Case No. C087895
(El Dorado County Superior Court Case No. SC20160208)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

TAHOE WELLNESS COOPERATIVE, INC., a California corporation, CODY BASS, an individual, Petitioners/Appellants, vs. CITY OF SOUTH LAKE TAHOE, CITY COUNCIL OF SOUTH LAKE TAHOE, NANCY KERRY, in her capacity as City Manager of CITY OF SOUTH LAKE TAHOE, Respondents/Respondents.	**IMMEDIATE, TEMPORARY STAY REQUESTED**

Appeal from a Judgment after Petition for Administrative Mandate under CCP § 1094.5 and trial of the El Dorado County Superior Court, the Honorable Warren C. Stracener, Judge, presiding

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PETITION FOR WRIT OF SUPERSEDEAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Statutes

Rules

Treatises

INTRODUCTION

In their appeal before this Court, Appellants TAHOE WELLNESS COOPERATIVE, INC., a California corporation (hereafter "TWC"), and CODY BASS (hereafter "BASS"), seek reversal of the Trial Court's denial of TWC's and BASS's Petition for Writ of Administrative Mandamus. The Trial Court reviewed the Respondents CITY OF SOUTH LAKE TAHOE, CITY COUNCIL OF SOUTH LAKE TAHOE, and NANCY KERRY, in her capacity as City Manager of CITY OF SOUTH LAKE TAHOE's (collectively referred to as "CITY's") denial of TWC's and BASS's application for renewal of their permit to operate a medical marijuana dispensary in the CITY.

By this Petition TWC and BASS seek a Writ of Supersedeas or other appropriate Stay under CCP § 923 to stay enforcement of the CITY's denial of the renewal of the permit pending issuance of remittitur in this appeal. Enforcement of the denial means irreparable harm to TWC and BASS: $1,000 per day fines for each day TWC remains open, meaning closure of the dispensary, the loss of TWC's and BASS's vested, fundamental right to continue its lawful business, as well as the hardship to the dispensary's

members, many of whom are disabled or on fixed incomes.

Under California Code of Civil Procedure § 1094.5(g), the maximum a stay can last when in place at the Trial Court level is twenty (20) days after the date notice of appeal is filed.[1] Notice of appeal was filed August 30, 2018. The last day of the Stay imposed against execution of the CITY's denial of the renewal of the permit was yesterday, September 19, 2018.

TWC and BASS have owned and operated the dispensary in South Lake Tahoe with a permit to do so from the CITY since 2011. In doing so TWC and BASS had relied on that permit and expended considerable sums refurbishing and operating the dispensary, serving the medical needs of thousands of members from the community, employing 29 people and providing them health insurance. In all that time there have been no serious complaints to the CITY, no basis whatsoever for declaring TWC a nuisance and abating it. Accordingly, supersedeas would not be against the public interest under CCP § 1094.5(g).

TWC and BASS present substantial issues on appeal. First, the Trial

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[1] All further references to California's Code of Civil Procedure shall be to "CCP."

Court reviewed the case using the wrong standard of review. TWC's and BASS's reliance on the CITY's permit to operate their lawful business and substantial expenditure of sums to do so since 2011 means that they have a fundamental, vested right to operate the dispensary. Such rights are important enough that they cannot be extinguished by a nonjudicial body. In those instances the trial court must exercise an independent review of the entire administrative record, instead of simply looking for substantial evidence to support the local agency's decision. Nor can the CITY deny TWC and BASS a vested, fundamental right by simply saying so in its ordinance. That would be akin to them saying there is no constitutional right to equal protection in that particular location. Constitutional law does not work that way.

The CITY denied TWC's renewal application as lacking the owner's consent on the CITY's form, even though TWC presented the CITY with a copy of the five-year lease between TWC and the property owner, and even though the property owner acknowledged that the lease, which expressly provided for use of the space as a dispensary, was in effect. The property owner was refusing to sign the form as part of a now-resolved dispute with

TWC and BASS over the owner backing out of its contract with BASS to allow BASS to exercise his right to buy the property. The property owner then sued BASS and TWC for unlawful detainer, trying to use the CITY as leverage in the process.

In addition, much of the delay in renewal is traceable to delays on the CITY's part due at least in part to the related suit involving the property owner**.** This several month delay, together with the many months' delay in the proceedings when the CITY chose reassignment to another judge rather than an expedited briefing schedule for objections to the statement of decision to accommodate the initial judge who heard the matter, makes hollow any claims of urgency and necessity over basing denial of renewal of the permit on a 23-hour delay.

