

1 LOUNSBERY FERGUSON ALTONA & PEAK LLP  
KRISTEN S. STEINKE / SBN 256931  
2 ALENA SHAMOS/SBN 216548  
960 Canterbury Place, Suite 300  
3 Escondido, California 92025-3870  
TEL: 760-743-1201 / FAX: 760-743-9926  
4

**FILED**  
Clerk of the Superior Court

JAN 14 2020

By: G. Mendoza, Clerk

5 Attorneys for Respondents, City of Lemon Grove  
and City Council of Lemon Grove  
6

**EXEMPT FROM FILING FEES**  
[Government Code § 6103]

7  
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**

10 CITRUS ST PARTNERS, LLC,

Case No.: 37-2019-00064690-CU-MC-CTL

11 Petitioner,

[UNLIMITED CIVIL]

12 v.

**CITY OF LEMON GROVE AND CITY  
COUNCIL OF LEMON GROVE'S  
OPPOSITION TO CITRUS ST PARTNERS'  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND ORDER TO  
SHOW CAUSE RE PRELIMINARY  
INJUNCTION**

13 CITY OF LEMON GROVE; CITY COUNCIL  
OF THE CITY OF LEMON GROVE, and  
14 DOES 1 through 10,

15 Respondents.

[IMAGED FILE]

17 DOES 11-20,

Date: January 14, 2020  
Time: 8:30 a.m.

18 Real Parties In Interest.

Judge: Hon. Kenneth J. Medel  
Dept: C-66  
Complaint Filed: December 5, 2019  
Trial Date: Not Set

19  
20  
21 The City of Lemon Grove and the City Council of Lemon Grove (jointly City) respectfully  
22 submits its Opposition to Citrus Street Partners, LLC's (Petitioner) Application for a Temporary  
23 Restraining Order and Order to Show Cause for issuance of a Preliminary Injunction to restrain and  
24 enjoin the City from acting on the Harris Street MMD conditional use permit (CUP) application or  
25 taking any other action, discretionary or ministerial, that would disturb, extinguish, interfere with,  
26 or otherwise prejudice Zoning Clearance ZCM-180-0005, issued by the City on March 28, 2019,  
27 until the final adjudication of the present action.

28 ///

1     **I. INTRODUCTION**

2           Petitioner seeks an overly broad temporary restraining order (TRO) and preliminary  
3 injunction against the City in an attempt to prevent the City from doing anything that might possibly  
4 “prejudice” Petitioner’s CUP application. The relief sought, as drafted, violates the rule that the  
5 order must have a description of the conduct which is prohibited, in language that gives fair and  
6 clear notice to the defendant of the consequences of disobedience. (*In re Berry* (1968) 68 Cal.2d  
7 137, 155; and *Watsonville Canning & Frozen Food Co., Inc. v. Sup.Ct. (Local 912, Int’l Broth. of*  
8 *Teamsters)* (1986) 178 Cal.App.3d 1242, 1246.)

9           However, at the heart of the *ex parte* application, is Petitioner’s request to enjoin the City  
10 from holding the January 21, 2020 public hearing on the Harris Street MMD CUP. As set forth  
11 herein, such injunctive relief is both legally improper and Petitioner has failed to meet the requisite  
12 standard.

13           The most fundamental point is that this application for injunctive relief is not yet ripe.  
14 Petitioner’s papers admit that the City has not yet approved the CUP for the Harris Street MMD.  
15 Thus, Petitioner must exhaust its administrative remedies at the January 21, 2020, public hearing for  
16 the Harris Street MMD CUP before this Court can have jurisdiction to consider the requested  
17 injunctive relief. (*Board of Police Commissioners v. Superior Court* (1985) 168 Cal.App.3d 420,  
18 431–432, 434.) Moreover, the harm Petitioner alleges will occur is speculative, rather than certain  
19 and imminent. (*City & County of San Francisco v. Market St. Ry. Co.* (1950) 95 Cal.App.2d 648,  
20 655) Petitioner therefore fails to meet the standards for a TRO.

