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1 **I. INTRODUCTION**

2 KIM Investments, LLC (“KIM”) seeks by its ex parte application to intervene in this
3 matter, not to preserve its interest in this litigation (for it has none), but to prevent Petitioner
4 Citrus St Partners, LLC (“Petitioner”) – its competitor – from obtaining something KIM wants.
5 In Lemon Grove, only one medical marijuana dispensary (“MMD”) may operate in any given
6 1,000-foot-radius area. Petitioner controls the location at 7309 Broadway in Lemon Grove;
7 approximately 500 feet away sits 3515 Harris Street, which KIM controls. Prior to any
8 application by KIM, Petitioner submitted an application for a conditional use permit (CUP) to
9 allow for the operation of an MMD. At the subsequent City of Lemon Grove City Council
10 hearing, Petitioner’s application was denied by the City of Lemon Grove and its City Council
11 (collectively, “City”), leading to the instant petition for writ of mandate to overturn the City’s
12 decision on the grounds that the City’s findings were made without any evidence, constituting an
13 abuse of discretion. As this litigation proceeds, the City’s improper denial of Petitioner’s
14 application stands. It is on this basis that KIM now sees an opportunity to obtain approval for its
15 own CUP – approval that would have been impossible but for the improper denial of Petitioner’s
16 CUP application. Accordingly, KIM has filed both a Motion to Intervene and an Ex Parte
17 Application to Intervene, not because it has any real interest in whether or not the City abused its
18 discretion, but because it wants to obtain approval of its own MMD application, thereby barring
19 Petitioner from obtaining its CUP. This is not the purpose of intervention, and KIM does not
20 satisfy intervener requirements.

21 More importantly, KIM has not even attempted to meet the requirements for ex parte
22 relief set forth in the Rules of Court. KIM has made no showing of irreparable harm or
23 immediate danger. As such KIM’s Ex Parte Application to Intervene must be denied.

24 **II. FACTUAL AND PROCEDURAL HISTORY**

25 To ensure that MMDs are not positioned within 1,000 feet of one another, or other
26 protected uses, in violation of Lemon Grove Municipal Code (“LGMC”) section 17.32.090(B),
27 the City requires that an MMD project proponent submit a “Zoning Clearance” application prior
28 to submittal of a CUP application to determine if the proposed site meets zoning and separation

1 criteria. Only entities with complete Zoning Clearance applications may submit a CUP
2 application. (Declaration of Grant R. Olsson in Support of Petitioner’s Opposition to Kim
3 Investments, LLC’s Ex Parte Application to Intervene (“Olsson Dec.”), Ex. A, p. 2.) On March
4 28, 2019, the City notified Petitioner that Zoning Clearance ZCM-180-0005, specific to
5 Petitioner’s request to apply for a CUP to establish an MMD at 7309 Broadway, was complete.
6 (Olsson Dec., Ex. B.) Based upon that Zoning Clearance, Petitioner submitted its application for
7 a CUP to establish an MMD at 7309 Broadway on April 3, 2019. (Olsson Dec., Ex. A, p. 2.)
8 KIM’s Zoning Clearance was later deemed complete on May 8, 2019, and KIM submitted its
9 application to establish an MMD at 3515 Harris Street on May 9, 2019. (Olsson Dec., Ex. C, p.
10 2.) Petitioner’s application for a CUP was deemed complete October 9, 2019 (Olsson Dec., Ex.
11 A, p. 2); KIM’s application for a CUP was deemed complete on November 7, 2019. (Olsson
12 Dec., Ex. C, p. 2.) Accordingly, Petitioner’s application for a CUP was set for hearing on
13 November 19, 2019 (Olsson Dec., Ex. A, p. 1), while KIM’s application for a CUP was not set
14 for hearing until January 21, 2020. (Declaration of Gina Austin in Support of Proposed
15 Intervenor’s Ex Parte Application (“Austin Dec.”) ¶ 11.)

