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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BENTECH LLC et al., Plaintiffs and Appellants, v. CITY OF LONG BEACH, Defendant and Respondent.	B254872 (Los Angeles County Super. Ct. No. NC058256)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Law Offices of James B. Devine and James B. Devine for Plaintiffs and Appellants.

Charles Parkin, City Attorney, and Theodore B. Zinger, Deputy City Attorney, for Defendant and Respondent.

Bentech LLC (Bentech), a California limited liability company, and Healing Tree Holistic Association (Healing Tree; collectively, appellants), an unincorporated California association, appeal from the judgment in favor of the City of Long Beach (City) following the grant of City's motion for judgment on the pleadings.

Long Beach Municipal Code chapter 5.89 (Ch. 5.89)[1] prohibits the establishment and operation of medical marijuana dispensaries within the City. Prior to the passage of Ch. 5.89, Bentech leased certain real property in the City to Healing Tree to operate such a dispensary. Appellants contend Ch. 5.89, as applied, is unconstitutional because Ch. 5.89 deprived them of their vested rights and was selectively enforced against them but not others. They also contend the trial court abused its discretion in not allowing them to amend their complaint to include two claims addressed in their opposition to the motion. In this regard, Bentech contends City improperly recorded a nuisance abatement lien on its real property, because a valid third-party mortgage existed at the time of recording. Healing Tree contends City failed to comply with the asset forfeiture rules and converted cash seized during arrests at its dispensary. We affirm the judgment.

BACKGROUND

The complaint alleges: Healing Tree was "operating as an association of qualified patients who collectively and cooperatively cultivate medical marijuana in Los Angeles County, California." "On or about July 10, 2011, [Healing Tree] was formed in accordance to and with Health & Safety Code sections 11362.5 (also known as the Compassionate Use . . . Act of 1996 (the 'CUA') and 11362.7 et seq. (also known as the Medical Marijuana Program Act of 2004 ('MMPA') and the 2008 Attorney General's *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* (the 'Guidelines')."

"On or about July 17, 2011, [Healing Tree] entered into an oral lease for the real property commonly known as 3721 East Anaheim, Long Beach, California (the [Property]) with [Bentech, the landlord], which [Property] would be for the exclusive use

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[1] All further chapter references are to those in the Long Beach Municipal Code.

of [Healing Tree] and its members." "[O]n or about September 1, 2011, the . . . City Prosecutor . . . sent [Bentech] a letter threatening to take legal action . . . , including criminally prosecut[ing Bentech], under the [then existing Ordinance, i.e., Ch. 5.87 relating to medical marijuana collectives] for permitting [Healing Tree] to operate at the [Property]."

"On February 14, 2012, the . . . City Council adopted [Ch.] 5.89 . . . which effectively banned all medical marijuana collectives in the [City]."

"On March 8, 2012, [City] issued an 'Administrative Citation Warning Notice' to [Bentech] indicating that all medical marijuana collectives in the [City] were banned as a result of . . . [Ch. 5.89 and warned if Healing Tree] does not stop operating at the [Property] immediately [Bentech] will be fined an initial $100, a second violation will result in an additional fine of $200 and third/subsequent violations will result in a fine of $500 each."

"On March 13, 2012, [City] issued an Administrative Citation ([Citation]) to [Bentech] for an alleged violation of . . . [Ch. 5.89] . . . . The fine was $100 with a correction date of March 27, 2012. Subsequently, on March 13, 14, 15, 16, 26, 28, 29 and 30, 2012 and April 3, 5, 6, 10, 12, 13 and 16, 2012 an[d] July 9, 2012[, City issued] a new [Citation] on each of the days listed above for an alleged violation of [Ch. 5.89]. The fine increased with each [Citation]."[2]

On May 16, 2012, a hearing was held before a hearing officer in the City's Department of Financial Management, Business Relations Bureau to determine whether to revoke Bentech's license "as a result of the business activities at the [Property]."

"On May 23, 2012, [City] placed a lien on the [Property] in the amount of $14,800."

On May 30, 2012, hearing officer Thomas A. Ramsey recommended Bentech's business license be revoked, and "[o]n June 6, 2012, the Department of Financial

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[2] We note, as alleged, the dates of the issued administrative Citations are ambiguous.

Management revoked the business license issued to [Bentech] for the [Property] as a result of an alleged violation of [Ch.] 5.89."

