



REPORT TO THE PLANNING COMMISSION

October 19, 2016

AGENDA ITEM NO. **VIII-C**
COMMISSION MEETING

APPROVED BY

FROM: 
MIKE SANCHEZ, Assistant Director
Development & Resource Management Department

SUBJECT

Appeal Of Director's Decision To Void Zone Clearance

RECOMMENDATIONS

Staff recommends that the Planning Commission take the following actions;

1. Affirm the Director's decision to **void** the zone clearance pursuant to FMC Sections 15-5004 and 15-5010, and to deny the zone clearance application as submitted.
2. Staff further recommends that the Planning Commission issue findings that the Applicant made material omissions and/or misrepresentations in the application for zone clearance and that the Applicant's intended use is inconsistent with the use described in the application.

EXECUTIVE SUMMARY

For over a decade, the property located at 2680 N. Miami ("Subject Property") has been the subject of extensive code enforcement activity. This led to the Director's decision to revoke the Property Owners' special permits in 2014, which was upheld by the City Planning Commission on May 21, 2014. (Attachment 1). Following the decision of the City Planning Commission, the Property Owners continued to use the Subject Property in a similar fashion, which led to the Fresno County Superior Court's issuance of an injunction (Attachment 2) and a contempt order for failing to comply with the injunction (Attachment 3).

On July 21, 2016, Gregory Occhionero ("Applicant") sought a zone clearance for a new, unnamed business on the Subject Property, wherein he represented the Subject Property was intended to be used for inside storage and warehousing and outside storage. In the application, the Applicant failed to disclose that he intended to continue his prior use; failed to disclose that he intended to operate the property like a recycling processing facility (which has more stringent zoning requirements); and failed to disclose the condition of the property, the applicable Court orders and his lack of compliance. These omissions/misrepresentations are material and led to the Director's decision to void the zone clearance.

THE SUBJECT PROPERTY

The Subject Property is a .52 acre parcel located at 2680 N. Miami Avenue, Fresno, California, Fresno County Assessor's parcel number 496-217-09. Under the previous zoning ordinance, the Subject Property was zoned M-1, *Light Industrial*. Under the new Development Code, the Subject Property is zoned Industrial Light, *IL*.

PROPERTY OWNERS

The current owners of record for the Subject Property are Michael and Vincenza Occhionero. Their son, Greg Occhionero, is the applicant for the zone clearance.

CERTAIN APPLICABLE SECTIONS OF THE FRESNO MUNICIPAL CODE

In an area zoned Industrial Light, indoor warehousing and storage is a permitted use; outside storage is a permitted use subject to a courtesy notice to properties within a 1,000 feet; and recycling facilities, including recycling processing facilities, require review and approval of a conditional use permit. (FMC Section 15-302). In cases where a specific land use or activity is not defined, the Director shall assign a land use or activity to a classification that is substantially similar in character. (FMC Section 15-302(C)). A proposed use within a zoning district must expressly be listed as a permitted use, or determined to be such through the determination of the Director, in order to be authorized under the Development Code. (FMC Section 15-104(A)(2)).

A zone clearance is required to confirm that the establishment of a new use is permitted as a matter of right and that no conditional use permit or other entitlement is required. (FMC Section 15-5102).

Under FMC Section 15-5004(B), the Director may determine that an application is incomplete or has missing information. Under FMC Section 15-5010(C), entitled "Actions Voiding Approval", the Director may void approval of a zone clearance if the use is inconsistent with the use described in the application or the application was based on misrepresentations.

BACKGROUND/ANALYSIS

1. PRIOR HISTORY

Since 2003, the Subject Property has been the subject of extensive code enforcement activity. The City issued numerous corrective notices and citations relating to the property: March 13, 2003 Notice of Violation; four Administrative Citations; April 2, 2004 Correction

REPORT TO PLANNING COMMISSION

Appeal Of Director's Decision To Void Zone Clearance

October 19, 2016

Page 3

Notice and Order; November 5, 2009 Correction Notice and Compliance Order; and October 24, 2013 Correction Notice and Order.

Issues pertaining to the Subject Property were exacerbated by the Occhioneros' refusal to allow City inspectors on to the property, and their recalcitrance in correcting the issues. The Occhioneros' lack of compliance led to the City's having to pursue inspection and abatement warrants on several occasions.

The lack of compliance also led to the revocation of the Occhioneros' special permits, as confirmed by the City Planning Commission (Attachment 1).

2. APPROVAL OF ZONE CLEARANCE

On July 21, 2016, the Applicant submitted an application for zone clearance. (Attachment 4). He represented that he was establishing a new business whose name had not yet been determined, and pursuant to FMC Section 15-302, he was intending to utilize the property for inside warehousing and storage and outside storage.¹ Based upon the information provided, the City representative granted a zone clearance for the permitted use identified therein.

3. DIRECTOR'S DECISION TO VOID ZONE CLEARANCE

After the zone clearance was granted, the Director became aware that the application for zone clearance contained several omissions and misrepresentations:

- A. By submitting the application, the Applicant represented he was the property owner and/or had the requisite authority. To the contrary, his parents own the Subject Property and he did not provide proof of authorization.

¹ Under FMC Section 15-6705, the proposed uses are defined as follows:

Indoor Warehousing and Storage. Storage within an enclosed building of commercial goods prior to their distribution to wholesale and retail outlets and the storage of industrial equipment, products and materials including, but not limited to, automobiles, feed, and lumber. Also includes cold storage, draying or freight, moving and storage, and warehouses. This classification excludes the storage of hazardous chemical, mineral, and explosive materials.

Outdoor Storage. Storage of vehicles or commercial goods or materials in open lots.

REPORT TO PLANNING COMMISSION

Appeal Of Director's Decision To Void Zone Clearance

October 19, 2016

Page 4

B. The Applicant represented he was creating a new business, and had not even picked a name. In reality, he is attempting to continue the same type of business that was the subject of the revocation decision by the Fresno City Planning Commission (Attachment 1), and is contrary to the injunction order and contempt order by the Superior Court. (Attachments 2 and 3).

C. During the same time frame of his application, wherein the Applicant was representing the Subject Property was to be used for warehousing and storage, he was repeatedly representing in other forums that the Subject Property was being used for collecting, sorting and baling recyclables and selling the materials to third party vendors. (Attachment 5, & 3; Attachment 6, & 4; Attachment 7, & 2). For example, the Applicant stated under oath:

Q.My understanding generally, there may be additions, but most of the materials that you bring onto your property and then sort are foam rubber products, correct?

A. Correct.

Q. Cardboard?

A. Correct.

Q. Plastics?

A. Correct.

Q. Scrap metal?

A. Correct.

Q. Glass?

A. Correct.

Q. Aluminum?

A. Correct.

Q. And CRV?

A. Correct....

Q. Okay. And it's my understanding that whether you go to the recyclers or the recyclers pick them up on your property in Miami, that, based upon the weight, they'll pay you a certain price.

A. Correct. (Attachment 8).²

² Under FMC Section 15-6705, a recycling facility is described as a facility for receiving, temporarily storing, transferring and/or processing materials for recycling, reuse, or final disposal[@] and a recycling processing facility is described as a facility that receives, sorts, stores and/or processes recyclable materials. In addition, recycling facilities have numerous requirements that do not apply to warehousing and storage. FMC Sections 15-302, 15-2721 and 15-2750.

REPORT TO PLANNING COMMISSION

Appeal Of Director's Decision To Void Zone Clearance

October 19, 2016

Page 5

- D. The Applicant's representations as to the condition of the Subject Property and its intended use are vastly different than the condition of the Subject Property as reflected in photographs. (Interior: Attachments 9 and 10; Exterior: Attachments 11 and 12).
- E. By the Applicant's representing that he was engaging in a new business, the City understood that there was no materials or items on the premises, other than structures and fixtures, associated with any previous business or there had been no prior business. The photographs and injunction indicate otherwise.

Because of the Occhioneros' actions with respect to the Subject Property after the revocation decision by the City Planning Commission, the City filed a lawsuit and motion for preliminary injunction to:

- 1. Preclude the Occhioneros from operating their storage and recycling facility without obtaining the requisite approval, permits and site plan for an M-1 property; and
- 2. Abate, dispose and/or remove the materials on the Subject Property.

The Court granted the preliminary injunction and stated, in part, as follows:

The court grants plaintiffs' motion for a preliminary injunction...Given the undisputed fact that defendants are operating their business illegally, and have blatantly and intentionally refused to comply with the law, the court opts for the first option proposed by plaintiffs. Therefore, during the pendency of this action, or until further order of the court, defendants, as well as their agents, servants, and employees, are enjoined and restrained from operating any storage and recycling facility on the Property without obtaining the requisite approval, permits and site plan for an M-1 property.

(Attachment 2). The Court further required the Occhioneros to remove the material on site.

On May 3, 2016, the Court found the Occhioneros to be in contempt of its injunction order and willfully disobeyed the Court's [injunction] order by not removing the materials and by still trying to engage in business. For example, the Superior Court stated in its contempt order:

The court's order also precluded defendants from operating their storage and recycling facility without obtaining the requisite approval, permits and site plan for an M-1 property. Plaintiff proved beyond a reasonable doubt that defendants have disobeyed this portion of the court's order because defendants have continued to sell material...The court finds that defendant's failure to immediately stop selling material when the

REPORT TO PLANNING COMMISSION

Appeal Of Director's Decision To Void Zone Clearance

October 19, 2016

Page 6

preliminary injunction was issued constitutes a violation of the court's order. (Attachment 3).

Moreover, in July of 2016 - - the same month that the Applicant sought a zone clearance, the Court awarded the City over \$16,000 for fees in seeking to have the Occhioneros comply with the Court's injunction order with respect to the Subject Property. (Attachment 13).

Based on the Applicant's omissions and misrepresentations in the zone clearance application, and his use of the Subject Property in a manner completely divergent to what was represented in the application, the Director provided its notice to void the zone clearance. (Attachment 14).

NOTICE OF DIRECTOR'S DECISION AND HEARING

The Director issued its determination to void the Applicant's zone clearance on August 9, 2016 (Attachment 14). The Applicant appealed the decision on August 22, 2016 (Attachment 15). The City has served notice of the appeal hearing pursuant to the Fresno Municipal Code. (Attachment 16).

Attachments:

- 1 - Fresno City Planning Commission Resolution No. 13282
- 2 - Order Granting Motion for Preliminary Injunction
- 3 - Order on OSC Re: Contempt
- 4 - Zone Clearance
- 5 - Declaration of Greg Occhionero in Opposition to Plaintiffs' Motion for a Preliminary Injunction
- 6 - Declaration of Greg Occhionero in Opposition to Application for Order to Show Cause
- 7 - Second Supplemental Declaration of Greg Occhionero in Opposition to Application for Order to Show Cause
- 8 - Excerpts from Deposition of Greg Occhionero
- 9 - Photographs taken 3/23/2016
- 10 - Letter to B. Leighton dated 9/7/2016
- 11 - Photographs taken 8/3/2016
- 12 - Photographs taken 8/1/2016 and 9/5/2016
- 13 - Order to Grant Attorney's Fees
- 14 - Director's Decision to Void Zone Clearance dated 8/9/2016
- 15 - Applicant's Appeal dated 8/22/2016
- 16 - Notice of Hearing

EXHIBIT 1

**FRESNO CITY PLANNING COMMISSION
RESOLUTION NO. 13282**

The Fresno City Planning Commission adopted the following resolution at its regularly scheduled meeting of May 21, 2014, pursuant to a proceeding instituted by the Development and Resource Management Department ("DARM") Director's decision to revoke Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-057.

PROJECT: Revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-057.

PERMITTEES AND APPELLANTS: Michael Occhionero and Vincenza Occhionero, current owners of the "Subject Property" located at 2680 N. Miami Avenue, Fresno, California

LOCATION: The southeast corner of Miami Avenue and E. Brown Street in the City of Fresno.

SITE SIZE: .52 acres

EXISTING ZONING: M-1 (Light Industrial)

EXISTING LAND USE: Warehouse and outside material storage

WHEREAS, on July 31, 1996 the Development Director conditionally approved Site Plan Review Application No. S-96-76 as evidenced by correspondence dated August 5, 1996 for the property located at 2680 N. Miami Avenue, Fresno, California, approximately .52 acres in size for applicants/permittees/appellants, Michael Occhionero and Vincenza Occhionero, and,

WHEREAS, Site Plan Review No. S-96-76 permitted the construction of a 5,000 square foot office/warehouse building and open storage of baled recycled products in certain designated areas; and,

WHEREAS, on October 28, 2011 the City's Planning Director approved Site Plan Review Application No. S-11-057, a Major Revised Exhibit for the Subject Property subject to the conditions of approval; and,

WHEREAS, Site Plan Review No. S-11-057 permitted the operation of an indoor/outdoor storage facility for polyurethane products for future recycling purposes as well as permitting a limited storage area for other recyclable materials, subject to the conditions of approval; and,

WHEREAS, on February 27, 2014, the Director of the Development and Resource Management Department revoked Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 for the reasons set forth in the Order and Notice of Permit Revocation of: Special Permit Nos. S-96-76 and S-11-057; and,

WHEREAS, on February 28, 2014 Appellants, through their attorney, filed a timely appeal of the DARM Director's revocation of the Special Permits which resulted in the matter being set for hearing on April 2, 2014, and continued and concluded April 16, 2014; and,

WHEREAS, on April 2, 2014 prior to commencement of the hearing on the appeal of revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057, the Fresno City Planning Commission considered and, after receiving comment from counsel representing the Appellants and the Development and Resource Management Department, adopted the Procedures for Special Permit Revocation Proceeding which established the format and procedures for conducting the hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057; and,

WHEREAS, during the hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 the Fresno City Planning Commission received a staff report, sworn oral testimony, written testimony and documentary evidence submitted on behalf of the Community Revitalization Division of DARM and on behalf of the Appellants regarding the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 and the appeal thereof; and,

WHEREAS, the Fresno City Planning Commission has considered all relevant evidence presented in the court of the public hearing and makes the findings and decisions herein, based solely upon that evidence.

NOW, THEREFORE, BE IT RESOLVED that the appeal is hereby denied, the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 is granted, and the denial of the appeal and granting of the revocation is based upon the following evidence, findings, and conclusions:

1. The recitals contained herein are true and correct.
2. The notice of revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 was given in accordance with the requirements of Fresno Municipal Code, section 12-405.
3. The Appellants, through their attorney, duly filed a timely appeal of the action of the Development and Resource Management Department's revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057.
4. During the Planning Commission hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 the Planning Commission followed the Procedures for Special Permit Revocation Proceeding.
5. In 1996 Appellants filed a site plan review application no. S-96-76 for the Subject Property to permit the construction of a 5,000 square foot warehouse and permitted in-door warehousing and

baling of foam plastics and out-door storage of baled recycled products. On or about July 31, 1996 the Development Director approved Site Plan Review Application S-96-76. S-96-76 permitted in-door storage up to a height of six (6) feet without an automatic fire sprinkler system. Site Plan S-96-76 allowed for outdoor storage of baled recycled products subject to the following location and height restrictions: (1) no storage permitted within three (3) feet of any property line; (2) storage up to a height of six (6) feet was permitted between three (3) feet and ten (10) feet of any property line; (3) storage up to a height of twenty (20) feet was permitted at distances ten (10) feet and greater from any property line. Site Plan S-96-76 required eight (8) parking spaces.

6. After Site Plan Review Application S-96-76, the Subject Property was the subject of the following Code Enforcement actions commencing in 2003:

6.1 The City issued Administrative Citations on May 1, 2003, May 20, 2003, June 10, 2003 and June 26, 2003 for various violations of the Fresno Municipal Code related to the unauthorized relinquishment, reduction, or alteration of the parking area via storage of used materials.

6.2 On April 2, 2004 the City issued a Notice and Order requiring Appellants to correct various violations of the Fresno Municipal Code related to the following: (1) Illegal use of land: consisting of the relinquishment, reduction or alteration of the parking area or parking space, including the driveway, and (2) Illegal use of land: consisting of the relinquishment or reduction of the loading space via storage of polyurethane, scrap, wood, carparts, cardboard and other miscellaneous items.

6.3 On November 5, 2009 the City issued a Notice & Order and Compliance Order Pursuant to FMC 10-418.c requiring Appellants to correct various violations of the Fresno Municipal Code at the Subject Property including: (1) the presence of rubbish or junk (including but not limited to) refuse, cardboard, foam, and miscellaneous items located throughout the property; (2) Failure to submit an application and permit fee for a Solid waste/Recycling Facility Permit; (3) Illegal use of land: consisting of the relinquishment, reduction, or alteration of the parking area or parking spaces, including the driveway as designed on site plan for Subject Property (S-96-76); (4) failure to comply with Conditions of Approval under Site Plan No. S-96-76. After this Notice & Order was upheld by the City's Administrative Hearing Officer. The Appellants filed a lawsuit against the City challenging the Notice & Order and the decision of the Administrative Hearing Officer.

At the revocation hearing, Senior Community Revitalization Specialist Richard Salinas testified that the Appellants never successfully challenged any of the citations or Notices & Orders. Appellants failed to present any evidence to contradict this testimony of Mr. Salinas.