16 Despite City staff’s recommendation to approve Petitioner’s CUP application, the City
17 denied it on the grounds that the parking provided by the project was insufficient. (Olsson Dec.,
18 Ex. D.) On December 5, 2020, Petitioner brought a petition for writ of mandate to overturn the
19 City’s decision. (ROA # 1.) On January 9, 2020, the City published notice of a public hearing set
20 for January 21, 2020, at which time the City intended to consider the KIM CUP application.
21 (Olsson Dec., Ex. E.) On January 13, 2019, Petitioner filed an Ex Parte Application for a
22 Temporary Restraining Order and OSC re Preliminary Injunction to prevent the City from taking
23 action during the pendency of the litigation which could interfere with Petitioner’s Zoning
24 Clearance, including approving KIM’s CUP application. (ROA # 12.) The Court granted the
25 Temporary Restraining Order (“TRO”) and also enjoined, *per KIM’s request*, further permitting
26 of a daycare facility located at 3468 Citrus Street. (ROA # 18; Austin Dec. ¶ 17.) The Court set
27 an OSC re Preliminary Injunction hearing for February 14, 2020 and held that it would consider
28 KIM’s intervention papers on the same date. (ROA # 18.)

1 Upon filing its Motion to Intervene, KIM filed an improper peremptory challenge based
2 on a falsified affidavit against Judge Medel, resulting in the automatic reassignment of the case
3 to Judge Whitney and the vacation of the preliminary injunction hearing and intervention
4 hearing. (ROA # 20, 31, 33.) Shortly thereafter, KIM scheduled a hearing for its Motion to
5 Intervene on May 1, 2020, but also scheduled a hearing on February 19, 2020 to have its Motion
6 to Intervene heard ex parte. (ROA # 32, 37.) The declarations of Gina Austin (KIM’s counsel)
7 and Jilette Yousif (KIM’s manager) both state that KIM scheduled the ex parte hearing “given
8 the time sensitive issues.” (Austin Dec. ¶ 25; Declaration of Jilette Yousif in Support of
9 Proposed Intervenor’s Ex Parte Application (“Yousif Dec.”) ¶ 18.)

10 Meanwhile, the City held its January 21, 2020 hearing on the KIM CUP application
11 under the condition, pursuant to the TRO, that it would not grant the application final approval at
12 that time. Pursuant to KIM’s request, the City Council continued the matter to its February 18,
13 2020 hearing. (Olsson Dec., Ex. F, 4:16-21, 7:9-19.) In advance of the February 18, 2020 City
14 Council hearing, City staff recommended a further continuation of the KIM CUP application
15 hearing and requested that the City Council “provide that no new sensitive uses shall prejudice
16 the [KIM] application.” (Olsson Dec., Ex. G, p. 2.)

17 **III. ARGUMENT**

18 **A. Intervention is Inappropriate for an Ex Parte Hearing.**

19 Cal. Rule of Court 3.1202(c) requires that an ex parte applicant “make an affirmative
20 factual showing...of irreparable harm, immediate danger, or any other statutory basis for
21 granting relief ex parte.” Accordingly, “[a] trial court should deny an ex parte application absent
22 the requisite showing.” (*People v. ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 257
23 (citations omitted); *see also Denton v. City and County of San Francisco* (2017) 16 Cal.App.5th
24 779, 793 (trial court erred in granting ex parte application absent evidence of irreparable harm);
25 *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 977 (same).)

26 KIM has not made any such factual showing; it only states that it filed its intervention
27 application ex parte due to “time sensitive issues.” (Austin Dec. ¶ 25; Yousif Dec. ¶ 18.) Even
28 assuming that this statement refers to the “pending day care application” (Austin Dec. ¶ 17), it is

1 belied by the fact that KIM itself ensured that any permitting for the day care facility is also
2 enjoined. (Austin Dec. ¶ 17; ROA # 18.) Additionally, the City has recommended that “no new
3 sensitive uses shall prejudice [KIM’s] application.” (Olsson Dec., Ex. G, p. 2.) As such, there is
4 no factual basis to conclude that any imminent event will interfere with KIM’s CUP application,
5 and thus there are no “time sensitive issues” necessitating ex parte relief. KIM’s Motion to
6 Intervene is a noticed motion pursuant to Cal. Rule of Court 3.1300 *et seq.* and should be heard
7 as one.

8 Conversely, KIM’s ex parte application *does* prejudice Petitioner, whose lead counsel is
9 unavailable to appear at the ex parte hearing. (Declaration of Suzanne Varco ¶ 4.)

