Superior Court of California
County of San Bernardino
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SUPERIOR COURT
COUNTY OF SAN BERNARDINO

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BY _____
NADYA AVAKIAN, DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

"MEASURE O CASES"	Case Nos.: CIVDS 1702131 CIVDS 1704276 CIVDS 1712424 **FINAL STATEMENT OF DECISION**

I

Introduction

On January 18, 2018, the court issued a tentative decision invalidating "Measure O," a ballot initiative approved by voters in the City of San Bernardino in the November 8, 2016, election.[1] Several parties objected to the tentative decision. This final

[1] Measure O is known officially as the San Bernardino Regulate Marijuana Act of 2016.

Statement of Decision addresses the objections,[2] but otherwise confirms the tentative decision.

Three lawsuits address the validity of Measure O:

(1) *Kush Concepts Collective, et al. v. City of San Bernardino, et al.* CIVDS 1702131;

(2) *Quiang Ye, et al. v. City of San Bernardino, et al., CIVDS 1704276;* and

(3) *Karmel Roe v. City of San Bernardino, et al.,* CIVDS 1712424.

Quiang Ye is a petition for writ of mandate with a cross-complaint for declaratory relief. *Kush Concepts and Karmel Roe* are both complaints for declaratory relief and injunctive relief. The three actions are not consolidated, and the specific interests and viewpoints of the parties differ. Some parties, such as Quiang Ye, seek straightforward implementation of the Measure O.[3] Others, such as Karmel Roe, challenge the validity of Measure O as written, but contend the court can sever invalid portions and allow implementation of the remainder. Still others, such as the City of San Bernardino, contend Measure O is altogether invalid.[4] Despite the divergent interests, the central issue in all three cases is whether Measure O is valid. Accordingly, the court conducted a single hearing, issued a single tentative decision, considered all objections to the tentative decision, and now issues this final Statement of Decision, applicable to all three cases. For the reasons set forth below, the court finds that Measure O is invalid.

II

Background

On November 8, 2016, California voters approved Proposition 64—known officially as the Control, Regulate and Tax Adult Use of Marijuana Act—thereby joining a

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[2] This final Statement of Decision does not address *every* objection or point raised by the parties. A Statement of Decision need address only the "principal controverted issues." (See Cal. Rules of Court, rule 3.1590.)

[3] The City has already issued Ye a permit to operate a marijuana dispensary, and Ye simply wants to commence business pursuant to that permit.

[4] In discovery responses, however, the City contended that only portions of Measure O are invalid.

burgeoning national trend to legalize recreational use of marijuana.[5] The stated purpose of Proposition 64 was "to establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana." (2016 Cal. Legis. Serv. Prop. 64, § 3 (West).) The new law contemplated a comprehensive regulatory structure to oversee the marijuana industry through a statewide system of "licensing, regulation, and enforcement." (*Id.* at § 3, subd. (b).) The new law also allowed local governments to ban the businesses entirely if they chose not to participate in the nascent industry. (*Id.* at § 3,subd. (d).)

On the same date that Proposition 64 appeared on the state-wide ballot, voters in the City of San Bernardino were presented with three competing local ballot initiatives pertaining to marijuana businesses—Measure N, Measure O, and Measure P. Measure O succeeded, defeating the other two initiatives.[6] Measure O removed a city-wide ban on medical marijuana facilities and specifically authorized marijuana businesses "in portions of the commercial and industrial zones" of the City.[7]

Measure O created two "marijuana business overlay zones" within the City. Under Measure O, businesses which obtain state-issued licenses for cultivation, manufacturing, testing, transportation, or distribution—but not for "dispensing" (*i.e.*,

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[5] The other states to pass laws legalizing recreational marijuana, subject to various limitations, are Colorado, Washington, Oregon, Nevada, Massachusetts, Alaska, Maine, and Vermont, as well as the District of Columbia.

[6] Measure P received less than fifty percent of the vote, and was therefore defeated outright. While Measure N received more than fifty percent of the vote, it received fewer votes than Measure O. Measure O therefore prevailed over Measure N pursuant to the terms of the competing measures.

[7] Had Prop. 64 failed, Measure O would still have taken effect, but would have applied only to *medical* marijuana facilities rather than *recreational* marijuana facilities. Medical marijuana facilities were already authorized under state law pursuant to the Medical Marijuana Program Act, Health & Safety Code section 11362.7 *et seq.*, but were previously banned in the City of San Bernardino by local ordinance. Measure O did not distinguish between medical marijuana and recreational marijuana, but simply allowed marijuana businesses insofar as they are "consistent with State law." (*See* Measure O, § 3-A.)

sales)—are permissible in "M-B Overlay Zone 1." Businesses which obtain state-issued licenses for *dispensing* are permissible only in "M-B Overlay Zone 2."[8]

The term "zone" typically implies a geographic region, but Measure O does not delineate the zones in that manner. Measure O assigns specific parcels, identified by Assessor's Parcel Number, to each "zone." In other words, the "zones" are not defined by *areas* of the City, but by the specific *parcels* the zones comprise. The parcels are not necessarily contiguous. Each zone contains a patchwork of parcels, interspersed with parcels that are not assigned to the zones. Overlay Zone 1 comprises 153 parcels. Overlay Zone 2 comprises twenty-one.