7. As part of the settlement of Appellants' lawsuit arising out of the Notice & Order issued on November 5, 2009, Appellants agreed to apply for a Major Revised Exhibit to Site Plan No. S-96-76 which was given the number S-11-057. On or about October 28, 2011 the Planning and Development Director approved Major Revised Exhibit No. S-11-057. Among other changes, S-11-057 reduced the number of required parking spaces from eight to two, delineated the approved areas for outdoor open storage of sorted and/or baled materials and products and included a new condition for exterior storage that "Maximum storage height shall not exceed the height of the fence."

8. On or about October 24, 2013 the City issued a Notice and Order to the Appellants alleging the following violations:

8.1 Materials stored throughout the property which are not approved under Site Plan No. S-11-057, including but not limited to scrap metal, appliance, bed frames, televisions and other electronic devices.

8.2 Materials stored in unapproved areas including, but not limited to, the driveways and ingress and egress lands, as well as in the required parking stalls; and areas immediately next to the building on the property as well as beyond the height of the fence surrounding the property.

8.3 The unauthorized relinquishment of parking stalls required under the Conditions of Approval under Site Plan Review No. 11-057, by storing various materials in the areas designated for required parking and for accessing the required parking stalls on the Subject Property.

8.4 The landscaping on the property is not being maintained.

8.5 The business owner and property owners have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-11-057, which is in violation of the Fresno Municipal Code, sections 12-411.A&B.

The Notice & Order required that the identified violations be corrected by November 13, 2013. The Appellants did not appeal this Notice & Order and failed to correct the violations set forth in the Notice & Order by November 21, 2013, the date an Inspection & Abatement Warrant was issued by the Fresno Superior Court to allow the City to enter the property to abate the violations that constituted a Public Nuisance.

9. On December 16, 17 and 18 of 2013 the City abated the violations that constituted a Public Nuisance by removing from the Subject Property, materials and other items that the City determined had contributed to the violations set forth in the Notice & Order issued on October 24, 2013. During the revocation hearing the Appellants disputed whether the City properly executed the abatement warrant claiming that the City removed items and materials that the Appellants were permitted to store on the Subject Property.

10. The proposed revocation of the Special Permits is categorically exempt from the requirements of CEQA pursuant to Section 15321 of Title 14 of the California Code of Regulations. Furthermore, none of the exceptions to the use of this exemption set forth in Section 15300.2 of Title 14 of the California Code of Regulations apply to the Planning Commission's action to revoke these Special Permits.

11. Fresno Municipal Code, section 12-405-E grants the DARM Director the authority to revoke special permits and the grounds for revoking them, stating:

REVOCATION OF RIGHTS. The Director may revoke the rights granted by such special permit and the property affected thereby shall be subject to all of the provisions and regulations of this Zoning Ordinance applicable as of the effective date of revocation. Such revocation shall be for good cause including, but not limited to, the failure to comply with conditions or complete construction as required by subsection C, the failure to comply with any condition contained in the special permit, failure to comply with the general sign provisions of Sections 12-1701 through 12-1718 and the Outdoor Advertising provisions of the zone district for which the special permit was granted, or the violation by the owner or tenant of any provision of this Code pertaining to the premises for which such special permit was granted.

12. In the Notice of the revocation of Site Plan and Major Revised Exhibit Nos. S-96-76 and S-11-057 dated February 27, 2013 the DARM Director set forth several grounds for the revocation of Site Plan S-96-76 and Major Revised Exhibit No. S-11-057, any of which, if found true, would in and of itself be sufficient based for the revocation of Site Plan S-96-76 and Major Revised Exhibit S-11-057. These grounds are generally the following:

12.1 The Property Owners and Business Owner have consistently stored unsorted, non-baled and unapproved materials in a disorderly manner throughout the Subject Property in violation of the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057.

12.2 The Property Owners and the Business Owner have consistently relinquished the parking stalls required under the Conditions of Approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057, by storing various materials in the areas designated for required parking, as well in the areas designated for ingress and egress for the Subject Property.

12.3 The Property Owners and Business Owners have failed to maintain the landscaping on the Subject Property.

12.4 The Property Owners and Business Owner have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057.

12.5 The business owner have consistently maintained a public nuisance at the Subject Property by failing to comply with the conditions of approval under S-96-76 and S-11-057, noted above, as well as with the Notice and Order issued October 24, 2013, Items 10.1 through 10.4.

12.6 The Property Owners and Business Owner have maintained a public nuisance at the Subject Property by consistently failing to comply with Conditions of Approval under S-96-76 and S-11-057, to the extent that the City was compelled to conduct a costly and extensive administrative abatement of the Subject Property.

13. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants consistently stored unsorted, non-baled and unapproved materials in a disorderly manner throughout the Subject Property in violation of the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057. This is based upon all of the evidence presented during the revocation hearing, including the following:

13.1 Planning Manager Mike Sanchez testified that S-11-057 required that the materials and products stored outdoors be sorted and/or baled. This testimony was confirmed by a notation on the actual site plan setting forth this requirement.

13.2 Fresno Fire Department Fire Prevention Inspector II, Mark Guardado, authenticated pictures taken of the Subject Property on October 16, 2013 showing large piles of unsorted materials, products and other debris.

13.3 Senior Community Revitalization Specialist Richard Salinas authenticated additional photographs of the Subject Property on various dates showing large piles of unsorted and unbaled materials, products and debris.

13.4 Mr. Salinas stated that when he entered the Subject Property on December 16, 2013 to start to abate the violation of the Fresno Municipal Code, as set forth in the Notice & Order dated October 24, 2013 he observed many items contained in the large unsorted piles that fell within the definition of "solid waste" as that term is defined by California Public Resources Code, section 40191. Mr. Salinas further testified that in order to maintain said items on the Subject Property, the City would have had to issue a Conditional Use Permit for the operation of a Solid Waste Transfer Station. Mr. Salinas stated that the City has not issued a Conditional Use Permit for a Solid Waste Transfer Station to operate at the Subject Property.

13.5 Various owners of property and businesses located near the Subject Property said that for many years they had observed large piles of unsorted materials and products at the Subject Property which were so unsightly that they caused prospective tenants to choose not to occupy buildings in the vicinity of the Subject Property.

The Commission was not persuaded by the evidence and arguments made by the Appellants attorney to the effect that because the term "sorted" was not defined in the Fresno Municipal Code it was vague and ambiguous and could not serve as the basis for the City to find that the Appellants violated S-11-057. The Commission has concluded that the large piles of material, product or debris depicted in

the photographs presented to the Commission could not reasonably be categorized as "sorted" based upon any reasonable interpretation of the meaning of that term.

14. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants consistently relinquished the parking stalls required under the Conditions of Approval under Site Plan No. S-96-76 and Major Revised Exhibit No. 11-057, by storing various materials in the areas designated for required parking, as well in the areas designated for ingress and egress for the Subject Property. This is based upon all of the evidence presented during the revocation hearing including the following:

14.1 Planning Manager Mike Sanchez testified that S-96-76 required eight (8) parking spaces on the Subject Property and that S-11-057 reduced the number to two (2) parking spaces. Mr. Sanchez further testified as to the limitations on the placement and height of outdoor storage of materials and products. He testified that both S-96-76 and S-11-057 stated that no storage was permitted within three feet of the property line; storage was permitted up to a height of six (6) feet between three (3) feet and ten (10) feet of the property line and that storage was permitted up to a height of twenty (20) feet if located more than ten (10) feet from the property line. However, Mr. Sanchez also testified that S-11-057 contained an additional condition that required all outdoor storage regardless of its location on the Subject Property to not exceed the height of the fence. Mr. Sanchez testified that the height of a standard fence is six (6) feet. As such, outdoor storage would not be permitted to exceed that height unless the Appellants applied for and were granted a variance for an over-height fence. If such a variance were granted, the maximum storage height would be the height of the approved over-height fence.

14.2 Fresno Fire Department Captain Reginald Zellous testified that on November 2, 2012 he was conducting a routine inspection of a fire hydrant located to the north of the Subject Property. While conducting this inspection he observed that foam rubber and carpet padding were being stored on the Subject Property in large piles that exceeded the height of the fence. He stated that the manner in which this material was being stored was blocking the ingress/egress into the Subject Property which would not permit the Fire Department to safely enter the subject property to fight a fire should these materials catch fire. He stated that if the materials, as stored at that time, were to catch fire it would result in what he described as a "catastrophic" event that would significantly and detrimentally effect air quality in the vicinity of the fire. Captain Zellous stated that upon observing this condition he contacted the City's Code Enforcement Division to report it.

14.3 Fresno Fire Department Fire Prevention Inspector II Mark Guardado testified that on October 16, 2013 he visited the property and took pictures which he showed to the Commission of material, product and debris up against the fences and building located on the Subject Property, in clear violation of S-11-057 requirement to maintain a five (5) foot clearance from

the building and a three (3) foot clearance from the fence to allow access for fire fighting personnel. The photographs he presented to the Commission also showed that the piles of material, product and debris clearly exceeded the height of the fence.

14.4 Senior Community Revitalization Specialist Richard Salinas testified and showed the Commission numerous photographs taken at various times after the City approved S-11-057 showing that the outdoor storage of the material, product and debris on the Subject Property failed to comply with the clearance and height requirements set forth in S-11-057 and S-96-76 and continued to fill the two (2) required parking spaces.

14.5 Various owners of property and businesses located near the Subject Property stated that for many years they had observed large piles of unsorted materials and products at the Subject Property which were placed up against the fence and the building.

The Appellants presented still shots of video taken of the Subject Property before and during the City's abatement of the Subject Property that commenced on December 16, 2013. The Appellants contended that these still shots demonstrated that at the time of the City's abatement, the Appellants were in compliance with the outdoor storage clearance and height requirements set forth in S-11-057 and S-96-76. The Commission is not persuaded that these still shots support that the Appellants were in compliance with the outdoor storage clear and height requirements of S-11-057 and S-96-76 as the piles still appeared to exceed the height of the fence and the piles also continued to block the ingress/egress required by the site plans.

15. The Commission finds that the weight of the evidence and substantial evidence does not support the DARM Director's statement that the Appellants consistently failed to maintain the landscaping on the Subject Property. The evidence consisted of a photograph showing what appeared to be a dead tree and testimony from Mr. Salinas that there was no water service to the Subject Property to water the landscaping. However, the Appellants presented testimony from Mr. Paul Saito that the Appellants had planted the oleander bushes required by S-11-057 and testimony from Appellants son Greg Occhionero that he had found an alternative means to water the landscaping, that the oleander bushes were still alive and growing and that he was aware of only one small tree that might be dead. The City failed to provide additional evidence to rebut the testimony of Mr. Saito and Mr. Occhionero.

16. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057 pursuant to Fresno Municipal Code, sections 12-411A&B and 10-604.j&l as these code sections state that a violation of condition of approval of a special permit is a violation of the City's zoning ordinance and that a violation of the City's Zoning Ordinance is per se a public nuisance. As set forth in paragraphs 6, 8, 13 and 14, the weight of the evidence and substantial evidence support the

Planning Commission Resolution No.
Revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57
May 21, 2014
Page 9

determination that the Appellants have routinely violated various conditions of approval set forth in S-11-057 and S-96-76.

Based upon the foregoing and all of the evidence set forth in the record of proceedings for the revocation hearing, the Commission finds that the weight of the evidence and substantial evidence provide good cause for the revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-057, and hereby revokes Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-057.

The foregoing Resolution was adopted by the Fresno City Planning Commission upon a motion by Commissioner Holt, and seconded by Commissioner Medina.

VOTING :	Ayes-	Holt, Medina, Hansen-Smith, Vasquez
	Noes-	None
	Not Voting-	Reed
	Absent-	None

DATED: May 21, 2014

Planning Commission Secretary


Arnoldo Rodriguez, AICP

EXHIBIT 2

FILED

SEP 03 2015

FRESNO COUNTY SUPERIOR COURT

By _____ DEPT. 502

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
B.F. SISK COURTHOUSE, CIVIL DIVISION

CITY OF FRESNO, et al.,

Plaintiffs,

vs.

MICHAEL OCCHIONERO, et al.,

Defendants.

Case No. 15CECG01908

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION AND
PRELIMINARY INJUNCTION

I.

INTRODUCTION

Plaintiffs allege claims for: 1) statutory violations of the Fresno Municipal Code; 2) public nuisance; and 3) Declaratory Relief. The claims arise out of defendants' use of real property located at 2680 N. Miami Ave., Fresno, California ("Property") allegedly in violation of City zoning laws and the City fire code. Pending trial on that complaint, plaintiffs herein seek a preliminary injunction.

II.

SUMMARY OF FACTS

Defendants have been operating their business on the Property since 1996. The Property is owned by defendants, Vincenza and Greg Occhionero, and the business is operated by their son, defendant, Michael Occhionero. In 1996 defendants obtained a permit and Site Plan authorizing the use of the 5,000 square foot facility for storing and baling foam plastics, along with limited outside storage for baled recycled products. The Site Plan was later modified in 2011 for a reduction in the required parking area and allowing for additional outside storage of sorted or baled materials. Under this Site Plan, the owners were required to maintain the Property in a manner consistent with the conditions of approval as outlined in their approved "Site Plan" numbered S-96-76 and S-11-057 and applicable codes.

Since 2003, the Property has been the subject of significant Code Enforcement Activity. The City has issued many corrective notices and citations related to the Property. On March 13, 2003 it issued a notice of violation. There were four administrative citations. On April 2, 2004 the City issued a correction notice and order. On November 5, 2009 it issued a correction notice and compliance order and on October 24, 2013 it issued a correction notice and order.

Moreover, defendants have refused to allow City inspectors on the Property and have been recalcitrant in correcting issues raised by the City. On several occasions the City has been required to pursue inspection and abatement warrants.

In late 2012 and into 2013, the City's Fire Department and Code Enforcement identified further hazards and violations on the Property and, as a result, the City issued a Correction Notice and Order on October 24, 2013 which identified several violations of defendants' site plan and City codes (1) there were materials stored throughout the Property which were not approved under Site Plan No. S-11-057, including scrap metal, appliances, bed frames, televisions and other electronic devices; (2) there were materials stored in unapproved areas in

1 violation of the Site Plan and the Municipal Code, including the driveways, ingress and egress
2 lanes, parking stalls and areas immediately next to the building on the Property and above the
3 height of the fence surrounding the Property; (3) unauthorized relinquishment of parking stalls
4 required under the Site Plan by storing materials in areas designated for parking and for
5 accessing parking; (4) the landscaping on the Property was not being maintained; (5) defendants
6 maintained a public nuisance on the Property by failing to comply with the conditions of
7 approval under the Site Plan, a violation of the Fresno Municipal Code.

8 The Correction Notice and Order required the identified violations be corrected by
9 November 13, 2013 and advised defendants as follows:

10 It is very important that you clean-up, remove, repair, or cease unlawful
11 use of said property within the specified time period. Failure to correct the
12 violations within the time frame provided will result in further action by the City,
13 including citations, administrative fees, abatement by the City, and/or legal action.
14 If further action is required, you will be held responsible for the City's costs to
15 enforce the code and/or abate the violations.

16 Defendants did not appeal the Notice and Order and also failed to correct the violations
17 by November 13, 2013. As a result, on November 23, 2013, the City sought and obtained an
18 abatement warrant from the Superior Court pursuant to Code of Civil Procedure Section
19 1822.50, et seq. On December 16 through 18, 2013, the City abated the violations by removing
20 materials and other items from the Property that the City determined had contributed to the
21 violations mentioned in the Notice and Order issued on October 24, 2013.

22 On February 27, 2014, the City issued an Order and Notice of Permit Revocation relating
23 to the Property owners' Site Plan and modification thereof. In part, the Order states:

24 NOTICE IS HEREBY GIVEN TO ALL INTERESTED PERSONS that the
25 Director of the City of Fresno Development and Resource Management

1 Department, pursuant to the authority vested in her by the City of Fresno City
2 Charter and Municipal Code, has determined it necessary to protect the public
3 health, safety and welfare to revoke all privileges granted under the above-
4 referenced permits. The revocation shall take effect April 2, 2014, which is not
5 less than thirty (30) days following the posting of and service of this notice as
6 provided for under Section 12-405.E of the Municipal Code.

7 THE CAUSE OF THIS ORDER is the permit holder's failure to comply with the
8 conditions of approval imposed by the decisions granting Site Plan S-96-76 and
9 Major Revised Exhibit S-11-057 relating to 2680 N. Miami Avenue, Fresno, CA
10 93727; and other grounds, all as explained in the Director's letter dated February
11 27, 2014, revoking the Site Plan S-96-76 as well as Major Revised Exhibit S-11-
12 057.

13 The owners of the Property, Vincenza and Greg Occhionero, appealed the Notice of
14 Revocation to the City Planning Commission and on April 2 and 16, 2014 the Planning
15 Commission held a hearing on the appeal. Ultimately, on May 21, 2014, the Planning
16 Commission upheld the revocation of defendants' Site Plan/Special Permit.

