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ARK OF HOPE PRESCHOOL and
LUTHERAN CHURCH OF THE HOLY SPIRIT

BOARD OF SUPERVISORS

CITY & COUNTY OF SAN FRANCISCO

ARK OF HOPE PRESCHOOL and LUTHERAN CHURCH OF THE HOLY SPIRIT,	) Appeal No.: 2014-003153CUA
Appellants)
	) APPELLANT'S RESPONSE TO OPPOSITION
	) BRIEFS OF SAN FRANCISCO PLANNING DEPT.
	) AND THE APOTHECARIUM RE: APPROVAL OF
vs.	) CONDITIONAL USE FOR 2505 NORIEGA
	) STREET
)
SAN FRANCISCO PLANNING COMMN.,	) Date: Oct. 3, 2017
Respondent	) Time: 4:30 p.m.
	) Location: City Hall, Room 250
	) 1 Dr. Carlton B. Goodlett Place
	) San Francisco, CA 94102

INTRODUCTION

When considering a demurrer's merits, an appellate court deems the facts alleged in the pleading to be true, even if those facts seem improbable. *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020, 1034 (Cal App. 6th Dist. 2009) (hereinafter *Berg & Berg*) [quoting *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (Cal. App. 2nd Dist. 1981)]. In this case, the opening brief filed by appellants ARK OF HOPE PRESCHOOL (the "Preschool") and LUTHERAN CHURCH OF THE HOLY SPIRIT ("the Church," and collectively with the Preschool "Appellants") is functionally equivalent to a pleading in that it alleges the harm Appellants will suffer if the Board of Supervisors (the "Board") upholds Appellee SAN

FRANCISCO PLANNING DEPARTMENT's (the "Department") decision to grant a conditional use to Appellee THE APOTHECARIUM ("The Apothecarium," and collectively with the Department "Respondents") to operate a proposed medical marijuana dispensary ("MMD") at 2505 Noriega Street (the "Property"). *Myers v. Trendwest Resorts, Inc.*, 178 Cal. App. 4th 735, 736 (Cal. App. 3d Dist. 2009) [citing Cal. Civ. Proc. § 420]. Respondents' opposing briefs are functionally equivalent to demurrers in that they challenge the adequacy of Appellants' claims. *Gaston v. Palmer*, 417 F.3d 1030, 1039 (9th Cir. 2005). Given that these proceedings are following a course similar to that of a typical civil lawsuit, the Board should construe all facts that Appellants have alleged in these proceedings as true even in light of contradictory allegations Respondents raise in their respective opposition briefs. *Berg & Berg*, 178 Cal. App. 4th at 1034.

ARGUMENT

I. Appellants' Responses to the Department's Opposition Brief

A. ISSUE NO. 1: The Proposed MMD's Proximity to the Church and the Preschool

Appellants' Response: "When exercising its review powers, the Board is bound by the relevant law as enunciated by the (City) Charter, ordinances and controlling court decisions ..." *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal. App. 3d 893, 906 (App. 1 Dist. 1980) (emphasis added). Controlling federal and state court decisions make clear that public policy favors keeping illegal drugs as far away from children as possible. *See People v. Williams*, 10 Cal. App. 4th 1389, 1395 (Cal. App. 3d Dist. 1992) (hereinafter *Williams*) [quoting *U.S. v. Nieves*, 608 F. Supp. 1147, 1149 (S.D.N.Y. 1985) (noting Congress' intent to keep illegal drugs "out of the easy reach of school-age children")] and *People v. Marzet*, 57 Cal. App. 4th 329, 338 (2nd Dist. 1997) (hereinafter *Marzet*) [noting California's intent to protect school-age children "from drug sellers, drug buyers, and the hazards presented in drug trafficking"].

