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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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REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS

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INTRODUCTION

Try as they might, Respondents CITY OF SOUTH LAKE TAHOE, CITY COUNCIL OF SOUTH LAKE TAHOE, and the CITY MANAGER OF SOUTH LAKE TAHOE (hereafter collectively referred to as "CITY"), cannot escape the fact that since 2011, when the CITY first provided for the lawful operation of medical marijuana dispensaries by permit, that Appellants TAHOE WELLNESS COOPERATIVE, INC., and CODY BASS (hereafter collectively referred to as "TWC"), has lawfully operated its dispensary. In the seven+ years since, and in reliance on their permit to operate, TWC has expended considerable sums of money in refurbishing and operating their business, hiring employees, and providing for the needs of their members.

Denial of TWC's Petition for Writ of Supersedeas would create precisely the problem that supersedeas is meant to address: It would create irreparable harm for the Appellant and destroy the *appellate status quo* pending appeal, depriving Appellants of the fruits of any reversal by forcing the closure of the dispensary in the face of $1000 daily citations brought by the CITY. This harm to TWC does not even include the further harm to the

29 TWC employees who would lose their jobs, nor the thousands of dispensary members who would be forced to drive many miles, often in bad weather, to Shingle Springs or Sacramento, or to carry their medical marijuana across state lines, in violation of federal law.

TWC's appeal presents substantial questions: What was the proper standard of review of TWC's Petition for Administrative Mandamus, in light of the creation of a vested, fundamental right in TWC's favor by TWC's reliance on its permit to carry on its lawful business by incurring significant sums of money over the years to operate its business. Where a vested, fundamental fight is involved, the proper standard of review is for the trial court to exercise its independent judgment on the entire administrative record, so that the vested right is not extinguished by a non-judicial actor, like a local agency. The Trial Court erred in using the wrong standard of review, the substantial evidence standard, instead of independent judgment, and in finding that no fundamental, vested right to carry on TWC's lawful business was created when TWC undertook to incur significant sums of money in reliance on their permit. The Trial Court also erred by upholding the CITY's denial of TWC's application for renewal of

their permit due to lack of timeliness and absence of owner consent to operation of the dispensary on the CITY's form, when the CITY already knew that the property owner consented to TWC's use of the premises as a dispensary in the form of a five-year lease that specifically provided for operation of a dispensary, and when the CITY told TWC not to bother with the fee without the owner's consent only on the CITY's form.

Issuance of a stay by this Court pending the outcome of this appeal would not hinder the CITY's police power authority to protect against public nuisances. Nor do the documents the CITY cites in its opposition pertaining to issuance of a stay pose any possibility that TWC or BASS poses such a nuisance to the community.

The irreparable nature of the harm, i.e. closure of the dispensary, and the substantial merit to the appeal combine to justify a writ of supersedeas or other appropriate stay pending the outcome of this appeal.

IRREPARABLE HARM IS CLEAR IN THE FORM OF CLOSURE OF THE DISPENSARY, IN LIGHT OF TWC'S SUBSTANTIAL EXPENDITURES IN RELIANCE ON THEIR PERMIT.

Since being *granted a permit to operate its dispensary by the CITY in 2011*, TWC expended significant sums, hundreds of thousands to

purchase the property from the Olsons, and more for expansions, construction of a community center, and a cultivation center (AR 105, 141, 177, 225-233, 284). The CITY ignores these expenditures and the harm to TWC and BASS from closure of the dispensary, and instead argues that harm to employees or customers does not equate irreparable harm.

While TWC does not contest the concept that the CITY could have banned dispensaries in the first instance under *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, those are not the facts before this Court, nor were such facts before the CITY nor the Trial Court. The CITY issued a permit to TWC and BASS to legally operate the dispensary in 2011 and again in 2014 and TWC and BASS acted in reliance on the issuance of that permit. Nor, the CITY's comments to the contrary on page 13 of its opposition, is there any record of complaints about the dispensary over the years that gave rise to a finding that the dispensary comprised a nuisance that needed to be abated (Exh. F, 13:3-6, AR 266).

APPELLANTS PRESENTED SEVERAL SUBSTANTIAL QUESTIONS FOR APPEAL

A. TWC derived its vested, fundamental right to operate its

business after acting in reliance on the permit to operate its business issued by the CITY in 2011.