After Measure O passed, the City's Community Development Office determined that a number of designated parcels should be disqualified due to their proximity to so-called "sensitive" areas—schools, religious facilities, and residential areas. The City disqualified seven parcels from Overlay Zone 1 on this basis, and then disqualified four more because they were not listed on the County Tax Assessor rolls. This left 142 qualified parcels in Overlay Zone 1.

The City also disqualified twelve of the twenty-one parcels designated for Overlay Zone 2, based on their proximity to "sensitive" areas, plus one additional parcel because it was not listed on the County Tax Assessor rolls. Furthermore, of the eight remaining parcels in Overly Zone 2, the City determined that five constituted a single site, located at 350 West Fifth Street. Thus Measure O allows dispensing of marijuana at only two addresses: 100 Hospitality Lane and 350 West Fifth Street.

III

Ballot Initiatives are to be Liberally Construed.

It is well-settled that "the people reserve to themselves the power of initiative and referendum." (*Cal.Const.*, art. IV § 1, cited in *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.) As a result, "the initiative power must be *liberally construed* to promote the democratic process." (*Ibid.*; *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 341). Courts have a duty to guard the initiative power, "and to resolve any reasonable doubts in favor

[8] *See* Table 1 in Measure O for the specific state-issued license types permissible in each zone.

of its exercise." (*Ibid.*) "[A]ll presumptions favor the validity of initiative measures and mere doubt as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Legislature v. Eu, supra,* 54 Cal.3d at p. 501; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814.) "An initiative measure amending a . . . zoning ordinance is valid 'so long as reasonable minds might differ as to the necessity or propriety of the enactment. . . .'" *(Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App. 4th 565, 574, quoting *Garat v. City of Riverside* (1991) 2 Cal.App 4th 259, 292, disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 fn. 11.) In ruling on the validity of Measure O, the court is mindful of the broad deference required for the review of ballot initiatives.

IV

Unjoined Permit Applicants Are Not Necessary Parties.

Code of Civil Procedure section 389, subdivision (a), requires joinder of a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest . . . ." If such a person cannot be joined, section 389, subsection (b), allows the court to "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable."

Bubba Likes Tortillas, LLC ("BLT")[9] contends that the suits challenging Measure O cannot proceed absent joinder of all applicants for business licenses under Measure O. Specifically, BLT argues that the City's failure to join certain lessees of qualified properties under Measure O, who have applied for or received applications for business licenses, is a ground for dismissal of these cases. BLT argues that these lessee-applicants have an obvious interest in the validity of Measure O, and that a judgment holding Measure O to be invalid will "as a practical matter impair or impede [their] ability to protect that interest . . . ." (*Ibid.*)

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[9] BLT is a cross-defendant in the *Quiang Ye* matter.

However, "[a] party's ability to protect its interest is not impaired or impeded as a practical matter where a joined party has the same interest in the litigation." (*Deltakeeper. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1102; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 161.) Here, the lessors of the qualified parcels—who must give their permission for lessees to operate marijuana businesses on the premises—have been joined. Their interest in upholding the validity of Measure O is sufficient to protect the interests of their lessees.[10] Therefore, the absent lessee-applicants are neither necessary nor indispensable parties within the meaning of the Code of Civil Procedure section 389.

V

Measure O is Not Preempted by Federal Law.

Evolution Health, Inc. ("EHI")[11] contends Measure O is invalid because it is preempted by federal law, which criminalizes the use, cultivation, and distribution of marijuana. (*See generally,* 21 U.S.C. § 801, *et seq.*)[12] Drawn to its logical conclusion, this argument would also require preemption and invalidity of Prop. 64 and similar laws in other states that have authorized the possession and sale of recreational or medicinal marijuana.

EHI's argument is predicated on *Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734. The court in *Qualified Patients,* however, held that California's medical marijuana laws were *not* preempted by federal law. (*Id.* at pp. 756-763.)[13] According to EHI, the holding of non-preemption in *Qualified Patients* is distinguishable because California's medical marijuana laws only *decriminalized*, for

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[10] Furthermore, dismissal would not be appropriate because there is no showing that the tenants could not be joined were the court to deem it necessary. Nor is there any showing that the action "in equity and good conscience" should not proceed in their absence. (*Code Civ. Proc., § 389,* subd. (b).)