On June 14, 2012, appellants appealed "the revocation of [Bentech's] business license," and "[o]n October 23, 2012," following a hearing, "the City Council voted 9 to 1 that the business license of [Bentech] be revoked."

The complaint pleaded three causes of action. The first and second, respectively, are for declaratory relief and a permanent injunction in favor of appellants. The third, as to Bentech only, is for cancellation of cloud of title.

In its motion for judgment on the pleadings, City argued the complaint failed to state facts sufficient to constitute a cause of action, because Ch. 5.89 is constitutional as a matter of law and the issued administrative Citations are valid. Appellants filed opposition, and City filed a reply.

In a formal order, the trial court granted City's motion for judgment on the pleadings without leave to amend.[3] Judgment was entered in favor of City based on the grant of judgment on the pleadings.

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[3] City filed requests for judicial notice of eight exhibits. Exhibit A is a copy of the complaint without its exhibits. Exhibits B and C are copies of, respectively, Ch. 5.89 and chapter 5.87. Exhibit D is a copy of the "Consent Judgment" entered by the United States District Court in *United States of America v. Real Property located at 3749 and 3751 E. Anaheim Street (3721 E. Anaheim Street), Long Beach, CA (BENTECH LLC)*, case No. 13-CV-04169-SJO (JCGx). Exhibit E is a copy of *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729. Exhibit F consists of copies of selected sections of chapter 9.65 regarding City administrative Citations. Section 9.65.010 was inadvertently omitted from exhibit F. We granted City's unopposed request for judicial notice of the entirety of chapter 9.65, a copy of which is attached to the request as exhibit A. Exhibit G consists of various declarations attached as exhibits A, B, and C to City's opposition to plaintiffs' application to enjoin City's ban on medical marijuana dispensaries. Exhibit H is a copy of "Bentech's Business License dated 04/13/2012."

Appellants filed a request for judicial notice of eight items. Items 1, 3, 5, 6, and 8 consist of allegations in certain paragraphs of the complaint. Items 2 and 7 are copies, respectively, of Ch. 5.89 and chapter 21.27 (existing nonconforming uses and structures). Item 4 is a copy of a deed of trust. *(Footnote continued on next page)*

DISCUSSION

1. ***Standard of Review***

"'When reviewing a judgment . . . after the [sustaining] of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, . . . we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]' [Citation.] We apply the same standard when reviewing a judgment of dismissal entered after a motion for judgment on the pleadings has been granted without leave to amend. [Citation.]" (*Shimmon v. Franchise Tax Bd.* (2010) 189 Cal.App.4th 688, 692–693.)

(Footnote continued from previous page)

The trial court took judicial notice of exhibits B, C, and F as "legislative enactments 'issued by or under the authority of . . . [a] public entity in the United States"; exhibits A, D, E, and G as records of a state court, but as to exhibits A and G only for "the fact that they appear in the Court's file"; and "the existence of Bentech's business license," the document in exhibit H, but not for its "'truthfulness and proper interpretation.'" The court took judicial notice of items 1, 3, 5, 6, and 8 because the "Complaint is a record of the Court" but not judicial notice of "the truth of the allegations in the [Complaint]." The court also took judicial notice of items 2 and 7 as official acts of legislative enactment. The court denied the request as to item 4 because "[t]he Deed of Trust does not qualify as an item subject to judicial notice under Evidence Code §452 or [§]453."

2. *No Declaratory Relief Cause of Action Available to Appellants*[4]

Contrary to appellants' claim, the complaint fails to state a cause of action for declaratory relief. "'[A] request for declaratory relief will not create a cause of action that otherwise does not exist.' [Citation.] Rather, 'an actual, present controversy must be pleaded specifically' and 'the facts of the respective claims concerning the [underlying] subject must be given.' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.) "That the constitutionality of an ordinance can be a proper subject for declaratory relief is without doubt. 'An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law.' [Citation.]" (*Id.* at p. 79.)