In order to preserve the status quo while this Petition is decided, TWC and BASS also seek a temporary stay of execution of the Trial Court judgment pending the outcome of this Petition.

PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER

To the Court of Appeal, Third Appellate District:

1. Appellants TAHOE WELLNESS COOPERATIVE, INC., a

California corporation (hereafter "TWC"), and CODY BASS, an individual (hereafter "BASS"), petition this Court for an order staying the execution of the decision of Respondents, CITY OF SOUTH LAKE TAHOE and CITY COUNCIL OF SOUTH LAKE TAHOE, and NANCY KERRY, in her capacity as City Manager of CITY OF SOUTH LAKE TAHOE (collectively referred to as "CITY"), dated November 14, 2016 and December 15, 2016, during the pendency of Third District Court of Appeal Case Number C087895.

2. The instant action was brought by Petitioners and Appellants TWC and BASS under Code of Civil Procedure §1094.5 to set aside the decision of the CITY declining to renew TWC's and BASS's permit to operate a medical marijuana dispensary. Attached as Exhibit A is a true and correct copy of the Trial Court judgment, notice of entry of which was served July 3, 2018.

3. The notice of appeal from the judgment was filed on August 30, 2018. A true and correct copy of the notice of appeal is attached as Exhibit B to this Petition.

4. The record on appeal has not yet been filed. The designation of

record on appeal was prepared on September 10, 2018, but not accepted for filing due to this Court's Local Rules. A true and correct copy of said designation of record is attached hereto as Exhibit C to this Petition.

5. A true and correct copy of TWC's and BASS' Petition for Writ of Administrative Mandate filed with the Trial Court is attached hereto as Exhibit D to this Petition.

6. A true and correct copy of the ruling on the CITY's demurrer to the Petition is attached hereto as Exhibit E to this Petition.

7. A true and correct copy of TWC's and BASS's Stay ex parte application is attached hereto as Exhibit F to this Petition.

8. A true and correct copy of the CITY's memorandum of points and authorities in opposition to TWC's application for stay is attached hereto as Exhibit G to this Petition. A true and correct copy of the CITY's Request for Judicial Notice in Opposition to Stay is attached hereto as Exhibit H to this Petition.

9. A true and correct copy of the Trial Court's order granting a stay pending resolution of the administrative mandamus proceedings is attached hereto as Exhibit I to this Petition. A true and correct copy of the

Reporter's Transcript of the hearing on TWC's stay application is attached hereto as Exhibit J to this Petition. By operation of law, CCP § 1094.5(g), that stay expires 20 days following the filing of a notice of appeal.

10. Attached as Exhibit K to this Petition is a true and correct copy of the Certified Reporter's Transcript of the August 23, 2017 proceedings before Judge Steven Bailey.

11. Also attached as Exhibit L to this Petition is the Administrative Record of the proceedings before the CITY, which was before the Trial Court. All further references to Exhibit L or to the Administrative Record shall be to "AR" then its page number. Attached as Exhibit M to this Petition is a true and correct copy of a Receipt for an initiative filed September 19, 2018, with the CITY.

12. This petition is made on the ground(s) that the execution of the agency's decision will cause irreparable harm to appellants, in that execution of the agency's decision will cause closure of TWC's and BASS's longtime lawful business, the resulting lost expenditure of considerable sums of money incurred in reliance on their permit, and loss of services to TWC's members. The public interest will not suffer if a stay is

granted, as there have been no complaints against TWC and BASS during its operation.

13. TWC and BASS present substantial issues on appeal that carry considerable merit. The Trial Court employed the wrong standard of review. TWC and BASS obtained a permit to operate their lawful business in 2011, and in the years since then have expended considerable sums in reliance on that permit to operate their business. That means that they have a vested, fundamental interest which required that the Trial Court employ the independent judgment standard, rather than the substantial evidence standard, over the administrative record.

14. In addition, the Trial Court erred in finding no fundamental, vested right. TWC's and BASS's permit for their lawful business is a fundamental, vested right. That right could not be extinguished by municipal fiat, nor by want of use only of the CITY's own form, when TWC and BASS provided the same information required by the CITY's ordinances. In addition, the CITY's own delays in setting a deadline for expiration of the permit renewal period, and in setting the trial court schedule, undercuts any claims on their part for urgency to resolve this

matter.