Make no mistake: Under federal law, all MMDs in San Francisco are engaging in illegal drug trafficking. *City of Garden Grove v. Super. Ct.*, 157 Cal. App. 4th 355, 377 (Cal. App. 4th Dist. 2007). Although The Apothecarium is engaging in drug trafficking of the state-approved, regulated, and arguably most benevolent variety, in the eyes of the federal government, The Apothecarium is indistinguishable from a seedy

street-corner crack dealer: Under the federal Racketeering Influenced and Corrupt Organizations Act (“RICO”), MMDs face civil liability for any injury to its neighbors’ business or property resulting from the MMDs’ “felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical ... [which is] punishable under any law of the United States.” See *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 881-82 (10th Cir. 2017) (hereinafter *Safe Streets Alliance*) [quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2096 (2016) and 18 U.S.C. § 1961(1)(D)]. Such substances include marijuana and products containing marijuana. *Id.*; see also 21 U.S.C. § 802(16).

Even if, under the Planning Code, the Preschool is not a “public or private elementary or secondary school” and the Church is not a “community facility or recreation center that primarily serves persons under 18 years of age,” ***it clearly makes sense to restrict*** businesses that exclusively serve adults, including MMDs, from places that are intrinsic draws for children. *Madain v. City of Stanton*, 185 Cal. App. 4th 1277, 1292 (App. 4th Dist. 2010) (Sills, P.J., concurring) (hereinafter *Madain*) (emphasis added). The law – not to mention common sense – recognizes the Preschool and the Church as intrinsic draws for children. *Id.* [noting that churches “may have a Sunday-school class and have regularly organized youth groups other days of the week”]; Cal. Health & Saf. Code § 1527 [defining “day care facilities for children” to include “those facilities which provide nonmedical care to infants and preschool and school-age children under 18 years of age during a portion of the day and includes infant centers, ***preschools***, family day care homes, and day care centers” (emphasis added)]. The dangers associated with drug trafficking make it necessary “to minimize the ‘negative impacts and secondary effects’ of [MMDs] by tightly regulating their locations and ***avoiding close proximity to sensitive areas like schools, churches, [and] residential neighborhoods***[.]” *People ex rel. Feuer v. Nestdrop, LLC*, 245 Cal. App. 4th 664, 675 (Cal. App. 2nd Dist. 2016) (hereinafter *Nestdrop*) (emphasis added). The Apothecarium’s desired location at the Property is thus far too close to the Preschool and the Church. Appellants’ Appeal of Planning Commn.’s Approval of Conditional Use for 2505 Noriega St. 1, 3, Exs. “A”-“B” (Aug. 24., 2017) (hereinafter “Appellants’ Br.”). Accordingly, the Board should use the broad discretion granted it under Cal. Health & Safety Code § 11362.768(f) to keep The Apothecarium from operating an MMD at the Property.

B. ISSUE NO. 2: Denial of Equal Protection to the Children of the Sunset District

Appellants' Response: The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment applies whenever a state, or one of its agencies, takes any action that treats distinct classes of similarly situated persons differently. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (emphasis added).

In this case, the Department denies that Planning Code § 790.141(a) “unlawfully discriminate[s] against certain groups of children in violation of the Equal Protection Clause.” San Francisco Planning Dept. Br. 1, 19 (Sept. 22, 2017) (hereinafter “Dept. Br.”). The Department bases this assertion on two things: First, “the Planning Code identifies particular land uses that are most likely to include children who might be directly exposed to the activities at an MCD. Those include certain accredited school uses, and uses principally serving children.” *Id.* Even if this is true, the Department is tacitly admitting that the drafters of Planning Code § 790.141(a) either inadvertently or intentionally omitted other land uses where children might be exposed to dangers attendant to MMDs. As stated above, the Preschool and the Church are prime examples of such uses. *Madain*, 185 Cal. App. 4th at 1292 (Sills, P.J., concurring); Cal. Health & Saf. Code § 1527.

