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RULING ON SUBMITTED MATTER filed.



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Superior Court of California
County of San Bernardino
247 W. Third Street, Dept. S-26
San Bernardino, CA 92415-0210

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO

NOV 02 2018

BY *Nadya Avakian*
NADYA AVAKIAN, DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

MIKE HARRIS,

v.

CITY OF FONTANA

Case No.: CIVDS 1710589

RULING ON SUBMITTED MATTER:

PETITION FOR WRIT OF MANDATE
GRANTED IN PART

Introduction

On November 8, 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (the "AUMA"), decriminalizing the possession and use of small quantities of marijuana for recreational use. Specifically, the AUMA allows adults, twenty-one years of age and over, to grow up to six cannabis plants at their residences for their own recreational use. The state does not require a license or permit to grow the plants, nor did it adopt any regulations, as it did extensively

1 for *commercial* cannabis production. The AUMA does, however, allow cities and
2 counties to enact “reasonable regulations” to regulate cannabis cultivation for personal
3 use.

4 The issue in this case is how far a city can restrict the *category* of persons who
5 are entitled to grow marijuana plants, and the *circumstances* under which they may
6 grow the plants, without running afoul of the AUMA’s requirement that regulations be
7 “reasonable.” The City of Fontana has gone too far.

9 Fontana adopted Ordinance, No. 1758, which defines the group of persons who
10 may grow cannabis plants more restrictively than the AUMA’s only limitation that they
11 be at least twenty-one years of age. The Ordinance also imposes onerous restrictions
12 that bear little or no relationship to the activity supposedly being regulated. While many
13 of the provisions in the Ordinance are reasonable, the effect of the Ordinance as a
14 *whole* is not to *regulate* cannabis cultivation for personal use, but to stamp it out
15 entirely. Indeed, counsel informs the court that no one has even bothered to apply for
16 the permit required by the Ordinance.¹

19 Petitioner Mike Harris, a Fontana resident, seeks a writ of mandate to prohibit
20 Fontana from enforcing the Ordinance (and its implementing Resolution 2017-105). For
21 the reasons explained more fully below, the court grants the petition in part, barring
22 Fontana from enforcing those provisions of the Ordinance which the court finds to be
23 invalid.² The remainder of the Ordinance may remain, although Fontana may wish to
24 draft a less onerous ordinance instead.

26 _____
27 ¹ This information provided by counsel is not part of the administrative record.

28 ² The Ordinance contains a severability clause: “If any section, sentence, clause or phrase of this Ordinance or the application thereof to any entity, person, or circumstance is held for any reason to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application and to this end the provisions of

II

The Standard of Review

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3 The "adoption of an ordinance is a legislative act." (*Friends of Sierra Madre v.*
4 *City of Sierra Madre* (2001) 25 Cal.4th 165, 173, fn. 2.) As such, it can be challenged
5 by a petition for a writ of mandate under Code of Civil Procedure section 1085.

6
7 (*Western States Petroleum Assn. v. Superior Court (Air Resources Board)* (1995) 9
8 Cal.4th 559, 566-568 [quasi-legislative action adopting regulations reviewable by
9 traditional mandamus].) Judicial review under section 1085 "is limited to an inquiry into

10 whether the action was arbitrary, capricious or entirely lacking in evidentiary support."

11 (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 964.) "This test has
12 also been formulated to add an inquiry whether the agency's decision was 'contrary to
13 established public policy or unlawful or procedurally unfair.'" (*Ibid.*) "Normally, mandate

14 will not lie to control a public agency's discretion, that is to say, force the exercise of
15 discretion in a particular manner. However, it will lie to correct abuses of discretion." (*Id.*
16 at p. 965.). Even under the "arbitrary and capricious" standard, however, the court

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18 "must ensure that an agency has adequately considered all relevant factors, and has
19 demonstrated a rational connection between those factors, the choice made, and the
20 purposes of the enabling statute." (*Carrancho v. California Air Resources Board* (2003)

21 111 Cal.App.4th 1255, 1265.) Nevertheless, "[t]he court does not 'weigh the evidence . . .