21           Petitioner has also failed to join or name indispensable parties, such as the applicant for the  
22 Harris Street MMD CUP, **Kim Investments, LLC** (Kim Investments). “Where the Petitioner seeks  
23 some type of affirmative relief which, if granted, would injure or affect the interest of a third person  
24 not joined, that third person is an indispensable party.” (*Save Our Bay, Inc. v. San Diego Unified*  
25 *Port Dist.* (1996) 42 Cal.App.4th 686, 692; see also; *Olszewski v. Scripps Health* (2003) 30 Cal.4th  
26 798, 808-809 [a person is indispensable when the judgment to be rendered necessarily affects that  
27 person's rights]; Code Civ. Proc., § 389(a).) The hearing Petitioner seeks to stop is the public  
28 hearing on Kim Investments’ CUP. Thus, Kim Investments is clearly impacted, and is beneficially

1 interested as it has a "special interest ...over and above the interest held in common with the public  
2 at large." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796; Code Civ. Proc., §  
3 1086; see also, *Vaill v. Edmonds* (1991) 4 Cal.App.4th 247, 257-58.)

4 The City respectfully requests that the Court deny the Application. However, if the Court is  
5 inclined to consider Petitioner's TRO Application, the City requests additional time to prepare and  
6 file a more complete opposition. While Petitioner gave notice of the *ex parte* hearing on January 9,  
7 2020, Petitioner only served its *ex parte* Application on the City January 13, 2020, leaving the City  
8 with minimal time to prepare these opposition papers.

## 9 II. PETITIONER CANNOT MEET ITS BURDEN

10 Injunctive relief, such as a Temporary Restraining Order (TRO) is not "a matter of right,"  
11 but is an extraordinary relief in any context. (*Woods v. Sup. Ct.* (1980) 102 Cal.App.3d 608, 613.)  
12 "To issue an injunction is the exercise of a delicate power, requiring great caution and sound  
13 discretion, and rarely, if ever, should [it] be exercised in a doubtful case." (*Ancora-Citronelle Corp.*  
14 *v. Green* (1974) 41 Cal.App.3d 146, 148.) To succeed in obtaining a TRO, Petitioner must satisfy  
15 the threshold requirement of proving it is likely to suffer great irreparable harm in the absence of  
16 preliminary relief. (Code Civ. Proc., § 526(a)(2); *White v. Davis* (2003) 30 Cal.4th 528, 554.)

17 An injunction is a drastic remedy which should only be granted where there is a clear right  
18 threatened with an imminent injury which could only be prevented by an injunction. (*City & County*  
19 *of San Francisco v. Market St. Ry. Co.*, supra, (1950) 95 Cal.App.2d at p. 655 [injunctive relief  
20 "should rarely, if ever, be exercised in a doubtful case."].) It is Petitioner's burden to make an  
21 "affirmative factual showing in a declaration containing competent testimony based on personal  
22 knowledge" of that alleged immediate irreparable harm. (Cal. Rules of Court, rule 3.1202(c).) "To  
23 justify the issuance of a restraining order in the first instance, or the continuance of it in force, it  
24 must appear from the verified complaint, or from affidavit, that sufficient grounds exist therefor."  
25 (*McPheeters v. McMahon* (1933) 131 Cal.App. 418, 420.) As discussed herein, Petitioner cannot  
26 meet such a steep burden as it cannot demonstrate that it will suffer irreparable harm if the  
27 requested injunctive relief does not issue.

28 ///

1 **III. PETITIONER CANNOT DEMONSTRATE IRREPARABLE HARM**

2 **A. Petitioner's Claim of Harm is Unripe and Speculative because the January 21, 2020**  
3 **Public Hearing on the Harris Street MMD CUP Has Not Yet Taken Place.**

4 *i. Petitioner Has Not Exhausted Its Administrative Remedies.*

5 Petitioner fails to make the required showing of irreparable harm because Petitioner's claim  
6 of harm is unripe and speculative. (Code Civ. Proc., §527; Cal. Rules of Court, rule 3.1202(c).)

