City of Costa Mesa

RECEIVED 11:27
2022
BY: BG

☒ Appeal of Planning Commission Decision:
$1,220.00 (Tier 1)[1]
$3,825.00 (Tier 2)[2]

☐ Appeal of Non-Planning Commission Decision:
$690.00 (Tier 1)[1]
$3,825.00 (Tier 2)[2]

APPLICATION FOR APPEAL OR REVIEW

Applicant Name* **Acess Costa Mesa dba South Coast Safe Access**
Address **2001 Harbor Boulevard, Suites 101-103, Costa Mesa, CA 92627**
Phone **(714) 686-5001**

REQUEST FOR: ☒ **APPEAL** ☐ **REVIEW****

Decision of which appeal or review is requested: (give application number, if applicable, and the date of the decision, if known.)

Decision by Planning Commission to deny Planning Application 22-21 for a Conditional Use Permit for the establishment of a cannabis retail storefront in the C2 (General Business District) zone located at 2001 Harbor Boulevard, Suites 101-103, Costa Mesa, CA 92627.

Decision by: **Planning Commission**

Reasons for requesting appeal or review:

See attached correspondence from our legal representative.

Date: **December 5, 2022** Signature: **David Dewyke**

*If you are serving as the agent for another person, please identify the person you represent and provide proof of authorization.
**Review may be requested only by Planning Commission, Planning Commission Member, City Council, or City Council Member

For office use only – do not write below this line

SCHEDULED FOR THE CITY COUNCIL/PLANNING COMMISSION MEETING OF:
If appeal or review is for a person or body other than City Council/Planning Commission, date of hearing of appeal or review:

Updated August 2018

[1] Includes owners and/or occupants of a property located within 500 feet of project site (excluding owners and/or occupants of the project site).

[2] Includes the project applicant, owners and/or occupants of the project site, and owners and/or occupants of a property located greater than 500 feet from the project site.

RUTAN
RUTAN & TUCKER, LLP

A. Patrick Muñoz
Direct Dial: (714) 662-4628
E-mail: pmunoz@rutan.com

December 5, 2022

VIA MESSENGER

Hon. Jon Stevens
and members of the City Council
City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626

Re: Appeal of Planning Commission denial of Planning Application 22-21 for a Conditional Use Permit for the establishment of a cannabis retail storefront in the C2 zone located at 20001 Harbor Blvd., Ste 101-103

Dear Mayor Stevens and members of the Council:

This office has been retained to represent Access Costa Mesa, dba South Coast Safe Access, in connection with the appeal noted above. This letter is intended to supplement their appeal application, and outlines the various reasons the Planning Commission's decision violates the law and must be overturned. A more detailed explanation of the issues outlined below will be provided once a hearing has been set for our client's appeal. There are a plethora of reasons the Planning Commission's appeal must be overturned, but perhaps most important is the fact the only basis for the decision was the existence of a counseling business known as "Yellowstone" in the same building as our client's proposed store. The Planning Commission relied on this "fact" to support various arguments which all violate the law. Even more important, **Yellowstone's lease expires on December 31, 2022!** Hence, without regard to the fact the Commission's reliance on the Yellowstone lease violates the law, the fact Yellowstone's lease will expire before our client's operations begin, (and Yellowstone has been advised they will not be permitted to remain as a holdover tenant) means there is no factual basis whatsoever for the Planning Commission's (unlawful) decision.

On November 28, 2022, the Planning Commission, in a split 4-2 vote, denied Planning Application 22-21 ("PA-22-21") for a Conditional Use Permit for the establishment of a retail cannabis storefront business located at 2001 Harbor Boulevard, Suites 101-103 in the C2 (General Business District) zone. The property is owned by Vaccher Family Trust ("Property Owner"). The applicant, Access Costa Mesa dba South Coast Safe Access ("Applicant" or "Safe Access") appeals this denial on the grounds that it stems from an incorrect application of the Costa Mesa Municipal Code ("CMMC"), is not supported by substantial evidence, is arbitrary and capricious, and finally, is in violation of a settlement agreement between the City, the Property Owner, and the Applicant.

By way of brief background, the Applicant worked extensively with City Staff prior to filing its application (PA-22-21), in order to ensure all CMMC requirements were met, including but not limited to the Pre-Application Determination. For the reasons detailed in the November 28, 2022 Planning Commission Agenda Report for Item Number PH-3, City Staff recommended approval of PA-22-21. (Agenda Report, pg. 1.) That recommendation was supported by substantial evidence and consistent with other approvals of the Planning Commission for similar cannabis related applications, including cannabis retail storefronts which are located in the immediate vicinity of other counseling uses, and/or adjacent to sober living homes.

As detailed in the Agenda Report, the requested entitlement (PA-22-21) is in conformance with City standards and regulations established and/or implemented by the Planning Division, Building Division, Public Works Department (including Transportation and Engineering Divisions), Fire Department, and Police Department. (Agenda Report, pg. 6.) Significantly, the proposed operation contemplated by PA-22-21 also meets the separation requirements set forth in Measure Q, which are codified in CMMC section 13-200.93(e), in that it is located more than 1000 feet from a K-12 school, playground, licensed child daycare, and homeless shelter, and more 600 feet from a youth center. (Agenda Report, pg. 7.)