[11] EHI is a plaintiff in the *Kush Concepts* case.

[12] Recent statements by United States Attorney General Jeff Sessions suggest the Department of Justice may cease the prior federal policy of foregoing prosecution of marijuana businesses operating in compliance with state law. (*See,* Los Angeles Times, January 4, 2018.)

[13] *See also, City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729.

purposes of state law, certain conduct related to medical marijuana, whereas Measure O specifically *authorizes* the possession and sale of marijuana in contravention of federal law. This is a distinction without difference. In both cases—under California's medical marijuana laws *and* under the new recreational marijuana laws—businesses are allowed to sell marijuana and customers are allowed to buy it. Yet neither is legal under federal law. But as noted in *Qualified Patients* regarding medical marijuana, there is no federal preemption because the state laws "do not mandate conduct that federal law prohibits, nor pose an obstacle to federal enforcement of federal law." (*Id.* at p. 757). The same is true of recreational marijuana. Neither Prop. 64 nor Measure O require Californians to cultivate, buy, sell, or use marijuana—Californians are free to abstain—and nothing prevents or impedes the United States Department of Justice from prosecuting violators. There is no federal preemption.

VI

The Challenges to Measure O are Not Barred by the Statute of Limitations.

BLT contends that the challenges to Measure O are time-barred under Government Code section 65009, which requires that actions attacking the validity of certain decisions of a legislative body be commenced with in ninety days of the decision. The statute has no application here. Measure O was not a decision of a legislative body, but was a voter-sponsored initiative. The challenges to Measure O are not time-barred.

Furthermore, "[t]here are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91, citing to *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691.) Here, BLT did neither. In its Answer, BLT merely alleged, "Said causes of action, and each of them, are barred in whole or in part, by the

applicable statute of limitations." Contrary to proper pleading standards, BLT did not plead the specific section and subdivision of the applicable statute of limitations, nor did it state any facts establishing that the City's causes of action were time-barred. BLT's failure to plead the statute of limitations properly in its Answer waives the defense, and BLT has not cited any authority for the proposition that raising the defense in a trial brief is sufficient. (*Mysel v. Gross* (1977) 70 Cal.App.3d Supp. 10, 15.) Therefore, BLT's statute of limitations defense is waived irrespective of its substantive arguments regarding section 65009.

VII

Permit Applicants Do Not Have Vested Rights Under Measure O.

BLT contends that it has and expended substantial resources and has incurred substantial obligations in reliance on Measure O and on the City's actions—specifically, the development of its property, the execution of leases with tenants seeking to establish marijuana operations, and the rejection of leases that would provide immediate rental income in favor of leases that are contingent upon the tenant obtaining a marijuana business permit. As a result, BLT argues that it has obtained "vested rights" under Measure O. The only case cited by BLT in support is *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785.

The City argues that *Avco Community Developers* is inapposite, because the Supreme Court found in that case found that the developer did *not* have vested rights, despite expenditures of approximately $2 million on development studies and subdivision of the parcel. (*Id.* at pp. 789-790, 797.) BLT, however, argues that the case still stands for the proposition that a landowner can acquire vested rights when it relies in good faith on a permit that has already been issued by the government, and once

those vested rights are secured, the government cannot change the zoning laws in order to prohibit construction authorized by the permit upon which the landowner has relied. BLT is correct about the general principle, but the principle does not apply in this case, just as it did not apply in *Avco Community Developers*.

"The doctrine of vested rights is ordinarily applied when a local agency attempts to prevent the completion or use of a project on the grounds that the project, while lawful at the time a permit was issued, had been rendered unlawful by an intervening change in the law." (*Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066, 1076.) In, *Avco Community Developers, supra*, 17 Cal.3d 785, the plaintiff developer obtained a grading permit for a residential development prior to the effective date of the Coastal Zone Conservation Act of 1972. Under the Act, developments within the coastal zone were required to obtain a permit from the Coastal Commission. The plaintiff had performed the necessary grading and began the installation of road and sewer improvements, but it had not obtained any building permits for the site because the completion of these improvements was required before a building permit could be issued. (*Id.* at p. 789.) The issue before the Supreme Court was whether the plaintiff developer had gained a vested right to complete the development without the coastal zone permit. The question was whether the issuance of the *grading* permit and the completion of substantial work under that permit—both of which occurred before the change in the law requiring a coastal zone permit—were sufficient to give the plaintiff "vested rights" to complete the project. In explaining the doctrine of vested rights, the Supreme Court wrote:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he

> acquires a vested right to complete construction in accordance with the terms of the permit. [Citations.] Once a landowner has secured a vested right, the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.