22 . . . or substitute its judgment for that of the agency" (*Ibid.*) "While the intent or
23 purpose of the legislative body must be considered in construing an ambiguous statute
24 or ordinance, the motive of the legislative body is generally irrelevant to the validity of
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this Ordinance are severable." "Although not conclusive, a severability clause normally calls for sustaining the
valid part of the enactment, especially when the invalid part is mechanically severable...." (*Gerken v. Fair Political
Practices Com.* (1993) 6 Cal.4th 707, 714.)

1 the statute or ordinance.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1093,
2 citation omitted.)³

3 Although a law or ordinance might be “inexpedient, or even foolish,” it “cannot be
4 invalidated upon that ground.” (*Ex parte Anderson* (1901) 134 Cal. 69, 75.) “They are
5 only invalid when the legislature has exceeded its powers in attempting to enact them.”
6 (*Ibid.*) “[I]f reasonable minds may differ as to the wisdom of the action of the local board
7 or agency, its action is conclusive and the courts should not substitute their judgment for
8 that of the local authority.” (*United Clerical Employees v. County of Contra Costa* (1977)
9 76 Cal.App.3d 119, 125.)
10

11 III

12 The Adult Use of Marijuana Act (the AUMA)

13
14 Proposition 64, the AUMA, is codified in Health and Safety Code section 11362.1
15 *et seq.*⁴ Section 11362.1 provides in relevant part:

16 (a) Subject to 11362.2, . . . , but notwithstanding any other
17 provision of law, if shall be lawful under state and local
18 law, and shall not be a violation of state or local law, for
19 persons 21 years of age or older to:

20 (3) Possess, plant, cultivate, harvest, dry, or process not
21 more than six living cannabis plants and possess the
22 cannabis produced by the plants;

23 (c) Cannabis and cannabis products involved in any way
24 with conduct deemed lawful by this section are not
25 contraband nor subject to seizure, and no conduct
26 deemed lawful by this section shall constitute the basis
for detention, search, or arrest.

27 ³ While it seems reasonably clear from the administrative record that the purpose of Fontana’s Ordinance
28 is to prevent Fontana residents from doing what the AUMA authorizes them to do—grow a small quantity of
marijuana plants for personal use (see e.g., AR 312:3-5)—strictly speaking, Fontana’s motivation is not relevant to
a judicial determination whether the Ordinance is valid or invalid.

⁴ All cited Code sections are found in the Health and Safety Code.

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Section 11362.2 provides in relevant part:

- (a) Personal cultivation of cannabis under paragraph (3) of subdivision (a) of Section 11362.1 is subject to the following restrictions:
 - (1) A person shall plant, cultivate, harvest, dry, or process plants in accordance with local ordinances, if any, adopted in accordance with subdivision (b).
 - (2) The living plants and any cannabis produced by the plants in excess of 28.5 grams are kept within the person's private residence, or upon the grounds of that private residence (e.g., in an outdoor garden area), are in a locked space, and are not visible by normal unaided vision from a public place.
 - (3) Not more than six living plants may be planted, cultivated, harvested, dried, or processed within a single private residence, or upon the grounds of that private residence, at one time.
- (b) (1) A city . . . may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
- (2) A city . . . may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
- (3) Notwithstanding paragraph (1), a city . . . shall not completely prohibit persons engaging in the actions and conduct under paragraph (3) of subdivision (a) of Section 11362.1 inside a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure.
- ...
- (5) For purposes of this section, "private residence" means a house, an apartment unit, a mobile home, or other similar dwelling.

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IV

Ordinance No. 1758

Pursuant to the authorization in section 11362.2, subdivision (b)(1), Fontana adopted Ordinance No. 1758, which requires Fontana residents who wish to grow cannabis plants at their residence to obtain a permit from the city. The Ordinance adds section 30-7(B) to the Fontana Municipal Code. (See AR000409, p. 2 of the Ordinance.)