There is no dispute that a counseling business (Yellowstone) is currently operating on the second story of the building in which the Applicant is proposing to operate. Staff did not make an issue of this, and our client did not focus on it in its application or presentation before the Planning Commission, because counseling are not a use for which a separation or buffer is required. Indeed, to even consider Yellowstone or similar businesses as a sensitive use subject to a buffer would require a vote to change the requirements of Measure Q. Equally important are the facts that (1) **Yellowstone's lease expires in less than 30 days,** and before our client's operations will begin, and (2) Yellowstone did not object to the proposed operation and has confirmed that at least two other dispensaries exist within 1000 feet, which, to date, have not impacted their operations or their clientele.

COMMISSIONER STATEMENTS ON DENIAL

In denying PA-22-21, three Planning Commissioners stated that they could not make the findings required by CMMC 13-29(g). Importantly, however, in attempting to express the factual basis for denial, three Planning Commissioners made conclusory statements that were unsupported by the facts, substituted their personal opinions for the objective requirements of the CMMC (and Measure Q), and arbitrarily and capriciously added requirements to the application process.

Specifically, Planning Commissioner Vivar provided three grounds upon which to support his vote to deny the application: (1) the Applicant allegedly did not engage in adequate public outreach because the Applicant did not personally approach staff at Yellowstone to discuss the proposed project (even though staff was notified via mail, and did not attend the open house held by the Applicant); (2) the Applicant's open house was also allegedly inadequate public outreach

because to it was held on Monday night; and finally, (3) the public outreach was insufficient because mailers were not provided in both the English and Spanish languages.

Similarly, Planning Commissioner Ereth stated only that he believed the proposed operation was not substantially compatible with the surrounding uses and could potentially be materially detrimental to the surrounding businesses and neighborhood. Commissioner Erath failed to cite or otherwise provide any specific factual basis to support his conclusion, and it appears as though no such facts exist in the record (and indeed, contrary facts supporting compatibility are detailed in the Agenda Report).

Finally, Planning Commission Chair de Arakal focused on substantial compatibility and material detriment. He noted that the Planning Commission made a finding of substantial compatibility for another cannabis retail storefront that was similarly situated in terms of nearby residential properties. He also acknowledged that separation requirements for sensitive uses do not include any type of counseling (including substance abuse counseling) even though he personally believed that counseling services should be considered a sensitive receptor. The Chair stated his "hope" was that this instant appeal would lead the City Council to revisit the regulations for the relevant ordinance (ignoring it is the result of a voter measure) because he thinks they are "totally inadequate."

While all of the observations of the aforementioned Commissioners might present options for the City Council to consider in adopting future cannabis regulations (and/or amendments), none of items the Commissioners based their decision to deny upon are currently codified in, or otherwise required by Measure Q, the CMMC, or any of the City's implementing regulations. More specifically, there is no requirement for personal notice to the counseling center, or any other neighboring property. Similarly, there is no requirement to hold an open house, or that the open house be held on a certain day or certain time of the week. There is also no requirement that the written notices be provided to neighboring properties in both the English and Spanish languages. And, finally, there is no requirement that a dispensary must be located a certain distance away from counseling services. Indeed, the cannabis subcommittee created by the City Council considered some similar regulations and specifically rejected them (for instance, adding similar uses, such sober living homes, to the list of sensitive receptors). For the Planning Commission to attempt to impose new personal notice, open house, translation, and/or sensitive receptor requirements at the end of what has been a lengthy, costly application process and after the conclusion of the public hearing is the definition of arbitrary and capricious, and represents nothing more than the Commission improperly substituting its own personal opinions for the desires of the voters and the lawfully established requirements of the CMMC.

Importantly, Planning Commissioner Toler correctly attempted to "re-direct" the Commission's discussion by pointing out that it must identify specific facts supporting a denial. He further noted that there is nothing about the proposed operation that differentiates it from all the other cannabis retail storefronts that the Planning Commission already approved, and that many

of the statements by his fellow Commissioners were based on oft-repeated misconceptions, rather than "real problems." Commissioner Toler's efforts unfortunately fell on deaf ears.

In sum, the Planning Commission's denial of the proposed project was not based on the rules and regulations that currently exist in the City's Municipal Code – it was based on what the Commissioners hoped those regulations might say at some unknown future date. In so doing, the Commissioners improperly inserted their own personal opinions and desires for the rules that had been lawfully vetted and approved by the Council, and the voters who, notably, approved Measure Q without the expansive public notice requirements "established" by Commissioner Vivar, or the additional sensitive receptor "established by Commissioners Ereth and de Arakal. **And finally, the basis for all of the ill-conceived concerns, the Yellowstone lease, is factually insupportable, in as much as its lease will expire in less than 30 days.**

SETTLEMENT AGREEMENT

On or about December 8, 2021, the City, the Property Owner, and the Applicant entered into a Settlement Agreement and Release ("Agreement"). As relevant to PA-22-21, the Agreement provides that the City agrees to "make good faith efforts to expeditiously process the CUP application and schedule a hearing thereon in a manner consistent with the other Phase 1 CUP storefront retail applications whose pre-applications were deemed complete on or about September 10, 2021."