17 After the Commission's decision, defendants filed a Petition for Writ of Mandamus,
18 challenging that decision. This matter was briefed, argued, and submitted to Judge Carlos
19 Cabrera in on April 17, 2015. Defendants never sought a stay under Code of Civil Procedure
20 Section 1094.5(g). At several hearings pertaining to the writs, the City's counsel advised counsel
21 for the defendants that his clients' continuing to engage in the same activities in the same manner
22 on the property would likely result in the instant civil action, in which injunctive relief would be
23 sought based on such activities.

24 Judge Cabrera found no violation of due process based on defendants' claims that they
25 had no advance notice of the evidence the City intended to present to the Commission. The

1 Judge also found no violation of due process based on time restrictions set out at the hearing. The
2 Judge found the Commission had not predetermined its decision and no violation of due process
3 because the Commission pursued revocation of the site plan while a valid appeal was pending
4 concerning defendants' contest of the underlying allegations of Code violations. Finally, Judge
5 Cabrera found that substantial evidence supported the revocation if defendants' permit.

6 Applying the independent judgment standard of review, Judge Cabrera found that the six
7 reasons stated for revocation were established: defendants consistently stored unsorted, non-
8 baled and unapproved materials in a disorderly manner throughout the property; they
9 consistently relinquished the required parking stalls as well as areas designated for
10 ingress/egress; they failed to maintain the required landscaping; and they maintained a public
11 nuisance on the property by failing to comply with the October 24, 2013 Notice/Order. The
12 Judge agreed with the Commission that "the piles of product depicted in the photographs could
13 not reasonably be categorized as 'sorted' under any reasonable definition or interpretation."
14 Finally, he found that even if the Commission erred with regard to there being a violation as to
15 the height of the materials stored the error was *de minimis* given the fact the other violations
16 "amply support revocation of the site plan."

17 Despite the fact that their permit has been revoked and that the revocation has been
18 upheld by a Superior Court Judge, the Property owners have continued to use the Property for
19 their business, continue to bring materials onto the property and continue to violate Fresno
20 Municipal and Fire Codes. In fact, the condition of the Property has become worse, not better,
21 since the permit revocation.

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III.

DISCUSSION

A. Preliminary Injunction Standard.

The parties agree that to obtain a preliminary injunction, plaintiffs must establish: (1) a reasonable probability of prevailing on the merits; and (2) that the harm to plaintiff resulting from a refusal to grant preliminary injunction outweighs the harm to the defendant from imposing the injunction. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; see also Code Civ. Proc. Sections 526 and 731.) Where a governmental entity establishes there has been a violation of a statute or ordinance, and establishes a reasonable probability it will prevail on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to defendant. (*Id.* at p. 72.) At that point, defendant must show that it would suffer grave and irreparable harm if the preliminary injunction were issued. If that is done, then the court must balance the actual relative harm to the parties. (*Id.*) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*Id.* at p. 73.)

B. Likelihood of Success.

1. Public Nuisance.

a. Nuisance Per Se.

Plaintiffs argue they has demonstrated a probability of prevailing under the required "reasonable" standard because defendants' activities constitute a nuisance *per se*.

A City or State legislature has the power to declare certain uses of property a nuisance. (Gov. Code Section 38771—"By ordinance the city legislative body may declare what

1 constitutes a nuisance.") A legislatively declared nuisance constitutes a nuisance *per se*. (*Beck*
2 *Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1207;
3 *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163-1164.) Once a violation of a
4 local law is declared to be a public nuisance, no proof of actual harmful effect is necessary. (*Id.*
5 *See also McClatchy v. Laguna Lands, Limited* (1917) 32 Cal.App. 718, 725—"Nuisances *per se*
6 are so regarded because no proof is required, beyond the actual fact of their existence, to
7 establish the nuisance. No ill effects need be proved.") Where a legislature has defined a
8 condition or activity as a nuisance, "it would be a usurpation of the legislative power for a court
9 to arbitrarily deny enforcement merely because in its independent judgment the danger caused by
10 a violation was not significant." (*Fallen Leaf Protection Assn. v. State of California* (1975) 46
11 Cal.App.3d 816, 826.)

12 Plaintiffs have presented evidence of a violation declared to be a public nuisance under
13 Fresno Municipal Code Section 10-605, pursuant to which a public nuisance exists when there
14 is: 1) a violation of the Fire Code; 2) a violation of a zoning ordinance; or 3) a violation of the
15 Fresno Municipal Code declaring a violation amounts to a public nuisance. Fresno Municipal
16 Code Section 12-411(B) states that any building or structure that is, *inter alia*, maintained
17 contrary to the Fresno Municipal Code, and any use of land, building or premises contrary to the
18 provisions of the Zoning Ordinance, and any violation of any condition of any permit issued by
19 the City, including a condition of approval or a covenant entered into as a condition of the
20 permit, shall be declared unlawful and a public nuisance, and the matter may be abated or
21 corrected by, *inter alia*, administrative citation.

22 Here, the complaint alleges multiple violations of the zoning ordinance, Fire Code, and
23 Fresno Municipal Code, including using the Property for a non-permitted use for M-1 zoning,
24 namely using the property for storage and recycling without proper approval, permits or site
25 plan, and improper storage of combustible materials and not allowing sufficient ingress and

1 egress to the property, in violation of the Fire Code. These violations clearly constitute a
2 nuisance *per se* under Fresno Municipal Code Section 10-605.

3 Defendants argue that plaintiffs did not prove that the Property was not used as allowed
4 for an M-1 zone, since they are not a recycling business, so they were never required to get a
5 permit to be a recycler, and they had permission to bring the "combustible materials," i.e., the
6 foam rubber/polyurethane foam) onto the Property. However, the court finds defendants went
7 well beyond the permit's authorization with regard to the manner of storing this property which
8 did and does constitute a danger. The court thus finds plaintiffs have shown a probability of
9 success on their claim that defendants' use of the Property constitutes a nuisance *per se*.

10
11 b. Public Nuisance.
12

13 Plaintiffs argue that even if the court does not find a nuisance *per se*, the evidence
14 supports finding the existence of a public nuisance. A "nuisance" includes "anything injurious to
15 health, including...an obstruction to the free use of property, so as to interfere with the
16 comfortable enjoyment of life or property." (Civ. Code § 3479.) A public nuisance is anything
17 "which affects at the same time an entire community or neighborhood, or any considerable
18 number of persons, although the extent of the annoyance or damage inflicted upon individuals
19 may be unequal." (Civ. Code § 3480.) Remedies against nuisance include injunctive relief. (Civ.
20 Code § 3491; Code Civ. Proc. § 731—authorizing a civil action by, *inter alia*, a City, in the
21 name of the People of the State of California, to abate a public nuisance.)

22 The City has the power to protect its citizens from improper land use and fire hazards,
23 and authority to enact and enforce ordinances regarding land use, permits, and nuisance
24 abatement. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1181; *City of Costa Mesa v.*
25 *Soffer* (1992) 11 Cal.App.4th 378, 385; *Golden Gate Water Ski Club v. County of Contra Costa*
(2008) 165 Cal.App.4th 249, 255—zoning violations constitute public nuisance; *City of Los*

1 *Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1017—fire hazard constitutes
2 public nuisance under Civ. Code §§ 3479 and 3480.)

3 The photographs and declarations plaintiffs have presented amply demonstrate that the
4 current conditions are untenable. The property violates several statutes and amounts to a public
5 nuisance. Further, plaintiff has established that the conditions on the property have become
6 increasingly worse over the last year.

7 Defendants do not address the issue of whether or not there is a nuisance, other than
8 attempting to argue they have not gone beyond their permit, or violated any Code. They attempt
9 to argue that the rebuttable presumption as stated in *IT Corp. v. County of Imperial, supra*,
10 should not arise because in that case the court said it only arose because the statute that was
11 violated specifically provided for injunctive relief, and Fresno Municipal Code Section 12-
12 411(B) does not do so. However, that is not accurate: Section 12-411(B) provides that if there is
13 a violation constituting a public nuisance it "may be abated or corrected by...court process..."
14 which certainly includes injunctive relief. Moreover, there are numerous other provisions of the
15 Fresno Municipal Code and the Civil Code that contemplate court intervention to pursue an
16 injunction. (See Civ. Code Sections 3490-3494; FMC Sections 1-301; 1-304(f); 10-615; 12-
17 411(B).)

18
19 2. Violation Of The Fresno Municipal Code.
20

21 As has been mentioned above, the evidence establishes, and the court finds, plaintiffs
22 have established a probability of success on their claim that defendants are in violation of several
23 sections of the Fresno Municipal Code.
24
25

1 3. Declaratory Relief.

2
3 The court finds plaintiffs are likely to establish that the Fresno Municipal Code and Fire
4 Code sections are controlling and apply to defendants' property. Persons owning property are
5 charged with knowledge of the relevant statutes affecting the use, control, or disposition of that
6 property. (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1193.)
7 Ignorance of the law is no excuse. (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th
8 1481, 1506; *Brumagim v. Tillinghast* (1861) 18 Cal. 265, 271—"Every man...must be taken to
9 be cognizant of the law; otherwise, there is no saying to what extent the excuse of ignorance
10 might be carried. It would be urged in almost every case.")

11
12 C. Balance of Hardships.

13
14 *IT Corp. v. County of Imperial, supra*, provides that where a governmental entity
15 establishes there has been a violation of a statute or ordinance, and that statute provides for
16 injunctive relief, and the governmental entity establishes a reasonable probability it will prevail
17 on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to
18 defendant. (*Id.* at p. 72.) Plaintiffs have established that the rebuttable presumption applies here.
19 Thus, it is defendants' burden to show that they would suffer grave and irreparable harm if the
20 preliminary injunction were issued. Only if they succeed in doing this does the court perform a
21 balance of the actual relative harm to the parties, with the ultimate goal being to minimize the
22 harm an erroneous interim decision might cause. (*Id.* at p. 72-73.)

23 Defendants attempt to show grave and irreparable harm through the declaration of Mr.
24 Occhionero, who states that this is his only job and if injunction is granted he will not have any
25 other source of income. However, this does not establish grave and irreparable harm: Mr.
Occhionero's income was interrupted by virtue of losing the business permit and being told to

1 cease and desist operations. Defendants have not shown they cannot use the Property for
2 something else; they may also seek a new entitlement from the City to operate the same business,
3 under a new site plan and any necessary permits the City dictates are necessary.

4 Defendants also refer to the alleged wrongs perpetrated on them at the Commission
5 hearing, and insist that because this matter is being appealed "and will continue to be appealed"
6 and has not yet been finally ruled upon, an injunction should not issue. However, defendants
7 have never sought a stay of the revocation of their Site Plan under Code of Civil Procedure
8 Section 1094.5, subdivision (g). It is thus undisputed that they have no operating permit for their
9 business and they are operating illegally.

10 Thus, even were the court to engage in a balancing of the harms, the balance tips strongly
11 in plaintiffs' favor. "The police power is one of the most essential powers of government and
12 one that is least limitable." (*Fallen Leaf Protection Assn. v. State of California*, *supra*, 46
13 Cal.App.3d at p. 825.) Zoning law seek to promote public health, safety and welfare by confining
14 certain classes of buildings and uses to defined locations. Such laws address issues such as undue
15 concentration of population; overcrowding of land or buildings; establishing residential districts
16 to promote the public welfare; protection of property values; advancement of the attractiveness
17 of the City; establishing trade and industrial districts; securing safety from fire, panic and other
18 dangers; promoting public sanitation; exclusion of dangerous, offensive, and unwholesome
19 trades and industries from certain districts; protection of adequate light and air; lessening
20 congestion in the streets, and reduction of traffic hazards. (*City of Los Angeles v. Silver* (1979)
21 98 Cal.App.3d 745, 749-50.) Moreover, protecting the public from fires is a primary function of
22 a municipal government.

23 The City argues that it suffers significant injury from defendants' blatantly ignoring of
24 the City's zoning ordinances and Fire Code, and their apparently intentional refusal to apply for
25 the necessary permits. This prevents the City from fulfilling its duty to enforce its codes, and also

1 sends the wrong message to other citizens regarding the importance of complying with zoning
2 laws, and about the City's lack of commitment to protect other citizen's property and businesses,
3 and about laws being equally enforced. The court agrees.
4

5 IV.

6 DISPOSITION
7

8 The court grants plaintiffs' motion for a preliminary injunction. Plaintiffs have suggested
9 several proposed injunctions. Given the undisputed fact that defendants are operating their
10 business illegally, and have blatantly and intentionally refused to comply with the law, the court
11 opts for the first option proposed by plaintiffs. Therefore, during the pendency of this action, or
12 until further order of the court, defendants, as well as their agents, servants, and employees, are
13 enjoined and restrained from operating any storage and recycling facility on the Property without
14 obtaining the requisite approval, permits and site plan for an M-1 property.
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18 Dated: 9-9-15
19

20 
Donald S. Black
Judge of the Superior Court
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SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-1900		FOR COURT USE ONLY
TITLE OF CASE: City of Fresno vs Michael Occhlonero		
CLERK'S CERTIFICATE OF MAILING		CASE NUMBER: 15CECG01908

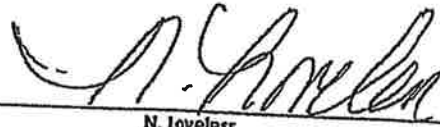
I certify that I am not a party to this cause and that a true copy of the Order Granting Motion For Preliminary Injunction and Preliminary Injunction was placed in a sealed envelope and:

- ☐ Deposited with the United States Postal Service, mailed first class, postage fully prepaid, addressed as shown below.
- ☒ Placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002 on:

Date: September 9, 2015

Clerk, by



N. Loveless

Deputy

Joseph Rubin
 907 Santa Fe Ave, Ste 201
 Fresno, Ca. 93721

Brian Leighton
 701 Pollasky Ave.
 Clovis, Ca. 93612

☐ Clerk's Certificate of Mailing Additional Address Page Attached

EXHIBIT 3

FILED

MAY 03 2016

FRESNO COUNTY SUPERIOR COURT
By _____ DEPT. 502

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ORDER ON OSC RE: CONTEMPT

I.

INTRODUCTION

Plaintiffs allege claims for: 1) statutory violations of the Fresno Municipal Code; 2) public nuisance; and 3) Declaratory Relief. The claims arise out of defendants' use of real property located at 2680 N. Miami Ave., Fresno, California ("Property") allegedly in violation of City zoning laws and the City fire code. Plaintiffs claim defendants have illegally operated a recycling and storage facility in violation of the City's ordinance and that the operation of defendant recycling facility constitutes a public nuisance.

SCANNED



1 On plaintiffs' application, the court issued a preliminary injunction on September 9,
2 2015. Plaintiffs now claim defendants are in violation of the court's order because they have not
3 removed all of the material from their property and have continued to operate their business and
4 seek an order adjudicating defendants in contempt.

5
6 II.

7 SUMMARY OF FACTS
8

9 Defendants have been operating their business on the Property since 1996. The Property
10 is owned by defendants, Vincenzo and Greg Occhionero, and the business is operated by their
11 son, defendant, Michael Occhionero. In 1996 defendants obtained a permit and Site Plan
12 authorizing the use of the 5,000 square foot facility for storing and baling foam plastics, along
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23 Despite the fact that their permit has been revoked and that the revocation has been
24 upheld by a Superior Court Judge, the Property owners have continued to use the Property for
25 their business, continue to bring materials onto the property and continue to violate Fresno

1 Municipal and Fire Codes. In fact, the condition of the Property has become worse, not better,
2 since the permit revocation.

3 On September 9, 2015, after application by plaintiffs, the court issued an order granting a
4 preliminary injunction against defendants. The preliminary injunction: (1) precluded defendants
5 from operating their storage and recycling facility without obtaining the requisite approval,
6 permits and site plan for an M-1 property; and (2) required that defendants abate, dispose and/or
7 remove the materials on the property.

8 Plaintiffs now move for issuance of an order of contempt against defendants because, it
9 claims, they have failed to immediately remove materials from the property and have continued
10 to operate their storage and recycling facility.

11 III.

12 DISCUSSION

13 The power to punish for contempt or to use the contempt powers to obtain compliance
14 with a court order is conferred by statute. (Code Civ. Proc. § 1218.) "Disobedience of any
15 lawful judgment, order, or process of the court" constitutes contempt. (Code Civ. Proc. § 1209,
16 subd. (a)(5).)

17 The substantive issues involved in a contempt proceeding are (1) the rendition of a valid
18 order, (2) actual knowledge of the order, (3) ability to comply, and (4) willful disobedience.
19 (*Conn v. Superior Court* (1987) 196 Cal. App. 3d 774, 784.) Because a contempt proceeding is
20 criminal in nature, guilt must be established beyond a reasonable doubt. (*In re Witherspoon*
21 (1984) 162 Cal. App. 3d 1000, 100.)

22 Here, there appears to be no question about elements 1 and 2, as defendants concede the
23 existence of a valid order and actual knowledge thereof. However, defendants contend they have
24 not willfully violated the court's order because though they admit they can eventually comply
25

1 with the order, they do not have the ability to immediately comply with it. Moreover, defendants
2 contend they have been removing material from their property as fast as reasonably possible
3 under the circumstances and that plaintiff has not shown that they had the ability, financial or
4 otherwise, to remove all of the material from their property.