A. Restrictions on *Who* Can Obtain a Permit

Among other requirements and conditions for issuance of a permit, the Ordinance imposes restrictions on *who* may grow cannabis plants for personal use, well beyond the single statutory limitation that the person be at least twenty-one years of age.

Under section 30-7(B).060(A)(2-6) of the Ordinance, applicants for a permit must:

- ...
- 2. Complete a Live Scan with the California Department of Justice, at the applicant's own cost.
- 3. Have no felony convictions for the illegal possession for sale, manufacture, transportation, or cultivation of a controlled substance within the last five (5) years[.]
- 4. Have no pending code enforcement actions with the City.
- 5. Have no outstanding payments due to the City.
- 6. Provide a signed, notarized affidavit of any landlord or property owner other than the applicant that acknowledges and grants permission for cultivation to occur on the property.

1 These restrictions on *who* may cultivate cannabis for personal use in Fontana are
2 arbitrary and capricious because they disallow certain persons from doing what state
3 law specifically allows them to do. The only restriction under the AUMA is that a person
4 must be at least twenty-one years old. Fontana's Ordinance, however, excludes (1)
5 certain felons, (2) anyone with a pending Code enforcement action (*e.g.*, violation of a
6 property set-back requirement), (3) anyone who owes money to Fontana (*e.g.*, an
7 unpaid parking ticket), and (4) anyone who cannot obtain permission of a landlord.
8 These are not reasonable restrictions, because they conflict with the broad permission
9 granted by the AUMA and, in the case of the Code enforcement and unpaid obligation
10 provisions, are wholly unrelated to the activity supposedly being regulated.⁵
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13 **B. Restrictions on Physical Aspects of Residences that Qualify for a Permit**

14 The Ordinance imposes other unreasonable conditions as well, by restricting
15 aspects of the physical residence where the plants may be grown to an extent that is
16 unrelated or only tangentially related to the small amount of cannabis cultivation
17 authorized under the AUMA. The residence and "all plumbing, electrical, and other
18 utilities must be properly permitted" (§ 30-7(B).060(C)(1)(a).) The residence must
19 not include more than one "cultivation area." (§ 30-7(B).060(B)(2).) "The cultivation
20 area" must be used *exclusively* for the marijuana, and "may not be shared with any
21 space used for sleeping, cooking, eating, bathing, or other residential activities." (§ 30-
22 (B).060(C)(1)(b).) Designated chemicals, including explosive gasses and dangerous
23 poisons, cannot be located in the cultivation area, and if stored *elsewhere* in the
24 residence, must be stored in leak and fireproof containers. (§ 30-7(B).060(C)(1)(d)(i)
25 and (ii).) The area of cultivation must be accessible by only one lockable door. (§ 30-
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⁵ While the Live Scan requirement does not restrict who may obtain a permit, its only purpose would be to verify the absence of the prohibitory felony convictions.

1 7(B).060(C)(2)(a.) Access to the area must be restricted only to a permit holder. (§ 30-
2 7(B).060(C)(2)(b).)

3 Certainly a city can *separately* require that all plumbing, electrical, and other
4 utilities be properly permitted. But those requirements are presumably addressed
5 already (or could be addressed) by other portions of the City Municipal Code having
6 nothing to do with marijuana. Imposing such a requirement as a “reasonable” condition
7 of permitting six marijuana plants to be grown is not demonstrated by the record. The
8 arguments advanced by counsel for Fontana about plumbing and electricity focused on
9 concerns that apply to large-scale *commercial* production, not to six or fewer marijuana
10 plants.
11

12 Similarly, imposing restrictions on the use and storage of dangerous poisons and
13 explosive gasses is a reasonable subject of municipal regulation. But the *nexus* of such
14 a restriction with growing six marijuana plants is not demonstrated in the record. (See
15 *Carrancho v. California Air Resources Board, supra*, 111 Cal.App.4th at p. 1265 (the
16 court “must ensure that an agency has adequately considered all relevant factors, and
17 has demonstrated a *rational connection between those factors, the choice made, and*
18 *the purposes of the enabling statute.*” Emphasis added.)
19