As a matter of law, Ch. 5.89 is constitutional on its face. While appellants concede this point, they contend Ch. 5.89 is unconstitutional as applied to them because Ch. 5.89 deprived them of their specific vested rights and was enforced selectively against appellants but not others "from whom the City had received substantial sums of money[.]" As a matter of law, Ch. 5.89 is not unconstitutional as applied: We explain below that appellants have no vested right to operate a marijuana dispensary in the City and there is no cognizable claim that City selectively enforced Ch. 5.89 against them. The complaint does not allege, and cannot be amended to allege, an "'actual, present controversy'" requiring resolution by the court. "This element was necessary to prove a cause of action for declaratory relief." (*Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1259.)

a. *Relevant Provisions of Ch.5.89, the Challenged Ordinance*

On February 14, 2012, on an urgency basis, City passed Ordinance No. 12-0004, which amended the Long Beach Municipal Code (LBMC)[5] "by adding [Ch.] 5.89

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[4] Appellants do not contend the trial court erred in granting the motion as to the injunction cause of action. We need not, and therefore do not, address the propriety of the court's ruling as to this cause of action.

prohibiting the establishment and operation of medical marijuana dispensaries within the City . . . ; and by repealing Chapter 5.87 relating to medical marijuana collectives; . . . and declaring that this ordinance shall take effect immediately."

Pursuant to Ch. 5.89, "[n]o person or entity shall operate or permit to be operated a Medical Marijuana Dispensary or Cultivation Site in or upon any premise or any zone in the City. The City shall not issue, approve, or grant any permit, license, or other entitlement for the establishment or operation of a Medical Marijuana Dispensary or Cultivation Site." (§ 5.89.030.A.) "It shall be unlawful for any person or entity to own, manage, conduct, establish, operate or facilitate the operation of any Medical Marijuana Dispensary or Cultivation Site, or to participate as an employee, contractor, agent, or volunteer, or in any other manner or capacity, in any Medical Marijuana Dispensary or Cultivation Site in the City. The term 'facilitate' shall include, but not be limited to, the leasing, renting or otherwise providing any real property or other facility that will in any manner be used or operated as a Medical Marijuana Dispensary or Cultivation Site in the City." (§ 5.89.030.B.)

Further, "[n]o Medical Marijuana Dispensary, Cultivation Site, Collective, operator, establishment, or provider that existed prior to the enactment of this Chapter shall be deemed to be a legally established use or a legal nonconforming use under the provisions of this Chapter or the Code." (§ 5.89.050.)

"'Medical Marijuana Dispensary or Dispensary' means any association, . . . cooperative, collective, or provider . . . that possesses, cultivates, distributes, or makes available medical marijuana to any person . . . . The term 'Medical Marijuana Dispensary' does not include three (3) or fewer qualified patients or their primary caregivers who associate at a particular location or property in the City to collectively or cooperatively cultivate or distribute medical marijuana amongst themselves in accordance with all applicable provisions of state law." (§ 5.89.020.E.)

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5 Undesignated section references are to the LBMC.

The above prohibition and ban of such dispensary "shall not be applicable until August 12, 2012, to those applicants of certain dispensaries . . . that were successful participants in a lottery conducted by the City on September 20, 2010 . . . . This temporary exemption is enacted in recognition of the fact that even though no permits have been issued, said applicants may have expended funds in good faith to facilitate their operations in accordance with the provisions of Chapter 5.87 . . . at the time it was in existence . . . . A complete list of those applicants eligible for a temporary exemption . . . is attached hereto and incorporated herein by this reference." (§ 5.89.055.)

b. *Appellants Have No Vested Rights and Ch. 5.89 Is Not Unconstitutional as Applied to Them as a Matter of Law*

On May 6, 2013, our Supreme Court decided *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729 (*City of Riverside*), which the trial court relied on in its December 13, 2013 order granting City's motion for judgment on the pleadings. In *City of Riverside*, the court concluded neither the CUA nor the Medical Marijuana Program (MMP) confers an unconditional right to cultivate or dispense medical marijuana and neither preempts California counties and cities from banning marijuana dispensaries and cultivation sites. The Court explained: "[T]he plain language of the CUA and the MMP is limited in scope. It grants specified persons and groups, when engaged in specified conduct, immunity from prosecution under specified state criminal and nuisance laws pertaining to marijuana. [Citations.] The CUA makes no mention of medical marijuana cooperatives, collectives, or dispensaries." (*City of Riverside*, *supra*, 56 Cal.4th at p. 753.) "[I]ts substantive provisions created no 'broad right to use [medical] marijuana without hindrance or inconvenience.' [Citations.]" (*Ibid.*)