5 The evidence showed, and the court finds, that defendants have removed a substantial
6 amount of material from their property. However, the court also finds that the pace of material
7 removal has been slowed because rather than simply remove the property, as the court ordered,
8 defendants have been selling it. Given the evidence presented through the deposition of Greg
9 Occhionero about the financial standing of defendants generally and Greg Occhionero in
10 particular, it does not appear to the court that it is necessary for defendants to sell the material in
11 order for them to have the ability to remove it. Rather, it appears to the court that if defendants
12 truly wanted to comply with the court's order, they would simply pay to have the material
13 removed. This they have not done. The court therefore finds that defendants have had the
14 ability to comply with the court's order and, because they have insisted on selling the material
15 rather than simply having it removed, they have willfully disobeyed the court's order.

16 The court's order also precluded defendants from operating their storage and recycling
17 facility without obtaining the requisite approval, permits and site plan for an M-1 property.
18 Plaintiff proved beyond a reasonable doubt that defendants have disobeyed this portion of the
19 court's order because defendants have continued to sell material. There is no question about
20 defendant's ability to comply with this portion of the court's order. The court finds that
21 defendants' failure to immediately stop selling material when the preliminary injunction was
22 issued constitutes a violation of the court's order.

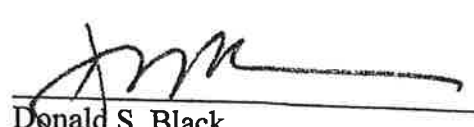
1
2
3
4 IV.

5 DISPOSITION
6
7

8 The court finds beyond a reasonable doubt that: (1) a valid court order was issued; (2)
9 defendants had actual knowledge of the order; (3) defendants had the ability to comply with the
10 order; and (4) defendants have willfully disobeyed the order. The court adjudicates defendants,
11 and each of them, in contempt of court. The court imposes a \$1,000 fine against defendants,
12 payment of which is stayed on the condition that defendants proceed forthwith to immediately
13 remove all remaining material from the property and, specifically, that defendants comply with
14 the following timetable for removal of the remainder of the material.

15 During the hearing it was represented by defendants' counsel that that all of the outside
16 material could be removed within 90 days and that all of the inside material could be removed
17 within 45 days. The court therefore orders defendants to remove all of the outside material by
18 not later than August 1, 2016. The court sets a status conference for August 10, 2016 at 3:30 in
19 Dept. 502 at which defendants are ordered to appear and satisfy the court that they have removed
20 all outside material from the property. The court also orders defendants to remove all inside
21 material by not later than September 15, 2016 and sets a status hearing for September 21, 2016 at
22 3:30 p.m. in Dept. 502 at which defendants are ordered to appear and satisfy the court they have
23 removed all inside material from the property. Finally, the court orders defendants to file a
24 written declarations one week before each of these hearings attesting to their compliance with
25 this order and providing evidentiary facts supporting their compliance.

26 Dated: 5-3-16


Donald S. Black
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000		FOR COURT USE ONLY
TITLE OF CASE: The People of the State of California vs. Michael Occhionero		
CLERK'S CERTIFICATE OF MAILING		CASE NUMBER: 15CECG01908

I certify that I am not a party to this cause and that a true copy of the:

Order On OSC Re: Contempt

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: **Fresno, California 93724-0002**

On Date: **05/04/2016**

Clerk, by _____

N. Loveless

N. Loveless

Deputy

Joseph D. Rubin
 Betts & Rubin
 907 Santa Fe Ave. Ste 201
 Fresno, CA 93721

Brian C. Leighton
 701 Pollasky Avenue
 Clovis, CA 93612

SCANNED



☐ Clerk's Certificate of Mailing Additional Address Page Attached

EXHIBIT 4



2600 Fresno Street - Third Floor
Fresno, California 93721-3604
(559) 621-8277 FAX (559) 498-1026

Development and Resource Management Department
Jennifer K. Clark, AICP, Director

ZONE CLEARANCE

- ☐ Continuation of a previously approved business / use
☒ Establishment of a business / by-right use, no associated physical development

Business Name: None yet determined

Business Address: 2680 N. Miami Ave. Fresno CA. 93727

Owner / Manager Name (please print) Gregory Dechiero

Business Phone #: 559-930-7775 Owner/Manager Cell # 559-930-7775

Description of Business (General location and/or type of property where business activity is being conducted; the number of employees; and the hours and weekdays of business activity):

Zoned I.L (Light Industrial) Per Table 15-302; Inside
Warehousing and storage and outside storage. Monday through
Saturday; daylight hours only. No employees and not opened
to the public. No physical modifications to the site are intended.

As the owner / manager of this business, I acknowledge the following: this clearance only verifies that the zoning of this property allows the business described above; any physical modifications to the site, including interior or exterior changes to the building, may require additional permits or approvals; Health Department approvals may be required; and business must apply for a City tax certificate and pay taxes to legally operate in the City of Fresno.

Gregory Dechiero

Signature of Owner / Manager

Mailing address: 757 LAVERNE LAVERNE, CA 93611

July 21, 2016

Date

BOXES BELOW ARE FOR CITY STAFF TO COMPLETE

Zone District: <u>1L</u>	Planning has verified that this use is allowed by right and does not require a change of occupancy group. Use category from Table 15-1__02: _____	
DARM Zoning Clearance APPROVED BY <u>[Signature]</u> 7-21-16 ZONE CLEARANCE STAMP WITH PLANNER'S INITIALS	☐ It is not a special use listed in Chapter 15, Article 27 ☐ It is a use listed in Chapter 15, Article 27 but there are no physical changes needed to the property, and the applicant has been advised of Article 27 requirements.	
Business Tax Staff Initials <u>KJ</u>	Tax Account/Certificate No. <u>430038</u>	
Verification that copy has been e-archived	PZ No <u>6-00601223</u>	Fee \$ <u>20</u>

CITY OF FRESNO
*** CUSTOMER RECEIPT ***
Oper: FRESRLM2 Type: DV Drawer: 1
Date: 7/21/16 01 Receipt no: 96034

Year Number Amount
2016 101228
PZ PLANNING & ZONING \$20.00

Tender detail
CA CASH \$20.00
Total tendered \$20.00
Total payment \$20.00

Trans date: 7/21/16 Time: 11:25:42

Jul 21, 2016 11:22:42 AM PDT
File Edit View Commands Help
SUNGARD PUBLIC SECTOR
NavLine

Payment Due Selection

Project number: 16 00101228
Project description: ZC GREGORY OCCHIONERO
Project type: ZONE CLEARANCE

Select	Amount To Apply	Balance Due	Fee Description	Transaction Amount
☒	20.00	20.00	SPECIAL CONSULTING SERVICE	20.00

20.00

☒ OK
☐ Exit
☐ Cancel
Select all fees

EXHIBIT 5

Brian C. Leighton, CA BAR #090907
LAW OFFICES OF BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612
Office: (559) 297-6190
Facsimile: (559) 297-6194
email: brian@lawleighton.com
& kim@lawleighton.com

Attorney for Defendants MICHAEL OCCHIONERO,
VINCENZA OCCHIONERO and GREG OCCHIONERO

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION - UNLIMITED CIVIL

CITY OF FRESNO, PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiffs,

v.

MICHAEL OCCHIONERO, VINCENZA
OCCHIONERO and GREG OCCHIONERO,
and DOES 1-10,

Defendants.

CASE NO. 15CECG01908

**DECLARATION OF GREG
OCCHIONERO IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
THE PLAINTIFFS' MOTION FOR
A PRELIMINARY INJUNCTION**

DATE: August 20, 2015

TIME: 8:30 a.m.

CTRM: 502

**Assigned for All Purposes to:
Hon. Donald S. Black, Dept. 502
Action Filed: June 18, 2015**

I, Greg Occhionero, declare as follows:

1. I am the son of Vincenza Occhionero and Michael Occhionero, who are also named Defendants herein, and my parents are in their 80s. My parents own the subject property at 2680 N. Miami Avenue, Fresno, California 93727 and have owned it since approximately 1995.

2. I am the one that is in charge of operating the property at that location. When the site plan (S-96-76) was approved by the City in 1996 (a true and correct of which is attached hereto and marked Exhibit "1"), the pertinent City Officials were made aware of the use of the property which is for the temporary collection and storage of materials for brief periods of time for foam rubber products,

1 cardboard, plastics, glass, metal, CRVs and related materials. Salinas admits that the outside storage
2 was permitted up to 20 feet height if 10 or more feet from the property line. (See Exhibit H to the
3 Salinas Decl., at p. 2, of his declaration in support his abatement warrant.) The City approved the
4 property for said use, and approved the property and that business for the M-1 light industrial use. At
5 no time was I told that I needed a conditional use permit because the City Officials told me that my use
6 of the property was already appropriate in the M-1 Zone.

7 3. What I did was that I found out that numerous items that could be recycled were
8 otherwise going to the landfill and I could pick that product up, take it to my facility, later sort it out into
9 foam, rubber products, cardboard, plastics, glass, metal and other materials because I had already lined
10 up buyers of that material to remove it from the premises and then pay me. The buyers would remove
11 it from the premises and then they would take it to their facilities mostly outside the County of Fresno
12 and then recycle the material themselves. Our business was not open to the public and there is basically
13 one person operating it, myself, even though my elderly father would come by and attempt to help.

14 4. Often times, the person who were suppose to pick up the product from me and take it
15 away got backed up on their end and so pick ups were delayed and the material kept stacking up.

16 5. Thereafter, Code Enforcement, primarily Richard Salinas, would come by and write us
17 up for alleged code violations and violations of the site plan. Several of those notices are attached to
18 the Salinas Declaration. But so many of the allegations were so general in nature it was difficult to
19 determine what he was claiming was not permitted outside of the revised site plan and operational plan.
20 Despite Salinas' claims to the contrary, on numerous occasions I, or one of my attorneys (I have had
21 attorneys representing me and my parents since 2003), would attempt to seek a clarification of said
22 notices or to schedule an inspection but most of the time the City Officials failed to respond to our
23 questions, or be reasonable regarding dates and times for inspections.

24 6. In approximately November/December 2003 the City sought and received an inspection
25 and abatement warrant from the Fresno County Superior Court, executed said warrant in December of
26 2003 and removed a substantial amount the material from out property. The City then attempted to
27 collect a substantial amount of money from us. The Hearing Officer agreed, but also held that the there
28 was no showing by the City of any imminent danger; and the Fresno County Superior Court on

1 November 12, 2004, granted our petition for writ of mandamus and held the City could not collect the
2 money because it did not comply with the Municipal Code. A true and correct copy of said order is
3 attached hereto and marked Exhibit "2."

4 7. It became apparent to me that Richard Salinas had a vendetta against me and the
5 operation of my property as he would constantly come by and I felt harassed me. He still does, as seen
6 from his declaration where he complains about my lack of cooperation. From 2003 through the present,
7 I have been represented by counsel and on numerous occasions I or my counsel attempted to
8 communicate with City Code Enforcement and Fire Department Officials, to ask questions, to set up
9 meetings, to clarify their alleged complaints but almost all of the time they failed to respond.

10 8. On November 5, 2009, Salinas wrote up a "correction notice and order" which Salinas
11 attaches as Exhibit F to his declaration. We appealed to the hearing officer, and when the hearing officer
12 denied our appeal, we filed a writ of mandamus in the superior court, and through negotiations, it was
13 agreed that the City would withdrawal the hearing officer's decision, we would withdrawal our writ of
14 administrative mandamus in order to work out a modified site plan. (See also, Salinas Decl. at ¶ 9.)

15 9. While we were negotiating a revised site plan, Salinas kept requesting additional matters,
16 and then convinced Mike Sanchez that I needed to file an operational plan stating exactly what I was
17 going to be doing at the property. Thus, on August 23, 2011, I filed a "operational plan" with Mike
18 Sanchez, a true and correct copy of which is attached hereto and marked Exhibit "3." I was in a meeting
19 with Mike Sanchez, Deputy City Attorney Michael Flores and Mr. Salinas and my counsel, and Mr.
20 Saito (the one who drafted the revised site plan No S-11-057), and Mr. Salinas became so meddling that
21 Deputy City Attorney Flores had him removed from future meetings, which he was.

22 10. The operational site plan was stated to be for the "temporary collection and/or storage
23 of materials for brief periods of time for foam rubber products, cardboard, plastics, glass, metal, CRVs
24 and related materials," that there were no employees, that there was no public drop off of materials at
25 the site by the general public, and that "a roll-off bin is brought in periodically to pick-up stored
26 materials." Mr. Sanchez voiced no problems with the operation, the materials to be stored there or the
27 20 foot height allowances.
28

1 11. On or about October 28, 2011, the City approved the “major revised” site plan No. S-11-
2 057 (see Salinas Decl. at ¶ 10). This revised site plan specifically stated that it was not a recycling
3 center, as approved by Mr. Sanchez, and that outside storage was limited to 20 feet in height, if more
4 than 10 feet from the property line. A true and correct copy of said revised site plan is attached hereto
5 and marked Exhibit “4.”

6 12. Mr. Sanchez was specifically advised what we were doing with the property, was well
7 aware of what we had been doing with the property in the past, we agreed that we did not operate a
8 recycling center, and as Salinas admits in paragraph 10 of his declaration the revised site plan “allowed
9 for a reduction in the number of parking spaces and also allowed additional outdoor storage.” At no time
10 did Sanchez or any other official state that any special permit was required, or any conditional use permit
11 was required, or that any variance needed to be sought by the Defendants, and though the operation of
12 the property has remained unchanged.

13 13. When Salinas issued another “correction notice and order” on October 24, 2013, (¶¶ 11
14 and 12 of the Salinas Decl.), he states, for example, that there were materials stored on the property
15 “which were not approved under site plan S-11-057, including but not limited to scrap metal, appliances,
16 bedframes, televisions and other electronic devices.” But those types of material were specifically
17 permitted, and is stated specifically at paragraph 5 of the operational plan to be permitted (attached
18 hereto and marked Exhibit “3”).

19 14. When the City retrieved and executed the administrative abatement warrant during a three
20 day period in December of 2013, they removed an immense amount of property, much of which was
21 specifically identified in paragraph 5 of the operational plan. During that three day period of time, the
22 City was “abating” and removing property, Salinas kept insisting that the outside storage height was
23 limited to the height of the fence, even though the original site plan and the amended site plan
24 specifically permitted up to 20 feet in height. Even after the City had completed removing
25 approximately \$100,000 worth of property (for which I could have sold it), and with Salinas in charge
26 of the three day operation, the City allowed to remain on the property electronics, scrap metal,
27 appliances, televisions and electronic devices – and material he claims we were not allowed to store on
28 the property.

1 15. Thus, on the one hand Salinas contends, even in the face of the site plan and the
2 operational plan, that said material was not permitted on the property, he left much of that material on
3 the property at the conclusion of the three days. He also took pre-sorted CRVs that were in plastic bags,
4 and polyurethane foam which had been permitted since the 1996 site plan.

5 16. Not until the Planning Commission hearing to revoke the site plan was I ever told after
6 the revised site plan in 2011 that I needed a conditional use permit or some other special permit. No
7 where in the declarations of any of the City's witnesses do they state why my operation on the property
8 is not a permitted use under M-1 Zone, nor do they state specifically why a conditional use permit would
9 be required, after the revised site plan in 2011, and operational plan nor why our use was not permitted
10 under the M-1 zoning.

11 17. The City alleges various problems with the operations of the property dating back to
12 2003, but at no time prior to 2014-2015 has the City ever taken legal action to shut the Defendants'
13 business down, but Salinas has told me he wanted to.

14 18. The Superior Court Judge's ruling of November 12, 2004 (Exhibit "2" attached hereto)
15 stated that the City failed to show that there was any "imminent danger of harm." (Pp 2-4.)

16 19. When the City did its abatement for three days in December of 2013, the City did not
17 remove any property from inside the actual building, apparently having determined that there were no
18 alleged violations inside the building. However, the City did remove, without my permission,
19 approximately 35 items of personal property including exercise equipment, a welding machine, high lift
20 jack, two-and-a-quarter ton floor jack, pruning shears, two bags of fence post cement, bale tie and steal
21 band and binding tool clips which Defendants used to bale the foam product.

22 20. Salinas states in paragraph 19 of his declaration that the "condition of the property has
23 become increasingly worse" citing the photographs taken in June of 2014, cited as Exhibit N to the
24 Salinas Declaration. If Salinas is referring to the property prior the abatement in mid-December, 2013,
25 he is absolutely incorrect. In addition, what has occurred since June of 2014 to the present, the
26 Defendants have continued to remove more material than they have collected.

27 21. In paragraph 21 of the Salinas Declaration, he falsely states that I have been "combative
28 on several occasions." While I have questioned him repeatedly about why he has a vendetta against me

1 and our operation, and is constantly coming around the property, and has ignored other neighboring
2 properties which have storage stacked above the height of the fence, lack ingress and egress and should
3 receive citations if he is going to cite me, he has ignored those violations, but I have never become
4 combative with him. Salinas also states there were "several occasions where Greg Occhionero chased
5 City Inspectors in his vehicle." On occasion I have followed City vehicles to see if I could determine
6 who it was, whether it be Fire/Code Enforcement or some other official, and in order to get a license
7 plate number.