15. Appellants further pray that this Court grant a temporary stay pending determination of this petition. The stay already in place under CCP § 1094.5(g) expired after 11:59 pm September 19, 2018 and no further stay is available in the Trial Court. Expiration of the stay means the same irreparable harm mentioned earlier will occur without this Court having the chance to preserve its appellate jurisdiction unless there is imposition of a temporary stay while this Petition is being decided.

PRAYER

Petitioners and Appellants respectfully pray for the following relief from this Court:

1. Pending this Court's ruling on this petition, Petitioners and Appellants request that the Court stay enforcement of the CITY's denial of renewal of the permit and/or of the decision and judgment of the Superior Court in El Dorado County Superior Court Case No. SC20160208;

2. Issue a writ of supersedeas, a stay, or other appropriate relief, staying enforcement of the CITY's denial of renewal of the permit and/or of the decision and judgment of the Superior Court in El Dorado County

Superior Court Case No. SC20160208, such stay to remain in effect until the remittitur is issued in the instant appeal.

3. Grant such other relief as may be just and proper.

Date: September 20, 2018

Respectfully submitted,

LAW OFFICES OF
JAMES ANTHONY

HENRY G. WYKOWSKI &
ASSOCIATES

LAW OFFICES OF
JOHN T. SCHREIBER

By /s/_____
JOHN T. SCHREIBER, attorneys for Appellants and Petitioners TAHOE WELLNESS COOPERATIVE, a California corporation, and CODY BASS

VERIFICATION

I am attorney for the petitioners and appellants in this action. I have read the foregoing Petition for Writ of Supersedeas or Other Appropriate Stay and know its contents. I sign this declaration as my clients are absent from the County in which I have my office. I declare under penalty under the laws of the State of the California that the foregoing is true and correct.

Date: September 20, 2018

JOHN T. SCHREIBER

MEMORANDUM IN SUPPORT OF PETITION

A. This Court has the inherent power to protect its appellate jurisdiction during the pendency of this appeal.

"If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken." Code of Civil Procedure §1094.5(g). The court also has inherent power to grant such a stay. See Code of Civil Procedure §923; *People* ex *rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 Cal.2d. 533. The Court in *Town of Emeryville* held that:

> So, too, the rule now is that in aid of their appellate jurisdiction the courts will grant supersedeas in appeals where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him, provided, of course, that a proper showing is made. On principle, it would be a terrible situation if in a proper case an appellate court were powerless to prevent a judgment from taking effect during appeal, if the result would be a denial of the appellant's rights if his appeal were successful. *Town of Emeryville*, 69 Cal.2d at 537 (citation omitted).

That protection is necessary here.

B. The CCP § 1094.5(g) stay ended after September 19, 2018 and cannot be extended except by action by this Court.

If a stay is in effect at the time of filing of a notice of appeal from a judgment denying a petition for a writ of administrative mandamus, the stay continues by operation of law for a period of 20 days from the filing of the notice of appeal. Code of Civil Procedure §1094.5(g). However, under CCP § 1094.5(g), the Trial Court has *no* authority to continue the stay of the judgment denying a petition for writ of administrative mandamus past that 20-day period. The Trial Court might have "familiarity with the evolving circumstances of a case (*Veyna v. Orange County Nursery, Inc.* (2009) 170 Cal.App.4th 146, 157-158)," but under CCP § 1094.5(g) it had no authority to stay the trial court judgment past the 20-day period set forth in the statute. September 19, 2018 was the last day of the stay, as TWC's notice of appeal was filed August 30, 2018 (Exh. B).

C. Supersedeas is warranted in this case.

Supersedeas may be granted on a showing that: (a) appellant would suffer *irreparable harm* absent the stay and (b) the *appeal has merit*.

Eisenberg, Horvitz, and Wiener, J. (Retired), *Cal. Prac. Guide: Civil Appeals and Writs* (The Rutter Group 2017), Ch. 7, "Stays and Supersedeas," ¶ 7:279, at p. 7-80 (emphasis original). Here both requirements are met.

1. TWC, BASS, and their patients will suffer irreparable harm if the matter is not stayed pending the outcome of the appeal.