10 **B. KIM Is Not Entitled to Intervene in this Petition for Writ of Mandate.**

11 KIM seeks to intervene under one of the following two paths to intervention: (1)
12 mandatory intervention, wherein the Court shall permit intervention if “[t]he person seeking
13 intervention claims an interest relating to the property or transaction that is the subject of the
14 action and that person is so situated that the disposition of the action may impair or impede that
15 person’s ability to protect that interest, unless that person’s interest is adequately represented by
16 one or more of the existing parties” (C.C.P. § 387(d)(1)(B)); and (2) permissive intervention,
17 wherein “[t]he court may, upon timely application, permit a nonparty to intervene in the action or
18 proceeding if the person has an interest in the matter in litigation, or in the success of either of
19 the parties, or an interest against both.” (C.C.P. § 387(d)(3).) KIM’s arguments reveal several
20 fundamental misunderstandings about the purpose of, requirements for, and, importantly, the
21 limitations on intervention.

22 **1. Mandatory Intervention Is Inapplicable.**

23 In order to claim mandatory intervention, KIM must demonstrate that it has an interest
24 relating to the property or transaction that is the subject of the Petition for Writ of Mandate, and
25 that the City cannot adequately represent this interest. (*See Estate of Davis* (1990) 219
26 Cal.App.3d 663, 667.) KIM cannot demonstrate either.

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1 a. KIM Has No Interest in the Property or Transaction that is the Subject of
2 this Action.

3 KIM claims as its interest in this case a “land use entitlement to operate a MMD at 3515
4 Harris Street.” (KIM’s Memorandum of Points and Authorities in Support of Ex Parte
5 Application to Intervene (“EPA”), 6:16-22.) This “interest” has no relation to the property or
6 transaction that is the subject of the action in this case. In fact, KIM’s focus on its own proposed
7 project indicates that it misunderstands the nature of this “action” altogether – a Petition for Writ
8 of Mandate.¹ The Petition seeks judicial review of the City’s decision to deny Petitioner’s CUP
9 application (the “transaction”) to operate an MMD at 7309 Broadway (the “property”). The
10 “transaction” is only the City’s decision on Petitioner’s CUP application, and the “property” is
11 Petitioner’s alone. The Court’s inquiry will extend no further than an analysis of the evidence in
12 the administrative record before the City when it made its decision on Petitioner’s CUP
13 application; it will not involve or require any examination of KIM’s CUP application process.
14 Intervention by KIM would therefore serve only to confuse the issues before the Court.

15 Moreover, KIM overstates the magnitude of both its “interest” and the remedy Petitioner
16 seeks. While KIM may have a statutory interest in having its CUP application *heard*, it has no
17 legal right to have its CUP application *approved*. After all, had the City approved Petitioner’s
18 CUP application, KIM’s CUP application would still have been heard by the City but not
19 approved. In its application for a preliminary injunction, Petitioner has not requested that the
20 Court enjoin the City from processing and hearing KIM’s CUP application, only from issuing a
21 final approval before the Petition can be decided. (ROA # 12, Petitioner’s Memorandum of
22 Points and Authorities, 18:12-13.) As such KIM’s interest in having its CUP application
23 *processed* is irrelevant to this case and will be unaffected by any judgment herein. Lastly, the
24 approval of KIM’s CUP application would be a legal impossibility but for the City’s abuse of
25 discretion. Surely KIM cannot have a cognizable “interest” in illegal agency action.

26 ///

27 ¹ “An action is an ordinary proceeding in a court of justice by which one party prosecutes
28 another for the declaration, enforcement, or protection of a right, the redress or prevention of a
wrong, or the punishment of a public offense.” (C.C.P. § 22.)

1 b. Any Interest that KIM has is Adequately Represented by the City.

2 Not only must KIM demonstrate a direct interest in the City’s decision on Petitioner’s
3 CUP application, it must demonstrate that the City is incapable of adequately representing KIM’s
4 interest. (C.C.P. § 387(d)(1)(B).) Again, it is important to clarify the nature of KIM’s “interest.”
5 Per the LGMC, an application deemed complete by the City will receive a staff review, proper
6 notice, and a public hearing. (LGMC § 17.28.020(E)(2).) KIM has received a staff review.
7 (Olsson Dec., Ex. C.) Notice was published. (Olsson Dec., Ex. E.) A public hearing was held on
8 KIM’s CUP application on January 21, 2020. (Olsson Dec., Ex. F.)