8 22. Through my counsel, Brian Leighton, we have notified Mr. Salinas and the City's
9 counsel, Mr. Rubin, that we are willing to sit down and work on a new site plan where I would intend
10 to use an expert to deal with the City in drafting an iron clad site plan to insure there are no areas that
11 are not specifically spelled out.

12 23. The use of the "subject property" is my sole source of income. Based upon the requested
13 injunction by the City it would completely terminate all my income. I am 49 years old.

14 24. If however, the Court is inclined to grant the injunction, it should provide the Defendants
15 with 60 days, as the City Attorney states at page 14 of their memorandum "to dispose and/or remove the
16 materials on the subject property such that it conforms to the post-abatement conditions of the Subject
17 Property in December of 2013" and that materials are allowed to be kept in the interior of the storage
18 facility on the subject property, since none of the material inside the building was removed in December
19 of 2013. Based upon the fact that our buyers need to have transportation come to the property to remove
20 it, I will need up to sixty days to remove sufficient property so that it conforms to the "post-abatement
21 condition of the subject property in December of 2013."

22 I declare under penalty of perjury pursuant to the laws of the State of California that the
23 foregoing is true and correct to the best of my knowledge, and I believe them to be true.

24 Executed this 6 day of August, 2015, at Clovis, California.

25 
26 GREG OCCHIONERO, Defendant
27
28

1 **PROOF OF SERVICE BY MAIL**

2 I declare that:

3 I am employed in the County of Fresno, California.

4 I am over the age of eighteen years and not a party to the within action; my business address is
5 701 Pollasky, Clovis, California 93612.

6 On August 7, 2015, I served a copy of the attached **DECLARATION OF GREG**
7 **OCCHIONERO IN SUPPORT OF DEFENDANTS' OPPOSITION TO THE PLAINTIFFS'**
8 **MOTION FOR A PRELIMINARY INJUNCTION** on the interested parties herein by placing a true
9 copy thereof in a sealed envelope and sending it via Federal Express overnight delivery addressed as
10 follows:

11 Douglas T. Sloan, CA Bar #194996
12 City Attorney
13 Francine M. Kanne, CA Bar #139028
14 Chief Assistant City Attorney
15 CITY OF FRESNO
16 2600 Fresno Street, Room 2031
17 Fresno, CA 93721-3602

18 James B. Betts, CA Bar #110222
19 Joseph D. Rubin, CA Bar #149920
20 BETTS, RUBIN & McGUINNESS
21 907 Santa Fe Avenue, Suite 201
22 Fresno, CA 93721

23 I declare under penalty of perjury of the State of California that the foregoing is true and correct
24 and that this Declaration was executed this 7 day of August, 2015, at Clovis, California. I declare
25 that I am employed in the office of a member of the Bar of this Court at whose direction this service was
26 made.

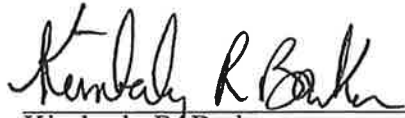
27 
28 Kimberly R. Barker

EXHIBIT 6

Brian C. Leighton, CA BAR #090907
LAW OFFICES OF BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612
Office: (559) 297-6190
Facsimile: (559) 297-6194
email: brian@lawleighton.com
& kim@lawleighton.com

Attorney for Defendants MICHAEL OCCHIONERO,
VINCENZA OCCHIONERO and GREG OCCHIONERO

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION - UNLIMITED CIVIL

CITY OF FRESNO, PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiffs,

v.

MICHAEL OCCHIONERO, VINCENZA
OCCHIONERO and GREG OCCHIONERO,
and DOES 1-10,

Defendants.

CASE NO. 15CECG01908

**DECLARATION OF GREG
OCCHIONERO IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
THE PLAINTIFFS' APPLICATION
FOR ORDER TO SHOW CAUSE
RE CONTEMPT**

**DATE: December 18, 2015
TIME: 1:30 p.m.
CTRM: 502**

I, Greg Occhionero, declare as follows:

1. I'm the son of Vincenza Occhionero and Michael Occhionero, who are also named Defendants herein, and my parents are in their 80's. My parents own the subject property at 2680 N. Miami Avenue, Fresno, California 93727 and have owned it since approximately 1995. We have no employees.

2. I'm the one who is in charge of operating the property at that location. My parents have nothing to do with the alleged violations or the operation of the property. When the City approved the original Site Plan in 1996 (as-96-76) (which was attached to my declaration in opposition of the Plaintiffs' motion for a preliminary injunction, filed August 7, 2015, and was marked as Exhibit "1".) The pertinent City officials were made aware of the use of the property which was for the temporary

1 collection and storage of materials for brief periods of time for foam rubber products, cardboard,
2 plastics, glass, metal, CRV's and related materials. City code enforcement employee Richard Salinas
3 admitted that the outside storage was permitted up to twenty feet in height if ten or more feet from the
4 property line. (See Exhibit "H" to the Salinas declaration at p. 2 of his declaration in support of his
5 abatement warrant.) The City approved the property for said use, and approved the property and the
6 business for an M-1 light industrial use. No Conditional Use Permit was required and at no time were
7 we told that we needed a Conditional Use Permit because the City officials advised me that my use of
8 the property was already appropriate in an M-1 Zone.

9 3. In 2011 we entered into an agreement with the City, through Mike Sanchez at that time
10 with a new Site Plan, number S-11-057 (which was attached as Exhibit "4" to my previously filed
11 declaration in opposition to the Plaintiffs' motion for a preliminary injunction), and was done to settle
12 all prior disputes. At Mr. Sanchez' request, I also filed an operational plan on August 23, 2011, (Exhibit
13 "3" to my previous declaration) where the operational plan which was approved by Mr. Sanchez and
14 stated that the site was used for the temporary collection and/or storage of materials for brief periods of
15 time for foam rubber products, cardboard, plastics, glass, metal, CRV's and related materials. It also
16 stated that the site was not open to the public. The Site Plan which Mr. Sanchez and his superior
17 approved also said we did not operate a recycling center.

18 4. How I operated was that I would bring to the site in my pick-up material that would
19 otherwise go to the landfill, but could be sorted by me and then provided to other companies for them
20 to recycle. I would bring the material to the property, later sort it out into foam, rubber products,
21 cardboard, plastics, glass, metal and other materials because I had already lined up buyers of that
22 material to remove it from the premises and then pay me. The buyers would remove it from the premises
23 and they would take it to their facilities, mostly outside the County of Fresno, and then recycle the
24 material themselves. Our business was not open to the public, and there is basically one person
25 operating it, myself.

26 5. Since the preliminary injunction was issued, and before the order to show cause re
27 contempt was set for a hearing on October 27, 2015 the City took photographs of the property which are
28

1 attached to the Plaintiffs' memorandum of points and authorities in support of the application for the
2 OSC and attached to the declaration of Timothy Morris in support of the application for the OSC with
3 the last photographs taken on October 23, 2015.

4 6. When the Plaintiffs filed their OSC papers on October 26, 2015, counsel for the Plaintiffs
5 – for the most part correctly stated (at p. 5) that there was evidence that some material had been removed
6 but that “there were vast amounts of debris on the site”. However, what was on the site was not
7 “debris”, but items, I could sort, bale, etc. to then provide companies who would recycle.

8 7. At the time of the hearing on October 27, 2015 I had provided my attorney information
9 to provide to the Court that since the preliminary injunction was issued, no further material had been
10 brought onto the property, and that since the preliminary injunction order had been issued, seven loads
11 of foam had been removed, one load of cardboard, two loads of metal, and that I was working on a third
12 load of metal, and that four bales of foam had also been removed. Each load (except for the bales) were
13 loaded into forty cubic yards, twenty-two foot roll off dumpsters.

14 8. The Court then continued this matter to December 18, 2015 to determine how I was
15 progressing in removing the material. Since that hearing on October 27, 2015 a substantial amount of
16 additional material has been removed. That is: (1) One semi-load of cardboard, on a fifty-three foot
17 trailer; (2) two more loads of foam, again on a fifty-three foot trailer; (3) eight separate bale loads of
18 foam, and an additional twenty-three bales moved out on pallets which are approximately four feet by
19 four feet by four feet high; (4) three loads of glass, each in a six cubic yard bins; and (5) another smaller
20 bin of steel/metal. I am still removing more. Also, on December 4 there is a person coming to the
21 facility to remove foam on a fifty-three foot trailer. I also have another forty cubic yard, twenty-two foot
22 roll off dumpster that is being filled with metal/steel. Also, prior to the hearing on December 18, 2015
23 there will be many more loads of foam, metal, glass, and other items from the property. Currently, there
24 is no material on the property that is higher than the six foot high fence, nor is there any barriers to
25 access by the fire department for ingress or egress.

26 9. On November 24, 2015 the City wished to come out and take pictures and inspect the
27 property. My attorney was there, Mr. Rubin was there, city code enforcement Mr. Salinas and several
28

1 others with the City were likewise there. The City employees took photographs, and my attorney had
2 had someone come to the property and also take photographs. True and correct copies of said
3 photographs we took are attached hereto and marked Exhibit "1" revealing that a substantial amount of
4 property had been removed. There is also at least a five foot clearance between the building and the
5 material (which the City required), there was at least three foot lanes – and much more – between the
6 fence and the material, as the City had required, there was substantial amount of bare ground on the
7 property which had not existed prior to the issuance of the preliminary injunction, and there is no
8 material above the height of the fence. There is also a substantial fire lane into and through the property,
9 which had not previously existed.

10 10. I have a pick-up truck. I don't have any large trucks and they are expensive to rent. I have
11 one forklift. I make arrangements for those to bring in the twenty-two foot roll off dumpsters so I can
12 fill it with material to later be picked up by the recycling place that would come and pick it up and
13 remove it, and then drop off another one. Even the day that the City officials showed up on November
14 24, 2015, a large truck came and removed a full load of cardboard, and also another twenty-two foot roll
15 off dumpster was picked up that morning which contained metal.

16 11. Many times, the person or persons who were suppose to pick-up product from me and
17 take it away would get backed up on their end and then they would be delayed in removing it. Many
18 times I've had to entice these companies to pick-up the property and pay me far less than they would
19 otherwise have to pay.

20 12. In addition, prior to the hearing on October 27, 2015, and continuing to today, my
21 attorney has been reaching out and discussing with various experts in the field of Site Plan and code
22 requirements, several of whom are retired from the City of Fresno. The other thing that has happened
23 that has made it difficult with respect to a Site Plan, just very recently the City amended much of their
24 codes and zoning ordinances (I understand about 600 pages worth – according to the Fresno Bee), and
25 my experts need to be brought up to speed on what are the new requirements for not only Site Plans, but
26 what can be allowed in an M-1 zone, and once that is figured out they can meet with the City and work
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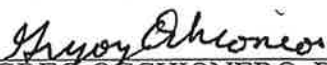
1 on a new Site Plan. I was told that the Site Plan approval process is difficult now while the City and
2 those working with the City can digest all the new zoning and code regulations.

3 13. The City states (brief at 4) that: "Despite not being allowed on the subject property after
4 the thirty days had elapsed, Plaintiffs took photographs from the exterior of the fence depicting the state
5 of the subject property. Although there was evidence that some material had been removed, there was
6 vast amounts of debris on the site." It was not at all that I would not allow the Plaintiffs on the subject
7 property, it was just at that particular time I would be out of town with my parents visiting my brother
8 in Ridgecrest, and it had been a long planned six-day trip. It was suppose to be five or six days, but I
9 came back early on the third day, I would have been available at any time thereafter to allow the City
10 onto the property, as I freely let them on my property on November 24, 2015.

11 14. I am not, and have not, attempted to violate the Court's preliminary injunction, nor have
12 I willfully done so. As a one person operation with no large trucks, back loaders or other implements,
13 I've been working six and one-half days a week to remove material from my property, from before
14 daylight until after dark, make arrangements for my customers to come pick-up the property, and I am
15 burdened by their schedules to do so. Again, and as stated before, since the preliminary injunction was
16 issued I have not brought on to the property, any additional material.

17 15. I'm doing my absolute best to remove the material on the property, I stay in constant
18 contact with my attorney, who has been in contact with those that know about getting me reapproved
19 for a Site Plan and subject to the City codes, which apparently have now been drastically changed in the
20 last month. Again, my parents have nothing to do with the operation of this property.

21 I declare under penalty of perjury this 3 day of December, 2015 at Clovis, California,
22 the foregoing is true and correct to the best of my ability.

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24 GREG OCCHIONERO, DEFENDANT
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I am employed in the County of Fresno, California.

On December 4, 2015, I served a copy of the attached DECLARATION OF GREG OCCHIONERO IN SUPPORT OF DEFENDANTS' OPPOSITION TO THE PLAINTIFFS' APPLICATION FOR ORDER TO SHOW CAUSE RE CONTEMPT on the interested parties herein by placing a true copy thereof in a sealed envelope and causing it to be sent via Federal Express, addressed as follows:

James B. Betts, CA Bar #110222
Joseph D. Rubin, CA Bar #149920
BETTS, RUBIN & McGUINNESS
907 Santa Fe Avenue, Suite 201
Fresno, CA 93721


Kimberly R. Barker

EXHIBIT 7

1 Brian C. Leighton, CA BAR #090907
2 LAW OFFICES OF BRIAN C. LEIGHTON
3 701 Pollasky Avenue
4 Clovis, CA 93612
5 Office: (559) 297-6190
6 Facsimile: (559) 297-6194
7 email: brian@lawleighton.com
8 & kim@lawleighton.com

9 Attorney for Defendants MICHAEL OCCHIONERO,
10 VINCENZA OCCHIONERO and GREG OCCHIONERO

11 SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
12 CENTRAL DIVISION - UNLIMITED CIVIL

13 CITY OF FRESNO, PEOPLE OF THE
14 STATE OF CALIFORNIA,

15 Plaintiffs,

16 v.

17 MICHAEL OCCHIONERO, VINCENZA
18 OCCHIONERO and GREG OCCHIONERO,
19 and DOES 1-10,

20 Defendants.

CASE NO. 15CECG01908

SECOND SUPPLEMENTAL
DECLARATION OF GREG
OCCHIONERO IN SUPPORT
OF DEFENDANTS' OPPOSITION
TO PLAINTIFFS' APPLICATION
FOR ORDER TO SHOW CAUSE
RE CONTEMPT

DATE: April 8, 2016
TIME: 1:30 p.m.
CTRM: 502

21 I, Greg Occhionero, declare as follows:

22 1. This is my second supplemental declaration to the declarations that I filed on December
23 4, 2015 and December 22, 2015, regarding what I have done to remove additional material from the
24 property since that filing date of December 22, 2015 and, previous to that, December 4, 2015. Said
25 December 22, 2015 and December 4, 2015, declarations are incorporated herein as though fully set forth.
26 The following information is what has occurred since my December 22, 2015, declaration which
27 declaration will not be repeated herein.

28 2. In addition to what I stated in paragraph 6 of my December 4th declaration, on December
4, 2015, the City claimed that there was vast amounts of "debris on the site" but that is decidedly
incorrect. In the hearing before a hearing officer in 2009, the hearing officer stated I did not have

1 rubbish or trash on the property and that the property was not a public nuisance. The property had the
2 same type of material as it did when the City received its preliminary injunction. When I pick up
3 material from various sites to take to my property, I never pick up "debris." It was all material that I
4 could sort, and if not bale, then put in bins or on trucks or trailers by companies who would then take
5 the material to different locations to actually recycle the material so it would never end up in a landfill.
6 I would never pick up "debris" or "garbage" but only those things that could be recycled.

7 3. Importantly, since the Court entered the preliminary injunction against me and my elderly
8 parents (in their 80s) in the Fall of 2015, I have complied with the Court ordered preliminary injunction
9 and have not brought any additional material onto the property at all. Since the Court entered the
10 preliminary injunction, the only thing that I have done is to methodically remove material from the
11 property to vendors that want it so that it does not end up in the Fresno County landfill. The City's
12 attempt to force me to remove all the property ASAP, is grounded on their belief that it is much better
13 to go the Fresno County landfill, than to recycle it – and deprive me of income. I have been having the
14 material recycled by others and do not operate a recycling of the material as agreed to by the City in our
15 settlement in 2011. However, I am left at the convenience of the vendors bringing in trucks and trailers
16 to pick up the material that I have sorted and stacked, whether it be metal, foam, cardboard or CRVs.
17 I only have a pickup to work with.

18 4. Since my declaration filed with the Court on or about December 22, 2015, I have had
19 removed a substantial amount of additional material – in addition to the property removed since the
20 Court issued its preliminary injunction, and since the material removed as stated in my declarations on
21 December 4 and 22, 2015.

