IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NET CONNECTION HAYWARD, LLC, Plaintiff, v. CITY OF HAYWARD, Defendant.	Case No. C 13-1212 SC ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

This is a case about the police powers of a city versus the constitutional rights of a business. Now before the Court is Plaintiff Net Connection Hayward, LLC's ("Plaintiff") motion for a preliminary injunction against Defendant City of Hayward ("Defendant" or the "City"). The Court held evidentiary hearings on this matter on April 30 and May 1, 2013, and the parties completed their supplementary briefing on the issue on May 30, after which the Court deemed the matter submitted.[1] Having

[1] The parties agreed that their supplemental briefs on the preliminary injunction matter, ECF Nos. 35 ("Br. ISO PI"), 39 ("Opp'n to PI"), 43 ("Reply ISO PI"), submitted per the Court's post-hearing Order, ECF No. 30, are meant to supplement but not

considered the evidence presented in the hearings, as well as the parties' papers and arguments, the Court DENIES Plaintiff's motion for a preliminary injunction.

II. BACKGROUND

Plaintiff is a business called Net Connection in downtown Hayward, California. Tr. at 2.[2] (The Court refers to Plaintiff's physical location as "Net Connection Hayward"). Plaintiff's owner is Mr. Ron Doyle. Id. Defendant is the City of Hayward.

Plaintiff sells and rents computer time, including Internet access and access to software like word processors and spreadsheet programs; provides other services like faxing, scanning, and copying; and sells snacks and drinks. Id. at 12. Plaintiff has four other businesses located around California that are essentially the same as Net Connection Hayward, but that particular location is the one at issue in this case. Id. at 11-12.

As a promotional strategy, Plaintiff operates a sweepstakes (the "Sweepstakes Promotion") at Net Connection Hayward. Id. at 12. The Sweepstakes Promotion runs on software that Plaintiff obtained from Capital Sweepstakes, which apparently designs and licenses similar software to other businesses in California. See id. at 11-12, 43. Essentially, the Sweepstakes Promotion allows customers who purchase computer time (or who opt into the Sweepstakes Promotion for free, with no purchase necessary) to play

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supersede their briefs on the earlier-entered temporary restraining order, ECF Nos. 3 ("Mot. for TRO"), 9 ("Opp'n to TRO").

[2] The transcript cited here is from the Court's hearing on Plaintiff's motion for a preliminary injunction, ECF Nos. 32-33, but the Court uses the shorter citation "Tr." for brevity's sake.

a series of games on Plaintiff's computers, with the possibility of winning cash prizes. See, e.g. id. at 45-47, 50-55. Plaintiff's customers spend a great deal of time playing the Sweepstakes Promotion games: witnesses approximated that about fifty percent of customers play the games as opposed to using the computers for other activities. Id. at 54, 253.

Though the inner workings of the Sweepstakes Promotion are not important at this point, the Court will briefly summarize a very complicated technological setup as described in the report and analysis on the Sweepstakes Promotion software from Nick Farley & Associates, Inc., ECF No. 36-1 ("Suppl. Farley Report"). There are several different game types that a customer can play on Plaintiff's computers by using "points" that the customer acquires by buying computer time or just by asking for free points. Id. at 1-2. The game types are designed to look different, but the underlying mechanism for all of the types is the same: the player essentially flips over a virtual card to see if she wins or loses, though the "stacks" of "cards" with which the customer interacts are all pre-shuffled by a computer and then sorted among the different game types and levels among each game. Id. at 1-6. For example, a customer can choose to play "Fat Cat" or "Panda Paradise," each of which will draw from a different pool of pre-shuffled pieces and require the customer to use a different amount of Sweepstakes Promotion points. Id. at 1-6, 9. How many points a customer needs to flip over a card depends on what game type the customer is playing, and each different level of points draws from a different pool as well. Id. at 9. On a purely mathematical and computational level, the results of each Sweepstakes Promotion game

are preset and predictable, since the Sweepstakes Promotion software does not randomize results as a customer uses the software, but the number of game types and the way "piles" of cards are shuffled, selected, and rotated among the games provides for a vast number of possible outcomes. See id. at 6-10.

Before opening Net Connection Hayward, Mr. Doyle obtained a lease on a building in downtown Hayward and contacted Defendant's planning manager, Mr. Richard Patenaude. Tr. at 13. At that time, Mr. Patenaude was the head of the City's planning division. Id. at 220. The City's zoning ordinance was exclusionary, meaning that anything not specifically listed in the ordinance is prohibited, and Mr. Patenaude's job when Mr. Doyle contacted him involved (among other things) deciding whether particular uses could be allowed under the City's ordinance. See id. at 220-22; see also ECF No. 3-10 ("Pl.'s RJN ISO TRO") Exs. G ("Zoning Ordinance Sections 10-1.100 - 10-1.180") (providing basic zoning ordinance guidelines), I ("Zoning Ordinance Sec. 10-1.2800 - 10.1-2850") (describing zoning compliance processes).[3]

The area where Plaintiff's business is located is zoned "Central City-Commercial." Pl.'s RJN ISO TRO Ex. H ("Central City-Commercial Ordinance"). The Central City-Commercial subdistrict permits a list of primary and conditional uses, but Plaintiff's business description is not included there. See id. It would accordingly require some form of approval from the city -- Plaintiff's business would not be a permissive primary use. See Zoning Ordinance Sections 10-1.100 - 10-1.180; Zoning Ordinance

[3] The Court takes judicial notice of documents submitted with the parties' various requests for judicial notice under Federal Rule of Evidence 201.

Sections 10-1.2800 - 10-1.2850; see also Pl.'s RJN ISO TRO Ex. K ("Zoning Ordinance Sections 10-1.3105 - 10-1.3170").

When Mr. Doyle explained to Mr. Patenaude what Net Connection Hayward planned to do, he said that the business would sell and rent computer time, provide photocopying and scanning services, and sell products like office supplies, snacks, and drinks. Id. at 14. He also mentioned that Net Connection Hayward would offer promotions, which Mr. Patenaude asked him to explain further. Id. at 14-15. Mr. Doyle accordingly sent Mr. Patenaude a letter on November 11 or 12, 2012, in which he outlined Net Connection Hayward's business and explained that Net Connection Hayward would offer "special promotions" similar to those offered by major food establishments and gas stations, so that customers could win cash prizes through the use of purchased Internet time. ECF No. 3-7 ("Doyle Decl. ISO TRO") Ex. B ("Patenaude Ltr.").