(*Id.* at p. 791.)

Ultimately, the Supreme Court found that the plaintiff did not have vested rights under the circumstances because a *grading* permit was insufficient to create a vested right if a *building* permit had not yet been issued. (*Id.* at pp. 792-795.) The Court held that "neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued." (*Id.* at p. 793.)

As a result, other courts have found that "it is generally recognized that while the issuance of a permit may insulate a party against subsequent changes in the law, it cannot create a vested right to construct or use property in violation of laws in effect at the time of issuance of the permit." (*Attard v. Board of Supervisors of Contra Costa County, supra,* 14 Cal.App.5th at p. 1077; see also, *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1097; *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646.)

Here, BLT contends that the vested rights doctrine applies to this action because several of its tenants received "approval letters" from the City in response to their applications for marijuana business permits. But like the developer in *Avco Community Developers*, these BLT tenants did not obtain *permits*—only letters stating that their applications had been reviewed and that their proposed projects were in compliance with Measure O. Notably, each of the letters expressly stated, "THIS IS NOT A

PERMIT TO OPERATE", and that prior to issuance of a permit, the applicant had to remit payment in accordance with the provisions of Measure O.

"'[T]he vested rights theory is predicated upon estoppel of the governing body .... Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel.'" (*Anderson v. City Council* (1964) 229 Cal.App.2d 79, 89, quoted in *Avco Community Developers, supra,* 17 Cal.3d at p. 793.) Therefore, to the extent funds were expended and leases were executed, if these events occurred before the permit applications were even approved, it cannot be said that BLT or its tenants incurred any liabilities in good-faith reliance upon the issuance of a permit. Absent the issuance of actual marijuana business permits to the BLT tenants, any resources expended by BLT or its tenants and any leases entered into in anticipation of the issuance of those permits are not sufficient to create vested rights in the subject property.

Southwest Patient Group, however, is a BLT tenant who was actually issued a marijuana business permit. While Southwest purportedly paid City $30,000 for the permit, pursuant to the provisions of Measure O, the permit expressly advised that Measure O was the subject of multiple pending lawsuits, and as a result, "[t]he outcome of one or more of those cases may affect the validity of some or all of [Measure O], as well as any permit that may be issued thereunder." Thus Southwest Patient Group (and any other permit recipients) knew that Measure O was being challenged. Issuance of the permit also allowed for a ten-day appeal period. Accordingly, Southwest Patient Group was taking a calculated risk in paying the permit fee and expending any other sums. (See, *Spindler Realty Corp. v. Monning* (1966) 243 Cal.App.2d 255.) Therefore, Southwest Patient Group or any other applicant who actually received a permit did not gain any vested rights as a result.

VIII

Measure O Does Not Conflict with the City's General Plan.

A city's General Plan is a "constitution for future development." (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1310, quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772-773.) Government Code section 66473.5 requires a project to be "compatible with the objectives, policies, general land uses, and programs" specified in the General Plan. The parties challenging Measure O contend it is invalid due to conflict with the City's General Plan.[14]

The City's General Plan seeks to "promote development that integrates with and minimizes impacts on surrounding land uses." The plan enumerates a number of specific policies to further that general goal, including: (a) controlling the number and location of "community-sensitive" uses (such as alcohol sales, sex-oriented business, and game arcades) based on their proximity to residences, schools, religious facilities, and parks; (b) requiring Police Department review of uses that may be characterized by high levels of noise, crime rates, etc., and providing for the conditioning or control of use to prevent adverse impacts on adjacent schools, residences, religious facilities, and other "sensitive" uses; and (c) agreeing that the protection of quality of life takes precedence during the review of new projects, thus allowing the City to utilize its discretion to deny or require mitigation of projects that result in impacts that outweigh benefits to the public.

Measure O voices similar and consistent values. Measure O states that it is the intent of the voters to provide a means for cultivation and use of marijuana for purposes consistent with California law, to protect public health and safety through reasonable limitations on marijuana businesses, to limit the concentration of marijuana businesses, to adopt a mechanism to monitor compliance with local and state law, to impose fees to help mitigate against possible adverse secondary effects, to cover the cost of regulation, to facilitate the implementation of state law, to allow marijuana businesses

[14] The City is the primary proponent of the argument that Measure O conflicts with the City's General Plan, though EHI joins in the argument generally.

only by people who have the intent and ability to comply with applicable law, and to protect public safety by limiting the locations where marijuana businesses can operate. The measure sets forth "location, type, and numerical requirements," and states, "It is the intent and purpose of the marijuana business overlay zones . . . to allow marijuana businesses in portions of the commercial and industrial zones where such uses would be consistent with the General Plan, compatible with surrounding commercial and industrial uses and not materially detrimental to adjacent properties."