As detailed above, and as explicitly stated by Commissioner Toler, PA-22-21 was not processed in good faith in a manner consistent with other Phase 1 CUP storefront retail applications. Instead, the Planning Commission denied PA-22-21 based solely on personal opinion, biases, and flagrant disregard of the standards set forth in Measure Q and the CMMC. As even Chair de Arakal expressly acknowledged, substantial compatibility findings have routinely been made by the Planning Commission for similarly situated storefront retail applications. However, rather than treat this application like the others that had come before him, the Chair decided to deny the application in the hope that an appeal would persuade the City Council to revisit the requirements for application approval. This is subversion of the CUP application process, and flagrant disregard for the rules set forth in Measure Q and the CMCC is a violation of the terms of the Agreement because the action of the Planning Commission was not a good faith effort to expeditiously process the CUP application.

As a result of the Agreement, the unlawful denial of the Application by the Planning Commission, if not rectified by the Council, not only subjects the City to a writ action to overturn the decision but also subjects it to an action for breach of contract, and all remedies (including damages and attorney fees) associated therewith.

CONCLUSION

As outlined above, the applicant appeals the denial of PA-22-21 as it is an incorrect application of the Costa Mesa Municipal Code ("CMMC"), not supported by substantial evidence, arbitrary and capricious, and results in a violation of the Agreement between the City, the Property Owner, and the Applicant.

Respectfully submitted,

RUTAN & TUCKER, LLP

A. Patrick Muñoz

APM

cc: Client

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Applicant Supplemental Information

RUTAN
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E-mail: pmunoz@rutan.com

February 6, 2023

VIA E-MAIL

Mayor John Stephens and
Members of the City Council
City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626

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Re: Meeting on February 21, 2023
Denial of Planning Application 22-21 for a Conditional Use Permit (CUP)
Appeal Hearing for Access Costa Mesa dba South Coast Safe Access

Dear Honorable Mayor and Councilmembers:

This office represents the applicant, Access Costa Mesa dba South Coast Safe Access ("Safe Access" or "Applicant"), who applied for a Conditional Use Permit ("CUP") for the establishment of a retail cannabis storefront business located at 2001 Harbor Boulevard, Suites 101-103, in the C-2 (General Business District) zone. The property is owned by Vaccher Family Trust ("Property Owner"). This letter is being submitted in support of Safe Access's appeal of the Costa Mesa Planning Commission's denial of Application 22-21 ("PA-22-21") for a CUP, which we believe (however, have yet to confirm) will be on the City Council's February 21, 2023, agenda.

In sum, as demonstrated below, the Planning Commission's denial stems from an incorrect application of the Costa Mesa Municipal Code ("CMMC"), is not supported by substantial evidence, is arbitrary and capricious, and finally, is in violation of a settlement agreement between the City, the Property Owner, and Safe Access. For those reasons, Safe Access respectfully requests that the City Council overturn the Planning Commission's denial of Safe Access's CUP Application 22-21 – before it is forced to waste tens of thousands of dollars defending a needless lawsuit that will no doubt result in the exact same outcome – reversal of the Planning Commission's decision to deny the CUP application.

I. BACKGROUND

By way of brief background, the Applicant worked extensively with City Staff prior to filing its Conditional Use Permit ("CUP") application, in order to ensure all CMMC requirements were met, including but not limited to the Pre-Application Determination. For the reasons detailed in the November 28, 2022, Planning Commission Agenda Report for Item Number PH-3, City Staff recommended approval of PA-22-21. (Agenda Report, pg. 1.) That recommendation was supported by substantial evidence and consistent with other approvals of the Planning Commission

for similar cannabis-related applications, including cannabis retail storefronts which are located in the immediate vicinity of counseling uses, and/or adjacent to sober living homes.

As detailed in the Agenda Report, the requested entitlement (PA-22-21) is in conformance with City standards and regulations established and/or implemented by the Planning Division, Building Division, Public Works Department (including Transportation and Engineering Divisions), Fire Department, and Police Department. (Agenda Report, pg. 6.) Significantly, the proposed operation contemplated by PA-22-21 also meets the separation requirements set forth in Measure Q, which are codified in CMMC section 13-200.93(e), in that it is located more than 1,000 feet from a K-12 school, playground, licensed child daycare, and homeless shelter, and more than 600 feet from a youth center. (Agenda Report, pg. 7.)

Based on this factual background, City Staff made a recommendation of approval of PA-22-21 to the Planning Commission. Despite these pre-application efforts, and against the recommendation of City Staff, the Planning Commission, in a split 4-2 vote, denied PA-22-21, ***without any written findings*** in support of the denial.[1] The ***only*** apparent basis for the denial was the existence of a counseling business known as "Yellowstone" in the same building as Safe Access's proposed store. The Planning Commission relied on this "fact" to support various arguments which all violate the law. Even more important, ***Yellowstone's lease was set to expire, and in fact did expire, on December 31, 2022***.

II. COMMISSIONER'S STATEMENTS ON DENIAL

In denying PA-22-21, three Planning Commissioners stated that they could not make the findings required by CMMC 13-29(g). Importantly, however, in attempting to express the factual basis for denial, three Planning Commissioners made conclusory statements that were unsupported by the facts, substituted their personal opinions for the objective requirements of the CMMC (and Measure Q), and arbitrarily and capriciously added requirements to the application process.