7 A public hearing on a CUP is defined in the Lemon Grove Municipal Code (LGMC) as "the  
8 opportunity for the *advisory body*, the *hearing body*, or the *appellate body* to obtain public  
9 testimony or comments prior to making a *decision*." (LGMC § 17.28.020(F)(1)[italics in  
10 document bold font added].) Thus, the January 21, 2020 hearing that Petitioner seeks to stop is the  
11 administrative procedure Petitioner must exhaust before seeking injunctive relief from the  
12 Court.

13 "Where an administrative remedy is provided by statute, relief must be sought from the  
14 administrative body and the remedy exhausted before the courts will act; a court violating the rule  
15 acts in excess of jurisdiction." (*Board of Police Commissioners v. Superior Court* (1985) 168  
16 Cal.App.3d 420, 431-432.) "The exhaustion rule 'is not a matter of judicial discretion, but is a  
17 fundamental rule of procedure ... binding upon all courts.' The Supreme Court has characterized  
18 the exhaustion rule as " ' "a jurisdictional prerequisite to resort to the courts." ' " (*Contractors'*  
19 *State License Bd. v. Superior Court* (2018) 28 Cal.App.5th 771, 779, reh'g denied (Oct. 29, 2018  
20 [internal citations omitted].)

21 Therefore, until Petitioner "exhausts its administrative remedies" at the January 21, 2020  
22 hearing, the Court lacks jurisdiction to issue the requested injunctive relief. (*Board of Police*  
23 *Commissioners v. Superior Court*, supra, (1985) 168 Cal.App.3d at p. 434.)

24 *ii. Petitioner Cannot Demonstrate the Imminent Threat of Harm Required for a TRO*

25 The City will make no decision on the Harris Street MMD CUP until the January 21, 2020,  
26 hearing thereby making Petitioner's assertion of harm speculative at best. Petitioner thus cannot  
27 meet the standard for a TRO, which requires the threat of irreparable harm to be *imminent* as  
28

1 opposed to a mere *theory* of harm. (*Korean Philadelphia Presbyterian Church v. California*  
2 *Presbytery* (2000) 77 Cal.App.4<sup>th</sup> 1069, 1084.)

3 “An injunction cannot issue in a vacuum based on the proponents' fears about something  
4 that may happen in the future.” (*Ibid.*) Injunctive relief properly issues only where, unlike here,  
5 “the right to be protected is clear, injury is impending and so immediately likely as only to be  
6 avoided by issuance of the injunction.” (*East Bay Municipal Dist. v. Dept. of Forestry & Fire*  
7 *Protection* (1996) 43 Cal.App.4<sup>th</sup> 1113, 1126.) Petitioner has only demonstrated a speculative  
8 harm, thereby failing to establish the right to the requested relief.

9 **B. The City and Kim Investments will be Irreparably Harmed by the TRO**

10 In contrast, the City, other applicants such as Kim Investments and the public, will be  
11 irreparably harmed by the issuance of any form of injunctive relief, especially at this time.

12 Where “a plaintiff seeks to enjoin public officers and agencies in the performance of their  
13 duties the public interest must be considered.” (*Tahoe Keys Property Owners' Assn. v. State Water*  
14 *Resources Control Bd.* (1994) 23 Cal.App.4<sup>th</sup> 1459, 1472–1473) “Where injury would result to the  
15 public, an additional reason arises for refusal to grant injunctive relief.” (*Cota v. County of Los*  
16 *Angeles* (1980) 105 Cal.App.3d 282, 292)

17 “It is well established that when injunctive relief is sought, consideration of public policy is  
18 not only permissible but mandatory.” (*O'Connell v. Sup.Ct. (Valenzuela)*, *supra*, (2006) 141  
19 Cal.App.4<sup>th</sup> at p. 1471.) Such a request impacts the public welfare and requires the Petitioner to  
20 meet a higher burden of proof. (*Id.*) Furthermore, California Law prohibits an injunction “to  
21 prevent the execution of a public statute by officers of the law for the public benefit” or prevent the  
22 lawful “execution of a public office” (Code Civ. Proc., § 526(b)(4); Civ. Code. § 3423(d), (f).)  
23 Thus, courts “lack jurisdiction” to enjoin implementation and enforcement of “validly adopted  
24 constitutional ordinances.” (*Xiloj-Itzep v. City of Agoura Hills* (1994) 24 Cal.App.4<sup>th</sup> 620, 635.)