BASS owns and operates TWC. TWC is a medical marijuana dispensary located in South Lake Tahoe and has operated with a CITY permit since 2011 (AR 105). TWC employs 29 people, paying them living wage and health benefits (AR 279). TWC has thousands of medical marijuana patients as members, many of whom are disabled and on fixed incomes (Exh. F 13:22-26, Brown dcl 1:26-2:1, 2:20-23, Jiminez dcl 1:25-2:4, 2:9). The other closest legal dispensary is in Shingle Springs, 70 miles away, at least a 90-minute drive, depending on the weather, or to Oakland or Sacramento, depending on the patients' individualized needs (Exh. F, 13:22-14:2). BASS and TWC have incurred significant expenses over the years in building this business, based on the permits received from the CITY (AR 177, 225-233, 284).

Neither BASS nor the TWC have been the subject of any citations or serious complaints from their neighbors or the CITY for nuisances or anything like that in the 7+ years TWC has operated under its permit (Exh. F, 13:3-6, AR 266).

If this Court does not issue a stay, all of TWC's and BASS's good works and expenditures in building the 7+ year old business will be destroyed. The CITY will issue $1,000 per day fines to enforce its denial of the renewal of the permit, necessitating closure of the dispensary (Exh. F, 13:17-23). The employees will lose their jobs (Exh. F, 13:23-24). TWC's patients will have to make a long, dangerous drive in bad weather to obtain their medication in Shingle Springs or Sacramento, or seek recourse on the black market (Exh. F, 13:25-14:2).

a. A stay would not be against the public interest under CCP § 1094.5(g).

The CITY may argue that a stay would be against the public interest under CCP § 1094.5(g). The record shows otherwise. As shown above, there have been no complaints against TWC. Claims by the CITY that a stay would delay prompt respect for its laws are undercut by the CITY's

own conduct in this litigation. The CITY had the opportunity last year to expedite finalization of the statement of decision before Judge Bailey retired and left the bench, but the CITY refused to do so, and it was months before the matter was reassigned to another judge, who had to hear the matter anew (Exh. K, 5:6-20).

The CITY may claim that a stay would conflict with their own new regulatory scheme to license both recreational and medical marijuana dispensaries. Yet a referendum on the matter was filed September 19, 2018 and would, if qualified by sufficient verified voter signatures, prohibit the new regulations from taking effect until voted on by the CITY's voters in 2020 (unless the CITY calls for a special election on the issue (Exh. M).

2. TWC's and BASS's appeal shows substantial questions.

A writ of supersedeas does not decide the merits of the appeal. TWC's and BASS' burden of showing "merit" is not so strong in this context as to require submission of an opening brief. *Civil Appeals*, ¶ 7:287. Their showing must show that "substantial questions" will be raised in the appeal. *Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67.

a. The Independent Judgment standard of review should have applied, as TWC and BASS held fundamental, vested rights in the continued operation of their lawful business.

In administrative mandate cases such as this, governed by CCP § 1094.5, the local agency acts in a quasi-judicial manner, *Strumsky v. San Diego County Employees Retirement Ass'n.* (1974) 11 Cal.3d 28, 34-35, fn. 2.

> If the administrative proceedings are quasi-judicial in character, judicial review will be stricter. Whereas quasi-legislative acts involve the formulation of rules of wide application, quasi-judicial action involves "the actual application of such a rule to a specific set of existing facts." (Citation omitted) Since such a proceeding adjudicates individual rights and interests, findings are required and the reviewing court looks to see whether the findings are supported by the evidence. (Citations omitted) If fundamental rights are implicated the court may be authorized to exercise its independent judgment to determine whether the findings are supported by the weight of the evidence. In all other cases the court examines the record for substantial evidence in support of the findings. (Citations omitted). *Shapell Industries, Inc. v. Governing Board of Milpitas Unified School Dist.* (1991) 1 Cal.App.4th 218, 231.

The CITY clearly acted in a quasi-judicial capacity here. The CITY COUNCIL appeal applied provisions of the South Lake Tahoe City Code to the facts involving TWC's renewal of its permit (AR 265). *Goat Hill*

Tavern v. City of Costa Mesa (1992) 6 Cal.App.4th 1519, 1525.

When the government issues a permit authorizing an activity and the permittee materially relies on that authorization, a fundamental vested right is formed. *See O'Hagen v. Board of Zoning Adjustment*, (1971) 19 Cal.App.3d 151, 158 ("Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right."). "[T]he right to continue operating an established business" is an activity that implicates fundamental vested rights. *Goat Hill Tavern,* 6 Cal.App.4th at 1529.