Although the MMP addresses "the collective or cooperative cultivation and distribution of medical marijuana," the MMP "specifies only that qualified patients, identification holders, and their designated primary caregivers are exempt from prosecution and conviction under enumerated state antimarijuana laws 'solely' on the

ground that such persons are engaged in the cooperative or collective cultivation, transportation, and distribution of medical marijuana among themselves. [Citation.]" (*City of Riverside, supra*, 56 Cal.4th at p. 753.) In other words, such "language no more creates a 'broad right' of access to medical marijuana 'without hindrance or inconvenience' [citation] than do the words of the CUA." (*Ibid*.) Further, "[n]o provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana." (*Id*. at pp. 753–754, fn. omitted.) "Those provisions do not mandate that local jurisdictions permit such activities." (*Id.* at p. 761.) Also, "the MMP's limited provisions neither expressly nor impliedly restrict or preempt the authority of individual local jurisdictions . . . to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct . . . to be a nuisance, and by providing means for its abatement." (*Id.* at p. 762, fn. omitted.)

In short, "neither the CUA nor the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions."[6] (*City of Riverside, supra*, 56 Cal.4th at p. 762.)

In view of the binding authority of *City of Riverside*, no actual, present controversy was alleged, or could be alleged, regarding whether CUA or MMP created any vested right in appellants to operate a medical marijuana dispensary and whether CUA or MMP preempted City from banning appellants from operating or allowing to be operated such a dispensary. (*Connerly v. Schwartzenegger* (2007) 146 Cal.App.4th 739,

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[6] Appellants do not assert their alleged vested rights arise from the Guidelines.

747 [no actual controversy because California Supreme Court interpretation of state Constitution final].)

Additionally, the complaint fails to allege, and appellants cannot allege, that appellants acquired under City's ordinances any vested right to operate a marijuana collective or dispensary. On January 18, 2011, the City adopted Ordinance No. 11-0002, which amended the LBMC "by amending and restating Chapter 5.87 relating to medical marijuana collectives." Pursuant to the existing chapter 5.87, a collective could apply for and obtain a permit to operate such a collective in the City. (Former §§ 5.87.020 [permit required], 5.87.030 [permit application process], 5.87.040 [permit approval and operating conditions].) Appellants do not claim they ever applied for or obtained such a permit.

Having failed even to seek, much less obtain, a permit under the prior chapter 5.87 to operate a medical marijuana collective, appellants cannot benefit from "the rule . . . 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." (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 (*Avco*).)[7]

Recognizing that they never had a permit for Healing Tree's planned dispensary, appellants contend the absence of a permit is irrelevant because they relied in good faith on a belief that chapter 5.87 would ultimately be declared unconstitutional, thereby leaving the City with no enforceable zoning ban on marijuana dispensaries.[8] Appellants'

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[7] Appellants attempt to confuse the issue of Healing Tree's lack of a permit issued under Chapter 5.87 by noting that Bentech was issued a City business license. Under its City business license, Bentech is authorized only to operate a "Comm[ercial]/Indust[rial] Space Rental" business. The scope and nature of this license provides no basis for appellants to assert they obtained a vested right to operate the dispensary.

[8] Appellants contend "there was no ban on medical marijuana dispensaries in [the City] when Healing Tree began operating its dispensary at the . . . Property on July 17, 2011," because the existing version of chapter 5.87 was subsequently declared unconstitutional. As authority, they cite *Pack v. Superior Court*. This decision, however,

contention has no merit. "A vested right requires more than a good faith subjective belief that one has it." (*Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 853.) Rather, the vested rights doctrine is predicated upon estoppel of the governing body, and "[w]here no . . . permit has been issued, it is difficult to conceive of any basis for such estoppel. [Citation.]" (*Avco, supra*, 17 Cal.3d at p. 793.) Even assuming there are cases where a vested right could be based on some government actions other than issuance of a permit, appellants here point to no action taken by City that could be argued to have estopped City from later adopting and enforcing the ban ultimately included in Ch. 5.89. Indeed, the gravamen of appellants' complaint is wholly inconsistent with such a claim: The complaint alleges that from the time Healing Tree started in business, City threatened to take legal action against appellants, including to prosecute them criminally, for attempting to operate the medical marijuana dispensary. Appellants' vested rights theory is not based in concepts of good faith reliance on, or estoppel of City at all. Rather, appellants' vested rights theory, fairly stated, is that they relied on a belief that City did not yet have a defensible zoning ordinance (because chapter 5.87 would be declared unconstitutional) and a hope that any future ordinance would permit their medical marijuana dispensary. But "[i]t is beyond question that a landowner has no vested right in existing or anticipated zoning" (*id.* at 796), and, as such, appellants' theory fails.[9]

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was superseded by the grant of review by our Supreme Court, which subsequently dismissed review without ordering that decision published (Aug. 22, 2012, S197169). Accordingly, *Pack v Superior Court* has no precedential value. (Cal. Rules of Court, rule 8.1105(e).)