The CITY misstates TWC's argument regarding the latter's gaining a vested, fundamental right in operating its business. The CITY claims that TWC asserts its fundamental, vested right to lawfully operate its dispensary based on the CITY's 2009 exemption from prohibited uses (Opp to Supersedeas at p. 14). To quote the CITY: "Not so." *TWC derives its vested, fundamental right to the permit the CITY issued in 2011 to lawfully operate its dispensary and on the actions TWC undertook in reliance on issuance of that permit* (Supersedeas petition at pp. 24-25).

The CITY's reliance on *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534 is misplaced. Unlike the situation here, in which the CITY in 2011 expressly authorized the operation of medical marijuana dispensary as a permitted use (AR 105), in *Conejo* the City of Agoura Hills expressly banned dispensaries and never authorized their operation within the City. *Conejo*, 234 Cal.App.4th at 1561-62. Similarly, in *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, a dispensary was never one of the permitted uses, and then, after the dispensary operator failed to disclose on his permit

application that the premises was for a dispensary, the permit was denied and the City adopted a moratorium barring dispensaries from operating in the City. The dispensary continued to operate in the face of a cease and desist order by the City. *City of Monterey,* 215 Cal.App.4th at 1094. *City of Monterey* relied on *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, which involved facts closely analogous to *City of Monterey*. *Naulls*, 166 Cal.App.4th at 424-427, *City of Monterey*, 215 Cal.App.4th at 1094-1095. In *Jaramillo v. State Bd. for Geologists and Geophysicists* (2006) 136 Cal.App.4th 880, Jaramillo's business could not be a vested right because he was never a licensed geophysicist. *Jaramillo*, 136 Cal.App.4th at 891.

City of Vallejo v. NCORP4, Inc. (2017) 15 Cal.App.5th 1078 did not even involve a petition for administrative mandamus. Instead, the case addressed the City's authority to condition immunity from prosecution as a public nuisance on past payment of local business taxes, in a City which *never* permitted operation of dispensaries. *City of Vallejo,* 15 Cal.App.5th at 1581.

Here, by contrast, once the CITY *expressly permitted* the legal operation of dispensaries and granted TWC and BASS a permit to do so,

and TWC and BASS acted in reliance on that permit by its substantial expenditures, TWC and BASS acquired a vested, fundamental right under *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1528-1531 (AR 105, 141, 177, 225-233, 279, 284). As the Court held in *Goat Hill Tavern:*

> Denial of an application to renew a permit merits a heightened judicial review. "Once a use permit has been properly issued the power of a municipality to revoke it is limited. [Citation.] Of course, if the permittee does nothing beyond obtaining the permit it may be revoked. [Citation.] Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled. [Citations.] When a permittee has acquired such a vested right it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted [citations] or if there is a compelling public necessity. [Citations.] [¶] A compelling public necessity warranting the revocation of a use permit for a lawful business may exist where the conduct of that business constitutes a nuisance." *Goat Hill Tavern*, 6 Cal.App.4th at 1530 (citing *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158).

Both the CITY and the Trial Court erred, in pertinent part, by failing to recognize TWC's and BASS's vested, fundamental right, by employing the incorrect standard of review on administrative mandamus, and ultimately in denying TWC's and BASS's petition for administrative mandamus and

their renewal of TWC's and BASS' use permit.

B. The CITY's arguments regarding timeliness and landlord consent are likewise groundless, as TWC and BASS initially sought renewal of the permit in April 2016 at a time in which there was no dispute between BASS and the property owner about BASS' exercise of his option to purchase the premises, only to be repeatedly put off from renewal by the CITY.

The CITY's arguments regarding timeliness and lack of landlord consent ignore the point that TWC and BASS initially sought renewal of the permit from the CITY in April 2016, at a time when landlord consent was not an issue, only to have the CITY put off the matter for an initial four months (AR 337-350). Not until August 2016 did the CITY finally request a renewal application from TWC and BASS (AR000349). By that time, their landlord had dragged TWC and BASS into court in a disingenuous effort to prevent BASS from exercising his purchase option on the property (AR 213-236, 377-390). As a method of gaining leverage in that case, Olson then refused to sign the City-provided consent form (AR 243). The matter has since been resolved and BASS purchased the property on which the premises is located from Patricia Olson and the trustee of her trust (SLT 25-34).

