

CF-10-0130

Michael Gonzales <mgonzales@gonzaleslawgroup.com>
To: "zina.cheng@lacity.org" <zina.cheng@lacity.org>

Mon, Nov 20, 2017 at 2:51 PM

Mr. Cheng,

Please see the attached Notice of Bankruptcy Case Filing concerning the applicant in the above referenced Council File. Please note, the filing of a Bankruptcy action imposed an automatic stay pursuant to 11 U.S.C. Section 362. A more detailed letter from my client's Bankruptcy counsel is forthcoming.

Best,

Mike

We've moved. Please note our new address.

Michael Gonzales, Shareholder

800 Wilshire Blvd., Suite 860

Los Angeles, CA 90017

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 **Notice BK of Case Filing.pdf**
98K

United States Bankruptcy Court
Central District of California

Notice of Bankruptcy Case Filing

A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 11 of the United States Bankruptcy Code, entered on 10/01/2017 at 5:18 PM and filed on 10/01/2017.

WB & M, Inc.

3600 STOCKER STREET
LOS ANGELES, CA 90008
(323) 296-7467
Tax ID / EIN: 26-1709128
dba **THE LIQUOR BANK**



The case was filed by the debtor's attorney:

William H Brownstein

11755 Wilshire Boulevard
Suite 1250
Los Angeles, CA 90025-1540
310-458-0048

The case was assigned case number 2:17-bk-22092-DS to Judge Deborah J. Saltzman.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

If you would like to view the bankruptcy petition and other documents filed by the debtor, they are available at our *Internet* home page www.cacb.uscourts.gov or at the Clerk's Office, 255 East Temple Street,, Los Angeles, CA 90012.

You may be a creditor of the debtor. If so, you will receive an additional notice from the court setting forth important deadlines.

Kathleen J. Campbell
Clerk, U.S. Bankruptcy Court

PACER Service Center

Transaction Receipt

10/01/2017 17:30:35			
PACER Login:	WBrowns476:2659908:0	Client Code:	The Liquor Barn
Description:	Notice of Filing	Search Criteria:	2:17-bk-22092-DS
Billable Pages:	1	Cost:	0.10

Council File 10-0130

Michael Gonzales <mgonzales@gonzaleslawgroup.com>

Mon, Nov 20, 2017 at 10:08 PM

To: "zina.cheng@lacity.org" <zina.cheng@lacity.org>

Cc: William Brownstein <brownsteinlaw.bill@gmail.com>, Nancy Murakami <nancy@centralescrow.com>

Ms. Cheng,

Please see the attached brief. I understand the attached was electronically filed today with the Bankruptcy Court for the Central District of California. Please add this document to the Council File. Please also provide a copy to the City Attorney in advance of tomorrow's PLUM Committee meeting. I will provide you with hard copies tomorrow. The brief asserts that the City is precluded from revoking WB&M's land use rights because of the automatic Federal Stay imposed pursuant to 11 U.S.C. Section 362. I have copied WB&M's Bankruptcy Counsel, Bill Brownstein, on this email.

Best,

We've moved. Please note our new address.

Michael Gonzales, Shareholder

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**THE LIQUOR BANK Store
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. 2:17-bk-22092DS

November 20, 2017

**BRIEF ON ISSUES PERTAINING TO HEARING ON
REVOCATION OF CONDITIONAL USE PERMIT**

I.

Opening Statement and Introduction.

On October 1, 2017, WB & M, Inc., d/b/a the Liquor Bank store (“Debtor”) filed a voluntary petition under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), and for all times thereafter it has remained in possession pursuant to 11 U.S.C. §§1107(a) and 1108.

The Debtor owns and operates a retail market and liquor store which is commonly known of as 3600 Stocker Street, Los Angeles, California (the “Store”), which it leases from a third party.

The Store has been in business for many years, it employs several people and it has been in compliance with the requirements of the City of Los Angeles since its inception.

The Debtor has been under the scrutiny of the City of Los Angeles which has taken action designed to drive the Debtor out of business and to force the closure of the store. In addition to the City making unreasonable demands, which the Debtor has complied such as to have several security guards, to re pave its parking lot, the City initially decided to reduce the hours of operation from 8:00 a.m. until 10:00 p.m., and later from 8:00 a.m. until 8:00 p.m., which efforts the Debtor disputed.