Despite these similarities in the stated purposes of Measure O and the General Plan, the City argues that Measure O obstructs the objectives of the General Plan. But a project—or in this case a zoning ordinance adopted by ballot initiative—need not be in "rigid conformity with every detail" of the General Plan. (*Foothill Communities Coalition, supra,* at pp.1310-1311, quoting *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656,678.) It need only be "compatible" with it. (*Ibid.*, quoting Gov. Code § 66473.5)

It is true that Measure O is not in "rigid conformity with every detail" of the City's General Plan. For example, the General Plan requires "community-sensitive" businesses (*i.e.*, businesses that may attract unsavory clientele or may be associated with increased levels of crime) to be located away from *residences*, whereas Measure O only prohibits marijuana businesses from close proximity to parcels *zoned* for residential use, without addressing the possible presence of non-conforming residences located within commercial or industrial areas. Similarly, Measure O does not specifically bar marijuana businesses from close proximity to religious institutions.

While these examples may demonstrate that Measure O does not align *perfectly* with the General Plan, the City has not shown that Measure O *obstructs* the plan or is *incompatible* with the plan. The measure expressly provides for the protection of public health and safety through reasonable limitations on marijuana businesses. Furthermore, it allows the City to promulgate regulations to address the needs of the community as they arise. Through these express grants, the City can require Police Department review of marijuana business applications and monitoring of marijuana

business operations. Nothing in Measure O prohibits the City from undertaking such protective measures. In short, there are no irreconcilable conflicts between Measure O and the General Plan, such that would require invalidation of Measure O.

IX

Measure O Creates Unlawful Spot Zoning and a Zoning Monopoly.

Among the categories of zoning ordinances that may be invalid as applied to particular properties are so-called "spot zoning" and zoning that creates a monopoly. (*Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 340; *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 354, 960, fn. 1. *See also* Lindgren, Mattas, et al., *California Land Use Practice* (Cal CEB 2017 Update) §19.50.3.) In this case, the challengers of Measure O contend it is invalid on this basis because it benefits only a few select owners of qualified parcels. They are correct, at least with respect to Overlay Zone 2.

After the elimination of disqualified parcels, Overlay Zone 1 (allowing non-dispensing marijuana businesses) comprises 142 specifically identified parcels, and Overlay Zone 2 (allowing marijuana dispensing businesses) comprises only two.[15] Why these particular locations and not others which are similarly situated? No one has adequately answered this important question.

Spot zoning, however, is not *necessarily* impermissible. It is impermissible if there is no rational basis for it—if it is arbitrary or capricious. (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1309, quoting *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268.) ""It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land." *(Reynolds v. Barrett* (1938) 12 Cal.2d 244, 251.) In *Arcadia*

[15] One of these locations is composed of several different parcels, but each of the two locations bears only one address.

Development Co. v. City of Morgan Hill (2011) 197 Cal.App.4th 1526, 1536, the court explained:

> "Spot zoning is one type of discriminatory zoning ordinance. [Citation.] 'Spot zoning occurs where a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses. [Citation.] Usually spot zoning involves a small parcel of land, the larger the property the more difficult it is to sustain an allegation of spot zoning. [Citation.] Likewise, where the 'spot' is not an island, but is connected on some sides to the like zone, the allegation of spot zoning is more difficult to establish since lines must be drawn at some point. [Citation.] Even where a small island is created in the midst of less restrictive zoning, the zoning may be upheld where rational reason in the public benefit exists for such a classification. [Citation.]"

Spot zoning is not limited, however, to situations where a property with more restrictive zoning is surrounded by properties with less restrictive zoning. Spot zoning can also result when a parcel of land is subject to *less* restrictive zoning than surrounding properties. (Hagman et al., *Cal.Zoning Practice* (Cont.Ed.Bar. 1969) §553, p. 152.) In *Foothill Communities Coalition, supra,* 222 Cal.App.4th at p. 1314, the court explained that " the creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning."

Even so, spot zoning—whether by islands of greater restriction or by islands of lesser restriction—"may be justified . . . if a substantial public need exists, and this is so even if the private owner of the tract will also benefit.'" (*Id.* at p. 1314, quoting *Pharr v. Tippitt* (Tex. 1981) 616 S.W.2d 173,177.) "'[T]he term 'spot zoning' is merely shorthand for a certain arrangement of physical facts. When those facts exist, the zoning may or may not be warranted. . . . Spot zoning may well be in the public interest; it may even be in accordance with the requirements of a master plan' [Citation]" (*Foothill Communities*

Coalition, supra, 222 Cal.App.4th at p. 1314, citing to *Arcadia Development Co. v. City of Morgan Hill, supra,* 197 Cal.App.4th at p. 1536).[16]

Here, the qualified parcels have been given *less* restrictive zoning relative to surrounding parcels—they may host marijuana businesses, whereas surrounding, similarly-situated, and even adjacent properties may not. This is spot zoning, at least with respect to Overlay Zone 2, where there are only two qualified addresses, separated from each other by several miles and surrounded on all sides by non-qualified parcels. The question, of course, is whether the spot zoning is permissible—does it have a rational basis?