1) The CITY Explicitly Authorized Petitioners' Dispensary Business Beginning in 2009.

The CITY first recognized Petitioners dispensary operations in 2009 when it passed Ordinance 1007. That ordinance, which banned *new* dispensary operations, explicitly exempted "established operations" from the ban. (South Lake Tahoe Ord. 1007, Sec. 3).

2) The City Issued Petitioners Multiple Dispensary Permits Beginning in 2011.

The CITY must admit that it originally granted TWC and BASS a

permit to operate a dispensary at its present location in 2011 (AR000105). TWC and BASS subsequently applied for and received a renewal of their dispensary permit in 2014. *Id.*

3) Petitioners Relied on the City's Permits in Developing Their Business.

Like the tavern owner in *Goat Hill*, who spent extensively on refurbishing based on his permit, since receiving their first dispensary permit in 2011, TWC and BASS have expended considerable sums of money in reliance on that permit. *Goat Hill Tavern,* 6 Cal.App.4th at 1529. TWC incurred extensive permit and inspection fees from the CITY Manager's Office, the CITY Building Department, and the CITY Fire Department (AR 284). TWC and BASS made numerous building renovations and improvements, both to comply with CITY-mandated inspections and for the sake of improving TWC's operation (AR 284). TWC and BASS incurred carried payroll, benefits, and other expenses related to 29 employees (AR 279).

TWC and BASS obtained multiple long-term leases for the dispensary space, and purchased an option to buy the dispensary property.

(Written Transcript of City Council Hearing, AR000279 (TWC has 29 wage employees with benefits), AR000284 (TWC has expanded and made improvements to the building, established a community center, and built a cultivation facility); Petitioner's Appeal, Retail Space Lease Agreement, AR000177; Petitioner's Appeal, Purchase Option Agreement, AR000225-233). Because these actions were conducted in reliance on the CITY's validly issued dispensary permit—and on the CITY's authorization of "established operations" before that—the record clearly supports that TWC and BASS have a vested fundamental right in the operation of the dispensary business.

In *Goat Hill*, the tavern owner "invested over $1.75 million in its refurbishment, including substantial exterior facade improvements undertaken at the city's behest. He then sought a conditional use permit to allow the addition of a game room, which was granted on a temporary basis. Now, with the expiration of the permit, the city urges he has lost all right to continue in business." *Goat Hill Tavern*, 6 Cal.App.4th at 1529.

The Court in *Goat Hill* held that:

We cannot conclude on these unique facts that Ziemer's [the

> tavern owner] right to continued operation of his business is not a fundamental vested right. This is not, as the city so strongly urges, a "purely economic privilege." It is the right to continue operating an established business in which he has made a substantial investment.
>
> Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body.
>
> While cases applying the independent judgment test in land use matters are few, we uphold its application here because of the unique facts presented. We might conclude differently were this, as the city attempts to suggest, a simple case of a property owner seeking a conditional use permit to begin a use of property. But it is not. Rather, Goat Hill Tavern is an existing business and a legal nonconforming use. *Goat Hill Tavern*, 6 Cal.App.4th at 1529-1530.

TWC, like the tavern in *Goat Hill*, is an existing business that relied on its permit to conduct its lawful business and in so doing spent considerable sums of money to operate it. It is not subject to "extinction by a nonjudicial body." *Goat Hill Tavern*, 6 Cal.App.4th at 1529.

The CITY may cite cases such as *Jaramillo v. State Bd. for Geo. Geophys*, (2006) 136 Cal.App.4th 880 and *City of Riverside v. Inland Empire Patients Health* (2013) 56 Cal.4th 729 for the proposition that the

CITY was within its rights to deny TWC's renewal of its permit. Those instances are readily distinguishable. In *Jaramillo*, the Petitioner did not have a license to practice geophysics, and therefore was not carrying on a lawful business. *Jaramillo*, 136 Cal.App.4th at 891. *City of Riverside* held that a city was within its police power authority to prohibit marijuana dispensaries from opening. *City of Riverside*, 56 Cal.4th at 762. The decision says nothing about what happens when communities allow such uses by permits, except that they can be abated as a nuisance. *Id.* Here, of course, there have been no serious complaints to the CITY about TWC that would justify abatement (Exh. F, 13:3-6, AR 266).