[9] Furthermore, appellants' contention that if Chapter 5.87 were struck down that would necessarily have meant appellants had a right to operate a medical marijuana dispensary is based on the faulty premise that such an operation is permitted unless expressly banned. Where, as here, City has a "permissive" zoning code, such a business would be presumptively prohibited. (See *City of Corona v. Naulls* (2008) 166 Cal.App.4th. 418, 425.)

Appellants have failed to show that their complaint includes, or could be amended to include, any cognizable claim for relief based on the deprivation of a vested right to operate or to be allowed to operate a marijuana dispensary in the City.[10]

c. *Allegation of Selective Enforcement Against Appellants Not Cognizable*

Appellants contend Ch. 5.89's ban against medical marijuana dispensaries is enforced against appellants but not lottery winners, which amounts to selective, discriminatory enforcement of Ch. 5.89 in violation of the Constitution. They argue "Healing Tree was being singled out for not having won a lottery, which is perhaps the best example of an arbitrary manner to determine eligibility for a license."

Appellants' unsuccessful contention is based on a misapprehension of section 5.89.055, which is entitled "Temporary Exemption." Former chapter 5.87 was repealed on February 12, 2012, and Ch. 5.89 was adopted that same date. The exemption from the Ch. 5.89 ban on medical marijuana dispensaries was for a six-month period, i.e., expiring August 12, 2012. The plain purpose of this temporary exemption was solely to allow the identified lottery winners to wind down their medical marijuana operations "in recognition of the fact that . . . [they] may have expended funds in good faith to facilitate their operations in accordance with the provisions of [the later repealed] Chapter 5.87[.]" (§ 5.89.055.) No permits were issued to the "successful participants in [the] lottery conducted by the City on September 20, 2010." (*Ibid*.) Further, "[t]he temporary exemption established . . . shall not be construed to protect applicants, dispensary . . . owners, [among others] from state or federal laws that may prohibit cultivation, sale, use,

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[10] We deem to be without foundation and therefore do not address appellants' contention that Ch. 5.89 revoked their entitlement to continue their otherwise lawful nonconforming use of the Property as granted under the LBMC. They quote section 21.27.020, "Continuance of nonconforming rights," which explains "Nonconformities [are] defined in Chapter 21.15 of this Title" and requires such nonconforming use to be "a result of vested rights obtained through the legal establishment of the nonconforming use[.]" Not only do appellants fail to provide this definition, they fail to make any meaningful argument with citation to the record in support of their point. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

or possession of controlled substances. Moreover, cultivation, sale, possession, distribution, and use of marijuana remain violations under federal law . . . , and this Section is not intended to, nor does it, protect any of the above described persons or entities from arrest or prosecution under those federal laws." (*Ibid*.)

3. *Grant Without Leave to Amend Not Abuse of Discretion*

Appellants contend the trial court abused its discretion in granting the motion for judgment on the pleadings without leave to amend because in their opposition papers they demonstrated two colorable claims existed. One is City improperly recorded a nuisance abatement lien on Bentech's Property although a valid, third-party mortgage existed at that time. The other is City failed to comply with the asset forfeiture rules and converted cash seized during arrests at its dispensary. No abuse transpired.

Appellants' claim of an unlawful recorded nuisance abatement lien does not amount to a cognizable legal cause of action. In their opposition, appellants claimed "City violated the Government Code by recording a lien against the Property at a time when the Property was encumbered with a valid, third party mortgage." After noting that a municipality is empowered "by ordinance" to "make the expense of abatement of nuisances a lien against the property on which it is maintained and a personal obligation against the property owner" (Gov. Code, § 38773), they pointed out "if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the cost of abatement shall not result in a lien against the real property but instead shall be transferred to the unsecured roll for collection." (Gov. Code, § 38773.5, subd. (c).) They noted Ch. 5.89 declared that establishing, maintaining, or operating medical marijuana dispensaries was a public nuisance. (§ 5.89.040.)