A few days after sending his letter, Mr. Doyle followed up with Mr. Patenaude and learned that Mr. Patenaude still did not understand the business or the Sweepstakes Promotion. Tr. at 17. Part of Mr. Patenaude's concern was that Mr. Doyle's description of the Sweepstakes Promotion was not on the business license application itself, though Mr. Patenaude agreed with Mr. Doyle that the space for a description was too small to fit a very detailed description -- all that fit was "Internet Service / Business Center." See id. at 67-68, 73, 229. To clarify the Sweepstakes Promotion and Plaintiff's business for Mr. Patenaude, Mr. Doyle told Mr. Patenaude that in San Lorenzo, not far from Hayward, Plaintiff operated an identical business to the one Plaintiff planned to open in Hayward. Id. Mr. Doyle invited Mr. Patenaude

to investigate the San Lorenzo business, since the services there were exactly what Plaintiff planned to provide at Net Connection Hayward. Id. Mr. Patenaude accepted the invitation and visited Plaintiff's San Lorenzo location, so that he could corroborate his understanding of the written description of the business that Mr. Doyle provided with the actual business's operations. Id. at 223.

While at Plaintiff's San Lorenzo location, Mr. Patenaude walked around the business, looked at the computers, spoke briefly to the cashier, and left. Id. at 223-25, 229-30; see also Patenaude Ltr. Mr. Patenaude did not operate any of the computers at Plaintiff's San Lorenzo location, nor did he play any of the Sweepstakes Promotion games, Tr. at 225, or read the large poster in Plaintiff's business that explained the Sweepstakes Promotion, Doyle Decl. ISO TRO Ex. A ("Sweepstakes Poster"). Plaintiff's manager, Ms. Keyawie Hernandez, also testified that the cashier on duty when Mr. Patenaude visited offered him some points to play the Sweepstakes Promotion games, and Mr. Patenaude's companion asked if he wanted to operate any of the computers, but Mr. Patenaude declined all offers. Tr. at 84-88. At that time, two other businesses similar to Plaintiff's were licensed and operating in the City, though Mr. Patenaude apparently did not visit those. Id. at 232-33.

Not long after Mr. Patenaude visited Plaintiff's San Lorenzo location, he approved a business license for Plaintiff, which Plaintiff retrieved toward the end of November 2012. Id. at 18-19, 232-33. Mr. Patenaude stated both that he authorized Plaintiff's license from a land use perspective and that he would not have issued the license if he had any concerns with the legality of

Plaintiff's proposed business. Id. at 228-29, 232-35. Though the City's zoning ordinance was exclusionary and allowed non-permissive uses only if the planning director (or the City Planning Commission, on appeal) determines that the use is similar to and not more objectionable than additional uses, the City also issues two different types of use permits: administrative use permits, which are approved by staff, and conditional uses, which require conditional use permits from the City Planning Commission. Id. at 264-65. Mr. Patenaude did not clarify under which permit he approved Plaintiff's license, but there is no dispute that he approved it from a land use perspective, relative to the City's zoning ordinance. Id. at 228-29, 232-35.

Plaintiff began operating at Net Connection Hayward in December 2012. Id. at 11. Around the same time, the California Bureau of Gambling Control issued an advisory letter, which was not intended to be legal advice, stating that it considers "Internet cafes" that offer Internet time or phone cards in conjunction with "promotional sweepstakes" to be illegal gambling operations subject to California criminal laws. Pl.'s RJN ISO TRO Ex. L ("Advisory Letter") at 1-3. Essentially, the Bureau of Gambling Control's position is that sweepstakes like the one Plaintiff uses at its businesses are games of chance that function as illegal slot machines or lotteries. Id. at 3.

In December, sometime around the Advisory Letter's dissemination, Plaintiff received its first visit from the City police. See Tr. at 86-89. On that visit, the police asked Mr. Doyle and Ms. Hernandez for an explanation of the Sweepstakes Promotion, which they provided, along with a demonstration. Id. at

87-88. After that, the police did several "walkthroughs" at Net Connection Hayward, during which officers visited the business, checked on customers (talking to some outside the store), and asked more questions about the Sweepstakes Promotion. Id. at 88-89.

Police visits to Net Connection Hayward continued -- including one random visit culminating in the arrest of one of Plaintiff's employees for an outstanding traffic warrant -- but the police were never at Net Connection Hayward to respond to calls of any sort. Id. at 27, 30, 32, 82, 84-88, 252, 298-99, 316. Mr. Doyle and his employees also testified that Net Connection Hayward has never had problems with crime, drugs, prostitution, or any such issues. See, e.g., at 30, 82, 252. Defendant's law enforcement witnesses confirmed the same. See, e.g., id. at 296, 316. The only issues that Defendant actually reported came from a neighbor of Net Connection Hayward, who reported seeing some bikes parked in public places outside the business; having people park in her parking lot, which was not marked as private; and observing some people smoking near Plaintiff's business. See id. at 280-81.

On February 8, 2013, Defendant sent Plaintiff a cease-and-desist letter indicating that Defendant had learned of Plaintiff's Sweepstakes Promotion and considered it illegal under California Penal Code sections 330a, 330b, 330.1, and 319 -- Defendant therefore ordered Plaintiff to cease and desist operation of the Sweepstakes Promotion at Net Connection Hayward. Doyle Decl. ISO TRO Ex. E ("Feb. 8 Ltr."). The February 8 Letter stated that if Plaintiff did not comply, Defendant would take any necessary legal action against Plaintiff, including public nuisance abatement, and that Defendant would assist with any other investigation or

prosecution related to Plaintiff's Sweepstakes Promotion. Id. at 1-2.