Secondly, the Department asserts that “the City could reasonably determine that land uses where children were served on an incidental basis, or serving children who could not travel unsupervised by an [MMD], do not require protection from an [MMD].” Dept. Br. at 19. This assertion is utter hogwash: To begin with, kindergarteners and first graders who attend public or private elementary schools in the City – and who are not much older than preschoolers – are unlikely to travel to those schools unsupervised, especially if their schools are located near MMDs. In that regard, kindergarteners and first graders are no different than the children who attend the Preschool. Furthermore, churches do not serve children on an “incidental” basis any more than a local YMCA does. See <https://www.ymcasf.org/programs>. Indeed, the YMCA, which would qualify as a “recreation center” under Planning Code § 790.141(a), provides programs for both children and adults, just as the Church does. *Id.* Section 790.141(a) thus treats distinct classes of similarly situated persons differently, and because there is no rational basis for such distinctive treatment, the ordinance would not pass muster under the Equal Protection Clause. *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139 (9th Cir. 2014)

[quoting *Bowers v. Whitman*, 671 F.3d 905, 917 (9th Cir. 2012), which states that laws do not survive rational basis scrutiny where “the relationship of the classification to its goal is ... so attenuated as to render the distinction arbitrary or irrational” (emphasis added)].

Appellants must respectfully disagree with the Department’s assertion that “A Conditional Use Authorization appeal hearing is not the proper forum to challenge the legality of adopted and applied Planning Code sections ...” Dept. Br. at 19. Indeed, the City could face liability due to its failure to extend the protections of Planning Code §790.141(a) to the children who attend the Preschool and the Church as well as the Department’s application of § 790.141(a) in granting a conditional use to The Apothecarium. The Board should thus limit the City’s liability by overturning the Department’s decision to grant the conditional use.

C. ISSUE NO. 3: The Department’s Abuse of its Discretion

Appellants’ Response: Under California law, “an abuse of discretion occurs when, in light of the applicable law and considering all of the relevant circumstances, [a] decision exceeds the bounds of reason and results in a miscarriage of justice.” *Uzyel v. Kadisha*, 116 Cal. Rptr. 3d 244, 267 (Cal. App. 2 Dist. 2010) (emphasis added). “A miscarriage of justice occurs when it is ‘... reasonably probable that a result more favorable to the appealing party would be reached in absence of the error.’” *Lundy v. Ford Motor Co.*, 87 Cal. App. 4th 472, 479 (Cal. App. 2 Dist. 2001) [quoting *In re Marriage of Jones*, 60 Cal. App. 4th 685, 694 (Cal. App. 5 Dist. 1998)].

In this case, the Department’s decision to grant a conditional use allowing The Apothecarium to operate an MMD at the Property exceeds the bounds of reason because the decision either willfully ignores or casually dismisses both the applicable law and the grave dangers and secondary effects to which the children who attend the Preschool and the Church would be exposed. To begin with, the Department was, or at least should have been, aware of laws prohibiting MMDs from operating in close proximity to places where children congregate: On March 30, 2017, Appellants’ attorney sent a letter to the Department informing the Department of such laws. Ltr. from Ray D. Hacke, Atty., Pacific Justice Institute, to Andrew Perry, Planner, Planning Dept., City and County of San Francisco, *Re: 2505 Noriega Street, San Francisco, CA 94122 1-6* (March 30, 2017).

Appellants' attorney also advised the Department of the laws at the Planning Commission's meeting on July 13, 2017. *See* Mtg. Min., Item No. 15 (July 13, 2017) (viewed online on Sept. 27, 2017 at <http://sf-planning.org/meeting/planning-commission-july-13-2017-minutes>). The attorney's words apparently fell on deaf ears, as the Commission voted 5-1 to grant The Apothecarium its conditional use. *Id.*

Furthermore, even if The Apothecarium does make efforts to limit the dangers and adverse secondary effects attendant to MMDs, as the Department asserts that it will [see Dept. Br. at 17-18], it exceeds the bounds of reason for the Department to pretend that the children who go to the Church and the Preschool are not as vulnerable to the hazards of drug trafficking as children who attend local schools or community or recreational facilities. *Marzet*, 57 Cal. App. 4th at 338 [stating that the California Legislature enacted the Juvenile Drug Trafficking and Schoolyard Act of 1988 not only to prevent "the sale of drugs to students on their way to and from school, but, of equal importance, the protection of school-age children from drug sellers, drug buyers, and the hazards presented in drug trafficking"]; *see also* Cal. Health & Saf. Code § 11353.6 [providing for enhanced criminal penalties for persons 18 years of age or older who are convicted of trafficking illegal drugs near schools]. In fact, in discussing how The Apothecarium intends to deal with such hazards, the Department has acknowledged the need to protect the children of the Sunset District from such hazards. Dept. Br. at 17. Given the Department's awareness of the hazards attendant to MMDs, it exceeds the bounds of reason for the Department to needlessly expose the children who attend the Church and the Preschool to those hazards.