9 The LGMC also provides for the conduct and outcome of a public hearing. LGMC
10 section 17.28.020(G)(3) states, in relevant part: “At the close of the public hearing...the hearing
11 body or the appellate body **may** make a decision. The hearing body may impose such conditions
12 or limitations as it deems necessary to serve the general purpose and intent of this title. The
13 matter may also be referred back to the lower body for further consideration or action.”
14 Additionally, “[p]ublic hearings may be continued to another time without requiring further
15 public notice.” (LGMC § 17.28.020(G).) A decision – to continue the hearing, at KIM’s request
16 – was reached. (Olsson Dec., Ex. F, 4:16-21, 7:9-19.) KIM is not entitled to and cannot claim a
17 legal interest in having its CUP approved; therefore, KIM’s interest does not extend further than
18 the operation of this City process. Unquestionably, no party is better situated to represent the
19 interest in the proper operation of City processes than the City itself.

20 “[M]ere differences in litigation strategy are not enough to justify intervention as a
21 matter of right.” (*Perry v. Proposition 8 Official Proponents* (2009) 587 F.3d 947, 954 (citations
22 omitted); *see also Ziani Homeowners Assn. v. Brookfield Ziani LLC* (2015) 243 Cal.App.4th 274,
23 282 (“in adopting section 387, the Legislature intended it to be interpreted consistently with
24 federal cases interpreting rule 24”).) KIM states that the City “is primarily concerned with
25 protecting its own decision-making and actions as it relates to Petitioner’s CUP application.”
26 (EPA, 8:1-2.) This is incorrect; the City, in its opposition to Petitioner’s request for a preliminary
27 injunction, argues broadly to protect both the City’s rights to operate and third parties’ rights to
28 access City processes. (ROA # 25, 10:19-13:3.) To the extent that KIM’s interest is in the proper

1 processing of its CUP application, the City’s interest is identical. To the extent that KIM
2 conflates this legally-protectable interest with its desire to obtain approval of its CUP
3 application, its “interest” is not appropriate for intervention.

4 In fact, the City is already representing KIM’s interest more adequately than KIM is
5 itself, by timely filing opposition papers to Petitioner’s request for a preliminary injunction.
6 (ROA # 25.) KIM, on the other hand, has chosen not to file any opposition papers despite the
7 Court’s January 16, 2020 Order requiring their submission “on or before 5:00 p.m. on January
8 30, 2020.” (ROA # 18.) Perhaps KIM (incorrectly) believes that the case reassignment nullified
9 the Court’s Order. (*See* C.C.P. § 170.3(b)(4); *see also* *Bates v. Rubio’s Restaurants, Inc.* (2009)
10 179 Cal.App.4th 1125, 1134-34 (explaining that orders made by a judge prior to disqualification
11 are not void).) However, regardless of whether KIM’s failure to file opposition papers is
12 intentional or negligent, the City is capably representing its interest in the City’s legal duties and
13 obligations.

14 **2. Permissive Intervention is Inappropriate.**

15 Although permissive intervention provides a more flexible avenue than mandatory
16 intervention, KIM still does not possess the type of interest that is necessary for permissive
17 intervention to apply.

18 a. **KIM Has No Direct Interest Capable of Determination in this Action.**

19 “To support permissive intervention, the proposed intervener’s interest must be direct
20 rather than consequential, and it must be an interest that is capable of determination in the
21 action.” (*Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 203-4
22 (citation omitted).) “The requirement of a ‘direct’ and ‘immediate’ interest means that the
23 interest must be of such a direct and immediate nature that the moving party will either gain or
24 lose by the direct legal operation and effect of the judgment.” (*Id.* at 204 (citations and
25 quotations omitted).) “A person has a direct interest justifying intervention in litigation where the
26 judgment in the action *of itself* adds to or detracts from his legal rights without reference to rights
27 and duties not involved in the litigation.” (*Id.* (citations and quotations omitted).) “Conversely,
28 [a]n interest is consequential and thus insufficient for intervention when the action in which

1 intervention is sought does not directly affect it although the results of the action may indirectly
2 benefit or harm its owner.” (*Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1505
3 (citations and quotations omitted).)

4 Before examining whether or not KIM has the type of direct and immediate interest
5 necessary to intervene, clarification of a basic term, “judgment,” is helpful. “A judgment is the
6 final determination of the rights of the parties in an action or proceeding.” (C.C.P. § 577,
7 emphasis added.) A preliminary injunction, therefore, is not a judgment; it “simply forms a
8 provisional or auxiliary remedy to preserve the status quo *until* a final judgment.” (*Southern*
9 *Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207,
10 226 (emphasis added).) “The grant or denial of a preliminary injunction does not adjudicate the
11 ultimate rights in controversy.” (*Id.*)

12 The question, therefore, is whether the judgement, i.e., the Court’s grant or denial of the
13 Petition for Writ of Mandate, will have a direct legal operation that detracts from KIM’s legal
14 rights. The answer is plainly no.