On February 19, 2013, the City's Director of Development Services and the City Attorney recommended that the City Council adopt an interim urgency ordinance that would impose a temporary moratorium on the development, establishment, and operation of Plaintiff's business and other similar businesses. Pl.'s RJN ISO TRO Ex. B ("Feb. 19 Memo.").

On the same day, Mr. Doyle wrote an extensive letter to the Mayor and City Council of Hayward, explaining in detail his opposition to the urgency ordinance and moratorium, and asking in the alternative that the matter be continued for forty-five days so that it could be reviewed in greater detail. Id. Ex. C ("Doyle Ltr."). The letter thoroughly explained Plaintiff's opposition to Defendant's planned urgency ordinance and requested that Defendant consider several points: (1) not all sweepstakes are illegal in California; (2) Plaintiff's Sweepstakes Promotion conforms with California law; (3) Sweepstakes Promotion operators whose businesses are nuisances can be eradicated without eliminating jobs and revenue from legitimate operators; (4) there is no legal justification for imposing a moratorium that would deprive Plaintiff of the opportunity to conduct its business; (5) the planned ordinance is unnecessary to preserve the community's health, safety, and welfare (or to avoid a current and immediate threat to the same); and (6) if the City Attorney believes that sufficient evidence exists to declare Plaintiff's business a nuisance, that evidence should be tested in a court instead of in the City Council. Id. at 3-5.

The City adopted Ordinance No. 13-03 on February 20, 2013, pursuant to California Government Code section 65858. Pl.'s RJN ISO TRO Ex. D. Broadly, that ordinance prohibited both all future issuance or approval of any permits or licenses for "Computer Gaming and Internet Access Businesses" -- Net Connection Hayward is such a business -- and all operation of such businesses. Id. at 4.

On March 7, 2013, Defendant sent Plaintiff another cease-and-desist letter. ECF No. 10 ("Vigilia Decl.") Ex. C ("Mar. 7 Ltr."). The contents of that letter were similar to the February 8 Letter, but instead of asking Plaintiff to cease and desist subject to California gambling laws, the letter demanded that Plaintiff comply with Ordinance No. 13-03. See id. at 1-3. The March 7 Letter invited Plaintiff to contact the City Attorney to discuss the matter, but the City Attorney apparently never responded to Plaintiff's requests for a conversation about Ordinance No. 13-03. See Doyle Decl. ISO TRO ¶ 18. On March 11, 2013, Plaintiff closed Net Connection Hayward for fear of prosecution or other legal action. Id. ¶ 20.

Plaintiff sued Defendant on March 19, 2013, asserting five causes of action based on the facts described above: (1) denial of procedural due process, (2) denial of substantive due process, (3) violation of the right to equal protection, (4) declaratory relief, and (5) writ of mandate. Compl. ¶¶ 24-55. Plaintiff moved for a TRO on March 21, 2013, and Defendant opposed the motion on March 25, 2013, one day before the hearing. In the meantime, on March 22, 2013, Defendant noticed a public hearing on its forthcoming decision to extend Ordinance No. 13-03. ECF No. 42 ("Def.'s Supp. RJN") Ex. C ("Mar. 22 Hr'g Notice").

At the hearing on Plaintiff's motion for a TRO, Plaintiff gave a brief overview of the Sweepstakes Promotion and the procedure by which it obtained a business license, as described above. See generally ECF No. 19 ("TRO Hr'g Tr."). Defendant responded that its police powers are very broad and that Plaintiff showed no evidence that Defendant acted arbitrarily or unreasonably. See id. at 31-35. Defendant added that Plaintiff's business was not permissible under Defendant's zoning ordinances, that Plaintiff obtained its business license improperly (meaning that Plaintiff had no vested interest in it or the operation of its business), and that the Sweepstakes Promotion is illegal under California law. Id. at 36-41.

Based on the evidence then before it, the Court granted Plaintiff's TRO to maintain the status quo while the parties prepared to present evidence at the preliminary injunction hearing. Id. at 45. After Plaintiff's TRO issued, the parties agreed that the TRO would remain in full force and effect, regardless of Federal Rule of Civil Procedure 65's deadlines, until the Court's decision on the preliminary injunction. ECF No. 17 ("Apr. 4 Stip."). Plaintiff's business therefore reopened.

On April 2, 2013, the City's Director of Development Services and the City Attorney recommended that the City Council extend the moratorium it had established in Ordinance No. 13-03. Def.'s Supp. RJN Ex. B ("Apr. 2 Memo."). That Memorandum described the background of Ordinance No. 13-03, suggested that Plaintiff's and other similar businesses' licenses had been granted without approval of those businesses' sweepstakes, and explained Defendant's concerns about these new businesses in terms of other

cities' experiences and the potential negative effects of such businesses. See id. at 1-7. The City Council met to consider extending Ordinance No. 13-03 on April 2, and it did so unanimously, enacting Ordinance No. 13-05 pursuant to California Government Code Section 65868. Def.'s Supp. RJN Ex. A ("Ordinance No. 13-05").[4]

Ordinance No. 13-05 included findings -- more detailed than what is summarized here -- that its purpose was to promote the public health, safety, and general welfare; that Computer Gaming and Internet Access Businesses presented new challenges for the City, as evidenced by other cities' experiences with similar businesses; that the City's present Zoning Ordinance Municipal Code were unsuited for handling these new business developments. Id. at 1-5. Ordinance No. 13-05 imposed the same moratorium as Ordinance No. 13-03 and also formally declared Computer Gaming and Internet Access Businesses to be nuisances.

The facts described above represent the current status of the parties and the relevant municipal legislation.

III. LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm absent preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. Winter v. Natural Resources

[4] The parties often refer to the two Ordinances, Nos. 13-03 and 13-05, collectively. The Court occasionally does the same, though the operative Ordinance here is Ordinance No. 13-05, and the Court cites that Ordinance specifically when it is important to do so.

Defense Council, Inc., 555 U.S. 7, 20 (2008).

The Ninth Circuit has formulated a version of the preliminary injunction test in which "serious questions going to the merits" and a balance of hardships tipping toward the plaintiff can support the issuance of a preliminary injunction, so long as there is a likelihood of irreparable injury and the injunction is in the public interest (that is, so long as the plaintiff makes a showing on all four prongs of the Winter test). See Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-33 (9th Cir. 2011). In other words, under this formulation, a stronger showing under one factor could offset a weaker showing for another, but a plaintiff must still satisfy every Winter factor. Id. at 1135.