Because a result more favorable to Appellants would have occurred but for the Department's failure to apply applicable law and consider relevant circumstances in granting the conditional use to The Apothecarium, a miscarriage of justice has occurred. The Board can correct that miscarriage by overturning the Department's decision to grant the conditional use.

II. Appellants' Responses to The Apothecarium's Opposition Brief

A. ISSUE NO. 1: The Apothecarium's Accusations of Fear-Mongering

Appellants' Response: The people of the Sunset District – especially those whose children attend the Church and the Preschool – are rightfully concerned about the impact that The Apothecarium's proposed MMD

will have on their neighborhood, especially given the Property's proximity to the Church and the Preschool. Courts in California and elsewhere have recognized that (1) MMDs have, at minimum, the potential to cause harmful effects on the neighborhoods they purport to serve, and (2) cities have a compelling government interest in limiting those harmful effects:

These impacts and secondary effects included "the extraordinary and unsustainable demands that have been placed upon scarce City policing, legal, policy, and administrative resources; neighborhood disruption, increased transient visitors, and intimidation; the exposure of school-age children and other sensitive residents to medical marijuana; drug sales to both minors and adults; fraud in issuing, obtaining or using medical marijuana recommendations; and murders, robberies, burglaries, assaults, drug trafficking and other violent crimes."

People v. Trinity Holistic Caregivers, 239 Cal. App. 4th Supp. 9, 21 (Los Angeles Co. Super. Ct. Appellate Div. 2015) [quoting Los Angeles Municipal Code §45.19.6]; *see also Nestdrop*, 245 Cal. App. 4th at 675, and *Safe Streets Alliance*, 859 F.3d at 885-89 [acknowledging that plaintiffs can recover for the nuisance created by noxious marijuana odors in their neighborhood and the accompanying decline in property values].

The Apothecarium's assertion that its opponents are "incit[ing] false fears that a dispensary will cause harm to children" is thus a bald-faced lie. Ltr. from Brett Gladstone, Atty. for The Apothecarium, to London Breed, President, San Francisco Bd. of Supervisors, *Re: The Apothecarium Sunset at 2505 Noriega Street MCD* 1, 6 (Sept. 25, 2017) (hereinafter "Apothecarium Ltr."). Also untrue is the Apothecarium's assertion that "[l]iquor stores are frequently associated with quality-of-life issues and crime. Dispensaries are not." *Id.* Even Burger King would not sell those whoppers, and the Board should not buy them. The Board should therefore overturn the Department's decision to grant The Apothecarium a conditional use for the Property.

B. ISSUE NO. 2: The "Hate Group" Label Slapped on the Pacific Justice Institute

Appellants' Response: The Latin term *ad hominem* refers to "attacking an opponent's character rather than answering his argument." <http://www.dictionary.com/browse/ad-hominem>. An *ad hominem* attack is also known as "poisoning the well," a logical fallacy in which one party attempts to present its opponent in a bad light with the intent of undermining the opponent's credibility before its target audience and making the party's own claims more palatable. <https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/140/Poisoning-the-Well>.

In this case, The Apothecarium has slammed the Pacific Justice Institute (“PJI”), the non-profit law firm that is representing the Church and the Preschool, as “a Sacramento-based organization that has been labeled an anti-LGBT hate group by the Southern Poverty Law Center.” Apothecarium Ltr. at 7. While it is unfortunately true that the SPLC has slapped PJI with this label, it is also true that the SPLC launches smear campaigns against any organization that dares to disagree with the SPLC. Stella Morabito, *12 Ways the Southern Poverty Law Center is a Scam to Profit From Hate-Mongering*, The Federalist (May 17, 2017) (viewed online on Sept. 28, 2017 at <http://thefederalist.com/2017/05/17/12-ways-southern-poverty-law-center-scam-profit-hate-mongering/>) (hereinafter Morabito, *12 Ways*). In fact, the SPLC itself can be considered a hate group: “The SPLC’s agitation and propaganda have been proven to incite violence,” including a 2012 SPLC-inspired shooting at the Washington, D.C. office of the Christian-based Family Research Council. *Id.*