22 5. As I stated in my December 22, 2015, declaration, none of the material on the property
23 is stacked above the height of the fence, and all of it is stacked substantially lower than the height of the
24 fence. As I also stated in my December 22, 2015, declaration there is substantially more clear space for
25 ingress and egress by the Fire Department and City officials, no handicap parking stalls are interfered
26 with, even though no customers are allowed on the site. There is now even more clear space and lower
27 stacks.
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1 6. Since my December 22, 2015, declaration there have been four additional 53 foot loads
2 of foam that have been removed; two large containers of steel that have been removed; another large
3 load of steel removed on Wednesday, March 16, 2016, eight smaller loads of CRVs transported in my
4 pickup, three pickup loads of electronics, and an additional load on a 53 foot trailer of foam.

5 7. Attached to the memorandum of points and authorities my counsel filed, were pictures
6 taken of the property on March 4, 2016. As the Court can see, all of the material is substantially lower
7 than the height of the fence, there is a substantial amount of clear space, and even more clear space than
8 there is space stacked with material, and all of the material is below the height of the fence. Another 53
9 foot load of foam was taken this week (which is approximately 60 cubic yards), and an additional 40-
10 cubic yard dumpster of metal removed Wednesday, March 16, 2016. The material on the property now
11 is considerably less than the pictures on March 4, 2016 show.

12 8. As the picture shown in Exhibit "2" to my counsel's memorandum of points and
13 authorities, there is a large metal, fire proof container on my neighbor's property stacked right up against
14 the fence at seven feet in height. I wish to rent or buy said storage containers to place the remaining
15 material on the property into it and it would not be an alleged eye-sore. The neighbor's container is
16 approximately 40 feet long by eight feet wide and approximately seven to eight feet high, and as the
17 Court can see in the pictures attached as Exhibit "2" of my counsel's memorandum filed concurrently
18 herewith, that is the type of containers that I would like to store on my property to store material. So far,
19 Richard Salinas of City Code Enforcement has stated since 2011 those storage containers are not
20 permitted even though my neighbor immediately to the east of me has more than one, as do other
21 properties around me, also zoned M-1, like mine. However, neither the City no Salinas can tell me any
22 Code section where it is prohibited. These type of storage containers are all over facilities zoned M-1
23 in my area.

24 9. An additional thing that I would consider, if required, is to put slats in the chain link fence
25 where there are no slats now in order to obscure the view of anyone driving by. The interior past the
26 fence is not really noticeable unless one is looking for it. There are many properties zoned M-1 around
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1 me that have material stacked high above the height of the fence and with metal storage containers.
2 Also, I have out to bid to fix the landscaping to spruce it up.

3 10. At no time has the City provided Code sections to me that would preclude me from
4 placing the eye-appealing storage containers on my property. At no time has the City informed me why,
5 when my property is zoned M-1 for light industrial, that a site plan is now required. While I know that
6 the Planning Commission revoked the site plan that I had, the site plan was only required as a result of
7 us developing the property and placing a structure on the property with outside storage when the property
8 developed. To date, the City has never provided to me any Code sections which requires that I still need
9 a site plan as long as the storage of my property is consistent with M-1 zoning, which it is.

10 11. What is contained in the stipulation is that I cannot even seek a new site plan until all of
11 the material is off the outside of the property; but the City has failed to provide me any Code sections
12 which states the current state of my property is inconsistent with M-1 zoning, nor why a site plan is now
13 required.

14 12. On or about January 15, 2016, I received a "Notice of Inspection Results" from the City
15 Fire Department itemizing alleged continued violations on my property. My counsel responded on
16 January 28, 2016, to the City Fire Code officials requesting clarifications and justification for their
17 "Notice of Inspection Results" of January 15, 2016. Those documents are attached to the memorandum
18 of my counsel filed concurrently herewith. As far as I know, the City has never responded to my
19 counsel's e-mail of January 28, 2016 for clarification.

20 13. In addition, over the winter and early spring, Fresno, including my facility, has been
21 inundated with rain, and that means the foam has to dry out before any of my customers will come and
22 pick it up. Fresno has received much rain over the last couple of months, it delays customers picking
23 up loads of foam. It also delays my ability to bale said foam until the foam dries out. Of course, while
24 the foam is wet, there is no fire hazard. The two site plans that I received in 1996 and the revised site
25 plan in 2011, the City specifically permitted the storage of foam, metal and other recyclables at my
26 facility.

1 14. On March 16, 2016, an additional 40-cubic yard dumpster of metal was removed from
2 the property and an empty 40-cubic yard dumpster was placed back on the property in order to be filled
3 with metal and then removed which, when filled, may eliminate all metal, but possibly one more
4 container, is needed.

5 15. In my conversations with City officials in the past, City officials were advising me that
6 I was providing a great service to the City by taking material that would otherwise go to the landfill, but
7 instead taken to my property and then others picking it up to take it to their facilities to actually recycle
8 it without it going to the landfill. I do not know the officials names, but I know the City of Fresno
9 strongly suggests, and if not requires, that material be recycled. Most people recycle aluminum, glass
10 and plastic and place it into their blue bins where a separate truck owned by the City picks it up and take
11 it to recycling centers. I pick up (though not since the preliminary injunction order was issued by this
12 Court) material that cannot be placed into "blue bins" for recycling, which would otherwise go to the
13 landfill. The City's argument is that I should hire contractors, with front loaders and large trucks to take
14 all of the material off my property and take it to the landfill, defeats the City's mission of recycling,
15 would stop my income, and not benefit the City.

16 16. I am working six to six and half days per week, 12 hour days, to stack, sort, and arrange
17 for removal of the material off the property. It must also be stated, that when the City performed their
18 three day abatement warrant in December of 2014, the City found that there was nothing inside the
19 building that needed to be removed, because it was not in violation of the site plan. Now, the City is
20 demanding that I remove everything inside the building, and they will not even allow me to have an
21 attorney or me to discuss with them a new site plan or what is required. I retained a prior deputy or
22 assistant city attorney to assist me with this process, and he spoke with Mr. Rubin, the City's attorney,
23 and the City's attorney would not even permit my retained attorney to speak to City officials regarding
24 getting an approval to allow me to store anything on the property. The City's bottom line is that
25 everything on the property must be removed and then, by the grace of the City, it may allow me to do
26 something on the property, whether required by Code or not.

1 I declare under penalty of perjury that the foregoing is true and correct to the best of my
2 information and belief. Dated this 17 day of March, 2016 at Fresno, California,

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4 GREG OCCHIONERO, DEFENDANT
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PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is
701 Pollasky, Clovis, California 93612.

On March 17, 2016, I served a copy of the attached **SECOND SUPPLEMENTAL
DECLARATION OF GREG OCCHIONERO IN SUPPORT OF DEFENDANTS' OPPOSITION
TO PLAINTIFFS' APPLICATION FOR ORDER TO SHOW CAUSE RE CONTEMPT** on the
interested parties herein by placing a true copy thereof in a sealed envelope, addressed as follows:

Douglas T. Sloan, CA Bar #194996
City Attorney
Francine M. Kanne, CA Bar #139028
Chief Assistant City Attorney
CITY OF FRESNO
2600 Fresno Street, Room 2031
Fresno, CA 93721-3602

Also causing it to be sent via E-MAIL to:

James B. Betts, CA Bar #110222
Joseph D. Rubin, CA Bar #149920 - br@bettsrubinlaw.com
BETTS, RUBIN & McGUINNESS
907 Santa Fe Avenue, Suite 201
Fresno, CA 93721 James B. Betts, CA Bar #110222

I declare under penalty of perjury of the State of California that the foregoing is true and correct
and that this Declaration was executed this 17 day of March, 2016, at Clovis, California. I declare
that I am employed in the office of a member of the Bar of this Court at whose direction this service was
made.

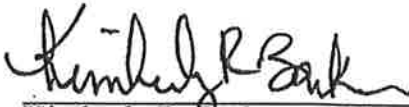

Kimberly R. Barker

EXHIBIT 8

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO

CITY OF FRESNO, PEOPLE OF
THE STATE OF CALIFORNIA,
Plaintiff,

vs.

Case No. 15CECG01908

MICHAEL OCCHIONERO, VINCENZA
OCCHIONERO and GREG OCCHIONERO,
and DOES 1-10,

Defendants.

DEPOSITION OF GREGORY OCCHIONERO
Fresno, California
Wednesday, March 23, 2016

Reported by:
Allison Gerdes, CSR No. 8649

APPEARANCES OF COUNSEL:

For the Plaintiff City of Fresno:

BETTS, RUBIN & MCGUINNESS
BY: JOSEPH D. RUBIN
Attorney at Law
907 Santa Fe Avenue, Suite 201
Fresno, California 93721
(559) 438-8500 FAX: (559) 438-6959
dr@bettsrubinlaw.com

For the Defendant Greg Occhionero:

LAW OFFICES OF BRIAN C. LEIGHTON
BY: BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky
Clovis, California 93612
(559) 297-6190 FAX: (559) 297-6194
bleighton@arrival.net

Deposition of GREGORY OCCHIONERO, taken
at 907 Santa Fe Avenue, Suite 201, Fresno, California,
on Wednesday, March 23, 2016, at 9:52 a.m., before
Allison Gerdes, a Certified Shorthand Reporter in and
for the State of California.

EXAMINATION INDEX

GREGORY OCCHIONERO	
BY MR. RUBIN	4
BY MR. LEIGHTON	46
FURTHER BY MR. RUBIN	46
FURTHER BY MR. LEIGHTON	47
FURTHER BY MR. LEIGHTON	48

EXHIBIT INDEX

Exhibit 1	
Notice of Deposition of Greg Occhionero with	4
Request for Production of Documents Pursuant	
to Stipulation and Order on Contempt	
Proceeding	

OBJECTION INDEX

BY MR. LEIGHTON	34
BY MR. LEIGHTON	34
BY MR. LEIGHTON	35
BY MR. LEIGHTON	35

The following proceedings were had and
testimony taken, to wit:

(Whereupon Deposition Exhibit 1
marked for identification.)

GREGORY OCCHIONERO,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. RUBIN:

Q. Mr. Occhionero, can you state your full name
for the record, please?

A. It's Gregory Occhionero.

Q. That oath that you just took is the same oath
as you'd take in a court of law. You understand you're
testifying under penalty of perjury?

A. Correct.

Q. Okay. There was a notice of deposition
provided to you previously to your Counsel. Have you
produced any documents today? It's my understanding
from your Counsel that you're not producing documents,
but I just need to confirm it for the record.

A. That's correct.

Q. Okay. Have you ever been married, sir?

1 worded.

2 Q. Okay. In the last five years, have you
3 received any kind of government benefits, unemployment
4 insurance, disability, Workers' Compensation, Social
5 Security, anything like that?

6 A. No.

7 Q. On the next questions, let's -- to make it
8 easier for you, the questions I'm going to ask at this
9 point is going to exclude your recycling operations on
10 the Miami property.

11 A. Okay.

12 Q. So let's just -- I'm going to try to deal with
13 if there are any other different income that you receive
14 from other employment or independent contractors, and
15 then we'll talk about the recycling facility. Okay?

16 A. Okay.

17 Q. Okay. So in the last four years, have you
18 received any salary, commissions or other income as an
19 employee or independent contractor from an employer or
20 business, excluding your -- excluding the Miami
21 property. Has there been --

22 A. Could I get you to repeat that?

23 Q. Sure. So excluding the Miami property, in the
24 last four years, have you received any salary or
25 commissions in the capacity as an employee or

1 independent contractor from another business?

2 A. No.

3 Q. Okay. Have you ever -- outside of the Miami
4 property, have you been employed part time or full time
5 by anybody over the last four years?

6 A. No.

7 Q. Is it fair to say, other than your investment
8 income and your income derived from the Miami property,
9 there's no other source of income for you?

10 A. Correct.

11 Q. Okay. With respect to the -- let's just talk
12 about the Miami property and hopefully get you out of
13 here with some expediency.

14 Let me just -- at least to my understanding, as
15 to the Miami property, do you take any kind of salary or
16 commissions from that property?

17 A. No.

18 Q. Okay. As to the Miami property, let's talk
19 about kind of your costs. Do you pay rent to your
20 parents?

21 A. No.

22 Q. Okay. Have you ever paid rent to your parents?

23 A. No.

24 Q. Okay. Do you have any kind of monthly bills on
25 the Miami property or anything associated with your

1 recycling operation?

2 A. Yes.

3 Q. And what are those?

4 A. PG&E.

5 Q. Okay. Anything else other than PG&E?

6 A. I don't want to say no.

7 Q. That's fine. You can -- if --

8 A. But I'm trying to think.

9 Q. Okay. You can always leave a qualifier.

10 Answer what you know, and say there may be others, but
11 I'm not sure at this time.

12 A. There may be others and I'm not sure at this
13 time.

14 Q. That's fine. I completely --

15 A. Thanks for the tip.

16 MR. RUBIN: Okay. That's fine.

17 MR. LEIGHTON: Just -- if I can here, what
18 about property taxes?

19 THE WITNESS: Since I've been having -- can I
20 say it?

21 MR. LEIGHTON: Yeah.

22 THE WITNESS: Since I've been having problems
23 with the City, my parents have been taking care of that.

24 BY MR. RUBIN:

25 Q. The property taxes?

1 A. Yes.

2 Q. Okay. And when you say -- at least during what
3 duration have your parents assisted with you on property
4 taxes?

5 A. Probably the full length of time or almost the
6 full length of time I've been dealing with the City
7 going back to 2003.

8 Q. Okay. Can you just generally -- and strike
9 that. I know I asked you, but I think the answer was
10 no.

11 You don't take a salary or commissions from
12 your recycling operation.

13 A. No.

14 Q. Okay. You just take the profits, if there are
15 any?

16 A. Correct.

17 Q. Okay. Quickly describe -- I've seen it in
18 declarations, but just quickly describe the nature of
19 your operations on the Miami property. What's the
20 business?

21 A. First of all, there is no business registered.

22 Q. Okay.

23 A. There's no name.

24 Q. Okay.

25 A. And the City's already said that they're not

1 requiring a license for this activity.

2 Q. I'm just asking what the nature of your
3 operations is.

4 A. Okay. Well, I wanted to clarify that.

5 Q. That's fine.

6 A. Nature of the operation is I pick up materials.

7 Q. Okay.

8 A. I find people that could use them, and I sell
9 them.

10 Q. Okay. And most of the time, and we're going to
11 break it down a little bit, but there are third party
12 recyclers that come pick up materials from you?

13 A. Correct.

14 Q. Or --

15 A. I do bring some to --

16 Q. To different recyclers. Okay.

17 My understanding generally, there may be
18 additions, but most of the materials that you bring onto
19 your property and then sort are foam rubber products,
20 correct?

21 A. Correct.

22 Q. Cardboard?

23 A. Correct.

24 Q. Plastics?

25 A. Correct.

1 Q. Scrap metal?

2 A. Correct.

3 Q. Glass?

4 A. Correct.

5 Q. Aluminum?

6 A. Correct.

7 Q. And CRV?

8 A. Correct.

9 Q. What's CRV? I've seen it --

10 A. California redemption values. They're bottles,
11 cans.

12 Q. As far as -- is there any other category that
13 you used recyclers or that you sort and sell to
14 recyclers, other than the ones I listed? And I'm
15 talking about generally.

16 A. In general, that sounds correct.

17 Q. Okay. And it's my understanding that whether
18 you go to the recyclers or the recyclers pick them up on
19 your property in Miami, that, based upon the weight,
20 they'll pay you a certain price.

21 A. Correct.

22 MR. RUBIN: Okay.

23 MR. LEIGHTON: Can I add something here?

24 THE WITNESS: Yeah, I got to think about that,
25 too. Let him add, but I got to think about that.

1 MR. RUBIN: Okay.

2 THE WITNESS: I might also have you repeat
3 that.

4 MR. RUBIN: That's fine.

5 THE WITNESS: But let's hear what Brian has to
6 say.

7 MR. LEIGHTON: Electronics.

8 THE WITNESS: Those more than typically go with
9 one of those classifications.

10 MR. RUBIN: That's fine.

11 MR. LEIGHTON: You mean like metal or what?

12 THE WITNESS: Right.

13 MR. LEIGHTON: Okay.

14 MR. RUBIN: Do you want the question read back?

15 THE WITNESS: Yes, I do want the question
16 repeated.

17 MR. RUBIN: Allison, can you read the last
18 question back?

19 (The reporter read the record as
20 follows:

21 "Q. And it's my understanding that
22 whether you go to the recyclers or
23 the recyclers pick them up on your
24 property in Miami, that, based upon
25 the weight, they'll pay you a certain

1 price.

2 "A. Correct.")

3 THE WITNESS: Okay. There's some things that
4 go by count.

5 BY MR. RUBIN:

6 Q. Okay. Can you differentiate -- I'm going to
7 assume most of the items go by weight.

8 A. Correct.

9 Q. Okay. So then as far as the items that go by
10 count, can you tell me what those items are?

11 A. Basically CRVs.

12 Q. Okay.

13 A. But not all of them.

14 Q. Okay. Fair enough. Do you keep track annually
15 how much you receive from third party recyclers for
16 materials that you bring on site or collect?

17 A. No.

18 Q. Okay. As you sit here today, do you have an
19 estimate annually from, let's say, the last five years
20 how much money you've received from third party
21 recyclers?

22 A. No.

23 Q. You don't have an estimate if it's -- okay.
24 Let's go back to the same thing as with the stocks. Do
25 you know if it's more than \$50,000?