IV. DISCUSSION

Plaintiff argues that Defendant's enactment of the Ordinances, declaration of Plaintiff's business as a nuisance, and legal threats to shut down Plaintiff's business deprived Plaintiff of its due process and equal protection rights under the Fourteenth Amendment. See Br. ISO PI at 1-2. These claims are also the basis for Plaintiff's requests for declaratory relief and a writ of mandate. See Compl. ¶¶ 48-55. Plaintiff claims that it is entitled to relief regardless of the underlying legality of the Sweepstakes Promotion. Id. Defendant argues that it acted properly at every step of the ordinance, nuisance declaration, and enforcement processes. See Opp'n to PI at 1-2.

A. Due Process

The parties' disputes over Plaintiff's due process claims concern essentially: (a) the Ordinances' legality generally; (b)

whether Plaintiff had obtained a vested right prior to the Ordinances' enactment, and how Defendant might impair that right; and (b) Defendant's nuisance powers.

a. The Ordinances

Defendant enacted Ordinance No. 13-03 as an interim urgency ordinance under California Government Code section 65868. Opp'n RJN Ex. B. The purpose of Section 65858 "is to allow a local legislative body to adopt interim urgency zoning ordinances prohibiting land uses that may conflict with a contemplated general plan amendment or another land use measure proposal which the legislative body is studying or intends to study within a reasonable period of time." 216 Sutter Bay Assocs. v. Cnty. of Sutter, 58 Cal. App. 4th 860, 869 (Cal. Ct. App. 1997). The effects of an interim urgency ordinance under Section 65858 are limited to forty-five days from the date of adoption, but after notice and a public hearing, the legislative body can extend the ordinance. Cal. Gov't Code § 65858(a)-(b).

Interim urgency ordinances must include legislative findings constituting urgency, and when those facts may reasonably be held to constitute an urgency, courts generally do not interfere with or determine the truth of those facts. 216 Sutter Bay, 58 Cal. App. 4th at 868. Ordinances are presumptively valid, and given the breadth of cities' police powers, courts will neither substitute their judgment for those of the legislature nor hold that a legislative body's enactments were improper uses of the legislative body's police powers "unless [the enactments] are palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare."

Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 187 (Cal. Ct. App. 1962).

In this case, there are two especially relevant sections of Ordinance No. 13-05, the operative Ordinance at this point: the part that declares Plaintiff's business a nuisance, and the part that prohibits Plaintiff from operating its business. First, Ordinance No. 13-05 defines "Computer Gaming and Internet Access Businesses" as follows:

> . . . [A]n establishment that provides one or more computers or other electronic devices for access to the World Wide Web, Internet, e-mail, video games or computer software programs that operate alone or networked (via LAN, WAN, wireless access or otherwise) or that function as a client/server program, and which seeks compensation or reimbursement, in any form, from users. "Computer Gaming and Internet Access Business" shall also be synonymous with a personal computer ("PC") café, Internet café, cyber café, sweepstakes gaming facilities, business center, Internet sales business and Internet center with Internet sweepstakes-type games . . . .

Ordinance No. 13-05 at 5.

The moratorium's scope, as to Computer Gaming and Internet Access Businesses, is this:

> . . . [F]rom and after the effective date of this Ordinance, no permit or any other applicable license or entitlement for use, including but not limited to, the issuance of a business license, business permit, building permit, use permit or zoning text amendment shall be approved or issued for the establishment or operation of Computer Gaming and Internet Access Businesses in the City of Hayward. Additionally, Computer Gaming and Internet Access Businesses are hereby expressly prohibited in all areas and zoning districts in the City.

Id.

Ordinance No. 13-05 also declares Computer Gaming and Internet Access Businesses to be nuisances:

> The establishment, maintenance or operation of a Computer Gaming and Internet Access Business as defined herein with[in] the City limits of the City of Hayward is a public nuisance. Violations of this Ordinance may be enforced by any applicable law, including but not limited to injunctions, administrative citations or criminal penalties.

Id. at 6.

Plaintiff has never disputed Defendant's ability to enact the Ordinances. See Reply ISO PI at 1. Plaintiff's argument is that the Ordinances themselves operate unconstitutionally to deprive Plaintiff of due process and subject it to unequal treatment under the law because its business is both legal and permissible under the City's zoning regulations. Plaintiff's claims primarily attack Defendant's ability to use the Ordinances to prohibit Plaintiff's operation of its business after Defendant's ostensible approval of the business. Id.

When a dispute over an ordinance is not whether it was validly enacted but that it has been unconstitutionally applied, an ordinance's broad scope is limited if it divests a plaintiff of vested rights previously acquired, unless the prohibited business is a nuisance. See Jones v. City of Los Angeles, 211 Cal. 304, 311-13 (Cal. 1930) ("[W]here . . . a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power."); Igna v. City of Baldwin Park, 9 Cal.

App. 3d 909, 913-14 (Cal. Ct. App. 1970); McCaslin v. City of Monterey Park, 163 Cal. App. 2d 339, 346-47 (Cal. Ct. App. 1958); see also, e.g., Santa Barbara Patients' Collective Health Coop. v. City of Santa Barbara, No. CV 10-06534 DDP, 2012 WL 5964353, at *5 (C.D. Cal. Nov. 29, 2012) (citing McCaslin, 163 Cal. App. 2d at 346-47)). This principle limits cities' abilities to close lawfully operating businesses by enacting new ordinances, because cities generally want to avoid questions as to the constitutionality of new ordinances' application to existing uses. Hansen Bros. Enters., Inc. v. Bd. of Supervisors, 12 Cal. 4th 533, 550 (Cal. 1996); Bauer v. City of San Diego, 75 Cal. App. 4th 1281, 1291 (Cal. Ct. App. 1999). The same concern animates Plaintiff's claims.