Specifically, Planning Commissioner Vivar provided three grounds upon which to support his vote to deny the application: (1) the Applicant allegedly did not engage in adequate public

[1] We note several failures to follow the requirements of its own Municipal Code have occurred by the City in connection with the denial and appeal, raising serious procedural due process concerns which our Client will be forced to address should the Planning Commission's denial not be overturned. (*Woody's Group Inc., v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1028; citing, *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 532 [noting, in context of prospectivity issue, that the unfairness of changing " 'the rules of the game' in the middle of a contest" is a commonsense notion]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194 [same]; *Rope v. Auto-Chlor System of Washington, Inc*. (2013) 220 Cal.App.4th 635, 648 [refusing to apply law to 'conduct preceding its effective date' because that would be 'tantamount to an unfair change in "the rules of the game" ' in the midst of a contest]".)

outreach because the Applicant did not personally approach staff at Yellowstone to discuss the proposed project (even though Yellowstone's staff was notified via mail, and did not attend the open house held by the Applicant); (2) the Applicant's open house was also allegedly inadequate public outreach because it was held on Monday night (yet no requirements exist that were not followed); and finally, (3) the public outreach was insufficient because mailers were not provided in both the English and Spanish languages (again, despite the fact this violates no City requirements.)

Similarly, Planning Commissioner Erath stated only that he believed the proposed operation was not substantially compatible with the surrounding uses and could potentially be materially detrimental to the surrounding businesses and neighborhood. Commissioner Erath failed to cite or otherwise provide any specific factual basis to support his conclusion, and it appears as though no such facts exist in the record (and indeed, contrary facts supporting compatibility are detailed in the Agenda Report).

Finally, Planning Commission Chair de Arakal focused on substantial compatibility and material detriment. He noted that the Planning Commission made a finding of substantial compatibility for another cannabis retail storefront that was similarly situated in terms of nearby residential properties. He also acknowledged that separation requirements for sensitive uses do not include any type of counseling (including substance abuse counseling) even though he personally believed that counseling services should be considered a sensitive receptor. The Chair stated his "hope" was that this instant appeal would lead the City Council to revisit the regulations for the relevant ordinance (ignoring it is the result of a voter measure) because he thinks they are "totally inadequate."

III. THE PLANNING COMMISSION'S DENIAL OF THE CONDITIONAL USE PERMIT IS NOT SUPPORTED BY THE EVIDENCE

Under the CMMC, the Planning Commission is tasked with reviewing, and ultimately approving or denying applications for conditional use permits (CMMC § 13-10(i)(2)(c)). The findings required by CMMC section 13-29(g)(2) for Planning Commission approval of a conditional use permit are as follows:

> a. The proposed development or use is substantially compatible with developments in the same general area and would not be materially detrimental to other properties within the area.
>
> b. Granting the conditional use permit or minor conditional use permit will not be materially detrimental to the health, safety and general welfare of the public or otherwise injurious to property or improvements within the immediate neighborhood.

c. Granting the conditional use permit or minor conditional use permit will not allow a use, density or intensity which is not in accordance with the general plan designation and any applicable specific plan for the property.

Furthermore, when the Planning Commission decides to deny an application, the CMMC requires that the applicant be notified of the circumstances of denial.[2] (CMMC § 13-29(h)(1)). Notice of the Planning Commission's decision shall be given within five (5) days to the City Council and to any affected party requesting the notice. (CMMC § 13-29(i)(2).)

Under well-established California law, when purporting to deny a discretionary entitlement, such as a CUP in this case, the City must make findings that are supported by "substantial evidence" in the record before the City. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244; *SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal. App. 4th 459, 469.) Evidence is considered "substantial" where it is of "ponderable legal significance," and "reasonable in nature, credible, and of solid value." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) Lastly, where the court determines that an agency's decision is not supported by substantial evidence, the court may reverse the agency's determination. (*Breakzone Billiards*, *supra*, 81 Cal.App.4th at 1244 .)

In this case, the Planning Commission denied the PA-22-21 for a CUP ***without any written findings***. Without written findings or any notification as to the circumstances of the denial (as required by the CMMC), the Applicant – as well as the City Council on appeal, and the court if and when litigation is commenced – is left to only infer the bases of the denial. The only possible (albeit, speculative) bases for denial are the individual comments by the three Planning Commissioners, each of which consisted of: (a) conclusory statements that were unsupported by the facts; (b) personal opinions rather than an application of the objective requirements of the CMMC (and Measure Q); and (c) the arbitrary and capricious addition of requirements to the application process, as detailed above.

While all of the observations of the aforementioned Commissioners might present options for the City Council to consider in adopting future cannabis regulations (and/or amendments), ***none*** of the items the Commissioners based their decision to deny upon are currently codified in, or otherwise required by Measure Q, the CMMC, or any of the City's implementing regulations. More specifically, there is no requirement for personal notice to the counseling center, or any other neighboring property. Similarly, there is no requirement to hold an open house, or that the open house be held on a certain day or certain time of the week. There is also no requirement that the

[2] The City's failure to comply with this requirement is yet another example of a procedural due process violation impacting our client's rights.

written notices be provided to neighboring properties in both the English and Spanish languages. And, finally, there is no requirement that a dispensary must be located a certain distance away from counseling services. Indeed, the cannabis subcommittee created by the City Council considered some similar regulations and specifically rejected them (for instance, adding similar uses, such as sober living homes, to the list of sensitive receptors). For the Planning Commission to attempt to impose new personal notice, open house, translation, and/or sensitive receptor requirements at the end of what has been a lengthy, costly application process and after the conclusion of the public hearing is the definition of arbitrary and capricious, and represents nothing more than the Planning Commission improperly substituting its own personal opinions for the desires of the voters and the lawfully established requirements of the CMMC. "Needless to say, changing the rules in the middle of the game does not accord with fundamentally fair process." (*Woody's Group Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1028; citing, *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 532 [noting, in context of prospectively issue, that the unfairness of changing " 'the rules of the game' in the middle of a contest" is a commonsense notion].) As such, these surmised bases for denial fail.

