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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF REDWOOD

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHN JONES, Defendant.	Case No. DEFENDANT'S TRIAL BRIEF Trial date:

Defendant John Jones did not violate Business & Professions Code § 25622. That statute prohibits a minor from consuming alcohol in a public place or a place open to the public. The locked pool area in which he was arrested was neither as a matter of law.

FACTS

On ____________, at about _____ in the afternoon, police responded to a noise complaint at a pool on Magnolia Drive, a private road within Sunny Acres, a townhouse development. Officers arrived at the pool and saw five people beside it. Defendant, 20 years old, was sunbathing on a flotation device in the middle of the pool, allegedly holding a beer.

The pool complies with the California Building Code's requirement of a five-foot

locked fence around it. Cal. Bldg. Code § 3118B.1, ¶ 1. The fence's three gates had self-locking mechanisms, and they were capable of being locked when the pool was not in use. *Id.*, § 3118B.2. ¶¶ 1, 2. The inside of one gate has an interior lock that does not need a key. *Id.*, ¶ 3.

The police officer demanded that one of the persons in the pool area open the gate to allow his entrance. They told defendant to get out of the pool and to get his identification. He walked to the patio of her condominium area, which was separated by a locked gate from the pool area. Despite his insistence that they not follow him, they did so and allegedly found additional beer cans inside the patio.

ARGUMENT

Neither the pool nor the patio was a "public area" under § 25622.

Under Business & Professions Code § 25622(a), "any person under the age of 21 years who has any alcoholic beverage in his or her possession on any street or highway or in any public place or in any place open to the public is guilty of a misdemeanor . . . ." The Sunny Acres pool area was certainly not a street or highway. Nor was it either a "public place" or a "place open to the public."

The courts have interpreted the term *public place* as used in California penal statutes as "'a location readily accessible to all those who wish to go there.'" *People v. Strider* (2009) 177 Cal.App.4th 1393, 1403-1404 (interpreting Pen. Code § 12031), quoting *People v. Perez* (1976) 64 Cal.App.3d 297, 301 (interpreting Pen. Code § 647(a); see also *People v. Jimenez* (1995) 33 Cal.App.4th 54, 60 (public place is a place where a member of the public may lawfully be present). The *Perez* court held that an apartment building's unlocked hallway was a public place. "Hallways and stairways of multiple dwellings are open to delivery men, service men, solicitors, visitors and other strangers, whether those hallways are interior or exterior to the buildings." *Perez*, 64 Cal.App.3d at 301.

"Conversely, 'a location *guarded by* a fence or locked door is not readily accessible

to the public, and is not a public place." *People v. Strider*, 177 Cal.App.4th at 1404 (adding emphasis), quoting *People v. Krohn* (2007) 149 Cal.App.4th 1294, 1298 (interpreting Pen. Code § 647(f)). Although the outside of one's house where a stranger can walk without challenge may be a public place, someone who is drinking in his or her own yard behind a three-foot fence with a closed but unlocked gate is not intoxicated in a public place in violation of Penal Code § 647(f). *Id.* at 1402, 1405, citing *People v. Cruz* (2008) 44 Cal.4th 636, 674, and *People v. White* (1991) 227 Cal.App.3d 886, 892. Thus, the stairway and courtyard of an apartment area surrounded by a high security fence was not a public area, even if the gate was frequently propped open. *Krohn*, 149 Cal.App.4th at 1299. "The fences and gates certainly 'challenge' the public's access to the courtyard. . . . The courtyard is not readily accessible to the public." *Id.*

The key consideration in determining whether an area is a public place is "'whether a member of the public can access the place without challenge.'" *People v. Strider*, 177 Cal.App.4th at 1405, quoting *People v. Krohn*, 149 Cal.App.4th at 1298 (further quotation marks omitted). In *Strider*, the defendant was arrested in his brother's yard. The court held that, because the yard was surrounded by a wrought-iron fence on two sides and a wood-and-brick fence on two sides, he was not in a public place. *Id.*

The gate around the Sunny Acres pool area also keeps it from being a public area. See *People v. Strider*, 177 Cal.App.4th at 1405. The "fence is neither flimsy nor purely decorative; its appearance suggests its purpose is to block entry into the [area] and act as a barrier to common or general use." *Id.* A pool fence at a townhouse complex not only fulfills the California Building Code's goals of ensuring that it is safe but also ensures that unauthorized persons do not use it.