Courts interpret municipal ordinances in the same manner and pursuant to the same rules applicable to the interpretation of statutes. See City of Monterey v. Carrnshimba, 215 Cal. App. 4th 1068, 1087 (Cal. Ct. App. 2013). Such interpretation is a judicial function. Id. The Court finds it clear, based on the language of the Ordinance, that the Ordinance prohibits the operation of Plaintiff's business. Ordinance No. 13-05 at 5. That much does not appear to be at issue. The remaining issues are therefore whether Plaintiff obtained a vested interest in the operation of its business, and if so, whether Defendant could lawfully impair that interest.

b. Vested Rights

The doctrine of vested rights states that a property owner who has performed substantial work and incurred substantial liabilities, in good faith reliance on a government permit, has a

vested right to use the premises as the permit allows. Communities for a Better Env't v. S. Coast Air Quality Dist., 48 Cal. 4th 310, 323 (Cal. 2010). While "[i]t is well settled in California that public entities may impair vested rights where necessary to protect the health and safety of the public," impairment of a vested right without due process is a constitutional violation, unless the use is a public nuisance. Davidson v. County of San Diego, 49 Cal. App. 4th 639, 648-49 (Cal. Ct. App. 1996); see also McCaslin, 163 Cal. App. 2d at 346-47.

Plaintiff argues that it obtained a vested right to operate its business when it obtained a business license (coupled with a discretionary approval from a land use perspective) from Defendant. See Br. ISO PI at 3. Defendant responds that mere issuance of a business license does not confer a right to do business in Hayward, and in any event, any vested rights in this case would be limited to computer time rental and ancillary business services -- not operation of a sweepstakes. Opp'n to PI at 11-13. Defendant adds that it can lawfully impair a vested right to protect public health and safety or to abate a nuisance. Id. at 14-15 (citing Jones, 211 Cal. at 317; Davidson, 49 Cal. App. 4th at 648-49). There is no dispute that Plaintiff spent time and money setting up Net Connection Hayward.

Defendant relies mainly on City of Corona v. Naulls, 166 Cal. App. 4th 418 (Cal. Ct. App. 2008), in which the operator of a medical marijuana dispensary had obtained a license to do business in the City of Corona but was found not to have a vested right to do business in the City. Id. at 427. However, the critical fact in the trial court's decision in Naulls (and the appellate court's

affirmation of it) was that the dispensary operator never told the City of Corona that he was going to operate a medical marijuana facility. Id. at 427-28. His application stated that he would operate a "miscellaneous retail" facility, explained nothing further -- he obtained his license essentially under false pretenses. Id. In this case, Mr. Doyle appears to have made every effort to be transparent with the City. He sent emails describing his business, he invited Mr. Patenaude to look around his other businesses, and he made no attempt to hide that he would operate a cash-prize sweepstakes (even though he did not fully explain that sweepstakes's architecture). See, e.g., Tr. at 14-15, 17; Patenaude Letter. Indeed, Mr. Patenaude visited Mr. Doyle's other businesses and was given the opportunity to play the sweepstakes games and investigate further, though he apparently did not choose to go very deeply. See, e.g., Tr. at 223-25, 228-29, 232-35.

Defendant's failure to investigate the matter and make a different finding at the time Plaintiff originally applied for its license is not Mr. Doyle's fault. Both parties did what they were supposed to do. Defendant contends that the sweepstakes were not one of the ancillary business services Plaintiff planned to offer, therefore limiting Plaintiff's license to "rental of computer/Internet time, provision of facsimile and copy services, and incidental sales of prepackaged snack foods," Opp'n to PI at 13, but the Court finds otherwise. Again, Plaintiff made clear the nature of its business to Defendant. Mr. Doyle did what he could to get Defendant to examine his sweepstakes program, but Defendant was apparently not inclined to do so.

The Court finds that Plaintiff obtained a vested right to

operate its business when Defendant approved its business license from a land use perspective. Even though Hayward's Municipal Code prohibits the operation of business without a license and makes the operation of certain business contingent on Defendant's approval, Defendant's agent Mr. Patenaude approved Plaintiff's business from a land use perspective, indicating that Plaintiff had satisfied requirements -- what more was Plaintiff expected to do? See Pl.'s Br. ISO PI at 3, 7-10; Pl.'s RJN ISO TRO Exs. E ("Municipal Code Sections 1-3.00 - 1-3.07"), F ("Municipal Code Sections 4-1.00 - 4-1.67"). Defendant's argument that the license was only for tax purposes, and that Plaintiff had no right to operate its business absent compliance with law and Defendant's approval, must fail. See Opp'n at 11-12. Defendant approved the license from a land use perspective, which in Plaintiff's and the Court's view appears to be a sign-off on Plaintiff's business's legality.

Since the Court has found that Plaintiff had a vested interest in the operation of its business after Defendant approved the license, the Court must consider the exception to the due process rule from Jones -- whether Defendant impaired Plaintiff's vested interest in response to a nuisance. Jones, 211 Cal. at 317; see also Davidson, 49 Cal. App. 4th at 648-49; McCaslin, 163 Cal. App. 2d at 346-47.

c. Nuisances

Defendant argues that it lawfully declared Plaintiff's business, and specifically its sweepstakes operation, to be a public nuisance. Opp'n to PI at 7-8. It adds that regardless of whether Plaintiff has a vested right in its business, Defendant can impair that right to protect public health and safety or to respond

to a nuisance. Id. at 14-15. Plaintiff responds that Defendant acted arbitrarily and irrationally both in enacting the Ordinance and declaring Plaintiff's business a nuisance, and that Plaintiff was entitled to a judicial determination of the nuisance declaration's validity before Defendant could take action based on a nuisance per se. See Reply ISO PI at 1-4, 6-8. Plaintiff also states that Defendant cannot argue that Plaintiff's business is a nuisance per se, since Defendant approved Plaintiff's business from a land use perspective, and that Defendant failed to demonstrate that Plaintiff's business is illegal under the Penal Code. Id. at 8-14.