20 Additionally, restricting the area where the plants can be grown to a single area,
21 in a separate room, with a lockable door, where no other residential activities can occur,
22 removes all but the wealthiest Fontana residents from obtaining a permit. Few
23 residents have an extra room, unneeded for other residential purposes, to devote
24 entirely to growing six marijuana plants. The need for such segregation is not
25 demonstrated in the record.
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1 **C. Property Inspections**

2 The petition seeks to invalidate the requirement for property inspections
3 altogether. (See § 30-6(B).060(C)(3)(a).) As the Ordinance was written, requiring
4 inspections made sense, to enable Fontana to assure that the property was in
5 compliance with all the requirements. But this court finds the portions of the Ordinance
6 that would justify a property inspection to be arbitrary and capricious, because they
7 impose restrictions that are unrelated (or only tangentially related) to the activity that is
8 supposedly being regulated, and by excluding those persons who qualify to grow
9 cannabis under state law, but who are unable to modify their residences to match
10 Fontana's onerous conditions. Once the ordinance is purged of the unreasonably
11 restrictive provisions, there is no longer a need for property inspections at all, let alone
12 inspections on the scale presently contemplated by Fontana, which would require
13 inspecting plumbing, wiring, other utilities, and searching every cabinet and closet for
14 regulated chemicals and poisons to assure that they are properly stored.
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17 Once the unreasonable provisions of the Ordinance are removed, the only
18 remaining purpose of a property inspection would be to assure that only six plants are
19 being grown, which is the limitation imposed by the AUMA. But section 11362.1 of the
20 AUMA provides that "no conduct deemed lawful by this section shall constitute the basis
21 for . . . search." If Fontana's contemplated inspection reveals plants in excess of the six
22 allowable plants—in other words, conduct that is *not* deemed lawful by the AUMA, the
23 inspection amounts to a search that could lead to a criminal prosecution. A search
24 warrant is required for that.
25

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27 Therefore, Fontana has not justified the need for interior inspections of the
28 residences of permit holders. Exterior inspections, however—to assure the plants are

1 not visible or otherwise perceptible to the public—do not require inspectors to enter the
2 premises.

3 **D. The Cost of the Permit**

4 If a city is going to regulate an activity, it is reasonable for the city to know who is
5 being regulated. But this permit is expensive—\$400 for the original permit and \$230 for
6 annual renewals. Fontana justifies the high cost because an in-depth inspection is
7 required for issuance or renewal of a permit. (See § 30-7(B).060(C)(3).) Presumably,
8 Fontana would also need to verify that the applicant has no outstanding Code violations
9 and owes no money to the city. Thus the cost is based on the amount of effort required
10 to assure compliance with the onerous permit conditions set forth in the Ordinance.
11 Since these restrictions are stricken on the ground that they are unreasonable, the cost
12 ceases to be justified. If Fontana intends to assess an initial fee or a renewal fee in a
13 *lesser* amount, it will need to reevaluate the necessary cost in light of the eliminated
14 provisions of the Ordinance.
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18 **V.**

19 **Conclusion**

20 For the reasons explained above, the following provisions are stricken from
21 Fontana Ordinance 1758, enacting section 30-7 B) of the Fontana Municipal Code:

- 22 1. § 30-7(B).030(B)(4);
- 23 2. § 30-7(B).060(A)(2), (3), (4), (5), and (6);
- 24 3. § 30-7(B).060(B)(2);
- 25 4. § 30-7(B).060(C)(1)(a)(second sentence only), (b), and (d)(i) and (ii);
- 26 5. § 30-7(B).060(C)(2)(a) and (b);
- 27 6. § 30-7(B).060(C)(3)(a).
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Additionally, the permit fees currently adopted by the City Council are disallowed,
though subject to reassessment in light of the corrected Ordinance.

Dated: November 2, 2018.



David Cohn,
Judge of the Superior Court