

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: February 3, 2021
TO: Councilmember Cate, Council District 6
FROM: City Attorney
SUBJECT: Impact of Redistricting on the Cannabis Outlet Council District Cap

This memorandum is a preliminary response to an inquiry from your Office regarding the impacts of redistricting on cannabis outlets in light of the limitations in the San Diego Municipal Code (Municipal Code or SDMC). Redistricting is scheduled to occur in 2022 and would create new City Council District (Council District) boundaries. This may result in a Council District having a greater number of cannabis outlets than is contemplated in the Municipal Code. Since we do not yet know the scope of revised boundaries, this advice is intended to provide a general outline of applicable law. This Office is available to provide further legal review and analysis once the redistricting process is finalized.

The Municipal Code does not include a Citywide limitation, but states “no more than four cannabis outlets are permitted in each City Council District” (Cannabis Outlet Cap). SDMC § 141.0504. Cannabis outlets “that are consistent with the requirements for retailer or dispensary license requirements in the California Business and Professions Code may be permitted with a Conditional Use Permit . . . in the zones indicated with a ‘C’ in the Use Regulations Tables.” *Id.* According to the most recent information from the City of San Diego, Cannabis Division, four of the nine Council Districts have reached the Cannabis Outlet Cap and no additional cannabis outlets can be permitted in those Council Districts.¹ The remaining Council Districts have zero to three permitted cannabis outlets.

I. IMPACT OF REDISTRICTING ON COUNCIL DISTRICTS THAT HAVE REACHED THE CANNABIS OUTLET CAP

Cannabis outlets in, or redistricted into, Council Districts that have reached the Cannabis Outlet Cap and have obtained and relied upon their Conditional Use Permit (CUP), have a vested right to continue to operate in accordance with their approved CUP. *Malibu Mountains Recreation, Inc. v. Cty. of Los Angeles*, 67 Cal. App. 4th 359, 368 (1998). Once a permittee has acquired a CUP, a municipality’s power to revoke the conditional use is limited. *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 783 (1948). “If a permittee has acquired a vested property right under a permit, the permit cannot be revoked,” except under the conditions

¹ https://www.sandiego.gov/sites/default/files/dsd_list_of_pending_marijuana_outlet_applications.pdf

described in the permittee's CUP. *Id.* at 784. If the permittee has incurred substantial expense and acted in reliance on the permit, the permittee has acquired a vested property right in the permit and is entitled to the protections of due process before the permit may be revoked.² *Id.* at 795. Municipal Code sections 121.0313 and 121.0314 codify these due process requirements. The "doctrine of vested rights protects property owners from changes in zoning or other land use regulations which occur before the completion of the owner's development project." *Billings v. California Coastal Comm'n*, 103 Cal. App. 3d 729, 735 (1980). A cannabis outlet's vested right to continue to operate pursuant to its CUP is unchanged even if it is redistricted into a Council District where the number of cannabis outlets exceeds the Cannabis Outlet Cap.

It is unlikely, however, that this vested right to operate pursuant to an approved CUP carries beyond the expiration date in the CUP, even though the Municipal Code allows amendments to extend the CUP one or more times for a period not to exceed five years. SDMC § 141.0504(i), (n)(4). In general, a vested right is only acquired for the work or use specifically and particularly described in the permit and does not provide any rights greater than what is in the permit. *Santa Monica Pines, Ltd. v. Rent Control Bd.*, 35 Cal. 3d 858, 866 (1984); *see also Russ Bldg. P'ship v. City & Cty. of San Francisco*, 44 Cal. 3d 839, 853 (1988) (the permit does not give any rights to complete work not specifically described in the permit). Where a CUP has been granted and includes an expiration provision, the courts have determined that the permittee has agreed to be bound by the terms of the permit, including the expiration, and there is no implicit understanding that the permit would be renewed. *Metro. Outdoor Advert. Corp. v. City of Santa Ana*, 23 Cal. App. 4th 1401, 1404 (1994); *Flanzer v. Bd. of Dental Exam'rs*, 220 Cal. App. 3d 1392, 1396 (1990) ("An applicant for reinstatement of a revoked license is in the same position as a person seeking a license in the first place.")³

II. IMPACT OF REDISTRICTING ON COUNCIL DISTRICTS THAT HAVE NOT REACHED THE CANNABIS OUTLET CAP

The Council Districts that have not reached the Cannabis Outlet Cap prior to or after redistricting may continue to have CUPs approved for cannabis outlets. If a permitted cannabis outlet is redistricted into a different Council District, it would no longer be counted towards the Cannabis Outlet Cap in its former Council District. Instead, that cannabis outlet would be counted in its new Council District and could apply for renewal of its CUP through the Municipal Code process.

² Note that revocation is not the same as the termination date specified in the CUP. Revocation is an affirmative action in which the City would terminate the CUP before the term specified in the CUP.

³ It should be noted that there is a rare and fact specific case in which the court decided that once a permit was validly issued and relied upon a vested right continued regardless of the permit expiration. *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519 (1992). In that case, the business was a legal nonconforming use that had been operating for 35 years and the CUP was issued to allow the expansion of a business, with the implicit understanding the permit would be renewable. *Id.* The court determined that the termination of the vested right required due process of law and even a failure to renew a permit with a limited duration may constitute an unlawful deprivation of a vested right to continue the use and occupancy. *Id.*

III. CONCLUSION

As the redistricting process advances and new Council District boundaries are developed, this Office recommends working with the Cannabis Division to understand the extent of any potential impacts. Redistricting could result in one or more cannabis outlets changing Council Districts, creating Council Districts that exceed their Cannabis Outlet Caps. For example, two cannabis outlets could be redistricted into a Council District that already has four permitted cannabis outlets, resulting in six permitted cannabis outlets. In this example, the first two cannabis outlets to have their CUPs expire most likely will not be able to have their CUPs amended due to the Cannabis Outlet Cap. As such, if redistricting results in Council Districts with cannabis outlets in excess of the Cannabis Outlet Cap, and the City Council would like address the issue, the City Council could amend the Municipal Code to change the Cannabis Outlet regulations, including increasing the Cannabis Outlet Cap or modifying the type of limitation on Cannabis Outlets. Our Office can assist with any Municipal Code changes and, as stated above, provide further legal review and analysis, as facts become known.

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By */s/ Corrine L. Neuffer*
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CLN:cm

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