In this dispute, the Court finds for Defendant. Cities have a statutory power to declare activities or conduct to be nuisances per se. Cal. Gov't Code § 38771; see also CEEED v. Cal. Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 315, 319 (Cal. Ct. App. 1974). Whenever a city has declared something to be a nuisance per se, courts do not look to the common law of nuisance or to state statutes to determine whether a nuisance exists, nor do courts substitute their judgment for the legislature's in examining the danger caused by a nuisance per se -- the only question is whether a statutory violation exists and whether the statute is constitutionally valid. See City of Bakersfield v. Miller, 64 Cal. 2d 93, 100 (Cal. 1966) (en banc); People ex rel Dep't of Transp. v. Outdoor Media Grp., 13 Cal. App. 4th 1067, 1076-77 (Cal. Ct. App. 1993).

Neither notice nor a hearing is required when a city declares something a nuisance per se, but both are required when government acts to terminate an existing land use activity. CEEED, 43 Cal.

App. 3d at 319. There are two broad limits on a city's ability to declare something a nuisance. First, per constitutional due process, cities may not act arbitrarily or unreasonably in declaring nuisances per se. People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1107 (Cal. 1997). Second, activities or conduct that are expressly permitted under statute cannot be deemed nuisances. Cal. Civ. Code § 3482.

Only the first limit is at issue here. The Court finds that Defendant did not act arbitrarily or unreasonably in enacting the Ordinances and declaring Plaintiff's business a nuisance. The Court owes deference to Defendant's choices on this matter, Thain, 207 Cal. App. 2d at 186-87, and Defendant made findings as to the necessity of its decision that the Court will neither over-analyze nor second-guess. See Ordinance No. 13-05 at 1-5. Defendant studied the issue, enacted a moratorium on a particular land use, then gave notice and held a hearing for that moratorium's extension and the declaration of a nuisance. See Feb. 19 Memo.; Apr. 2 Memo.; Ordinance No. 13-03; Ordinance No. 13-05; Mar. 22 Hr'g Notice.

Plaintiff argues that Defendant lacked a rational basis to make these decisions because its evidence concerned activity outside Hayward and Defendant (in Plaintiff's estimation) did not prove that Plaintiff's sweepstakes promotion is illegal. Reply ISO PI at 6-8; see also, e.g., Ordinance No. 13-05 at 1-5 (discussing evidence that other cities have had problems with businesses like Plaintiff's). As to the first point, Plaintiff is correct that none of Defendant's evidence in support of either its Ordinances or nuisance determination concerns facts specific to Plaintiff's

business, and that Plaintiff has not had any typical nuisance problems like drug activity or prostitution. See Br. ISO PI at 9-12. But deep inquiries into the evidence are unnecessary: in the due process context, the Court's job is to evaluate whether the object of the ordinance is proper, and if so, whether the ordinance bears a reasonable and substantial relation to its object. See Thain, 207 Cal. App. 2d at 186. In this case, no law suggests that Defendant needed to wait for the same negative effects it observed in other municipalities to arise in its own downtown before it could respond to a new land use development. This is not arbitrary or unreasonable action. The Court finds that Defendant's object in enacting the Ordinance was proper and that Defendant showed rational grounds for its enactment.

At several points, Plaintiff asserts that, nuisance declaration aside, it deserved a judicial determination before Defendant could actually take action against the alleged nuisance of Plaintiff's business. See Br. ISO PI at 4-5; Reply ISO PI at 2-3; Br. ISO TRO at 21-22. This is not true. A city can declare a nuisance on its own, even though abatement requires additional process (such as notice, hearing, and potentially judicial review). See CEEED, 43 Cal. App. 3d at 319. The parties never got that far, because Plaintiff sued Defendant before the abatement process got underway, and so the facts before the Court concern only Defendant's process up to that point.

Plaintiff's strongest argument that it was entitled to due process in the form of a judicial determination of the nuisance declaration's validity comes from Leppo v. City of Petaluma, 20 Cal. App. 3d 711 (Cal. Ct. App. 1971), in which the California

Court of Appeal stated that under neither common law nor its statutory power to declare and abate public nuisances could a city, by mere declaration, make a property a nuisance "when in fact it is not." Id. at 718; see also Flahive v. City of Dana Point, 72 Cal. App. 4th 241, 244 n.4 (Cal. Ct. App. 1999) (citing Leppo, 20 Cal. App. 3d at 718). According to Plaintiff, Leppo requires Defendant to establish by a preponderance of the evidence that an emergency existed before it declared something to be a nuisance. See Reply ISO PI at 1-2. However, Plaintiff's contention blurs the legal distinction between the process required when a city declares something to be a nuisance and when a city acts to abate a nuisance. See CEEED, 43 Cal. App. 3d at 319. When a city declares something to be a nuisance, its powers are broad indeed, as described above. In this context, the Leppo and Flahive courts' concern that a city could declare something a nuisance "when it in fact is not" is a narrower statement than it seems, as the Court of Appeal recently clarified in Golden Gate Water Ski Club v. Cnty. of Contra Costa, 165 Cal. App. 4th 249, 256 (Cal. Ct. App. 2008).

In Golden Gate, the court stated that Leppo and Flahive's statements that a city's "designation of a nuisance does not necessarily make it so" addressed "the situation where there is some factual dispute which, if determined in favor of the landowner, would mean the landowner was not in fact violating zoning law or land use ordinance." 165 Cal. App. 4th at 256. Similarly, the defendants in City of Claremont v. Kruse, 177 Cal. App. 4th 1153, 1167-68 (Cal. Ct. App. 2009), cited Leppo for their argument that a city could not enforce an ordinance declaring a condition that violated the city municipal code to be a public

nuisance, absent a judicial determination. The court in Kruse distinguished Leppo by noting that it concerned neither a similar ordinance nor a nuisance per se -- rather, Leppo concerned whether a city could dispense with a due process hearing and summarily demolish a building pursuant to its nuisance abatement powers. Id.

In this case there is no factual dispute that Plaintiff's business violated the Ordinances, which are the operative land use laws in this case. Further, as the court in Kruse noted, the simplicity of Leppo is not apposite here, since Defendant has both gone through statutorily mandatory process for its ordinance and exercised its nuisance per se powers. Accordingly, Plaintiff's factual contentions about Defendant's nuisance declaration are misplaced: they go toward whether Defendant acted unreasonably or arbitrarily in declaring Plaintiff's business a nuisance, not whether the business is in fact a nuisance. And since Defendant did not act unreasonably or arbitrarily, Plaintiff's challenge fails.