Importantly, Planning Commissioner Toler correctly attempted to "re-direct" the Planning Commission's discussion by pointing out that it must identify specific facts supporting a denial. He further noted that there is nothing about the Applicant's proposed operation that differentiates it from all the other cannabis retail storefronts that the Planning Commission already approved, and that many of the statements by his fellow Planning Commissioners were based on oft-repeated misconceptions, rather than "real problems." Commissioner Toler's efforts unfortunately fell on deaf ears.

In sum, the Planning Commission's denial of the CUP was not based on the rules and regulations that currently exist in the City's Municipal Code – it was based on what the Commissioners hoped those regulations might say at some unknown future date. In so doing, the Commissioners improperly inserted their own personal opinions and desires for the rules that had been lawfully vetted and approved by the Council, and the voters who, notably, approved Measure Q without the expansive public notice requirements "established" by Commissioner Vivar, or the additional sensitive receptor "established" by Commissioners Ereth and de Arakal. ***And finally, the basis for all of the ill-conceived concerns, the Yellowstone counseling business, is factually insupportable, in as much as its lease has expired.***

IV. A SETTLEMENT AGREEMENT REQUIRES GOOD FAITH EFFORTS TO EXPEDITIOUSLY PROCESS THE CUP APPLICATION

On or about December 8, 2021, the City, the Property Owner, and the Applicant entered into a Settlement Agreement and Release ("Agreement"). As relevant to PA-22-21, the Agreement provides that the City agrees to "make good faith efforts to expeditiously process the CUP application and schedule a hearing thereon in a manner consistent with the other Phase 1 CUP

storefront retail applications whose pre-applications were deemed complete on or about September 10, 2021."

As detailed above, and as explicitly stated by Commissioner Toler, PA-22-21 was not processed in good faith in a manner consistent with other Phase 1 CUP storefront retail applications. Instead, the Planning Commission denied PA-22-21 based solely on personal opinion, biases, and flagrant disregard of the standards set forth in Measure Q and the CMMC. As even Chair de Arakal expressly acknowledged, substantial compatibility findings have routinely been made by the Planning Commission for similarly situated storefront retail applications. However, rather than treat this application like the others that had come before him, the Chair decided to deny the application in the hope that an appeal would persuade the City Council to revisit the requirements for application approval. This is subversion of the CUP application process, and flagrant disregard for the rules set forth in Measure Q and the CMCC is a violation of the terms of the Agreement because the action of the Planning Commission was not a good faith effort to expeditiously process the CUP application.

As a result of the Agreement, the unlawful denial of the PA-22-21 by the Planning Commission, if not rectified by the City Council, not only subjects the City to a writ action to overturn the decision, but also subjects it to an action for breach of contract, and all remedies (including damages and attorneys' fees) associated therewith.

V. THE CITY'S FAILURE TO FOLLOWS ITS MUNICIPAL CODE VIOLATES THE APPLICANT'S DUE PROCESS RIGHTS

Safe Access's Application for Appeal, along with the associated appeal fees, were timely filed on December 5, 2022. The CMMC which governs appeals of Planning Commission determinations on CUP applications, provides in no uncertain terms that such appeals ". . . ***shall*** be considered at the first regular meeting which follows receipt of the application by ten (10) or more days, and which allows sufficient time for the giving of notice as required by section 2-308." (CMMC § 2-303(2); see also, § 2-311 ["The procedures set forth in this chapter are the exclusive methods by which appeals and reviews may be pursued and none of the steps set forth herein may be waived or omitted."]; CMMC § 13-29(j) [appeal procedures in Title 2, Chapter IX govern CUP appeals]; *Woody's Group Inc.*, *supra*, 233 Cal.App.4th at 1025 [interpreting the term "shall" in the appeal procedures in the City's Municipal Code to mean "suggesting [the reviewing body] has no choice in the matter."].)

Despite the clear language set forth in the CMMC regarding the timing of an appeal hearing (*i.e.*, the next regular meeting agenda more than 10 days after the appeal is filed), the appeal of Safe Access has yet to be formally scheduled, let alone *heard* by the City Council. Indeed, pursuant to this provision, Safe Access's appeal should have been heard by the City Council on the December 20, 2022 agenda. Yet, it was not. It likewise could have been heard on January 17, 2023. Yet, again, it was not. It likewise was not noticed timely so as to enable it to be placed on

the February 7, 2022, City Council meeting agenda. Most recently, after a strongly worded letter from our firm, City Staff has advised our Client that Safe Access's appeal will be heard by the City Council on its February 21st agenda. While we and our Client appreciate this, we cannot help but note that nothing "official" has yet to occur to confirm the appeal will in fact be heard that date.