Furthermore, the Federal Bureau of Investigation no longer treats the SPLC as a legitimate resource on hate crimes, “a promising sign of growing clarity that the SPLC’s designations for hate groups lack legitimacy.” Morabito, *12 Ways*. Even so, many media outlets that cover and serve San Francisco treat the SPLC’s hate-group designations as gospel. *See, e.g.,* David DeBolt, *Former Oakland Mayor Jean Quan Wants to Ease Your Pain – With Medical Pot*, East Bay Times (March 6, 2017) (viewed online on Sept. 28, 2017 at <http://www.eastbaytimes.com/2017/03/06/oakland-jean-quant-plans-to-open-pot-shop-in-san-francisco/>); Sari Staver, *Anti-LGBT Hate Group Opposes Medical Cannabis Dispensary*, Bay Area Reporter (March 16, 2017) (viewed online on Sept. 28, 2017 at <http://www.ebar.com/news/article.php?sec=news&article=72428>); Tyler Walicek, *A War of Weed Rages in Outer Sunset*, Bay City Beacon (July 24, 2017) (viewed online on Sept. 28, 2017 at https://www.thebaycitybeacon.com/politics/a-war-of-weed-rages-in-outer-sunset/article_f4f9bb36-7278-11e7-b9f6-378ab3b4e9b1.html). For such media outlets to perpetuate the SPLC’s defamation of groups like PJI is “journalistic malpractice.” Fr. Mark Hodges, *ABC News Calls Religious Liberty Organization a ‘Hate Group’ for Christian View of Marriage*, LifeSiteNews.com (July 17, 2017) (viewed online on Sept. 28, 2017 at https://www.lifesitenews.com/opinion/abc-news-calls-religious-liberty-organization-a-hate-group-for-christian-vi?utm_content=buffered4d).

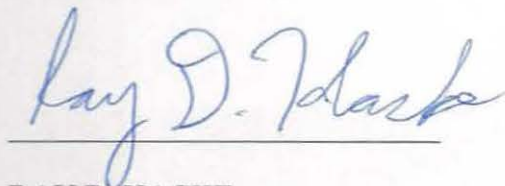
The Apothecarium cites not one shred of law in support of its position. Apothecarium Ltr. at 1-9. This is because, as indicated above, both federal and state law recognize the danger of placing MMDs so close to places where children congregate. Even assuming *arguendo* that The Apothecarium's track record of limiting the dangers attendant to MMDs in the neighborhoods it serves is exemplary – a point that neither the Preschool nor the Church concedes by any means – the law clearly disfavors placing MMDs close to places where children are most likely to congregate, including the Church and the Preschool. Furthermore, PJI has had success opposing the Department's grants of conditional uses to MMDs in the Sunset District. Joe Garofoli and Joaquin Palomino, *The One S.F. Neighborhood Where Pot Dispensaries Aren't Welcome*, SFGate.com (August 17, 2015) (viewed online on Sept. 28, 2017 at <http://www.sfgate.com/business/article/The-one-S-F-neighborhood-where-pot-dispensaries-6447789.php>) [noting that San Francisco's Zoning Board of Appeals overturned a grant of a conditional use to Bay Area Compassionate Health to open an MMD on Taraval Street in 2010; PJI was a key player in that case]. The Apothecarium thus has every incentive to take the Board's focus off the concerns that PJI has raised on behalf of Appellants by perpetuating the SPLC's bogus labeling of PJI as a hate group.

The Board should not reward The Apothecarium for its dirty-pool tactics. The Board should thus overturn the Department's decision granting The Apothecarium its conditional use for the Property.

CONCLUSION

Based on the foregoing, the Board should deny the conditional use that would allow The Apothecarium to operate an MMD at 2505 Noriega.

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