25 The City, and the public, have an interest in the laws of the City being followed as well as an  
26 interest in attending and commenting at a public hearing. Preventing the City from moving forward  
27 with the January 21, 2020, public hearing mandated by LGMC § 17.28.020 thwarts the City's  
28 ability to regulate and control land use, zoning and business licensing. (*3570 East Foothill*

1 *Boulevard v. City of Pasadena* (C.D. Cal. 1995) 912 F.Supp. 1257, 1262-1263.) The United States  
2 Supreme Court and the Ninth Circuit have recognized that the, “interest [of cities] in attempting to  
3 preserve the quality of urban life is one that must be accorded respect.” (*Young v. American Mini*  
4 *Theaters, Inc.* (1976) 427 U.S. 50, 71; *Lydo Enterprises, Inc. v. City of Las Vegas* (9th Cir. 1984)  
5 745 F.2d 1211, 1213.)

6 In this instance, the balancing of interests demands that the TRO be denied. As indicated in  
7 the prior section, any injury to Petitioner is speculative as its CUP application has already been  
8 denied and the Harris Street MMD CUP application has yet to be heard. (See, Code Civ. Proc., §  
9 526(a)(4).) In contrast, the injury produced by the proposed TRO would be immediate and certain,  
10 as the City is following the law, and acting for the public benefit in processing and conducting a  
11 hearing on the Harris Street MMD CUP as mandated by LGMC.

#### 12 **IV. PETITIONER FAILED TO JOIN THE REQUIRED PARTIES.**

13 Even if Petitioner’s argument somehow had merit, the Court cannot provide Petitioner with  
14 the relief it seeks. Petitioner has not joined real parties, including Kim Investments, the applicant for  
15 the Harris Street MMD CUP in this action.

16 Petitioner is not considering the prejudice it seeks to inflict on other applicants with this  
17 TRO. Petitioner did not join them, or name them as Real Parties in Interest. “Where the Petitioner  
18 seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third  
19 person not joined, that third person is an indispensable party.” (*Save Our Bay, Inc. v. San Diego*  
20 *Unified Port Dist, supra*, (1996) 42 Cal.App.4th at p. 692; *Olszewski v. Scripps Health, supra*,  
21 (2003) 30 Cal.4th at pp. 808-809; Code Civ. Proc., § 389(a).)

22 Kim Investments, the applicant scheduled to obtain approvals on January 21, 2020 is  
23 arguably a beneficially interested, indispensable party who should have been named in this action.  
24 (*Sierra Club, Inc. v. California Coastal Comm'n* (1979) 95 Cal.App.3d 495, 501; see also, Code  
25 Civ. Proc., § 1086; *Vaill v. Edmonds, supra*, (1991) 4 Cal.App.4th at pp. 257-58.) Where  
26 indispensable parties are not joined, the Court should consider dismissing the action. (Code Civ.  
27 Proc., § 389(b); see *Koster v. County of San Joaquin (Cose & Assocs.)* (1996) 47 Cal.App.4th 29,  
28 44; *Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 570.) As

1 equity is a significant factor to be considered by the Court, it should also prevent issuance of  
2 injunctive relief where such parties are not named and will be materially impacted by the result.  
3 (*County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1151-  
4 1153.)

5 **V. CONCLUSION**

6 For the foregoing reasons, the City respectfully requests that the Court deny Petitioner's  
7 Application for TRO.

8 DATED: 1/14/2020

LOUNSBERY FERGUSON ALTONA & PEAK, LLP

9

10

By: 

Kristen S. Steinke, City Attorney  
Alena Shamos,  
Attorneys for Respondents,  
CITY OF LEMON GROVE and  
CITY COUNCIL OF LEMON GROVE

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28