The Trial Court cited *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534 for the proposition that an activity had to be lawful in order to be vested as a nonconforming use (tent at 8-9). However, in *Cornejo*, unlike the situation here, dispensaries were never permitted in Agoura Hills and Cornejo never had a permit to operate his dispensary. *Cornejo*, 214 Cal.App.4th at 1561-1562.

The CITY may point to provisions in its ordinance that "no person shall have any vested rights to any permit, right or interest under the

ordinance." (*See* AR 000404 (SLTCC § 6.55.730)). That provision does not give the CITY the power to nullify fundamental, vested rights. These are rights that are "sufficiently personal, vested and important to preclude its extinction by a nonjudicial body." *Goat Hill Tavern*, 6 Cal.App.4th at 1529. "[T]he test for 'vestedness' and 'fundamentalness' is one and the same. The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." *Whaler's Village Club v. California Coastal Com,* (1985) 173 Cal.App.3d 240, 252 (quoting *Frink v. Prod* (1982) 31 Cal.3d 166, 176)(internal quotations omitted).[2]

b. The Trial Court erred in light of the record before the CITY when it ruled.

One basis for the Trial Court denial of administrative mandate was that it upheld the CITY's determination that the November 2016 renewal

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[2] It seems astonishing that the Trial Court and CITY need at this date to be reminded that: "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

application was incomplete without the landlord's written consent on the CITY's renewal form (Exh. A, pp. 16-17). However, TWC and BASS submitted a five-year lease between TWC, BASS, and the Olsons, who owned the property between January 1, 2013 and December 31, 2017, which specifically stated that TWC and BASS were authorized to operate the dispensary during that time (Exh. A, p. 14).[3] While that copy was unsigned by the Olsons, the latter admitted, in an unlawful detainer action they filed against TWC and BASS, that they signed the lease and it was in full force and effect at the time (AR000175-000195).

The Trial Court held that while the admission could be used against the Olsons it could not be used against the CITY (Exh. A, 16:3-6). However, the CITY would logically have no preference one way or the other as to whether the Olsons consented to TWC's lease of the property for

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[3] TWC and BASS did not (and still do not) possess an executed copy of the lease because many of their files were seized, for unknown reasons, by the El Dorado County Sheriff's Office in 2015. (AR00004, fn. 1). The seized files have not been returned, and Petitioners have received no explanation for the seizure. It is presumed that Petitioners' landlords, Patrick and Patty Olson, have executed copies of the lease, but they have refused to provide such to Mr. Bass.

dispensary uses under their ordinance. The CITY presumably was neutral on that topic and was simply following its ordinance. If not, the CITY was operating in an arbitrary and capricious manner. TWC and BASS had signed an option to purchase the property from the Olsons (AR 004). According to TWC and BASS, the OLSONS backed off that commitment, TWC and BASS sued the Olsons for breach of contract and the Olsons sued TWC and BASS for unlawful detainer (AR 002-3). The dispute over whether the Olsons consented to continued use of the property for dispensary purposes continued to be between TWC/BASS and the Olsons. The Olsons were the ones reneging on their stated willingness.

In finding that TWC and BASS did not possess landlord consent to continue operating their dispensary on the premises, the TRIAL COURT adopted the CITY's contention that landlord consent must be re-obtained *each time* the CITY requests a renewal application and that it must be presented *only* on the City Manager's specific consent form. (*See* AR000335; AR000316-317 (Ms. Daugherty (sic) advised the Council that consent that is not provided on the City form is "outside the letter of the law")).

This contention tortures the language of the City's dispensary ordinance in a nonsensical and highly prejudicial way. The argument is based on language in the City of South Lake Tahoe Dispensary Ordinance that states, "Applications shall be on forms provided by the City." (City of South Lake Tahoe Ordinance No. 1032 ("the Dispensary Ordinance"), Section 32-73(d), AR000409). Rather than reading this provision as a general requirement as to how the permit application process shall be conducted, Respondents would have it be an absolute mandate that no information required to be submitted as part of the application process may be submitted on any medium other than the City-provided application forms.

First, the CITY routinely accepts other information as attachments or exhibits to their application forms. For example, documents proving entity governance and tax compliance are accepted as attachments. (*See* AR000355-392). Clearly the CITY does not treat the provision requiring the use of CITY forms as an unqualified rule. Why the CITY now attempts to draw a red line at attaching documents to prove owner consent is perplexing, to say the least. There is no reason for such inconsistent logic,

other than a concerted effort to destroy TWC's and BASS's vested right to operate their dispensary.