Bentech argued "the City violated the Government Code by recording a lien against the Property for the unpaid administrative citations and thus applied [Ch. 5.89] unconstitutionally against Bentech." The complaint alleged that in March, April, and July of 2012, City issued administrative Citations against Bentech for violating Ch. 5.89,

and on May 23, 2012, "City placed a lien on the [Property] in the amount of $14,800." Bentech asserted, "However, as of May 23, 2012, the Property was, and had been, encumbered with a mortgage in the principal amount of $2,196,055 . . . in favor of CHB America Bank (not a party to this lawsuit) since at least July 22, 2004." As authority for this assertion, Bentech relied on item 4, which purports to be a deed of trust dated July 22, 2004, in their request for judicial notice and of which the trial court did not take judicial notice.

The inherent flaw in Bentech's position is its failure to recognize the administrative Citations were not issued under the Government Code provisions regarding abatement of nuisances. Rather, "[t]he legislative body of a local agency, [i.e., City], may by ordinance make any violation of any ordinance enacted by the local agency subject to an administrative fine or penalty." (Gov. Code, §§ 53069.4, subd. (a)(1), 54951.) Section 5.89.040 of Ch. 5.89 authorizes City to elect among various remedies to pursue in addressing "[t]he establishment, maintenance, operation, facilitation, of, or participation in a Medical Marijuana Dispensary and Cultivation Site within the City limits[.]" Such public nuisance "may be *abated* by the City *or subject to* any available legal remedies, including but not limited to civil injunctions and *administrative penalties*." (*Ibid.*, italics added.) "The City Attorney may institute an action . . . to . . . abate any condition(s) found to be in violation of the provisions of this Chapter, as provided by law" and "[i]n the event the City files any action to abate any dispensary . . . as a public nuisance, the City shall be entitled to all costs of abatement, costs of investigation, attorney's fees, and any other relief available in law or in equity." (*Ibid*.)

The administrative Citations were authorized pursuant to section 5.89.060 ("Penalties for violation"), which provides in pertinent part: "In addition to the remedies set forth herein, the City in its sole discretion, may also issue an Administrative Citation in accordance with Chapter 9.65 of this Code to any person or entity that violates the provisions of this Chapter." Section 9.65.060 sets forth the criteria for assessment of fines for administrative Citations in the context of code violations and provides in

pertinent part: "Each and every day a violation exists constitutes a separate and distinct offense" (§ 9.65.060.B); "Fines shall be assessed for code violations committed by the same responsible person as follows: [¶] 1. A fine for each initial violation, in an amount established by the City Council by resolution; [¶] 2. A fine for each of a second violation of the same code section within one (1) year from the date of the first violation, in an amount established by the City Council by resolution; [¶] 3. A fine for each additional violation of the same code section within one (1) year from the date of the first violation, in an amount established by the City Council by resolution[.]" (§ 9.65.060.D.1–3.) Section 9.65.140.A provides: "The failure of the cited party to pay a civil fine or late penalty in a timely manner may result in the imposition of a . . . lien against the real property on which the violation occurred[.]"[11] Section 9.65.200 provides this "administrative citation process . . . does not preclude the City from recovering any other code violation or nuisance abatement costs incurred by the City in performing its code enforcement efforts."[12] (§ 9.65.200.)

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[11] The complaint alleges Bentech invoked the administrative appeal process regarding revocation of its business license. In contrast, it does not allege, and Bentech does not claim, it invoked the administrative appeal process regarding the administrative Citations. (§§ 9.65.080, 9.65.100, 9.65.110, 9.65.120, 9.65.130; see also § 9.65.190 ("Right to judicial review"); cf. Gov. Code, § 53069.4 [alternative procedures for challenging administrative decision on code violation ruling].)

[12] This court granted City's request to take judicial notice of LBMC chapter 9.37 ("Long Beach Nuisance Code"), a certified copy of which was attached to the request. Nuisance includes "[t]he use of any premises for the purpose of unlawfully selling, serving, storing, keeping, maintaining or giving away any controlled substance, precursor, or analog as those terms are described by State law." (§ 9.37.090.N.) Administrative penalties may be assessed "in the event the nuisance activity or condition is not corrected or abated within the time frame established by the notice for correcting or abating the nuisance." (§ 9.37.100.B.2.) In contrast to those in section 9.65.060.A for code violations, such penalties "are not to exceed a maximum of two hundred fifty dollars ($250.00) per day for each on-going violation, except that the total administrative penalty shall not exceed five thousand dollars ($5,000.00), exclusive of any administrative costs, for any violation or related series of violations." (§ 9.37.120.A.) "In determining the amount of administrative penalty, the City Manager or his authorized

Healing Tree contends City's Police Department seized personal property ("cash and equipment") from Healing Tree's dispensary without complying with the asset forfeiture rules, i.e., no "receipts were ever provided" as required under section 11488, subdivision (b) of the Health and Safety Code.[13] Healing Tree's attendant contention is City's turning over the seized cash to the federal government constituted a conversion of the cash. No cause of action can arise based on these contentions.

