

FILED
CIVIL BUSINESS OFFICE 18
CENTRAL DIVISION

2018 JAN 26 P 2:54

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

2018 JAN 26 2:21

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10 Attorneys for Real Parties in Interest
11 LARRY GERACI and REBECCA BERRY

12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DIVISION

14 DARRYL COTTON, an individual,
15 Petitioner/Plaintiff,

16 v.

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

18 Respondents/Defendants.

19 REBECCA BERRY, an individual; LARRY
20 GERACE, an individual, and ROES 1 through
21 25,

22 Real Parties in Interest.

Case No. 37-2017-00037675-CU-WM-CTL

Judge: Hon. Joel R. Wohlfeil
Dept.: C-73

23 NOTICE OF RULING AFTER HEARING
RE:

(1) MOTION BY REAL PARTIES IN
INTEREST LARRY GERACI AND
REBECCA BERRY TO COMPEL THE
DEPOSITION OF DARRYL COTTON
AND TO CONTINUE HEARING ON
MOTION FOR PRELIMINARY
INJUNCTION

(2) MOTION BY PETITIONER/
PLAINTIFF DARRYL COTTON FOR
ISSUANCE OF A PEREMPTORY
WRIT OF MANDATE

[IMAGED FILE]

DATE: January 25, 2018
TIME: 8:30 a.m.
DEPT: C-73

Petition Filed: October 6, 2017

1 PLEASE TAKE NOTICE THAT on January 25, 2018, the Court heard the following noticed
2 motions:

3 (1) Motion by Real Parties in Interest, Larry Geraci and Rebecca Berry, to (a) compel the
4 deposition of Darryl Cotton, and (b) continue the January 25, 2018, hearing on the motion by
5 Petitioner/Plaintiff, Darryl Cotton, for issuance of a peremptory writ of mandate; and

6 (2) Motion by Petitioner/Plaintiff, Darryl Cotton, for issuance of a peremptory writ of mandate.
7 Petitioner/Plaintiff, Darryl Cotton, was represented by Darryl Cotton, pro se. Respondent/Defendant,
8 City of San Diego, was represented by M. Travis Phelps, Chief Deputy City Attorney with the Office of
9 the City Attorney. Real Parties in Interest, Larry Geraci and Rebecca Berry, were represented by
10 attorney Michael R. Weinstein of the law firm Ferris & Britton, APC.

11 PLEASE TAKE FURTHER NOTICE THAT, having reviewed the written pleadings submitted
12 in support and opposition to the motions and hearing oral argument, the Court ruled as follows:

13 (1) The Court confirmed its tentative ruling as the final ruling of the court, set forth in and
14 attached hereto as Exhibit A, GRANTING Real Parties in Interests' motion to compel
15 Petitioner/Plaintiff to a deposition and ordering Petitioner/Plaintiff to submit to a deposition
16 within twenty (20) days of the hearing, and DENYING Real Parties in Interests' motion to
17 continue the January 25, 2018, hearing on Petitioner/Plaintiff's motion for issuance of a
18 peremptory writ of mandate, subject to the following modification: Petitioner/Plaintiff must
19 submit to a deposition within twenty (20) days of the hearing absent further leave of the
20 court or agreement of the parties. By close of business on Friday, January 26, 2018,
21 Petitioner/Plaintiff shall provide to attorney Weinstein two dates within the next 20 days on
22 which Petitioner/Plaintiff is available for a full-day deposition (9 a.m. to 5 p.m., with a 1-
23 hour lunch break) to be taken at Aptus Court Reporting Service, which is located at 600
24 West Broadway, Suite 300, San Diego, CA 92101. Attorney Weinstein shall then select one
25 of those two dates for the deposition and shall serve an amended deposition notice providing
26 notice of the selected date.