II.

The Automatic Stay Prohibits and Pending Hearing.

Faced with the mounting losses resulting from the arbitrary change in the Stores operating hours, the Debtor was forced to seek the protection afforded under Chapter 11 of the Bankruptcy Code and it marketed and entered into a sales contract for the sale of the Store.

Unfortunately, in violation of the automatic stay and in efforts that were, by their nature, intended to interfere with the Debtors efforts to sell the Store in its Chapter 11 case, the City continued with its conduct to revoke Debtor’s land use right for the off-site

sale of alcohol, despite the fact that doing so was stayed by Federal law and the continuation of such action was an open violation of the automatic stay for which the City did not seek relief or have any legal justification.

11 U.S.C. § 362(a) provides in pertinent part that except as provided in § 362(b), a petition filed under 11 U.S.C. §§ 301, 302, or 303 operates as a stay, applicable to all entities, of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under Title 11, or to recover a claim against the debtor that arose before the commencement of the case under Title 11, or any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Section 362 of the Code (11 U.S.C. § 362) operates as a stay, applicable to all entities of: (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate.

According to its legislative history, the automatic stay is one of the fundamental debtor protections provided by the Bankruptcy Laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy (House Report No. 95-595, 95th Cong. 1st Sess. [1977] 340; Senate Report No. 95-989, 95th Cong. 2nd Sess. [1978] 49). 4 B.R. 706 and 707, *In re Scott Housing System, Inc.*, *supra* LEXIS 11119..

In re Scott Housing System, Inc., 1988 U.S. Dist. LEXIS 11119 (U.S.D.C. S.D.Ga. 1988), the District Court for the Southern District of Georgia found that the automatic stay under 11 U.S.C. § 362(a)(3) is applicable to preserve the status quo until a Debtor has the opportunity to familiarize itself with the various rights and interests involved and with the property available for distribution. Finally, the court held that the 11 U.S.C. § 362(b)(4) exemption to automatic stay was not applicable because the action was not one falling under § 362(a)(1).

The automatic stay is one of the most fundamental debtor protection devices provided by the Bankruptcy Code. The filing of a petition in bankruptcy triggers the automatic stay of 11 U.S.C. § 362, which is extremely broad in scope, and, except for limited exceptions set forth in § 362(b), applies to almost any type of formal or informal action or proceeding against the property of the estate. Section 362(a)(3) provides that the filing of a petition operates against all entities as a stay of any act to obtain possession of property of the estate or of property from the estate or to exercise control

over property of the estate. This provision is intended to preserve the status quo until the trustee has had the opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution. *Id at* LEXIS 11119.

11 U.S.C. §362(a) provides that the automatic bankruptcy stay operates only to stay the exercise of rights. It does not otherwise create rights or entitlements that would not have existed and it does not terminate obligations that must otherwise be satisfied; *Lawson v. Town of Sardinia (In re Chaffee Aggregates, Inc.)*, 300 B.R. 170, (Bank. W.D.N.Y. 2003)

As its name suggests, the automatic bankruptcy stay operates only to stay the exercise of rights. It does not otherwise create rights or entitlements that would not have existed and it does not terminate obligations that must otherwise be satisfied. These precepts have relevance to the central issue in this motion, namely whether the automatic stay of 11 U.S.C. § 362 operates to stay not only the present enforcement of a zoning regulation, but also the expiration of authorization for a nonconforming use. *Id at* 300 B.R. 171.

In this case, where the City commenced an action to enforce its zoning ordinance, such conduct might be viewed as an act "to exercise control over property of the estate," in violation of 11 U.S.C. § 362(a)(3). *Id at* 300 B.R. 171.

11 U.S.C. § 541 defines the property of the bankruptcy estate, which is subject to the bankruptcy court's in rem jurisdiction. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1282 (9th Cir. 1983). The Debtor's business which includes its use permit constitute property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). *Traders State Bank of Poplar v. Mann Farms, Inc. (In re Mann Farms, Inc.)*, 917 F.2d 1210, 1214 (9th Cir. 1990); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986).