Second, such a severe interpretation around the consent issue does not align with the law's purpose for including such a requirement. As admitted by the City Manager in the City Council hearing, the purpose of the owner consent requirement is "about ensuring...that the property owner was properly informed, notified and agreed, gave consent for a dispensary to be on that property..." (AR000268). This purpose is not served by limiting its fulfillment only to completion of a particular paper form. Indeed here, the owner "was properly informed, notified and agreed, gave consent for a dispensary to be on that property," and there is no better evidence of that than the terms of the lease itself where the owner agreed to "Tenant's use of the Premises as a dispensary" and to *no other uses*.

Third, Respondents' interpretation as adopted by the Trial Court would impermissibly change the meaning of the law's owner consent requirement. As written, the ordinance only requires applicants to provide "Statement of Owners Consent. Consent to operate a dispensary at the proposed location ... from the owner or landlord..." (City of South Lake

Tahoe Ordinance No. 1032, Section 32-73(d), AR000409). The CITY's interpretation would add additional requirements to the code that are not present; principally, that owner consent be recent and affirmatively renewed every two years, regardless of consents previously given. Such a reading adds onerous elements, which simply do not exist in the Ordinance itself. If the authors of the Ordinance wanted repeated consents, regardless of a prior and still-valid long term consent previously given, then that is what the text of the Ordinance would have stated. Respondents acted in excess of jurisdiction in applying the law to Petitioners application.

Finally, the CITY made an error of law, and thus abused their discretion, in applying the ordinance in a way that rejected Petitioners' application without providing reasonable alternative methods to prove landlord consent. Because Petitioners possess a fundamental vested right in the operation of the dispensary, full procedural due process is necessary to revoke that right, a standard not remotely met by the City's "our form or the highway" approach to landlord consent, which the City has used to reject Petitioners application and thereby revoke its permit.

The constitutional standards for revoking a vested property right were set by the California Supreme Court in *Jones v. City of Los Angeles* (1930) 211 Cal. 304, and reaffirmed countless times over the past nine decades: When a permittee has acquired a vested property right, it may be revoked only "if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted or if there is a compelling public necessity." *Korean Am. Legal Advocacy v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 393, fn. 5 (quoting *O'Hagen*, *supra* at 158, which itself cites *Jones,* among the sources). The *Korean American* court elaborates:

> A compelling public necessity warranting revocation of a use permit for a lawful business may exist if the conduct of a business as a matter of fact constitutes a nuisance and the permittee refuses to comply with reasonable conditions to abate the nuisance. [...] [I]n order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals. *Id.* (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894) and *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 717

Respondents fail to meet any of the justifications warranting revocation of a vested property right. No one has alleged that TWC's and BASS's dispensary constitutes a nuisance (Exh. F, 13:3-6, AR 266). No

serious complaints of any kind have been presented. Nor do the "public interests require" that a dispensary permit be revoked for failure to utilize the CITY's form, as requiring consent be proved *only* on the CITY's form is not "reasonably necessary to accomplish the purpose" of the law's consent requirement, especially when a valid lease is available. To revoke TWC's and BASS's permit on the basis of lack of consent on this record is an impermissible revocation of a vested right, and, therefore, a clear misapplication of the law.

c. The City Caused Petitioners' Consent Problem by Delaying Acceptance of the Renewal Application.

In addition to the City's problematic and inconsistent interpretation of the ordinance language, an equitable issue exists as to the timing of Respondents' actions in applying that interpretation.

As evidenced by the email correspondents between Mr. Bass and Assistant City Attorney Nira Doherty in the Spring and Summer of 2016, the City caused a four-month delay in Petitioners renewal application. (*See* Email Correspondence Between Cody Bass and Nira Doherty AR000337-350). Petitioner Mr. Bass attempted to begin the renewal application

process as early as April 2016 by emailing and telephoning Ms. Doherty on multiple occasions. However, Ms. Doherty advised him upon each inquiry that the City was not ready to accept the application. (AR000347). At that time, Petitioners had no dispute with their landlord, and were ready and able to obtain a newly signed consent form for the renewal application. However, it was not until August 2016 that the City finally requested a renewal application from Petitioners. (AR000349). By that time, their landlord, Patrick Olson, had dragged Petitioners into Court in a disingenuous effort to prevent Mr. Bass from exercising his purchase option on the property. As a method of gaining leverage in that case, Olson then refused to sign the City-provided consent form. Thus, a straight line can be drawn between the City-created, 4-month delay of the application and the alleged lack of owner consent on which the City bases its denial. It is a perverse result indeed for the City to refuse to accept a renewal application for lack of consent, when the absence of that consent is partly of the City's own making. Application of the law in this way is a clear abuse of discretion.