It is unclear why or how these particular parcels were selected. Why those addresses and not others which are similarly situated? Furthermore, there is no showing of a "substantial public need" for the selection of these particular sites. (*Foothill Communities Coalition, supra,* 222 Cal.App.4th at p. 1314.) Measure O simply states that the purpose of the overlay zones is "to allow marijuana businesses in portions of the commercial and industrial zones where such uses would be consistent with the General Plan..." But there is no explanation for the selection of the *particular* parcels chosen. While there may be a public interest in restricting marijuana businesses to certain areas of the City, no rational basis supports the unexplained and apparent randomness of the selection of these particular parcels which constitute the zones.

The parties seeking to have Measure O upheld rely upon the deposition testimony of Charles Dunn to demonstrate a rational basis for the selection of particular parcels. A full analysis of his testimony, however, demonstrates to the contrary.

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[16] The court in *Foothill Communities* ultimately found that the up-zoning of a lot to permit a senior living facility was permissible spot zoning, as opposed to impermissible spot zoning.

Dunn is the Executive Director for Californians for Responsible Government ("CRG"), the organization that drafted Measure O. (Dunn Deposition, 11:20-23.) CRG does not have any members or paid employees; other than Dunn, it has only one other volunteer. (*Id.*, 13:12-19.) Besides his work for CRG, Dunn is employed as the airport manager for Cable Airport in the City of Upland, and, prior to that, had a thirty year career in municipal government. (*Id.*, 13:20-25,14:7-14.) But he never worked in the fields of city planning or community development. (*Id.*, 14:15-17.)

Dunn alone selected the parcels to be included in Measure O. (*Id.*, 26:2-18.) When asked what goals and policies of the City were furthered by Measure O, Dunn stated that because of the measure's "revenue source and the fact that it can generate jobs, [it] fits many of the pieces of the elements within the City's General Plan." (*Id.*, 30:24-31:15.) But Dunn also stated that he did not determine whether Measure O met the elements or goals that City was trying to establish in the Plan. (*Id.*, 31:19-23.)

Regarding the particular parcels that were designated under Measure O, Dunn first stated that he arbitrarily chose to limit the potential number of marijuana dispensaries at five. (*Id.*, 32:17-19.) When asked why he set this limit, Dunn responded: "It's a political calculation. My experience with municipal government and having dealt directly with the marijuana issue is that the dispensary is the face of the marijuana industry and ... the perceived clientele, and to leave an open-ended amount would not set well with the voters. To say one or two would scream monopoly, so it was just a wild guess." (*Id.*, 32:21-33:2.)

Dunn conceded that in drafting Measure O, he did not intend for all of its provisions to work together. (*Id.*, 33:3-5.) Instead, he stated that "the purpose of Measure O was primarily to deal with the supply side because the City of San

Bernardino has a lot of land use area that is zoned for industrial/commercial uses. ... So the focus of Measure O was on the supply side and, actually, the dispensary was kind of an afterthought." (*Id.*, 33:5-12.)

In describing how he selected the parcels to include in Overlay Zones 1 and 2, Dunn stated he drove around San Bernardino "just to get a general feel to refresh my memory of what the area is like and what is in the immediate area ...." (Id., 38:3-6.) He said that he did not perform an analysis to determine how much of the area consisted of vacant land versus residences, but he said that he saw land that was "ripe for development," and, in certain areas, "it would be considered blight" and "not ... the best use of the property." (*Id.*, 39:1-16.) When asked about determining the parcels to be included in Measure O, he stated:

> I focused in on the parcels. I did not focus in on whether they met the criteria of Measure O. Primarily, again, it was a political calculation, and the thinking I was using ... is that even if there was a residentially zoned property within the 600 feet, if somebody was motivated to open a business at that particular location, then they will do what it takes to make that business comply. So if it requires him to acquire the property to do that, again, a highly motivated person, they have to understand if the numbers are going to pencil out, they would do that. That's from my experience.

(*Id.*, 44:6-17.)