C. Not using the CITY's form to show owner consent does not

comprise the sort of public nuisance that would justify refusal to renew TWC's and BASS's permit, not in the face of the record showing the landlord's stipulation not to modify any terms of TWC's and BASS's lease.

One of the grounds for denial of TWC's and BASS's permit renewal was that owner consent to operate a dispensary on the premises had to be on the form provided by the CITY (AR 316-317, 335). That is hardly the sort of public nuisance that would justify revoking a validly issued permit. *Goat Hill Tavern*, *O'Hagen*, *supra.* That rationalization becomes more absurd considering that such a severe interpretation around the consent issue does not align with the law's purpose for including such a requirement. The City Manager admitted that 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* and the owner admitted that this lease is in

effect and verified that fact under oath (AR 174-175, Item 6, 176, 177, ¶ 1.4, 178-193). In addition, the CITY had before it the owner's stipulation that it would not do anything to modify the terms of the lease with TWC and BASS (AR 240:19-20).

Respondents' interpretation as adopted by the Trial Court would also 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), AR409). The CITY's interpretation would add additional requirements to the code that are not present; mainly 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. The CITY acted in excess of its jurisdiction in applying the law as it did to TWC's and BASS's application.

The CITY also made an error of law, and thus abused their discretion, in applying the ordinance in a way that rejected TWC's and BASS's application without providing reasonable alternative methods to prove landlord consent. Because TWC and BASS possess a fundamental vested right in the operation of the dispensary, full procedural due process is necessary to revoke that right (see *Goat Hill Tavern* and *O'Hagen)*, a standard far removed from the CITY's "our form or the highway" approach to landlord consent, which the CITY used to reject TWC's and BASS's application and thereby revoke the permit.

IF THIS COURT ISSUES A STAY, THE CITY CONTINUES TO POSSESS ITS POLICE POWER TO PROTECT AGAINST ANY PUBLIC NUISANCES CREATED BY THE DISPENSARY.

Should this Court issue a writ of supersedeas or other appropriate stay pending the outcome of this appeal, the CITY would still retain its authority under its police powers to protect the public against public nuisance posed by violation of the permit at issue. *Korean Am. Legal Advocacy v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 393, fn. 5 (citing *O'Hagen*). Since 2011 no complaints remotely creating such a nuisance have arisen against TWC and BASS (Exh. F, 13:3-6, AR 266).

The CITY seeks judicial notice, *inter alia*, of a verified complaint filed by U.S. Bank against several parties, including BASS's predecessor in interest, the former owners of the premises, Patricia Olson, and Olson Bijou Center, Ms. Olson's LLC, as well as Green Bijou, BASS's LLC that currently holds title to the premises, arising out of U.S. Bank's loan to Olson and Olson Bijou, seeking appointment of a receiver to collect rents at that property (SLT Exh. 1). The CITY also points to a State Tax evasion indictment against BASS (SLT Exh. 2). The CITY claims that these are two examples of the kinds of conduct that would permit the CITY to close TWC as a public nuisance.

What they really comprise are attempts on the CITY's part to prejudice this Court against TWC and BASS for matters that BASS at this point are only accused of, and not proved to have committed. In light of current circumstances, the allegations in those two pleadings are proving to be groundless. Henry Wykowski, BASS's long time attorney in the tax matter and other cases, including this one, is a distinguished and experienced former Senior Trial Attorney for the United States Department of Justice. His assessment of the evidence, without violation of any

privileges, revealed that the charges are meritless and more appropriately civil in nature (Wykowski dec., ¶¶ 5-6). The IRS audited Mr. BASS and found that the same allegations belong in civil court (Wykowski dec., ¶ 6). This tax matter is therefore likely to have no effect on the CITY's exercise of its police powers if this Court grants a stay.

The receivership matter also represents far less than meets the eye. BASS and his father have assumed U.S. Bank's note on the premises, which resolves U.S. Bank's claim without the need for appointment of receiver, nor requiring TWC and BASS to vacate the premises (BASS dcl. ¶ 6).

The CITY refers to its two different ordinances, only one of which is subject to the pending referendum. The other remains in place pending this litigation, thereby highlighting the need for this Court to issue a stay to preserve the *status quo* in this appeal.

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: October 17, 2018 Respectfully submitted,

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