1) The Alleged Untimeliness of Petitioners' Application and Permit Fee Were at Least

Partly Caused by Respondents and, in any Event, are Insufficient Bases to Revoke a Fundamental Vested Right.

As outlined in *Korean Am.* and the line of vested rights cases that preceded it, in order to revoke a vested fundamental right, a municipality must show either a failure to comply with the reasonable terms and conditions of a permit or a compelling public necessity. *See Korean Am., supra* 393, fn. 5. The alleged 23-hour tardiness of TWC's and BASS's submission and the, if anything, mistaken failure to attach the fee to the application forms do not satisfy either justification.

TWC and BASS note that the CITY's Written Decision denying the appeal states that Petitioners application was submitted on November 11, 2016. This is incorrect, as evidenced by the email sent by Petitioners' counsel, Andrew Scher, to City Attorney, Thomas Watson, time-stamped 4:25PM, November 10, 2016. (AR000353). Thus, the application was a mere 23 hours late, assuming the deadline was clearly set for close of business on November 9. However, BASS gave extensive testimony at the City Council hearing that, as a result of telephone conversations with City Attorney Thomas Watson on November 9th, BASS was given the

impression that the deadline was not a hard one, that submission of his application at that time would be futile, and that Mr. Watson would get in touch with him to provide more information about submitting. However, Mr. Watson failed to get back in touch with Mr. Bass. (*See* AR000303-305, AR000325).

On the issue of the renewal application's tardiness, the lack of a compelling public necessity is apparent from the CITY's self-initiated delay of Petitioners application for nearly four months. (AR000337-350). As discussed in Section III.A.3, BASS attempted to begin the renewal application process as early as April 2016, but was put on pause by the City until August 2016. For the CITY to subsequently claim that a 23-hour delay in submission invoked some critical public need for urgency is disingenuous. It certainly does not meet "compelling public necessity" necessary to revoke a vested fundamental property right.

The CITY's argument regarding the application fee is a similarly inappropriate reason to revoke a vested fundamental right. Because the application was rejected on its face, the CITY incurred no costs in processing it. Thus, the absence of the fee caused no harm at that stage, and

no public interest is yet implicated. Moreover, taking and keeping the fee without actually incurring any application processing costs to be covered by the fee would constitute an unconstitutional revenue-generating tax—not a proper cost-covering fee as required by California law. *See* California Constitution, Art. 13C, §1(e) (the definition of "tax" limits the authority of cities to impose regulatory fees). Petitioners tendered the fee at the City Council hearing and the Council rejected it (AR000335). This is further evidence that there is "no harm, no foul" here, and that the permit fee issue was a mere artifice created by the City to try to justify revocation. Petitioners will pay the fee immediately upon City actually processing the application.

On either basis, TWC and BASS reveal the substantial merits to their appeal. The CITY did not show a valid justification for revoking a vested property right and the Trial Court erred in upholding the revocation.

A TEMPORARY STAY IS NECESSARY TO PRESERVE THE STATUS QUO PENDING THE OUTCOME OF THIS PETITION

Rule 8.112 provides for a temporary stay pending the outcome of this Petition. A temporary stay is necessary to preserve the appellate court's jurisdiction in this case, as the stay imposed by CCP § 1094.5(g) expired at

midnight last night. The 15-day period to allow for opposition to this Petition under Rule 8.112(b)(1) would itself justify a temporary stay even if this Petition were filed earlier. Appellate counsel was retained three days ago, September 17, 2018 and association of counsel accompanies this Petition. Trial counsel filed the notice of appeal on August 30, 2018, less than three weeks ago (Exh. B). Trial counsel prepared the record ten days later, last week (Exh. C). For these reasons, TWC and BASS respectfully request a temporary stay be put in place pending resolution of this Petition for Writ of Supersedeas.

CONCLUSION

For all of the above-stated reasons, TWC's and BASS's Petition for Writ of Supersedeas or other Appropriate Stay must be granted.

Dated: September 20, 2018

Respectfully submitted,

LAW OFFICES OF
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By /s/_____

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