When asked about his process of selecting parcels to include in Overlay Zone 2, Dunn similarly stated:

> Again, it was a gut feeling, a political calculation. Specifically, since dispensaries have more of a presence to the community, ...the reason why... I didn't pick more than five was that that's the volatile part of the marijuana industry or issue when it comes to communities, and so I didn't want to pick that they could go in this particular area or that particular area. ... And the places that were selected were places, in my personal feeling and based on my knowledge and based on a political calculation, where I believe the voting, or the citizens and voting population, wouldn't have a

> concern that a marijuana business, a retail business was operating out of there.

(Id., 45:12-46:2.)

Dunn then explained that he did not have a pre-determined number of parcels to designate for Overlay Zone 2, but rather, "[i]t was me driving around the town looking and areas of the City of San Bernardino where, in my opinion, I felt a dispensary could probably operate and not get a lot of flack." (*Id.*, 46:10-17.) Dunn admitted that he did not specifically look at what was around the parcels he selected; rather, he generally looked at location and parking and:

> I was literally driving going, you know, "I think that might be a spot" and wrote myself a little note, go research the property as far as the APN number. That was pretty much the process....What I can tell you is that when I was picking the parcels, I hadn't settled on the details of Measure O. It was multiple things going on at the same time.

(*Id.*, 47:6-13.)

Notably, regarding his selection of the 100 Hospitality Lane property, Dunn admitted he knew the property was related to the Welty family, and he said he selected it because it was an adult business, and "[i]t's already considered a pariah in the community so they make perfect locations for dispensaries." (*Id.*, 49:6-15.)

Dunn made a similar assessment regarding the property at 350 West Fifth Street. Although he did not know who owned the property, he said, "It's not a very good area of town. That had a lot to do with why that property was selected." (*Id.*, 50:19-22.) When asked what else went into his selection of that property, Dunn stated: "Probably just the conditions of the area. There's a lot of homeless. In the end, what a lot of cities have done when they are allowing dispensaries is they are putting them in areas that aren't generally favored, and part of the thinking I had was along those lines. I know that

particular area has deteriorated quite a bit since I was a teenager, and those are perfect areas for businesses that a lot of citizens frown upon." (*Id.*, 50:25-51:8.)

Dunn's testimony does not provide any rational basis for the selection of the parcels selected under Measure O. It appears he simply drove about the City randomly, and identified areas for possible marijuana businesses based on his "gut feelings" and "political calculation." He admits he did not determine if the provisions of Measure O would align with the goals stated in City's General Plan, and he did not perform any quantitative or qualitative analysis of the areas he toured. Instead, he based his determinations on whether the properties were blighted, in a "bad" part of town, or somehow undesirable. There was no consideration of any "public benefit" or "legitimate state purpose," nor any identifiable relationship to City's General Plan, but rather, only Dunn's amorphous belief as to where marijuana businesses should be located.

Furthermore, there is no explanation why one property in a supposedly "blighted area of the City, but not similarly situated properties, such as Ms. Roe's, was passed over.

In summary, Mr. Dunn's testimony does not support a finding that there was a rational basis for the selection of particular parcels, particularly for the dispensaries.

As for the monopoly question, Overlay Zone 1 (which allows non-dispensing marijuana businesses) is sufficiently large to avoid monopoly, but Overlay Zone 2 (which allows dispensing businesses) comprises only two addresses. This creates a zoning monopoly (or, to be precise, a duopoly), with the owners of these two locations

the sole beneficiaries. They and they alone may operate a marijuana dispensary—surely a uniquely profitable enterprise.[17]

X

Measure O is Not Severable.

When an initiative provision is invalid, the void provision must be stricken but the remaining provisions should be given effect if the invalid provision is severable. (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 721.) Measure O contains a severability clause: "If any provision in this Chapter, or part thereof, or the application of any provision or part to any person or circumstance is held for any reason to be invalid or unconstitutional, the remaining provisions and parts shall not be affected, but shall remain in full force and effect, and to this end the provisions of this Chapter are severable."

As explained by the California Supreme Court in *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714, quoting *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821:

> " 'Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable....' " And yet, . . . " '[s]uch a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute ... or constitutes a completely operative expression of legislative intent ... [and is not] so connected with the rest of the statute as to be inseparable....' "

[17] Even Mr. Dunn, Measure O's author, stated that he chose five locations to qualify as dispensaries, because "one or two would scream monopoly." (Dunn Deposition, 32:21-33:2.)

"The three criteria for severability are that the invalid provision must be grammatically, functionally, and volitionally separable." (*Park At Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, 1211 [emphasis added], citing to *Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d at p. 821.) Courts have held that for a provision to be grammatically separable, "the valid and invalid parts can be separated by paragraph, sentence, clause, phrase or single words." (*Park At Cross Creek, LLC v. City of Malibu, supra*, 12 Cal.5th at p. 1211, citing to *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 330.) "Functional severability refers to whether the surviving sections are capable of independent application," while "[v]olitional severability refers to whether the voters would have adopted the initiative without the invalid provisions." (*Park At Cross Creek, LLC v. City of Malibu, supra*, 12 Cal.5th at p. 1211, citing to *Pala Band of Mission Indians v. Board of Supervisors, supra*, 54 Cal.App.4th at p. 586.)