1 (2) The Court confirmed its tentative ruling as the final ruling of the court, set forth in and
2 attached hereto as Exhibit A, DENYING Petitioner/Plaintiff's motion for issuance of a
3 peremptory writ of mandate.
4

5 Dated: January 25, 2018

FERRIS & BRITTON, APC

6
7 By: Michael R. Weinstein
8 Michael R. Weinstein
9 Attorneys for Real Parties in Interest
LARRY GERACI and REBECCA BERRY
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - January 22, 2018

EVENT DATE: 01/25/2018 EVENT TIME: 09:00:00 AM DEPT.: C-73
JUDICIAL OFFICER: Joel R. Wohlfeil

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

CASE TITLE: COTTON VS CITY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Writ of Mandate

EVENT TYPE: Hearing on Petition
CAUSAL DOCUMENT/DATE FILED:

The Motion (ROA # 60, 61) of Real Parties in Interest LARRY GERACI and REBECCA BERRY, to (1) compel the deposition of Petitioner / Plaintiff DARRYL COTTON ("Plaintiff"), and (2) continue the January 25, 2018, hearing on Plaintiff's Motion for issuance of a peremptory writ of mandate, is GRANTED IN PART AND DENIED IN PART.

The Motion to compel Plaintiff to submit to a deposition is GRANTED. Plaintiff shall submit to a deposition within twenty (20) days of the hearing of this Motion.

The Motion to continue the hearing of Plaintiff's Motion for issuance of a peremptory writ of mandate, is DENIED.

The Petition (ROA # 38, 42) of Plaintiff / Petitioner DARRYL COTTON ("Plaintiff") for writ of mandate, is DENIED.

The Court initially notes that its December 7, 2017 order denying the ex parte application for an order shortening time to hear this Motion (ROA # 42) invited the filing of moving and opposition papers per Code. However, no additional papers were filed. As a result, this ruling is premised the original Petition for writ of mandate, and briefing and evidence presented to the Court prior to both ex parte hearings.

A traditional writ of mandate under Code of Civil Procedure section 10858 is a method for compelling a public entity to perform a legal and usually ministerial duty. Klajic v. Castaic Lake Water Agency (2001) 90 Cal. App. 4th 987, 995. The Court reviews an administrative action, pursuant to Code of Civil Procedure section 1085, to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. Id.

A record owner, or "[a]ny person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application" may submit an application for a permit. SDMC 112.0102. Plaintiff argues that the City has a ministerial duty to process the CUP Application with Petitioner as the sole applicant; however, Petitioner cannot demonstrate that he was the only person who possessed the right to use the subject property. Whether someone other than the "record owner" possesses a valid

right to apply for and obtain the CUP is disputed. Evidence exists demonstrating an agreement for the purchase and sale of the subject property, which could confer a legal right and entitlement to the use of the property.

In addition, Plaintiff has not exhausted his administrative remedy by submitting his own separate CUP application. He cannot be recognized as the "sole applicant" (see Petition at page 10, line 5) when he has not, in fact, submitted a separate application. The City may very well have a ministerial duty to accept and process Petitioner's CUP application in lieu of any competing application, but this duty does not arise in the absence of the filing of such an application.

The Motion (ROA # 94, 95) of Plaintiff and Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY ("Cross-Defendants") to (1) compel the deposition of Defendant and Cross-Complainant DARRYL COTTON ("Defendant"), and (2) continue the January 25, 2018, hearing on Defendant's Motion for a preliminary injunction, is GRANTED IN PART AND DENIED IN PART.

The Motion to compel Defendant to submit to a deposition is GRANTED. Defendant shall submit to a deposition within twenty (20) days of the hearing of this Motion.

The Motion to continue the hearing of Defendant's Motion for a preliminary injunction, is DENIED.

Defendant and Cross-Complainant DARRYL COTTON'S Motion for a preliminary injunction is DENIED.

The Court initially notes that its December 7, 2017 order denying the ex parte application for a TRO and setting this hearing (ROA # 72) invited the filing of moving and opposition papers. However, no additional papers were filed. As a result, this ruling is premised on the briefing and evidence presented to the Court prior to the ex parte hearing.