Furthermore, property of the estate is determined from the time the petition is filed and is broadly defined to include "all legal or equitable interests of the debtor" in property "wherever located and by whomever held." 11 U.S.C. § 541(a)(1). See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983) (scope of 11 U.S.C. § 541(a)(1) is intentionally broad). Statutory zoning rights existing at the time of filing are included as property of the estate and, therefore, they are subject to the protections afforded under 11 U.S.C. § 362. See *In re Rocky Mountain Trucking Co., Inc.*, 47 B.R. 1020, 1021 (D.Colo. 1985); *In re REA Central Regional Services, Inc.*, 39 B.R. 738, 740 (Bankr.C.D.Ill. 1984); *In re Island Club Marina, Ltd.*, 38 B.R. 847, 852-54 (Bankr.N.D. Ill. 1984); *Matter of IDH Realty, Inc.*, 16 B.R. 55, 58 (Bankr. E.D.N.Y. 1981); *R.S. Pinellas Motel Partnership v. Ramada Inns, Inc.*, 2 B.R. 113, 118 (Bankr.M.D.Fla. 1979). The enforcement or assertion of a restrictive zoning provision because of the postpetition suspension of a nonconforming use is an act to exercise control over property of the estate. As an act to control the debtor's property, such enforcement or assertion is subject to the stay under 11 U.S.C. § 362(a)(3). See *Rocky Mountain Trucking, supra*, at 1021. *Id at* LEXIS 11119.

Furthermore, a post-filing action, whether pending or commenced post-filing, changing use of a property is not an act of enforcement, and is subject to the stay. *In re IDH Realty, Inc.*, 16 B.R. 55, (Bank Ct. EDNY 1981).

11 U.S.C. § 105 provides that the bankruptcy court may issue any order, process or judgment necessary or appropriate to carry out the provisions of this title.

The stay imposed by 11 U.S.C. § 362 is applicable to **all** entities and prevents the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor. *Id at* 16 B.R. 55.

There is a limited exception to the provisions of the automatic stay found in 11 U.S.C. § 362(b)(4) which is intended to be given a narrow construction in order to permit governmental units to pursue and protect health and safety. The Second Circuit adopts this narrow interpretation as to the scope of the § 362(b)(4) stay exemption, and has affirmed that congress did not adopt the total hands-off approach toward local regulation. *Id at* 16 B.R. 55.

Under 11 U.S.C. § 362(b)(4) governmental activities exemption has been interpreted as being limited solely to the "enforcement" of police or regulatory law. This literal construction has expressly declined to classify as exempt, proceedings or events which occur prior to accrual of a municipal right of action. There must exist a derogation of the local law at the time of a bankrupt's filing before a municipality can proceed to enforce its zoning statutes in the face of the stay. *Id at* 16 B.R. 55.

Case law under the Bankruptcy Code has further narrowed the 11 U.S.C. § 362(b)(4) exemption to only those exercises of the police powers which are "urgently" needed to protect the public health and welfare. Under this interpretation hospital licensing regulation was deemed not to involve sufficient urgency. *Id at* 16 B.R. 55.

The Second Circuit has adopted this narrow interpretation as to the scope of the section 362(b)(4) stay exemption, and has affirmed "that congress did not adopt the total hands-off approach toward local regulation." *In the Matter of National Hosp. & Builders Co. v. Philip Goldstein, N.Y.C. Dept. of Buildings and N.Y.C. Board of Standards and Appeals*, 658 F.2d 39, 8 B.C.D. 236 (2 Cir., 1981). *Id at* 16 B.R. 57.

Furthermore, the section 362(b)(4) governmental activities exemption has been interpreted as being limited solely to the "enforcement" of police or regulatory law. *Barber, Inc. v. NLRB*, 9 B.C.D. 188 (N.D.Tex.1981). This literal construction has expressly declined to classify as exempt, proceedings or events which occur prior to accrual of a municipal right of action. There must exist a derogation of the local law at the time of a bankrupt's filing before a municipality can proceed to enforce its zoning statutes in the face of the stay. *In re Cousins Rest. Inc.*, 11 B.R. 521, 8 B.C.D. 15 (Bkrtcy.W.D.N.Y.1981).