EXHIBIT 9

**PHOTOGRAPHS TAKEN
MARCH 23, 2016**





EXHIBIT 10

JDR

BETTS & RUBIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

907 SANTA FE AVENUE
SUITE 201
FRESNO, CALIFORNIA 93721

JAMES B. BETTS
JOSEPH D. RUBIN

TELEPHONE
559-438-8500
TELEFAX
559-438-6959

September 7, 2016

VIA E-MAIL

Brian C. Leighton, Esq.
Law Offices of Brian C. Leighton
701 Pollasky
Clovis, California 93612

RE: City of Fresno v. Occhionero

Dear Brian:

This letter is written to confirm our conversation on September 6, 2016, wherein we agreed that the City can forego an inspection of the interior storage area on September 16, 2016, as the Occhioneros have not removed a significant portion of the property from the interior storage area since our previous inspection in March of 2015. Thank you for your cooperation in this regard. If you have any questions or concerns, or a different recollection of this conversation, please do not hesitate to contact me.

Very truly yours,

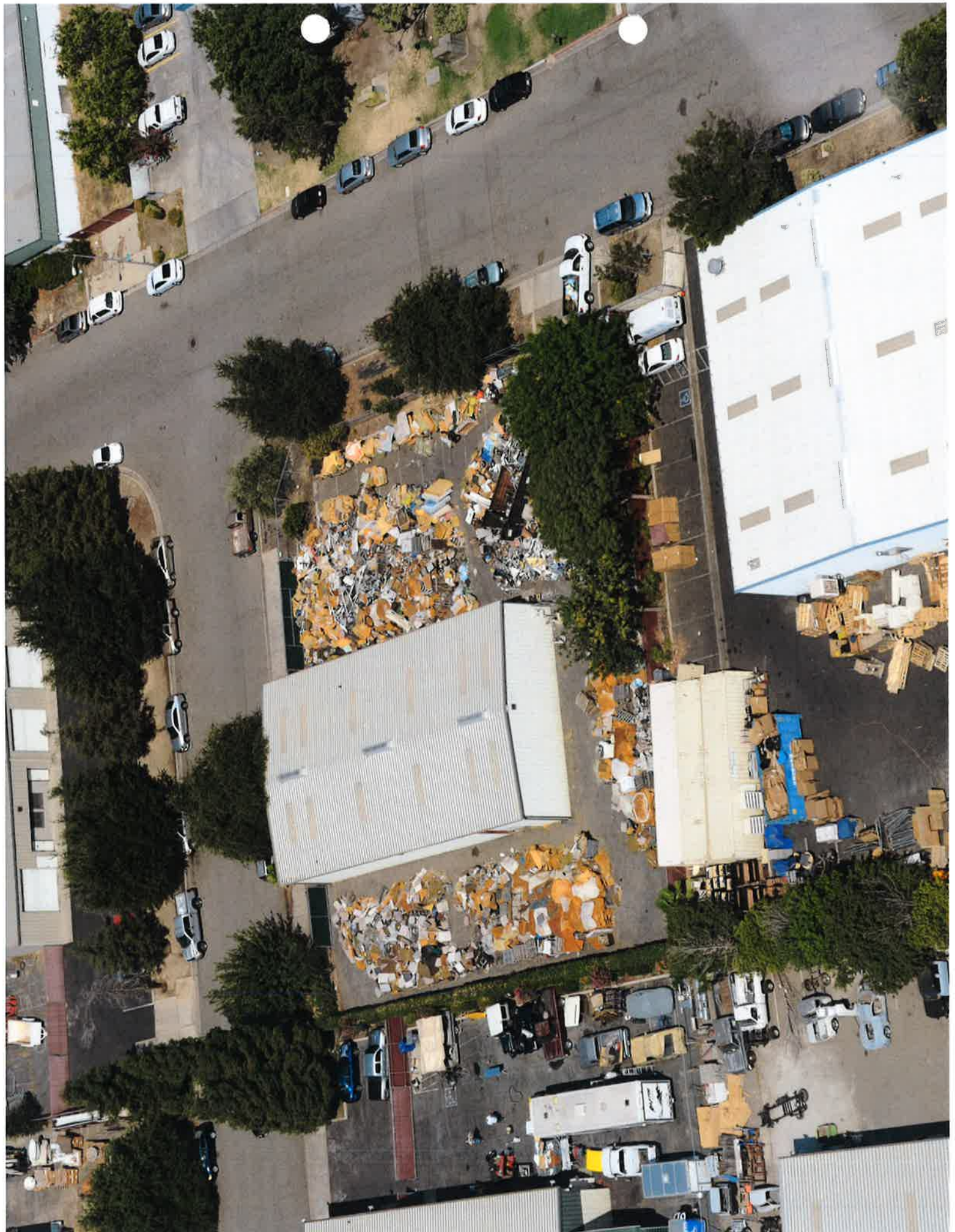


Joseph D. Rubin
BETTS & RUBIN

JDR:dm

EXHIBIT 11

**AERIAL PHOTOGRAPHS
TAKEN AUGUST 3, 2016**







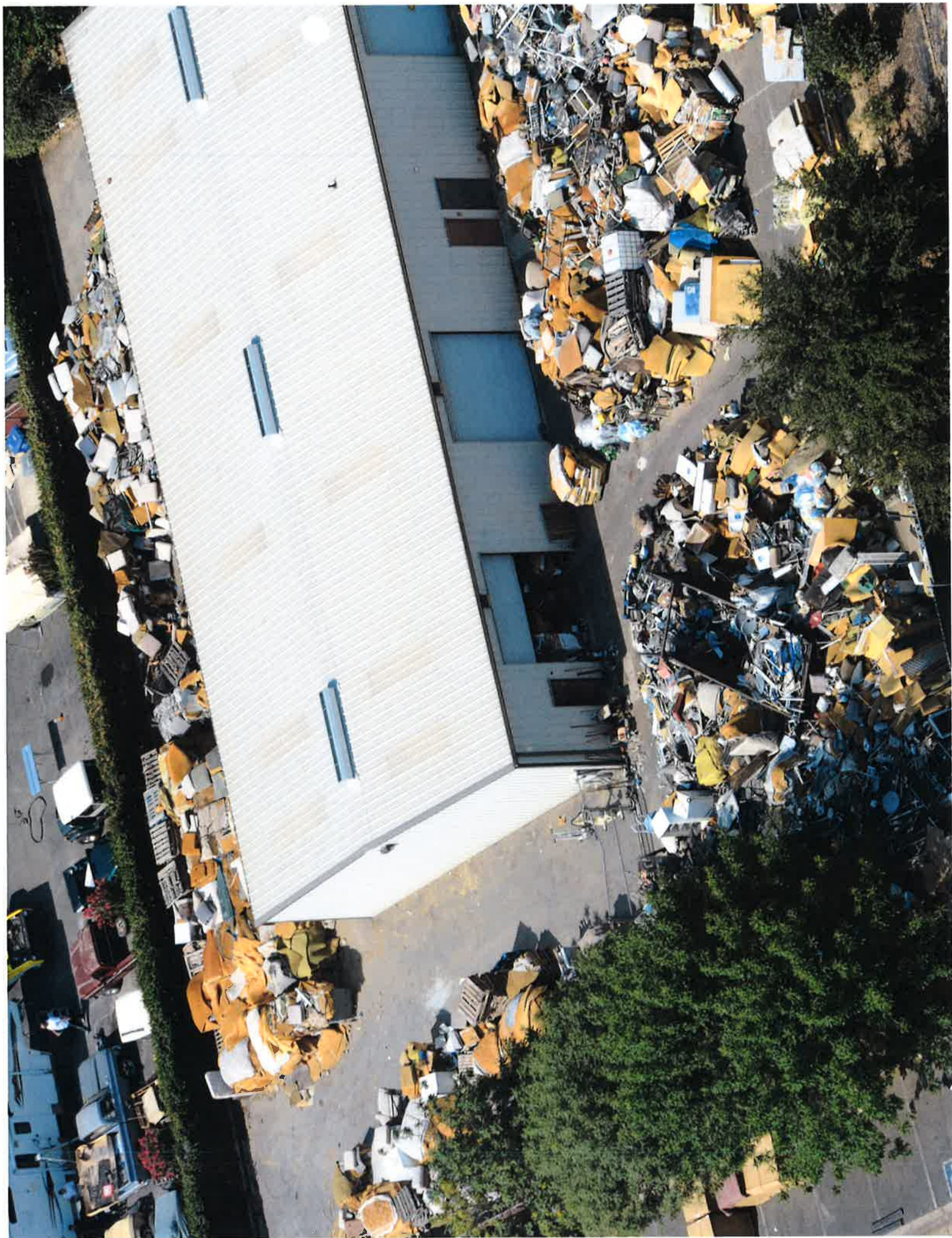




EXHIBIT 12

**PHOTOGRAPHS TAKEN
AUGUST 1, 2016**













**PHOTOGRAPHS TAKEN
SEPTEMBER 5, 2016**











EXHIBIT 13

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited		Filed by:
TITLE OF CASE: The People of the State of California vs. Michael Occhionero		
LAW AND MOTION MINUTE ORDER		Case Number: 15CECG01908

Hearing Date: **July 13, 2016** Hearing Type: **Motion - Attorney Fees**
 Department: **502** Judge/Temp. Judge: **Black, Donald**
 Court Clerk: **Loveless, Nancy** Reporter/Tape: **NR**

Appearing Parties:	
Plaintiff: Not Present	Defendant: Not Present
Counsel:	Counsel:

- ☐ Off Calendar
☐ Continued to ☐ Set for ___ at ___ Dept. ___ for ___
☐ Submitted on points and authorities with/without argument. ☐ Matter is argued and submitted.
☐ Upon filing of points and authorities.
☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.
☐ Taken under advisement
☐ Demurrer ☐ overruled ☐ sustained with ___ days to ☐ answer ☐ amend
☒ Tentative ruling becomes the order of the court. No further order is necessary.
☒ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.
☒ Service by the clerk will constitute notice of the order.
☒ See attached copy of Tentative Ruling.
☐ Judgment debtor ___ sworn and examined.
☐ Judgment debtor ___ failed to appear.
 Bench warrant issued in the amount of \$ ___

JUDGMENT:

- ☐ Money damages ☐ Default ☐ Other ___ entered in the amount of:
 Principal \$___ Interest \$___ Costs \$___ Attorney fees \$___ Total \$___
☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to \$___ per ___

FURTHER, COURT ORDERS:

- ☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.
☐ \$___ to be released to judgment creditor and balance returned to judgment debtor.
☐ Levying Officer, County of ___, notified. ☐ Writ to issue
☐ Notice to be filed within 15 days. ☐ Restitution of Premises
☐ Other: ___

(24)

Tentative Ruling

Re: **City of Fresno v. Occhionero**
Court Case No. 15CECG01908

Hearing Date: **July 13, 2016 (Dept. 502)**

Motion: City of Fresno's Motion to Fix Attorney's Fees in Contempt
Proceeding (Code Civ. Proc. § 1218, subd. (a).)

Tentative Ruling:

To grant, with attorney's fees fixed at \$16,560.

Explanation:

Fees are authorized by Code of Civil Procedure section 1218, subdivision (a). The statute's use of the phrase "in connection with the contempt proceeding" does not mean only with regard to the hearing, but concern all fees generated in connection with the proceeding. Contempt proceedings are considered separate and distinct from the action within which the contempt proceeding occurs. (Code Civ. Proc., §§ 1211 and 1218; *Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 616.) Plaintiff has carefully limited the time for which fees are sought, and all charges were incurred in connection with the contempt proceeding. The supplemental memoranda and evidence filed by plaintiff during the course of the proceeding were reasonable and necessary. The time Mr. Rubin spent in deposing Mr. Occhionero and in preparing witnesses defendants stated they were going to call at the contempt hearing was reasonable, and reasonably incurred.

A post-contempt-hearing motion for attorney's fees is authorized by Code of Civil Procedure section 1033.5. (*Id.*, subds. (a)(10)(B) and (c)(5).) Defendants were clearly put on notice that plaintiff intended to ask for fees. The hourly rate charged by Mr. Rubin is reasonable.

Defendants' arguments as to mitigating circumstances is not compelling or persuasive. They admit they were not "literally complying" with the court's prior order, and in fact what they term their "active attempts" at compliance—i.e., their insistence on continuing to sell material rather than simply paying to have it removed, when it was proven they had the financial ability to do so—was a key reason the court found them in contempt.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: JB on 7-8-16
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	<i>FOR COURT USE ONLY</i>
TITLE OF CASE: The People of the State of California vs. Michael Occhionero	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 15CECG01908

I certify that I am not a party to this cause and that a true copy of the:

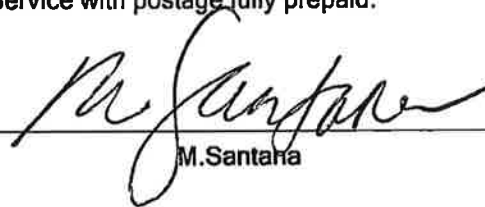
07/13/2016 Minute Order and copy of Tentative Ruling

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 07/13/2016

Clerk, by _____



M. Santana

, Deputy

Joseph D. Rubln
 Betts & Rubin
 907 Santa Fe Ave. Ste 201
 Fresno, CA 93721

Brian C. Leighton
 701 Pollasky Avenue
 Clovis, CA 93612

☐ Clerk's Certificate of Mailing Additional Address Page Attached

EXHIBIT 14

City of



2600 Fresno Street • Third Floor
Fresno, California, 93721-3604
(559) 621-8003 • FAX (559) 498-1012
www.fresno.gov

Development and Resource Management

Jennifer K. Clark, AICP, HDP
Director

August 9, 2016

Mr. Gregory Occhionero
757 Laverne Ave.
Clovis, California 93611

Mr. Brian C. Leighton
701 Pollasky Ave.
Clovis, California 93612

Re: Zone Clearance for 2680 N. Miami Ave.

Dear Mr. Occhionero and Mr. Leighton:

You are hereby notified that the Zone Clearance application submitted for the property located at 2680 N. Miami Ave., Fresno, CA, 93727, has been revoked, as Mr. Occhionero is enjoined from operating any storage and recycling facility on the property by the preliminary injunction granted September 9, 2015, to the City of Fresno ("City").

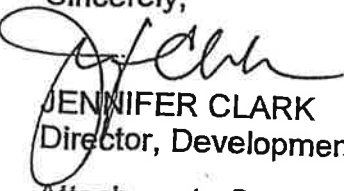
"...during the pendency of this action, or until further order of the court, defendants, as well as their agents, servants, and employees, are enjoined and restrained from operating any storage and recycling facility on the Property without obtaining the requisite approval, permits, and site plan for an M-1 property."

Additionally, the Zone Clearance application that was submitted has been deemed incomplete by the Director of the Development and Resource Management Department, consistent with Fresno Municipal Code (FMC) Section 15-5004(B), because information regarding the property and the preliminary injunction was omitted from the application.

Further, any approval of a Zone Clearance application for this property is void, in accordance with FMC 15-5010(C), due to misrepresentations made in the application by omitting any reference to the preliminary injunction currently prohibiting any storage on the property.

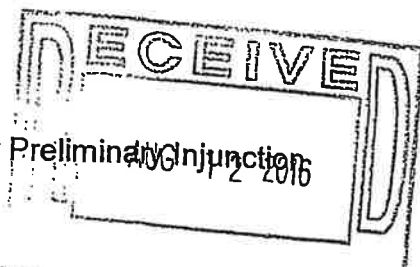
To avoid further escalation of this matter, the City requests that Mr. Occhionero immediately cease all storage and recycling facility operations occurring on the property, as the Zone Clearance is considered to be revoked and void. The City retains its rights to pursue its legal and equitable remedies against Mr. Occhionero if these activities do not stop.

Sincerely,


JENNIFER CLARK

Director, Development and Resource Management

Attachment: September 9, 2015 Order Granting Motion for Preliminary Injunction
cc: Bruce Rudd, City Manager



FILED

SEP 09 2015

FRESNO COUNTY SUPERIOR COURT

By _____ DEPT. 502

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
B.F. SISK COURTHOUSE, CIVIL DIVISION

CITY OF FRESNO, et al.,

Plaintiffs,

vs.

MICHAEL OCCHIONERO, et al.,

Defendants.

Case No. 15CECG01908

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION AND
PRELIMINARY INJUNCTION

I

INTRODUCTION

Plaintiffs allege claims for: 1) statutory violations of the Fresno Municipal Code; 2) public nuisance; and 3) Declaratory Relief. The claims arise out of defendants' use of real property located at 2680 N. Miami Ave., Fresno, California ("Property") allegedly in violation of City zoning laws and the City fire code. Pending trial on that complaint, plaintiffs herein seek a preliminary injunction.

II.