In his opposing declaration, James B. Devine, appellants' attorney, stated that in five separate criminal matters filed by the City's Prosecutor's Office, he represented 14 named individuals, "all of whom were charged with violating LBMC § 5.89.060(A) in connection with their participation in [Healing Tree's] dispensary" and "which [charges] arose from a raid on [Healing Tree's] dispensary by the [City] Police Department" on "November 7, 2012, November 29, 2012, December 13, 2012, January 3, 2013, and February 28, 2013." He further stated, "According to the property reports prepared by the . . . Police Department, [the Police] seized several thousand dollars in actual cash and equipment (cash registers, display cases, etc.)." The "Police Department never provided [Healing Tree] or [any of his] individual clients a notice that their assets were being seized and/or were subject to forfeiture." Also, "the City Attorney advised . . . the money seized by the . . . Police Department was given to the federal government."

The above 14 individuals were arrested for violating section 5.89.060.A. Healing Tree fails to demonstrate it was entitled to a receipt for the "cash and equipment" seized. It does not contend the City police attempted to arrest or arrested these individuals for a

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designee shall take any or all of [the seven enumerated] factors into consideration[.]" (§ 9.37.120.B.)

[13] Health and Safety Code section 11488, subdivision (b) provides: "Receipts for property seized pursuant to this section shall be delivered to any person out of whose possession such property was seized, in accordance with Section 1412 of the Penal Code. In the event property seized was not seized out of anyone's possession, receipt for the property shall be delivered to the individual in possession of the premises at which the property was seized."

violation of any of the Health and Safety Code or Penal Code offenses for which the relied upon receipt requirement applies.[14]

Further, Healing Tree has forfeited its point that a cause of action for return of the seized "cash and equipment" can be stated based on the mere failure to provide a receipt to Healing Tree for the seized property, which point is unsupported by meaningful argument and supporting authority. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

Healing Tree's attempt to state a cause of action for conversion of the cash seized and turned over to the federal government also fails. Although the declaration ambiguously refers to "their assets," Healing Tree does not contend it could allege any ownership or possession right in this cash, an element of a conversion claim. (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.)[15] It also does not contend it has complied with, or is able to comply with, the Government Claims Act (Gov. Code, § 810 et seq.), which applies to a conversion cause of action (*Addison v. State of California* (1978) 21 Cal.3d 313, 316–317). "Timely claim presentation is not merely a procedural requirement, but rather, a condition precedent to plaintiff's maintaining an action against a defendant, and thus, an element of the plaintiff's cause of action. [Citation.] A complaint which fails to allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action. [Citation.]" (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1238.)

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[14] This requirement applies where the seizure is made "subsequent to making or attempting to make an arrest for a violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, or 11382 of [the Health and Safety Code], or Section 182 of the Penal Code insofar as the offense involves manufacture, sale, purchase for the purpose of sale, possession for sale or offer to manufacture or sell, or conspiracy to commit one of those offenses." (Health & Saf. Code, § 11488, subd. (a).)

[15] As Healing Tree correctly points out in the reply brief, Ch. 5.89 does not provide for asset seizure as a penalty for violating of its ban against medical marijuana dispensaries. A claim for conversion may be based on this fact, but this fact does not render Ch. 5.89 unconstitutional as applied to Healing Tree.

Further, Healing Tree does not contend it was arrested when the property was seized or the property was taken under a search warrant, which situations are exceptions to these requirements. (See *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 742 ["rule that suits to recover specific property are not subject to the [Claims Act] requirements" applies both to "a claim for the return of personal property seized at the time of an arrest" and "in actions to recover property seized under a search warrant, or compensation for its value"].)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the City of Long Beach.

NOT TO BE PUBLISHED.

MOOR, J.*****

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.