Case law under the new code has further narrowed the 11 U.S.C. §(b)(4) exemption to apply only those exercises of the police powers which are "**urgently**"

needed to protect the public health and welfare which definitely is not the case here. *King Memorial Hospital Inc. v. Dept. of Health and Services, State of Florida*, 4 B.R. 704, 6 B.C.D. 634 (Bkrtcy.1980).

The lack of any standing for the City to disregard the automatic stay is further supported by the fact that even if the argument for enactment and enforcement of the zoning statutes could be stretched to qualify as urgent protection of the public welfare, the municipal exemption is inapplicable if the proceeding would result in the taking of property from the estate. *Colonial Tavern, Inc. v. Byrne*, 420 F. Supp. 44 (D.Mass.1976); See also 11 U.S.C. §§ 362(a)(3), (b)(4); COLLIER ON BANKRUPTCY para. 362.05(4) (15th ed. 1980). As all the property of IDH including statutory zoning rights are part of the estate, the loss of the Debtor's land use rights without a prior hearing before this a bankruptcy court would effectuate an improper taking from the debtor's estate. 11 U.S.C. § 541; *R. S. Pinellas Motel Partnership v. Ramada Inns Inc.*, 2 B.R. 113, 5 B.C.D. 1292 (Bkrtcy.M.D.Fla. 1979), *Id.* at 57 and 58.

In the automatic stay context, the United States Court of Appeals for the Ninth Circuit generally has construed the phrase "police or regulatory power" to refer to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court. *Hillis Motors, Inc. v. Haw. Auto Dealers' Ass'n*, 997 F.2d 581, 591 (9th Cir. 1993.)

The Ninth Circuit has applied two alternative tests to determine whether the actions of a governmental unit are in exercise of its police and regulatory power as defined in 11 U.S.C. § 362(b)(4): the "pecuniary purpose" and the "public policy" test. Satisfaction of either test will suffice to exempt the action from the reach of the automatic stay. *City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115 (9th Cir. 2006.)

11 U.S.C. § 362(b)(4) provides for a specific exception to the operation of the stay under 11 U.S.C. § 362(a)(1) for the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. This exception to the automatic stay, however, relates only to actions falling under 11 U.S.C. § 362(a)(1), not to those falling under 11 U.S.C. § 362(a)(3). Section 362(a)(1) provides for a stay of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under Title 11, or to recover a claim against the debtor that arose before the commencement of the case under Title 11. *Id.* at LEXIS 11119.

In general, the courts have interpreted the governmental activities exemption of 11 U.S.C. § 362(b)(4) as being narrowly limited to the enforcement of police or regulatory laws necessary to protect the public health and welfare. Where the actions of a governmental unit are not a response to an urgent need to protect the health and

welfare of the citizenry, those actions will not be exempted from the automatic stay by § 362(b)(4). *Id.* at LEXIS 11119.

Although the terms "police power" and "regulatory power" may appear broad and imprecise, "section 362(b)(4) is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety." 124 Cong.Rec. H11089, reprinted in 1978 U.S.Code Cong.Admin.News 6436, 6444-45 (statement of Rep. Edwards); 124 Cong.Rec. S17406, reprinted in 1978 U.S.Code Cong.Admin.News 6506, 6513 (statement of Sen. DeConcini).