SUMMARY OF FACTS

Defendants have been operating their business on the Property since 1996. The Property is owned by defendants, Vincenzo and Greg Occhionero, and the business is operated by their son, defendant, Michael Occhionero. In 1996 defendants obtained a permit and Site Plan authorizing the use of the 5,000 square foot facility for storing and baling foam plastics, along with limited outside storage for baled recycled products. The Site Plan was later modified in 2011 for a reduction in the required parking area and allowing for additional outside storage of sorted or baled materials. Under this Site Plan, the owners were required to maintain the Property in a manner consistent with the conditions of approval as outlined in their approved "Site Plan" numbered S-96-76 and S-11-057 and applicable codes.

Since 2003, the Property has been the subject of significant Code Enforcement Activity. The City has issued many corrective notices and citations related to the Property. On March 13, 2003 it issued a notice of violation. There were four administrative citations. On April 2, 2004 the City issued a correction notice and order. On November 5, 2009 it issued a correction notice and compliance order and on October 24, 2013 it issued a correction notice and order.

Moreover, defendants have refused to allow City inspectors on the Property and have been recalcitrant in correcting issues raised by the City. On several occasions the City has been required to pursue inspection and abatement warrants.

In late 2012 and into 2013, the City's Fire Department and Code Enforcement identified further hazards and violations on the Property and, as a result, the City issued a Correction Notice and Order on October 24, 2013 which identified several violations of defendants' site plan and City codes (1) there were materials stored throughout the Property which were not approved under Site Plan No. S-11-057, including scrap metal, appliances, bed frames, televisions and other electronic devices; (2) there were materials stored in unapproved areas in

1 violation of the Site Plan and the Municipal Code, including the driveways, ingress and egress
2 lanes, parking stalls and areas immediately next to the building on the Property and above the
3 height of the fence surrounding the Property; (3) unauthorized relinquishment of parking stalls
4 required under the Site Plan by storing materials in areas designated for parking and for
5 accessing parking; (4) the landscaping on the Property was not being maintained; (5) defendants
6 maintained a public nuisance on the Property by failing to comply with the conditions of
7 approval under the Site Plan, a violation of the Fresno Municipal Code.

8 The Correction Notice and Order required the identified violations be corrected by
9 November 13, 2013 and advised defendants as follows:

10 It is very important that you clean-up, remove, repair, or cease unlawful
11 use of said property within the specified time period. Failure to correct the
12 violations within the time frame provided will result in further action by the City,
13 including citations, administrative fees, abatement by the City, and/or legal action.
14 If further action is required, you will be held responsible for the City's costs to
15 enforce the code and/or abate the violations.

16 Defendants did not appeal the Notice and Order and also failed to correct the violations
17 by November 13, 2013. As a result, on November 23, 2013, the City sought and obtained an
18 abatement warrant from the Superior Court pursuant to Code of Civil Procedure Section
19 1822.50, et seq. On December 16 through 18, 2013, the City abated the violations by removing
20 materials and other items from the Property that the City determined had contributed to the
21 violations mentioned in the Notice and Order issued on October 24, 2013.

22 On February 27, 2014, the City issued an Order and Notice of Permit Revocation relating
23 to the Property owners' Site Plan and modification thereof. In part, the Order states:

24 NOTICE IS HEREBY GIVEN TO ALL INTERESTED PERSONS that the
25 Director of the City of Fresno Development and Resource Management

1 Department, pursuant to the authority vested in her by the City of Fresno City
2 Charter and Municipal Code, has determined it necessary to protect the public
3 health, safety and welfare to revoke all privileges granted under the above-
4 referenced permits. The revocation shall take effect April 2, 2014, which is not
5 less than thirty (30) days following the posting of and service of this notice as
6 provided for under Section 12-405.E of the Municipal Code.

7 THE CAUSE OF THIS ORDER is the permit holder's failure to comply with the
8 conditions of approval imposed by the decisions granting Site Plan S-96-76 and
9 Major Revised Exhibit S-11-057 relating to 2680 N. Miami Avenue, Fresno, CA
10 93727; and other grounds, all as explained in the Director's letter dated February
11 27, 2014, revoking the Site Plan S-96-76 as well as Major Revised Exhibit S-11-
12 057.

13 The owners of the Property, Vincenza and Greg Occhionero, appealed the Notice of
14 Revocation to the City Planning Commission and on April 2 and 16, 2014 the Planning
15 Commission held a hearing on the appeal. Ultimately, on May 21, 2014, the Planning
16 Commission upheld the revocation of defendants' Site Plan/Special Permit.

17 After the Commission's decision, defendants filed a Petition for Writ of Mandamus,
18 challenging that decision. This matter was briefed, argued, and submitted to Judge Carlos
19 Cabrera in on April 17, 2015. Defendants never sought a stay under Code of Civil Procedure
20 Section 1094.5(g). At several hearings pertaining to the writs, the City's counsel advised counsel
21 for the defendants that his clients' continuing to engage in the same activities in the same manner
22 on the property would likely result in the instant civil action, in which injunctive relief would be
23 sought based on such activities.

24 Judge Cabrera found no violation of due process based on defendants' claims that they
25 had no advance notice of the evidence the City intended to present to the Commission. The

1 Judge also found no violation of due process based on time restrictions set out at the hearing. The
2 Judge found the Commission had not predetermined its decision and no violation of due process
3 because the Commission pursued revocation of the site plan while a valid appeal was pending
4 concerning defendants' contest of the underlying allegations of Code violations. Finally, Judge
5 Cabrera found that substantial evidence supported the revocation of defendants' permit.

6 Applying the independent judgment standard of review, Judge Cabrera found that the six
7 reasons stated for revocation were established: defendants consistently stored unsorted, non-
8 baled and unapproved materials in a disorderly manner throughout the property; they
9 consistently relinquished the required parking stalls as well as areas designated for
10 ingress/egress; they failed to maintain the required landscaping; and they maintained a public
11 nuisance on the property by failing to comply with the October 24, 2013 Notice/Order. The
12 Judge agreed with the Commission that "the piles of product depicted in the photographs could
13 not reasonably be categorized as 'sorted' under any reasonable definition or interpretation."
14 Finally, he found that even if the Commission erred with regard to there being a violation as to
15 the height of the materials stored the error was *de minimis* given the fact the other violations
16 "amply support revocation of the site plan."

17 Despite the fact that their permit has been revoked and that the revocation has been
18 upheld by a Superior Court Judge, the Property owners have continued to use the Property for
19 their business, continue to bring materials onto the property and continue to violate Fresno
20 Municipal and Fire Codes. In fact, the condition of the Property has become worse, not better,
21 since the permit revocation.

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III.

DISCUSSION

A. Preliminary Injunction Standard.

The parties agree that to obtain a preliminary injunction, plaintiffs must establish: (1) a reasonable probability of prevailing on the merits; and (2) that the harm to plaintiff resulting from a refusal to grant preliminary injunction outweighs the harm to the defendant from imposing the injunction. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; see also Code Civ. Proc. Sections 526 and 731.) Where a governmental entity establishes there has been a violation of a statute or ordinance, and establishes a reasonable probability it will prevail on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to defendant. (*Id.* at p. 72.) At that point, defendant must show that it would suffer grave and irreparable harm if the preliminary injunction were issued. If that is done, then the court must balance the actual relative harm to the parties. (*Id.*) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*Id.* at p. 73.)

B. Likelihood of Success.

1. Public Nuisance.

a. Nuisance Per Se.

Plaintiffs argue they has demonstrated a probability of prevailing under the required "reasonable" standard because defendants' activities constitute a nuisance *per se*.

A City or State legislature has the power to declare certain uses of property a nuisance. (Gov. Code Section 38771—"By ordinance the city legislative body may declare what

1 constitutes a nuisance.") A legislatively declared nuisance constitutes a nuisance *per se*. (*Beck*
2 *Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1207;
3 *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163-1164.) Once a violation of a
4 local law is declared to be a public nuisance, no proof of actual harmful effect is necessary. (*Id.*
5 *See also McClatchy v. Laguna Lands, Limited* (1917) 32 Cal.App. 718, 725—"Nuisances *per se*
6 are so regarded because no proof is required, beyond the actual fact of their existence, to
7 establish the nuisance. No ill effects need be proved.") Where a legislature has defined a
8 condition or activity as a nuisance, "it would be a usurpation of the legislative power for a court
9 to arbitrarily deny enforcement merely because in its independent judgment the danger caused by
10 a violation was not significant." (*Fallen Leaf Protection Assn. v. State of California* (1975) 46
11 Cal.App.3d 816, 826.)

12 Plaintiffs have presented evidence of a violation declared to be a public nuisance under
13 Fresno Municipal Code Section 10-605, pursuant to which a public nuisance exists when there
14 is: 1) a violation of the Fire Code; 2) a violation of a zoning ordinance; or 3) a violation of the
15 Fresno Municipal Code declaring a violation amounts to a public nuisance. Fresno Municipal
16 Code Section 12-411(B) states that any building or structure that is, *inter alia*, maintained
17 contrary to the Fresno Municipal Code, and any use of land, building or premises contrary to the
18 provisions of the Zoning Ordinance, and any violation of any condition of any permit issued by
19 the City, including a condition of approval or a covenant entered into as a condition of the
20 permit, shall be declared unlawful and a public nuisance, and the matter may be abated or
21 corrected by, *inter alia*, administrative citation.

22 Here, the complaint alleges multiple violations of the zoning ordinance, Fire Code, and
23 Fresno Municipal Code, including using the Property for a non-permitted use for M-1 zoning,
24 namely using the property for storage and recycling without proper approval, permits or site
25 plan, and improper storage of combustible materials and not allowing sufficient ingress and

1 egress to the property, in violation of the Fire Code. These violations clearly constitute a
2 nuisance *per se* under Fresno Municipal Code Section 10-605.

3 Defendants argue that plaintiffs did not prove that the Property was not used as allowed
4 for an M-1 zone, since they are not a recycling business, so they were never required to get a
5 permit to be a recycler, and they had permission to bring the "combustible materials," i.e., the
6 foam rubber/polyurethane foam) onto the Property. However, the court finds defendants went
7 well beyond the permit's authorization with regard to the manner of storing this property which
8 did and does constitute a danger. The court thus finds plaintiffs have shown a probability of
9 success on their claim that defendants' use of the Property constitutes a nuisance *per se*.

10
11 b. Public Nuisance.
12

13 Plaintiffs argue that even if the court does not find a nuisance *per se*, the evidence
14 supports finding the existence of a public nuisance. A "nuisance" includes "anything injurious to
15 health, including...an obstruction to the free use of property, so as to interfere with the
16 comfortable enjoyment of life or property." (Civ. Code § 3479.) A public nuisance is anything
17 "which affects at the same time an entire community or neighborhood, or any considerable
18 number of persons, although the extent of the annoyance or damage inflicted upon individuals
19 may be unequal." (Civ. Code § 3480.) Remedies against nuisance include injunctive relief. (Civ.
20 Code § 3491; Code Civ. Proc. § 731—authorizing a civil action by, *inter alia*, a City, in the
21 name of the People of the State of California, to abate a public nuisance.)

22 The City has the power to protect its citizens from improper land use and fire hazards,
23 and authority to enact and enforce ordinances regarding land use, permits, and nuisance
24 abatement. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1181; *City of Costa Mesa v.*
25 *Soffer* (1992) 11 Cal.App.4th 378, 385; *Golden Gate Water Ski Club v. County of Contra Costa*
(2008) 165 Cal.App.4th 249, 255—zoning violations constitute public nuisance; *City of Los*

1 *Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1017—fire hazard constitutes
2 public nuisance under Civ. Code §§ 3479 and 3480.)

3 The photographs and declarations plaintiffs have presented amply demonstrate that the
4 current conditions are untenable. The property violates several statutes and amounts to a public
5 nuisance. Further, plaintiff has established that the conditions on the property have become
6 increasingly worse over the last year.

7 Defendants do not address the issue of whether or not there is a nuisance, other than
8 attempting to argue they have not gone beyond their permit, or violated any Code. They attempt
9 to argue that the rebuttable presumption as stated in *IT Corp. v. County of Imperial, supra*,
10 should not arise because in that case the court said it only arose because the statute that was
11 violated specifically provided for injunctive relief, and Fresno Municipal Code Section 12-
12 411(B) does not do so. However, that is not accurate: Section 12-411(B) provides that if there is
13 a violation constituting a public nuisance it "may be abated or corrected by...court process..."
14 which certainly includes injunctive relief. Moreover, there are numerous other provisions of the
15 Fresno Municipal Code and the Civil Code that contemplate court intervention to pursue an
16 injunction. (See Civ. Code Sections 3490-3494; FMC Sections 1-301; 1-304(f); 10-615; 12-
17 411(B).)

18
19 2. Violation Of The Fresno Municipal Code.
20

21 As has been mentioned above, the evidence establishes, and the court finds, plaintiffs
22 have established a probability of success on their claim that defendants are in violation of several
23 sections of the Fresno Municipal Code.
24
25

1 3. Declaratory Relief

2
3 The court finds plaintiffs are likely to establish that the Fresno Municipal Code and Fire
4 Code sections are controlling and apply to defendants' property. Persons owning property are
5 charged with knowledge of the relevant statutes affecting the use, control, or disposition of that
6 property. (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1193.)
7 Ignorance of the law is no excuse. (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th
8 1481, 1506; *Brumagim v. Tillinghast* (1861) 18 Cal. 265, 271—"Every man...must be taken to
9 be cognizant of the law; otherwise, there is no saying to what extent the excuse of ignorance
10 might be carried. It would be urged in almost every case.")

11
12 C. Balance of Hardships

13
14 *IT Corp. v. County of Imperial, supra*, provides that where a governmental entity
15 establishes there has been a violation of a statute or ordinance, and that statute provides for
16 injunctive relief, and the governmental entity establishes a reasonable probability it will prevail
17 on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to
18 defendant. (*Id.* at p. 72.) Plaintiffs have established that the rebuttable presumption applies here.
19 Thus, it is defendants' burden to show that they would suffer grave and irreparable harm if the
20 preliminary injunction were issued. Only if they succeed in doing this does the court perform a
21 balance of the actual relative harm to the parties, with the ultimate goal being to minimize the
22 harm an erroneous interim decision might cause. (*Id.* at p. 72-73.)

23 Defendants attempt to show grave and irreparable harm through the declaration of Mr.
24 Occhionero, who states that this is his only job and if injunction is granted he will not have any
25 other source of income. However, this does not establish grave and irreparable harm: Mr.
Occhionero's income was interrupted by virtue of losing the business permit and being told to

1 cease and desist operations. Defendants have not shown they cannot use the Property for
2 something else; they may also seek a new entitlement from the City to operate the same business,
3 under a new site plan and any necessary permits the City dictates are necessary.

4 Defendants also refer to the alleged wrongs perpetrated on them at the Commission
5 hearing, and insist that because this matter is being appealed "and will continue to be appealed"
6 and has not yet been finally ruled upon, an injunction should not issue. However, defendants
7 have never sought a stay of the revocation of their Site Plan under Code of Civil Procedure
8 Section 1094.5, subdivision (g). It is thus undisputed that they have no operating permit for their
9 business and they are operating illegally.

10 Thus, even were the court to engage in a balancing of the harms, the balance tips strongly
11 in plaintiffs' favor. "The police power is one of the most essential powers of government and
12 one that is least limitable." (*Fallen Leaf Protection Assn. v. State of California, supra*, 46
13 Cal.App.3d at p. 825.) Zoning law seek to promote public health, safety and welfare by confining
14 certain classes of buildings and uses to defined locations. Such laws address issues such as undue
15 concentration of population; overcrowding of land or buildings; establishing residential districts
16 to promote the public welfare; protection of property values; advancement of the attractiveness
17 of the City; establishing trade and industrial districts; securing safety from fire, panic and other
18 dangers; promoting public sanitation; exclusion of dangerous, offensive, and unwholesome
19 trades and industries from certain districts; protection of adequate light and air; lessening
20 congestion in the streets, and reduction of traffic hazards. (*City of Los Angeles v. Silver* (1979)
21 98 Cal.App.3d 745, 749-50.) Moreover, protecting the public from fires is a primary function of
22 a municipal government.

23 The City argues that it suffers significant injury from defendants' blatantly ignoring of
24 the City's zoning ordinances and Fire Code, and their apparently intentional refusal to apply for
25 the necessary permits. This prevents the City from fulfilling its duty to enforce its codes, and also

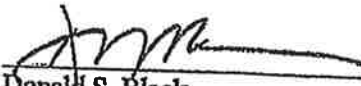
1 sends the wrong message to other citizens regarding the importance of complying with zoning
2 laws, and about the City's lack of commitment to protect other citizen's property and businesses,
3 and about laws being equally enforced. The court agrees.
4

5 IV.

6 DISPOSITION

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8 The court grants plaintiffs' motion for a preliminary injunction. Plaintiffs have suggested
9 several proposed injunctions. Given the undisputed fact that defendants are operating their
10 business illegally, and have blatantly and intentionally refused to comply with the law, the court
11 opts for the first option proposed by plaintiffs. Therefore, during the pendency of this action, or
12 until further order of the court, defendants, as well as their agents, servants, and employees, are
13 enjoined and restrained from operating any storage and recycling facility on the Property without
14 obtaining the requisite approval, permits and site plan for an M-1 property.
15
16
17

18 Dated: 9-9-15

19 
20 Donald S. Black
21 Judge of the Superior Court
22
23
24
25