The City's failure to follow its own Municipal Code is, and continues to, amount to a violation of Safe Access's procedural due process rights. Indeed, when combined with the legally indefensible basis for denial of its CUP by the Planning Commission, it may already be too late for the City to avoid a determination by a court that Safe Access's CUP is deemed approved.

* * *

In light of the foregoing, it is clear that the Planning Commission did not, and the City cannot, make the requisite factual findings to deny PA-22-21. Likewise, it is clear that there is no substantial evidence that supports the statements made by three Planning Commissioners that form the bases of their vote to deny PA-22-21. Instead, the evidence provided by City Staff clearly shows that the PA-22-21 for a CUP should be approved.

Accordingly, the Applicant respectfully requests that the City Council overturn the Planning Commission's denial of the PA-22-21, and approve the CUP.

RUTAN & TUCKER, LLP

A. Patrick Muñoz

APM:mrs

cc: Brenda Green, City Clerk (*brenda.green@costamesaca.gov*)
Lori Ann Farrell Harrison, City Manager (*loriann.farrellharrison@costamesaca.gov*)
Kimberly Hall Barlow, Esq. (*khb@jones-mayer.com*)
Jennifer Le, Director of Economic and Development Services (*JenniferLe@costamesaca.gov*)
Client

SCSA
SOUTH COAST SAFE ACCESS

949-474-7272 *Email: info@southcoastsafeaccess.com*

2/13/2023

Mayor Stephens and members of the city council,

I am the CEO of Access Costa Mesa, Inc., dba South Coast Safe Access /SCSA . As you know, an appeal of the denial of our requested CUP by the Planning Commission is scheduled to be heard before you on February 21st. In addition to the information provided to you by our legal counsel, I want to explain our company's response to the comments we heard at the Planning Commission. Specifically, from the comments of the various Planning Commissioners, it appeared to us that we were denied a conditional use permit due to three concerns: 1) having a counseling business located too close to our premises, and 2) holding our open house at a time that wasn't as convenient as the commission would have liked, and 3) not translating our open house invitations into Spanish.

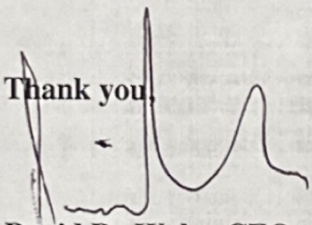
I am happy to report that all three of the above concerns have been remedied. First, the lease for Yellowstone Women's First Step, Inc., the counseling center also located at 2001 Harbor Blvd., expired on December 31, 2022. Yellowstone has been advised by the owner of the property that it's current month to month occupation must end by April 30, 2023. A copy of the lease extension showing it expired last December and correspondence explaining the situation from our landlord are attached for your information.

As it relates to the second and third concerns raised by the Planning Commission, please note that on Saturday February 11th, 2023 Safe Access held a second open house at on site at 2001 Harbor Blvd. The open house was held from 1pm to 3:30 pm, and was scheduled on a Saturday in response to concerns from the Planning Commission that the last open house we held was on a Monday when neighbors might not be available to attend. In response to the Planning Commission's comments, the notice we sent out to the surrounding neighbors was printed in both Spanish and English. Moreover, educational pamphlets regarding our proposed business were made available to all attendees of the open house, and these were also printed in both English and Spanish. As an additional measure to address the Planning Commission's concerns, we had both English and Spanish speaking

members of our team present at the open house to answer any questions our neighbors might have.

While we recognize the above efforts exceed the requirements of your cannabis regulations, it was important to us that we addressed the concerns raised by the Planning Commission. Our goal is to be a reputable business that listens to community concerns, whether raised by the City or our neighbors, and to respond to any and all concerns so as to ensure we make a positive contribution to the community.

Thank you,



David De Wyke, CEO of Access Costa Mesa, Inc.

1900 Warner Ave., Santa Ana, Ca 92705

Mar Vac
ELECTRONICS
J.V. Electronics, Inc. 2001 Harbor Blvd. Costa Mesa, CA 92627
Tel: 949-650-2001 Fax: 949-548-5939

2-10-23

To: City Council of Costa Mesa

RE: Yellowstone Recovery Lease Ended 12-31-22

My name is Vince Vaccher, and I am one of the owners of Mar Vac Electronics, located at 2001 Harbor Blvd., Costa Mesa CA 92627. Our corporation J.V. Electronics, Inc., has sublet the offices above our space to Yellowstone Recovery since 3-1-2015.

Yellowstone Recovery's lease expired, with no holdover, on 12-31-22. We have allowed their occupancy past that date, acting in good faith and in hopes we could negotiate acceptable terms. Unfortunately, those discussions broke down when Yellowstone wanted to vacate portions of the lease that would strip our rights as sublessor/landlord.

Yellowstone Recovery was notified by email on 1-26-23 of our decision not to renew their lease and a timeline for them to vacate all previously leased spaces. The email was sent to Dr. Anna Thames and Jason Brewer, who has been my contact over the past several years. I received no feedback from either person.

Today I sent Yellowstone Recovery, via FedEx Overnight Delivery, a letter spelling out the reason for our decision and reiterated the date they needed to vacate. We are sensitive of their need to find another location, and we were willing to work with them; however, their lack of communication has left us no option but to demand their departure by 4-30-23.

Respectfully,

Vincent J. Vaccher
President/CEO
J.V. Electronics, Inc.