At this point, no further examination of Defendant's Ordinances is necessary. It does not even matter whether Defendant was right or wrong about the sweepstakes promotion's legality, because the overriding question is whether Defendant's responses to its decision that the promotion was illegal were proper. They were. It is enough that Defendant acted properly in declaring Plaintiff's business a nuisance, but even in enacting the Ordinances, Defendant acted within the law. It was permitted to pass Ordinance No. 13-03 without the usual notice and hearing, and it provided the statutorily requisite hearing for Ordinance No. 13-05. See Mar. 22 Hr'g Notice; Tr. at 36 (Mr. Doyle spoke at the

hearing).

d. Conclusion as to Plaintiff's Due Process Claims

As explained above, Plaintiff has shown no likelihood of success on its substantive or procedural due process claims. Defendant followed the proper procedures in enacting and enforcing the Ordinances, and Defendant did not act arbitrarily or unreasonably in doing so.

B. Equal Protection

Plaintiff also claims that Defendant's enactment and enforcement of the Ordinances violated Plaintiff's Fourteenth Amendment right to equal protection under the law. Plaintiff alleges that Defendant treated Plaintiff differently than similarly situated businesses, for no rational reason. See Br. ISO PI at 23 (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). Plaintiff's claim is based on its allegation that while Hayward is home to other businesses that operate sweepstakes promotions for cash prizes, Defendant targeted only Plaintiff with its enforcement efforts. See id. at 23-24. Defendant responds that Plaintiff fails to show any facts indicating that it was irrationally treated differently from any similarly situated business, and in any event, Defendant's actions were rationally related to its legitimate interest in regulating land use and putting a check on potentially criminal conduct. Opp'n to PI at 10-11.

When a government's action does not involve a suspect classification or implicate a fundamental right, it will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); Lockary v.

Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). The rational basis standard is quite deferential: it forbids the Court from judging the wisdom, fairness, or logic of legislative choices, and where there are "plausible reasons" for the legislature's action, the Court's "inquiry is at an end." U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-79 (1980); see also FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993).

To establish its equal protection claim in this case, Plaintiff must establish that Defendant "intentionally, and without rational basis, treated [Plaintiff] differently from others similarly situated." Village of Willowbrook, 528 U.S. at 564. Plaintiff contends that according to Defendant's own arguments, Defendant specifically targeted Plaintiff's Sweepstakes Promotion because sweepstakes games are not permitted under any city ordinance. Reply ISO PI at 7. However, according to Plaintiff, other businesses' sweepstakes are legally identical to Plaintiff's, and so if Defendant was really aiming to curtail sweepstakes for zoning compliance reasons, it should have targeted those businesses too. Id. at 7-8. Plaintiff's argument (partly by implication) is that Defendant's enforcement actions against Plaintiff and other Internet cafes must have been irrational and pretextual, given the Sweepstakes Promotion's similarity to those run by better-established businesses like McDonald's or Coca-Cola. See id.

Part of Plaintiff's argument appears to urge the Court to analyze the workings of Plaintiff's sweepstakes software and compare it to Plaintiff's evidence on other businesses' sweepstakes. That evidence consists of an array of sweepstakes rules and some brief, vague testimony on how the McDonald's

sweepstakes might work. See ECF No. 3-3 ("Griffin Decl. ISO TRO") Exs. A-M (providing other sweepstakes rules); Tr. at 135-46.

The Court declines to consider these issues. It is unnecessary to answer questions about the sweepstakes' legality at this point, and the Court will not (and cannot) issue an advisory opinion on that matter. Flast v. Cohen, 392 U.S. 83, 96 (1968) (forbidding advisory opinions). Besides, the Court lacks enough evidence to determine whether any other businesses' sweepstakes are similar, much less identical, to Plaintiff's, or even whether the other businesses Plaintiff and Defendant mention (e.g., Coca-Cola, Carl's Jr., or Wal-Mart) could qualify as Computer Gaming and Internet Access Businesses under the Ordinances. A list of rules and Plaintiff's witness's guesses about another business's sweepstakes is not enough to permit the Court to decide this issue.

What is clear from the evidence is that Plaintiff has failed to show any likelihood of success on its equal protection claim. If the Court looks to the most obviously similarly situated businesses -- Internet cafes like Plaintiff -- most of those businesses are already in court, on one side of the table or the other. See, e.g., Ibiz LLC v. City of Hayward, No. CV 13-1537 SC; Chances Are, LLC v. City of Hayward, No. CV 13-2383 SC. There is no disparate treatment (much less irrational action) there, and Plaintiff does not claim that there was. However, the Court finds that even if the Court assumes that businesses as different from Plaintiff as Wal-Mart, McDonald's, and Carl's Jr. are "similarly situated" for purposes of equal protection law -- which they may be, given the breadth of the Ordinances -- and even if all of these businesses' sweepstakes operate identically, Plaintiff has not

established that Defendant had no rational basis for taking enforcement action against Plaintiff instead of McDonald's, for example.

The parties spar on what Defendant's actual motives were, but Defendant states that its aim was to stop what it saw as both forbidden activity under its land use ordinances and potentially a form of illegal gambling, and also to provide a longer review period for the City Council's decision about what to do with these new businesses. See Opp'n to PI at 10-11. This is enough for rational basis review. Since it is plausible and rationally related to Defendant's goals, the Court's inquiry must stop there. U.S. R.R. Retirement Bd., 449 U.S. at 179. Further, the Court does not find that any evidence suggests pretext on Defendant's part. Plaintiff might think that Defendant's decision was wrong, but Plaintiff never established evidence suggesting that Defendant had an ulterior motive in pursuing its enforcement actions against Plaintiff and other similar Internet cafes. Cf. Lockary, 917 F.2d at 1155-56 (plaintiffs in equal protection action raised issue of fact as to a utility board's allegedly pretextual and therefore irrational decision to refuse a water hookup due to water shortage, since plaintiffs' facts indicated that there was no water shortage at all).

