

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MIDAS INDUSTRIES
INTERNATIONAL, LLC, et al.,

Plaintiffs and Appellants,
v.

CITY OF SAN BUENAVENTURA,

Defendant and Respondent.

2d Civil No. B234194
(Super. Ct. No. 56-2010-
00382589-CU-CR-VTA)
(Ventura County)

The owners of a liquor store filed a complaint alleging their due process rights were violated because they were not allowed to sell alcoholic beverages without a conditional use permit (CUP). The trial court sustained the demurrer of the City of San Buenaventura (City) without leave to amend on the grounds that appellants initially failed to exhaust administrative remedies and, subsequently, exercised their administrative remedies and obtained the permit they sought. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Since 2005, the City's zoning code requires that a conditional use permit be obtained from City prior to commencing the retail sale of alcoholic beverages. (San Buenaventura Mun. Code, § 24.460.210.) The code sets forth the

procedure for applying for and obtaining a permit, which includes submitting an application, paying a fee, a planning commission hearing, and the right to appeal an adverse planning commission decision to the City Council. (*Id.*, §§ 24.460.220-24.460.260.) The code provides for an exemption from the CUP requirement if proof of alcohol sales occurring within the past six months by the previous owner was provided. (*Id.*, § 24.460.310, subd. (B)(2)(d).)

In March 2010, appellants Midas Industries International, LLC, and its principals, David T. Ungar and Kimberly A. Ungar, both California attorneys, entered into a lease to rent premises located at 4013 East Main Street, Ventura, for the purpose of operating a retail store called "Oceanus Market & Select Spirits." Previously, from September 2005 through August 2009, Eun Suk Choi had a license to operate a liquor store on the premises. Choi cancelled his business license on August 18, 2009, and ceased doing business at that time.

On June 29, 2010, appellants submitted a new business license application to respondent City and a license was issued for the period July 1, 2010, to June 30, 2011. Appellants checked a box on the application which states: "Business sells alcohol. Use permit required." On August 3, 2010, appellants obtained a license to sell alcohol from the State of California Alcoholic Beverage Control Agency (ABC). Without obtaining a CUP or providing evidence exempting them from the CUP requirement, Oceanus opened for business on or about August 13, 2010.

On or about August 25, 2010, Derek Donswyk, the City's alcohol enforcement officer, went to the store and again informed appellants that they were required to obtain a CUP before operating a liquor store and could not sell alcohol in the store until a CUP was obtained. Donswyk explained that appellants were not eligible for an exemption from the CUP requirement because alcohol had not been sold on the premises during the previous six months.

On September 7, 2010, appellants submitted a CUP application to the City. The CUP was granted a few months later.

On September 30, 2010, appellants filed a complaint for declaratory relief and preliminary injunction against the City and its police department alleging violation of procedural due process rights and challenging the constitutional validity of the City's alcohol control ordinance and the CUP application fee. On October 5, 2010, appellants sought and obtained by ex parte application a temporary restraining order and order to show cause re preliminary injunction enjoining enforcement of the ordinance.

After a hearing on October 25, 2010, the trial court denied appellants' request for a preliminary injunction on the grounds that the City's regulation of alcohol retailers was a valid exercise of the City's police power, the ordinance did not violate appellants' right to procedural due process, and appellants failed to exhaust their administrative remedies.

On November 17, 2010, the court sustained the City's demurrer to the complaint with leave to amend. Appellants filed a first amended complaint (FAC) containing the same causes of action as the initial complaint and also alleging that they were not informed of their right to contest the City staff's decision that they could not sell alcohol until they obtained a CUP and therefore were not required to exhaust administrative remedies before filing a civil action.

The trial court sustained the City's demurrer without leave to amend on the grounds that the challenge to the City's administrative process was moot because appellants had been issued a CUP, the City's regulations of the sale of alcohol constitute a valid exercise of the police power, and the FAC alleged no facts giving rise to application of an equitable estoppel.

On appeal, appellants assert the issuance of the CUP did not moot their challenge to the availability or adequacy of administrative remedies, pursuit of

administrative remedies would have been futile, and the City should be estopped from asserting the defense of exhaustion of administrative remedies because of its negligent or intentional conduct which caused appellants to fail to exhaust administrative remedies.

DISCUSSION

Standard of Review

When reviewing a dismissal of a complaint after a demurrer has been sustained without leave to amend, we accept the factual allegations of the complaint as true and review the pleading de novo to determine whether the facts as pleaded state a cause of action. (*Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) If we determine that an amendment would cure the defect, we conclude the trial court abused its discretion and reverse. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff bears the burden of establishing that the complaint could have been amended. (*Ibid.*; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

The Appeal Is Moot

The FAC requests declaratory relief alleging the City's alcohol control ordinance is unconstitutional and the inadequacy of procedures for obtaining a CUP. At the hearing on the demurrer, appellants admitted that it had applied for and obtained a CUP and had been operating its business for "several months." Where, as here, events occur subsequent to the filing of a lawsuit which prevent the court from ordering effective relief, the action may be dismissed as moot. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77-78.) Here, appellants sought and received a CUP. They have alleged no facts or legal authority supporting their contention that they had a vested right to operate a liquor

store before obtaining a CUP. (See, e.g., *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 388 [city may validly require permit to sell alcoholic beverages under its zoning power].) As they have not established a legally vested right, they cannot state a claim or obtain damages for an alleged due process violation. (See, e.g., *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana* (1994) 23 Cal.App.4th 1401, 1403-1404 [where grant or denial of permit is discretionary, no vested right is involved sufficient to invoke due process protection].)

*The City Had no Duty to Inform Appellants
Of the Provisions of its Zoning Code*

Appellants assert they lost money because the City staff did not inform them they were required to obtain a CUP before selling alcohol. The argument is without merit. At the time appellants began operating their liquor store, the City's municipal code contained a clearly-defined procedure for operating liquor stores in the City. A party who does business with a city is deemed to have knowledge of the city's ordinances. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 234; see also *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1479 ["One who deals with the public officer stands presumptively charged with the full knowledge of that officer's powers, and is bound at his . . . peril to ascertain the extent of his . . . powers to bind the government for which he . . . is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted"].)

Based on this established precedent, appellants' allegations that they were ignorant of the law, or were misled by city officials as to the requirements of the law, do not state a cause of action. (See, e.g., *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 669 ["It is established that the unauthorized promise of an

employee does not constitute grounds for an estoppel as to the governmental body by which he or she is employed where the means and limitations on its power to act are prescribed by statute"].) Moreover, they filled out and signed a business license application which informed them that a business selling alcohol was required to obtain a conditional use permit. Thus, appellants' assertions that they were ignorant of the law or misinformed by City staff is contradicted by the evidence. (See *Hill v. Roll International Corp.* (2011) 195 Cal.App.4th 1295, 1300 [facts subject to judicial notice take precedence over inconsistent facts alleged in complaint].)

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Henry Walsh, Judge
Superior Court County of Ventura

Kimberly A. Ungar, in pro. per., and for Plaintiffs and Appellants Midas Industries International, LLC, and David T. Ungar.

Ariel Pierre Calonne, City of San Buenaventura City Attorney, Andy H. Viets, Senior Assistant City Attorney, and Jennifer Lee, Assistant City Attorney, for Defendant and Respondent.