STANDARD SUBLEASE
MULTI-TENANT
AIR COMMERCIAL REAL ESTATE ASSOCIATION

1. **Basic Provisions ("Basic Provisions").**

1.1 **Parties:** This Sublease ("Sublease"), dated for reference purposes only February 25, 2015, is made by and between JV Electronics, Inc. ("Sublessor") and Yellowstone Women's First Step House, Inc. DBA Yellowstone Recovery ("Sublessee"), (collectively the "Parties", or individually a "Party").

1.2(a) **Premises:** That certain portion of the Project (as defined below), known as _____, consisting of approximately 3476 square feet ("Premises"). The Premises are located at: 2001 Harbor Blvd, Stes 200, 220, 230, in the City of Costa Mesa, County of Orange, State of CA, with zip code 92627. In addition to Sublessee's rights to use and occupy the Premises as hereinafter specified, Sublessee shall have nonexclusive rights to the Common Areas (as defined below) as hereinafter specified, but shall not have any rights to the roof, the exterior walls, or the utility raceways of the building containing the Premises ("Building") or to any other buildings in the Project. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Project."

1.2(b) **Parking:** 11 unreserved and _____ reserved vehicle parking spaces.

1.3 **Term:** 2 years and 7 months commencing March 1, 2015 ("Commencement Date") and ending September 30, 2017 ("Expiration Date").

1.4 **Early Possession:** If the Premises are available Sublessee may have non-exclusive possession of the Premises commencing February 26, 2015 ("Early Possession Date").

1.5 **Base Rent:** [redacted] per month ("Base Rent"), payable on the 1st day of each month commencing March 1, 2015.

[X] If this box is checked, there are provisions in this Sublease for the Base Rent to be adjusted.

1.6 **Sublessee's Share of Operating Expenses:** _____ percent ([redacted] %) ("Sublessee's Share"). In the event that that size of the Premises and/or the Project are modified during the term of this Lease, Lessor shall recalculate Lessee's Share to reflect such modification.

1.7 **Base Rent and Other Monies Paid Upon Execution:**

(a) **Base Rent:** $[redacted] for the period March 1-31, 2015.

(b) **Security Deposit:** $[redacted] ("Security Deposit").

(c) **Other:** $_____ for _____.

(d) **Total Due Upon Execution of this Lease:** $[redacted].

1.8 **Agreed Use:** The Premises shall be used and occupied only for general office use; group therapy sessions and for no other purposes.

INITIALS

INITIALS

LORA PIAZZA, 2659 ELDEN COSTA MESA, CA 92627
Phone: (949)642-6822 Fax: LORA PIAZZA

CALIFORNIA ASSOCIATION OF REALTORS®

EXTENSION OF LEASE
(C.A.R. Form EL, Revised 12/19)

The following terms and conditions are hereby incorporated in and made a part of the Residential Lease [X] other *COMMERCIAL LEASE RENEWAL AGREEMENT* ("Lease"), dated *OCTOBER 3RD, 2017*, on property known as *2001 HARBOR BLVD, Ste 200,210,220,230 COSTA MESA , CA* ("Premises"), in which *YELLOWSTONE WOMEN'S FIRST STEP HOUSE,INC, JV ELECTRONICS, INC* is referred to as ("Tenant") and *THE VACCHER FAMILY TRUST, VINCE VACCHER* is referred to as ("Landlord").

Note to Landlord: If the Premises are subject to any rent increase cap under any state or local law, Landlord is strongly advised to seek counsel from a qualified California real estate lawyer, who is familiar with the law where the property is located, prior to using this form to modify any of the existing terms of the Lease.

The terms of the tenancy are changed as follows. Unless otherwise provided, the change shall take effect on the date the Lease was scheduled to terminate.

1. **EXTENSION OF TERM:** The scheduled termination date is extended to *December 31, 2022* (Date).
2. **Rent shall be $** [redacted] **per month.**
3. **Security deposit shall be increased by $** *existing security deposit on file* .
4. [ ] **Rent Cap and Just Cause Addendum (C.A.R. Form RCJC) is attached and incorporated into the Lease.**
5. **ADDITIONAL TERMS:** *This Extension of Lease form serves as official notice that the lease term is an extension of the previous lease as of 10-1-2017 thru 9-30-2020. This renewal agreement is valid as of 10-1-2020 thru 12-31-2022. All previous lease terms are enforced. The Guarantor is still Anna M. Thames for Yellowstone Women's First Step House.*

By signing below, Tenant and Landlord acknowledge that each has read, understands, and received a copy of and agrees to the terms of this Extension of Lease.

Tenant _____ Date 10-1-2020
YELLOWSTONE WOMEN'S FIRST STEP HOUSE,INC

Tenant _____ Date 10-1-2020
JV ELECTRONICS, INC

Landlord _____ Date 10-1-2020
THE VACCHER FAMILY TRUST

Landlord _____ Date 10-1-2020
VINCE VACCHER

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525 South Virgil Avenue, Los Angeles, California 90020

Reviewed by _____ Date _____

RUTAN
RUTAN & TUCKER, LLP

A. Patrick Muñoz
Direct Dial: (714) 662-4628
E-mail: pmunoz@rutan.com

February 16, 2023

VIA E-MAIL

Mayor John Stephens and
Members of the City Council
City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626

john.stephens@costamesaca.gov
andrea.marr@costamesaca.gov
manuel.chavez@costamesaca.gov
loren.gameros@costamesaca.gov
jeffrey.harlan@costamesaca.gov
don.harper@costamesaca.gov
arlis.reynolds@costamesaca.gov
cityclerk@costamesaca.gov