That defendant and his friends may have been fully visible from outside the pool area does not make the area a public place. See *People v. Strider*, 177 Cal.App.4th at 1405. Had the Legislature intended to include within § 25622's proscriptions a minor's possession of alcohol in a place *visible* to the public, it would have said so. See *In re Koehne* (1963) 59 Cal.2d 646, 649. The *Koehne* court held that proof that a person was

intoxicated in a place open to public view was not enough to find him guilty under Penal Code § 647(f), which prohibits intoxication in a public place or a place open to the public. *Id.* The court contrasted subdivision (f) with subdivision (a), prohibiting lewd conduct not just in a public place or a place open to the public but in a place exposed to public view. *Id.* In subdivision (f), the Legislature implicitly provided that "intoxication in a place which is not a public place but is exposed to public view should not be criminal." *Id.*; see also *People v. White*, 227 Cal.App.3d at 892-893. Similarly, the failure to prohibit a minor's possession of alcohol in a place open to public view implicitly provides that possession in such places is criminal only if it is also in a public place or one open to the public.

Nor was the pool area a "place open to the public." Whether and to what extent a "place open to the public" differs from a "public place" is not clear. See *In re Danny H.*, 104 Cal.App.4th 92, 98. The terms are "arguably synonymous," but the Legislature at times defines one in terms of the other and at times distinguishes them. *Id.* at 98-99, citing Pen. Code §§ 311.6, 653.20(b); see also *People v. Blatt* (1972) 23 Cal.App.3d 148, 151 ("a business open to the public is a public place" under § 647(f)).

Courts in other states interpreting the phrase "open to the public" have relied on the definition stated in an Oregon statute. See *Ghamesouly v. Commonwealth* (Va.App. 2009) 675 S.E.2d 854, 872 (Harris, J., dissenting from dismissal for lack of jurisdiction) (Exh. 1, at 8) rev'd o.g. (2010) 689 S.E.2d 698, citing *Steele v. Breinholt* (Utah App. 1987) 747 P.2d 433, 435; *State v. Sanchez* (N.M.App. 1987) 735 P.2d 536, 539 (Apodaca, J., specially concurring); *State v. McGinnis* (Mo.App. 1981) 622 S.W.2d 416, 419, and *People v. Bozeman* (Colo.App. 1980) 624 P.2d 916, 918. In those courts, "'Open to the public' means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required.'" Or. Rev. Stat. § 164.205(4), cited *id.*

The Sunny Acres pool area was not a public area under this definition. Reasonable members of the public could not believe that they needed no permission to enter or remain in a locked pool area in a private townhouse development. Defendant therefore could not

have violated § 25622 by possessing alcohol in that area.

Defendant's condominium patio is even less of a public place or place open to the public. The gate between the patio and the pool area, which challenged not just the public generally but even those properly in the pool area from entering, prevents it from being a public place. The public could not lawfully be there. See *People v. Jimenez*, 33 Cal.App.4th at 60. No reasonable person could believe that he or she could enter the patio or remain there without permission. Possession of alcohol in the patio thus would not violate § 25622, either.

CONCLUSION

Neither the pool area nor defendant's adjoining condominium patios were a public place or a place open to the public. The locked gates informed the public that it could not enter. No reasonable person could believe that they could enter or remain without permission. Defendant did not violate § 25622 as a matter of law, and this court should dismiss the complaint.

Dated: Respectfully submitted,

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Attorneys for Defendant