The Court considers two interrelated questions in deciding whether to issue a preliminary injunction: (1) is Plaintiff likely to suffer greater injury from a denial of the injunction than Defendant is likely to suffer from its grant; and (2) is there a reasonable probability that Plaintiff will prevail on the merits. Robbins v. Superior Court (1985) 38 Cal.3d 199, 206; Code Civ. Proc. 526(a). The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors. Butt v. State of California (1992) 4 Cal. 4th 668, 678. A preliminary injunction is appropriate when pecuniary compensation would not afford adequate relief; or where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. Code Civ. Proc. 526(a). The burden is on the moving party to show all elements necessary to support issuance of a preliminary injunction. O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1481. A preliminary injunction amounts to a mere interlocutory order to maintain the status quo pending a determination of the action on its merits. Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 191.

Regarding the probability of prevailing, a record owner, or "[a]ny person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application" may submit an application for a permit. SDMC §112.0102. Defendant and Cross-Complainant Cotton argues that the City must process the CUP Application with him as the sole applicant. However, disputed evidence exists suggesting that Cotton was not the only person who possesses the right to use the subject property. Whether someone other than the "record owner" possesses a valid right to apply for and obtain the CUP is disputed. Evidence exists demonstrating an agreement for the purchase and sale of

the subject property, which could confer a legal right and entitlement to the use of the property.

In addition, Defendant and Cross-Complainant Cotton is not likely to prevail because the evidence demonstrates that he has not submitted his own separate and competing CUP application. He cannot be recognized as the sole applicant when he has not, in fact, submitted an application. A determination regarding the City's obligation to accept and process Cotton's CUP application in lieu of any competing application cannot be made in the absence of the filing of such an application.

Finally, Defendant and Cross-Complainant Cotton is unlikely to sustain irreparable harm because pecuniary compensation would afford adequate relief. Plaintiff can prosecute a claim premised on the lost revenue from operation of a medical marijuana dispensary. Although calculating such revenue may be somewhat complicated and require an expert opinion, this is far from an impossible task.

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9 gaustin@austinlegalgroup.com

10 Attorneys for Real Parties in Interest
LARRY GERACI and REBECCA BERRY

11
12 **SUPERIOR COURT OF CALIFORNIA**

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

14 DARRYL COTTON, an individual,
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20 REBECCA BERRY, an individual; LARRY
21 GERACI, an individual, and ROES 1 through
22 25,

23 Real Parties In Interest.
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Case No. 37-2017-00037675-CU-WM-CTL

Judge: Hon. Joel R. Wohlfeil

PROOF OF SERVICE

[IMAGED FILE]

Petition Filed: October 6, 2017

1 I, Anna K. Lizano, declare that: I am over the age of 18 years and not a party to the case; I am
2 employed in, or am a resident of, the County of San Diego, California; and my business address is:
3 501 West Broadway, Suite 1450, San Diego, California 92101.

4 On, January 25, 2018, I served the following document:

- 5 **1. NOTICE OF RULING AFTER HEARING RE: (1) MOTION BY REAL**
6 **PARTIES IN INTEREST LARRY GERACI AND REBECCA BERRY TO**
7 **COMPEL THE DEPOSITION OF DARRYL COTTON AND TO CONTINUE**
8 **HEARING ON MOTION FOR PRELIMINARY INJUNCTION (2) MOTION BY**
9 **PETITIONER/PLAINTIFF DARRYL COTTON FOR ISSUANCE OF A**
10 **PEREMPTORY WRIT OF MANDATE.**

11 **[X] EMAIL.** Based on an agreement of the parties to accept service by email, I caused the document
12 to be sent to the person at approximately 4:00 p.m. on the date above, to the following email addresses:


13 Darryl Cotton
14 indagrodarryl@gmail.com

15 M. Travis Phelps
16 mphelps@sandiego.gov

17 I did not receive, within a reasonable time after the transmission, any electronic message or other
18 indication that the transmission was not successful.

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

21 Dated: January 25, 2018

22 
23 _____
24 Anna K. Lizano