The Court finds that Plaintiff has not shown a likelihood of success for its equal protection claim.

C. Declaratory Judgment

Plaintiff requests a declaration that (1) the operation of its business and its offering of a promotional sweepstakes is permissible under the Hayward Zoning Ordinance, or is otherwise a

legal nonconforming use; and (2) the sweepstakes system Plaintiff uses is legal and permissible under California law. Compl. ¶¶ 48-51.

The parties extensively briefed these issues as they applied to Plaintiff's constitutional claims, but they did not brief the underlying issues of whether declaratory judgment is proper in this case or whether Plaintiff has showed a likelihood of succeeding on its claim for declaratory relief. At this point, there is no question that the parties meet the requirements for federal jurisdiction in this case, or that the parties have no pending state actions between themselves. In considering Plaintiff's declaratory relief claim at the preliminary injunction stage, the Court must consider whether Plaintiff's argument on this point satisfies the Winter factors, as modified by the Ninth Circuit.

The Declaratory Judgment Act ("DJA") allows a district court to "declare the rights and other legal relations of any party seeking such declaration, whether or not further relief is or could be sought," but only "[i]n a case of actual controversy." 28 U.S.C. § 2201(a). Under the Declaratory Judgment Act, the Ninth Circuit applies a two-part test to determine whether jurisdiction over a claim for a declaratory relief is appropriate. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). The court must first determine if an actual case or controversy exists within its jurisdiction. Id. If so, the court must then decide whether to exercise its jurisdiction. Id.

In determining whether to exercise jurisdiction, courts are guided by the factors from Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942). "The Brillhart factors are non-exclusive and state

that, '[1] the district court should avoid needless determination of state law issues; [2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and [3] it should avoid duplicative litigation.'" Principal Life Ins. Co., 394 F.3d at 669 (quoting Dizol, 133 F.3d at 1225) (alterations in original). Additionally, the Ninth Circuit asks district courts to consider whether the declaratory action will be useful in clarifying the legal relations at issue, thereby affording relief from uncertainty, insecurity, and controversy giving rise to the proceeding. McGraw-Edison Co. v. Preformed Line Prods. Co., 362 F.2d 339, 342 (9th Cir. 1966), cert denied 385 U.S. 919 (1966).

As to Plaintiff's first request for declaratory judgment -- that the operation of its business and its offering of a promotional sweepstakes is permissible under the Hayward Zoning Ordinance, or is otherwise a legal nonconforming use -- the Court finds no likelihood of success. The Court discussed this issue above, at length.

As to Plaintiff's second request -- to declare Plaintiff's Sweepstakes Promotion legal under California law -- the Court finds no likelihood of success. There is no actual controversy on that matter, and for the Court to decide the issue now would be an impermissible advisory opinion. Flast, 392 U.S. at 95-96.

It is true that courts may grant declaratory relief on the constitutionality of state criminal statutes when prosecution has been threatened but is not pending. See Steffel v. Thompson, 415 U.S. 452, 469-70 (1974). But that situation does not apply to this case. Plaintiff's claims are based on Plaintiff's contentions that Defendant's Ordinances were unconstitutionally enacted, but as the

Court has found, that is not the case here. Plaintiff's requested declaratory relief is very different: it asks the Court to decide whether the California gambling laws should apply to Defendant's Sweepstakes Promotion, even though as noted above, and as Plaintiff agrees, the legality of the Sweepstakes Promotion is not relevant to Plaintiff's constitutional claims. Br. ISO PI at 2 ("While the legality of [Plaintiff's] sweepstakes is a disputed issue, the resolution of this motion [for a preliminary injunction] does not depend on the outcome of that issue.") As such, if the Court were to issue a ruling on whether Plaintiff's sweepstakes system is legal and permissible under California law, the Court would essentially be issuing an advisory opinion on a state statute even though the statute's constitutionality has not been challenged, and the statute itself is not relevant to Plaintiff's other constitutional claims. Flast, 392 U.S. at 95 (discussing rule against advisory opinions).

Therefore none of the factors from Brillhart, Dizon, or McGraw-Hill favor the exercise of jurisdiction under the DJA or indicate that Plaintiff has shown a likelihood of success for its declaratory relief claims regarding the legality of the sweepstakes. In short, resolution of this particular declaratory relief matter would resolve no actual controversies, settle no rights at issue in this case, and would result in the Court's making an unnecessary decision on state law.

Accordingly, the Court finds that Plaintiff has not shown a likelihood of success for its declaratory judgment claim under Winter.

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D. Writ of Mandate

Plaintiff requests a writ of mandate invalidating the Emergency Ordinance as applied to Net Connection and directing Defendant to cease all enforcement efforts against Net Connection pursuant to the Emergency Ordinance. Compl. ¶¶ 52-55. As stated above, Plaintiff has not shown sufficient likelihood of success on the merits to warrant the Court's issuing a writ of mandate. This claim will not suffice to show the necessity of a preliminary injunction under Winter.

E. Conclusion on Plaintiff's Preliminary Injunction

Under both Winter alone and the Ninth Circuit's formulation of the sliding scale test, Plaintiff has not shown that a preliminary injunction should issue. Winter, 555 U.S. 7, 20 (2008); Cottrell, 632 F.3d at 1131-33. Plaintiff has failed to show a likelihood of success on the merits on any of its claims, and without a showing under every Winter factor, Plaintiff cannot obtain a preliminary injunction. See Cottrell, 632 F.3d at 1131-33.

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V. CONCLUSION

For the reasons described above, Plaintiff Net Connection Hayward LLC's motion for a preliminary injunction is DENIED. The Court wishes to make clear that Plaintiff's motion is denied because it was directed only to issues of due process, equal protection, declaratory relief, and mandate, as discussed above. However, the plaintiff in the related case of IBiz, LLC v. City of Hayward, Case No. 13-1537, succeeded on a First Amendment challenge -- which Plaintiff did not make in this case -- and was granted a preliminary injunction against the ordinance that was at issue here. Defendant City of Hayward remains subject to that injunction, even though Plaintiff's motion is denied.

IT IS SO ORDERED.

Dated: July 18, 2013

UNITED STATES DISTRICT JUDGE