Zoning provisions usually involve a municipality's effort to control land use and the manner and extent of growth within its boundaries. See generally *R. Anderson, American Law of Zoning* (3d ed. 1986); *Richards, Zoning for Direct Social Control*, 1982 Duke L.J. 761. In general, the courts have interpreted the governmental activities exemption of 362(b)(4) **as being narrowly limited to the enforcement of police or regulatory laws necessary to protect the public health and welfare.** See *Penn Terra Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania*, 733 F.2d 267, 274 (3d Cir. 1984) (injunction seeking to rectify harmful environmental hazards an exercise of power to protect health and safety). *State of Missouri v. United States Bankruptcy Court for the E.D. of Arkansas*, 647 F.2d 768, 776 (8th Cir. 1981) (state's grain laws regulatory in nature but did not relate to matters of public safety and health and thus did not fall under 362(b)(4) exemption); *In re Commonwealth Cos., Ltd.*, 80 B.R. 162, 164 (Bankr.D.Neb. 1987) (type of action excepted from stay involves circumstance requiring injunctive relief); *In re Island Club Marina, Ltd.*, 38 B.R. 847, 854 (Bankr. N.D.Ill. 1984) (density zoning not sufficiently related to health and safety to fall under (b)(4) exception); *In re Rath Packing Co.*, 35 B.R. 615, 620-22 (Bankr.N.D.Iowa 1983) (regulation allowing revocation of debtor's self-insurance exemption not closely enough related to health and safety to fall under (b)(4) exemption); *Memorial Hospital, Inc. v. Department of Health and Services, State of Florida*, 4 B.R. 704, 708 (Bankr.S.D.Fla. 1980) (hospital licensing regulation deemed not to involve sufficient urgency of public welfare). See also *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 502-05 (1986) (discussing stay generally and health and safety exception under § 554); *Ohio v. Kovacs*, 469 U.S. 274, 283-84 n.11 (1985) (discussing applicability of automatic stay to suits to enforce police and regulatory statutes aimed at hazardous waste cleanup). But see *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 974-77 (1st Cir. 1986) (all zoning ordinances included in regulatory powers under 362(b)(4)); *Matter of 1600 Pasadena Office, Ltd.*, 64 B.R. 192, 194 (Bankr.M.D.Fla. 1986) (standard for deciding whether (b)(4) exception applies not stringent). Where the actions of a governmental unit are not a response to an urgent need to protect the health and welfare of the citizenry, those actions will not be exempted from the automatic stay by § 362(b)(4). For this additional reason, and because no exemption applies in this case, the automatic stay operates to stay the planned action by the City.

The application of the police powers exception is not automatic. *Dunbar*, 235 B.R. at 471. Two tests have developed to determine whether a state agency's

administrative action falls with the police powers exception -- the "pecuniary purpose" test and the "public policy" test. The Ninth Circuit Bankruptcy Appellate Panel has described these two tests as follows:

Under the "pecuniary purpose" test, the court must determine whether the government action relates "primarily to the protection of the government's pecuniary interest in the debtors' property or to matters of public safety and welfare." *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S. Ct. 2367, 141 L. Ed. 2d 736 (1998) (*citing N.L.R.B. v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991)). "Indeed, most government actions which fall under [11 U.S.C. § 362(b)(4)] have some pecuniary component, particularly those associated with fraud detection. This does not abrogate their police power function. Only if the action is pursued 'solely to advance a pecuniary interest of the governmental unit' will the automatic stay bar it." *Universal Life Church*, 128 F.3d at 1299 (9th Cir. 1997) (quoting Thomassen, 15 B.R. at 909). *Bertuccio v. Cal. State Contrs. License Bd. (In re Bertuccio)*, 414 B.R. 604 (Bkrcty. ND Cal. 2008).

The "public policy" test distinguishes between those proceedings that effectuate public policy and those that adjudicate private rights. *Universal Life*, 128 F.3d at 1297; *In re Charter First Mortg., Inc.*, 42 B.R. 380, 383 (Bankr. D. Or. 1984). Under the latter test, the court considers whether the administrative agency is exercising legislative, executive, or judicial functions. *In re Poule*, 91 B.R. 83, 86 (9th Cir. BAP 1988). "Where the agency's action affects only the parties immediately involved in the proceedings, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceeding were being conducted in a judicial form." *Id.*


Dunbar, 235 B.R. at 471.

III **Conclusion.**

For the foregoing reasons the automatic stay prevents the continuation of any act against the Debtor. The action is not covered under the Police Power of the State and the action must be taken off calendar.

Dated: November 20, 2017

William H. Brownstein & Associates,
Professional Corporation

By: 

William H. Brownstein, Bankruptcy
Attorneys for WB & M, Inc.