Volitional severability has been characterized as follows: "'[T]he provisions to be severed must be so presented to the electorate in the initiative that their significance may be seen and independently evaluated in the light of the assigned purposes of the enactment. The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.'" (*Gerken v. Fair Political Practices Com., supra,* 6 Cal.4th at pp. 714-715, quoting *People's Advocate, Inc. v. Superior Court, supra,* 181 Cal.App.3d at pp. 332-333.)

Section 3 of Measure O provides:

> "It is the intent of the people of the City of San Bernardino in enacting this measure to:

> A. Provide for a means of cultivation, production, manufacturing, testing, transportation, distribution, *dispensing, acquisition, and use* of marijuana by persons who qualify to obtain, possess, and use marijuana for purposes consistent with State law." [Emphasis added.]

Similarly, regarding the overlay zones, section 5 of Measure O (adding Chapter 19.420 to the City's Development Code) provides:

> . . . [I]t is the further intent of this chapter to regulate the location, cultivation, production, manufacturing, testing, transportation, distribution, *dispensing, acquisition, and use* of marijuana in a manner that is consistent with the State Compassionate Use Act ("CUA"), the State Medical Marijuana Program Act ("MMPA"), and the State Medical Marijuana Regulation and Safety Act ("MMRSA"), as well as with laws and regulations that have been or may be enacted by the State regarding the same, including but not limited to marijuana for medical or recreational use. [Emphasis added.]

This provision goes on to recognize that marijuana businesses "have the potential of causing serious adverse secondary effects upon the community," that it is the intent of Chapter 19.420 "to minimize this potential impact," and that "[t]o do so, to adopt . . . regulations that . . . [p]rovide for a means of cultivation, production, manufacturing, testing, transportation, distribution, *dispensing, acquisition, and use by persons who qualify to obtain, possess, and use marijuana for purposes consistent with State law.*" (Measure O, §19.420.010, emphasis added.)

The repeated use of the terms "dispensing, acquisition, and use" alongside the terms "cultivation, production, manufacturing, testing, transportation, [and] distribution" demonstrates that the measure was intended to create a *unified* marijuana industry in San Bernardino, embracing all aspects of the industry from cultivation through retail sales and ultimate use by the consumer.

Although some provisions in Measure O pertain only to marijuana dispensaries, and therefore might be severable grammatically and functionally, the initiative was

presented to the electorate as an *indivisible* ballot measure—an all-inclusive regulatory structure to govern not only the cultivation and manufacture of marijuana, but also the retail sale of marijuana through licensed dispensaries.[18]

If the provisions governing the marijuana dispensaries had been deleted from the proposed Measure O, it seems unlikely that the voters would have adopted a measure that simply allowed certain businesses to cultivate and manufacture marijuana without providing some means of dispensing the product to the public. It is reasonable to assume that many of those who voted in favor of Measure O were as interested in *buying* marijuana in their community as they were in allowing others to grow it.

Accordingly, even if the Overlay Zone 2 provisions are grammatically and functionally separable, thus meeting the first two prongs of the severability test, they are not volitionally separable, thus failing the third prong.

XI

Conclusion

For the reasons explained above, Measure O is invalid. It creates a zoning monopoly for the dispensing of marijuana, due to "spot zoning" which lacks a rational basis. It allows only two addresses within the City to qualify for business licenses for the dispensing of marijuana. These two addresses are separated from each other by several miles and are surrounded on all sides by similarly-situated, yet non-qualifying, properties. There is no showing that the public interest supports the selection of these two locations alone.

While the portion of Measure O allowing marijuana cultivation, manufacturing, testing, transportation, or distribution—but not dispensing—may not suffer from the

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[18] Moreover, Measure O was arguably enacted in anticipation of the passage of California's Proposition 64 – the Adult Use of Marijuana Act – which was designed "to establish a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale" of both medical marijuana and adult-use cannabis. (See, *Cal. Bus. & Prof. Code*, § 26000, subd. (b)(1), (2).)

same defects, Measure O cannot be salvaged by striking the portions applicable to dispensaries, because Measure O contemplated a *complete* industry within the city, from cultivation through retail sales. It is reasonable to infer that many of the voters who approved Measure O were as interested in being able to buy marijuana within the City as they were in allowing others to grow it.

Dated: February 9, 2018.

David Cohn,
Judge of the Superior Court