On September 29, 2017, the City responded by email to Cotton's letter and indicated its
13 refusal to remove Berry from the application or process it in Cotton's sole name. (Cotton
14 Decl., ¶ 18; VP Ex. 5 [email response from Firouzeh Tirandazi].)

15 III

16 STATUTORY AUTHORITY FOR REQUESTED MANDATE RELIEF

17 Cotton seeks a writ of mandate under Code of Civil Procedure section 1085,
18 subdivision (a), which provides in part: "A writ of mandate may be issued by any court to any
19 inferior tribunal, corporation, board, or person, to compel the performance of an act which the
20 law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc. §
21 1085, subd. (a).)

22 A petitioner is entitled to writ relief if the respondent has failed to comply with a "clear,
23 present, and ministerial duty that inures to the petitioner's benefit." (*California High-Speed*
24 *Rail Auth v. Superior Court* (2014) 228 Cal.App.4th 676, 707.) A ministerial duty is one that
25 an officer of a public agency, such as the City, is "obligated to perform in a prescribed manner
26 required by law when a given state of facts exists." (*Alliance for a Better Downtown Millbrae*

1 v. *Wade* (2003) 108 Cal.App.4th 123, 129.)

2 Courts review a public agency's action interpreting a statute under an abuse of
3 discretion standard, meaning the challenged agency action is reviewed to determine if it was
4 "arbitrary, capricious, lacking in evidentiary support, or was made without due regard for the
5 petitioner's rights." (*American Indian Model Schools v. Oakland Unified School District*
6 (2014) 227 Cal.App.4th 258, 286).

7 As explained below, the City's Planning Commission abused its discretion because
8 Cotton is the only person who may be rightfully recognized as the applicant on the Cotton
9 Application under California law. The City's refusal to recognize Cotton as such is an
10 arbitrary and capricious decision made without due regard to Cotton's rights under state law.

11 IV

12 COTTON IS THE ONLY PERSON LEGALLY ENTITLED TO BE THE
13 APPLICANT ON THE COTTON APPLICATION UNDER STATE LAW
14 AND THE CITY HAS A DUTY TO RECOGNIZE COTTON AS THE APPLICANT

15 A. The City's Improperly Refused To Honor Cotton's
16 Requests To Be The Person To Beneficially Use His
17 Solely-Owned Property In Connection With A CUP

18 Under both California and federal law, a property owner enjoys the right to use – and to
19 exclude from beneficial use – his property as he sees fit. For instance, California Civil Code
20 section 654 provides that "ownership of a thing is the right of one or more persons to possess
21 and use it to the exclusion of others." (Emphasis added.) The United States Supreme Court
22 has also held that a landowner's right to exclude others from the use and the possession of the
23 property is "one of the most essential sticks in the bundle of rights that are commonly
24 characterized as property." (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S.
25 419, 435.)

26 Here, Cotton is, and at all times material to this action was, the sole record owner of the
27 Property, the real property that is the subject to this dispute. (Cotton Dec. ¶ 3.) Berry does not
28 have and has never had any interest in the Property, whether under a lease or otherwise.

1 (Cotton Dec. ¶ 8.) Any rights Geraci may have had to the Property were terminated when
2 Cotton terminated the parties' agreement after Geraci repeatedly acted in bad faith and failed to
3 honor the parties' agreement. (Cotton Dec. ¶ 14.) Accordingly, Cotton has the power to
4 validly exclude Berry and Geraci from beneficially using or attempting to use the Property,
5 which they have no interest in whatsoever.

6 The City cannot nullify Cotton's property rights, conferred by the most basic tenets of
7 law, to control who may (or may not) beneficially use his Property. Yet, this is precisely what
8 the City does when it refuses to recognize Cotton as the only applicant entitled to the benefits
9 of a CUP that would run with Cotton's land. (*Malibu Mountains Recreation, Inc. v. County of*
10 *Los Angeles* (1998) 67 Cal.App.4th, 362, 370 [holding that a CUP runs with the owner's
11 land]). Accordingly, the City's refusal to honor Cotton's requests to remove Berry from the
12 Cotton Application is preempted by state and federal law. (See *O'Connell v. City of Stockton*
13 (2007) 41 Cal.4th 1061, 1067 ["If otherwise valid local legislation conflicts with state law, it is
14 preempted by such law and is void."]) As such, the City must process the Cotton Application
15 in Cotton's name alone, as repeatedly requested by Cotton.