15 If the Court grants the Petition for Writ of Mandate, its operative effect will simply be to
16 vacate the City’s denial of Petitioner’s CUP application. The Court’s judgment will not have any
17 direct legal operation on any third parties. The judgment may *indirectly* hinder KIM’s ability to
18 operate an MMD, but this effect is by definition “consequential and thus insufficient for
19 intervention.” (*Lindelli*, 139 Cal.App.4th at 1505.) Additionally, KIM does not possess any legal
20 right to operate an MMD; its only legal right is to the processing of its CUP application. As
21 explained above, the processing of KIM’s CUP application is not an interest “capable of
22 determination” in this action; it has not been and will not be affected by the Court’s final
23 judgment on the Petition for Writ of Mandate.

24 b. KIM’s Intervention Would Enlarge the Issues in this Case.

25 KIM claims that it “simply seeks to participate in the proceeding to ensure it has the
26 ability to defend Plaintiff’s request to stop the processing of KIM’s land use entitlement.” (EPA
27 10:13-15.) Again, KIM misstates the nature of Petitioner’s request, which seeks to temporarily
28 enjoin *approval* of KIM’s CUP application, not *processing*. However, if KIM’s only actual

1 reason for intervention is to defend against a request to enjoin the City from processing KIM’s
2 CUP application, then this inquiry is over; there is no such request, so intervention is
3 unnecessary.

4 If, however, KIM’s intention for intervention is to obstruct the Petition for Writ of
5 Mandate more broadly, intervention will by necessity bring new issues to bear because the only
6 arguments KIM has made involve its own CUP application – an issue not relevant to this case.
7 Discretionary intervention is not permitted where the intervention would enlarge the issues in the
8 litigation. (*Royal Indemnity Co.*, 162 Cal.App.4th at 203.) For example, a nonparty will be
9 denied permissive intervention, even if it has a direct interest in the potential remedy, if the
10 consideration of the remedy raises additional issues due to the intervener’s claims. (*See Siena*
11 *Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1429.) KIM’s
12 arguments are similarly intended to muddy the waters around Petitioner’s potential remedy.
13 Indeed, KIM has already inserted itself into this matter beyond the limited participation it claims
14 by filing an improper peremptory challenge to have the case reassigned, without having standing
15 to file such a challenge. (ROA # 33.) Discretionary intervention is therefore unavailable to KIM
16 in this matter.

17 c. KIM’s Ancillary Interests Can and Should Be Litigated Separately.

18 As KIM’s briefing demonstrates, it is more concerned with its “ability to obtain approval
19 of its MMD land use entitlement” (EPA, 9:21-22) than with its actual legal interest, for purposes
20 of intervention, in the proper processing of its CUP application. “Not only must the interest be
21 direct rather than consequential, but it must be an interest which is proper to be determined in the
22 action in which the intervention is sought.” (*People By and Through State Lands Commission v.*
23 *City of Long Beach* (1960) 183 Cal.App.2d 271, 275; *see also Siena Court Homeowners Assn. v.*
24 *Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1426 (explaining that intervention is properly
25 denied when the proposed intervener’s interests can be protected through separate litigation).)
26 Accordingly, KIM’s concern is not only irrelevant to the cause of action in the instant matter, but
27 it has another manner of legal protection entirely: administrative mandamus. Should the City
28 deny KIM’s CUP application at public hearing, KIM has the same remedy as Petitioner and can

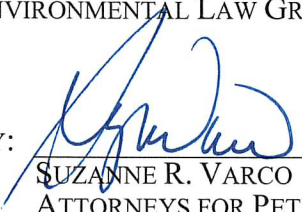
1 pursue a writ of mandate of its own. The present action is not a substitute for any cause of action
2 KIM can bring against the City, and Petitioner's case is not a vehicle for third parties to litigate
3 irrelevant issues.

4 **IV. CONCLUSION**

5 KIM Investments, LLC seeks to intervene through an ex parte application but cannot
6 satisfy even the basic requirements for ex parte relief, much less those of mandatory or
7 permissive intervention. As such the Court lacks sufficient basis or discretion to grant KIM's ex
8 parte application to intervene, and it must be denied.

9
10 DATE: FEBRUARY 18, 2020

VARCO & ROSENBAUM
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11
12
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