16 B. The City Has a Duty to Recognize Cotton
17 As The Applicant On The Cotton Application

18 Additionally, Cotton is, and always has been, the sole qualifying applicant for the
19 Cotton Application under the municipal code governing CUPs in the City. Municipal Code
20 section 113.0103 states:

21 Applicant means any person who has filed an application for a
22 permit, map or other matter and that is the record owner of the real
23 property that is the subject of the permit, map, or other matter; the
24 record owner's authorized agent; or any other person who can
25 demonstrate a legal right, interest, or entitlement to the use of the
26 real property subject to the application.

27 (Emphasis added.) Under the plain language of section 113.0103, Cotton, the sole record
28 owner of the Property, is the only person who qualifies as the applicant on the Cotton
Application. Although Berry and Geraci initially filed the Cotton Application while the parties
contemplated an agreement on the sale of the Property, neither is or has ever been the record

1 owner of the Property. Further, neither Berry nor Geraci is Cotton's authorized agent (nor
2 have they claimed to be). Finally, as discussed above, neither Berry nor Geraci has
3 demonstrated or can demonstrate any legal right, title, or entitlement to the Property because
4 Cotton has never entered into an agreement with Berry and any rights Geraci may have had
5 were terminated months ago. Therefore, the City has a ministerial duty to recognize Cotton as
6 the sole applicant on the Cotton Application.

7 V

8 AN EXPEDITED HEARING AND BRIEFING SCHEDULE SHOULD BE ORDERED

9 Failing the immediate issuance of the requested writ relief, Cotton requests that the
10 Court schedule a hearing on the merits of Cotton's petition for writ of mandate as soon as
11 possible and adopt an expedited briefing schedule, lest Cotton be subject to irreparable harm in
12 the following ways.

13 First, as alluded to above, Cotton would be irreparably harmed by being continually
14 denied the right to exercise his authority to decide who may or may not beneficially use his
15 property. Courts have recognized that such harm is irreparable. For example, in *Fretz v. Burke*
16 (1967) 247 Cal.App.2d 741, 746, the court held that an irreparable harm occurs where one's
17 behavior "constitutes an overbearing assumption by one person of superiority and domination
18 over the rights and property of others." (Emphasis added.) If Cotton is forced to wait for a
19 hearing on the merits of his writ petition, the court would essentially lend its imprimatur to
20 Berry's appropriation of Cotton's property rights by overriding Cotton's express wishes that
21 she not be listed as a beneficial user of his Property.

22 Second, if Cotton is forced to wait for a regular hearing on his petition, Cotton will lose
23 the competitive advantage he has worked for and anticipated for months. The State of
24 California is set to implement the "Control, Regulate and Tax Adult Use of Marijuana Act."
25 Under this Act, the State will institute a new process licenses for persons to legally sell
26 marijuana on January 1, 2018. (Section 26012(a)(1)-(2)(c) ["Licensing authorities shall begin
27
28

1 issuing licenses under this division by January 1, 2018.”)] If the issues related to the Cotton
2 Application are not resolved in sufficient time for the CUP to be issued for the Property prior
3 to the implementation of the Act, Cotton will be forced to abandon his year-old application on
4 his Property and resubmit under an entirely new and potentially lengthier regulatory scheme,
5 with no assurance that the Property will qualify under this entirely different set of laws.
6 Accordingly, the Court should expedite the hearing of Cotton’s petition in order to prevent the
7 potential waste of the Property’s business potential and loss of Cotton’s property rights.

8 VI

9 COTTON PROVIDED THE REQUIRED NOTICE

10 Cotton provided timely notice of this application to all parties per California Rules of
11 Court 3.1203 and 3.1204. (Concurrently filed Declaration of David S. Demian (“Demian
12 Decl.”), ¶ 3.) As of this drafting, it is unknown if City, Geraci, and Berry will be opposing.
13 (Demian Decl., ¶ 4.)

14 VII

15 CONCLUSION

16 For the reasons stated above, the Court should grant Cotton’s request for (1) an
17 alternative writ of mandate directing the City to recognize Cotton as the sole applicant with
18 respect to the Cotton Application at the Property and to process the Cotton Application with
19 Cotton as the sole applicant; (2) an order to show cause why a peremptory writ should not
20 issue; and/or (3) the scheduling of an expedited hearing and briefing schedule on Cotton’s
21 verified petition for writ of mandate.

22 DATED: October 27, 2017

Respectfully submitted,

23 FINCH, THORNTON & BAIRD, LLP

24 By: 

25 DAVID S. DEMIAN
26 ADAM C. WITT
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