Re: Meeting on February 21, 2023
Denial of Planning Application 22-21 for a Conditional Use Permit (CUP)
Appeal Hearing for Access Costa Mesa dba South Coast Safe Access
Follow-Up to February 6, 2023 Correspondence

Dear Honorable Mayor and Councilmembers:

This office represents the applicant, Access Costa Mesa dba South Coast Safe Access ("Safe Access" or "Applicant"), who applied for a Conditional Use Permit ("CUP") for the establishment of a retail cannabis storefront business located at 2001 Harbor Boulevard, Suites 101-103, in the C-2 (General Business District) zone. The property is owned by Vaccher Family Trust ("Property Owner").

Our office previously sent correspondence to you on February 6, 2023. Among other items, that correspondence noted multiple instances where our client's procedural due process rights were violated by the City. This correspondence is to bring your attention to ***even more due process violations***.

As you will recall, on November 28, 2022, the Costa Mesa Planning Commission, in a split 4-2 vote, denied Application 22-21 ("PA-22-21" or "Project") for a CUP without any written findings in support of the denial. Because staff has recommended approval of the project, there was no draft resolution of denial as part of the agenda packet, and as such, there was no resolution of denial considered or adopted at that meeting. Moreover, since that meeting, the Planning Commission has not considered or adopted any resolution of denial related to this Project at any agendized meeting.

Most recently, the February 13, 2023, agenda for the Planning Commission states the following as the title for Consent Calendar Item 1: "November 28, 2022." The title of the item contains no indication as to why that date is on the agenda. More specifically, the agenda title

does not refer to "minutes" or "transcript" or otherwise refer to PA-22-21, our client's proposed Project, or its property.

Despite the lack of an adequate description of the item, during its February 13, 2023, meeting, the Planning Commission voted to approve the minutes of its November 28, 2022, meeting -- solely as to Public Hearing Item No. 3, which was the Planning Commission's consideration of PA-22-21. The description of the item would not notify a reasonable person, and did not notify our client of the action the Planning Commission was considering. As such, it constitutes a violation of the Brown Act. (*See, Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196, 200 [holding that an agenda title of "Continuation School site change" was "entirely misleading and inadequate" and thus insufficient to allow for board's discussion and vote to discontinue school services and transfer students to a new school because it "show the whole scope of the board's intended plans" and "[i]t would have taken relatively little effort to add to the agenda that this "school site change" also included the discontinuance of [school services] and the transfer of [students]."].)

In addition to the inadequate description of "November 28, 2022," the Planning Commission also committed a Brown Act violation when it adopted "Resolution PC-2022-33 – A Resolution of the Planning Commission of the City of Costa Mesa, California Denying Planning Application 22-21 for a Retail Cannabis Storefront Business Located at 2001 Harbor Boulevard, Suites 101-103 (South Coast Safe Access)." Notably, Resolution PC 2022-33 was not listed on the February 13, 2023, Planning Commission agenda (and likewise was not contained as an attachment to a staff report) – and it was not listed (or otherwise provided) at the November 28, 2022, Planning Commission meeting, at which Staff only provided the Commission with a draft resolution to approve the Project. Indeed, after reviewing each and every Planning Commission agenda between November 28, 2022, to today's date, it is apparent that neither Planning Commission (nor the public) has ever been provided a copy of Resolution 2022-33.

Despite this obvious fact, in the minutes, the "Action" for Public Hearing Item No. 3 is listed as "Planning Commission adopted a Resolution to deny Planning Application 22-21." Further, after recording the motion to deny the Project (not adopt a resolution), the minutes refer to "Resolution PC-2022-33 – A Resolution of the Planning Commission of the City of Costa Mesa, California Denying Planning Application 22-21 for a Retail Cannabis Storefront Business Located at 2001 Harbor Boulevard, Suites 101-103 (South Coast Safe Access)."

Again -- the ***only*** resolution included as part of the agenda packet for the November 28, 2022, Planning Commission was a draft resolution ***approving*** the Project. As a result, the only resolution the Planning Commission could consider at that meeting was one to approve the Project. The Planning Commission was not provided with – and thus, could not vote upon – a resolution denying the Project.

Complicating matters further, since this Resolution PC 2022-33 was revealed on Monday, our office has attempted on <u>three</u> different occasions to obtain a copy of it from at least <u>four</u> different staff members – and to date, those staff members have either been <u>unable or unwilling to provide us with a copy</u>. If Resolution PC-2022-33 exists, and was in fact adopted, that adoption was in violation of the Brown Act because Resolution PC-2022-33 was never listed – yet alone considered – by the Planning Commission at an agendized meeting. (*G.I. Industries v. City of Thousand Oaks* (2022) 84 Cal. App. 5th 814, 823 ["The Brown Act clearly and unambiguously states that an agenda shall describe '*each item of business* to be transacted or discussed' at the meeting.'"], citing § 54954.2, subd. (a)(1).) Moreover, if in fact the Resolution exists, our client should have been promptly provided with a copy of it in line with the requirements set forth CMCC Sections 13-29(h)(i), and 13-29(i)(2). The failure to provide our client with a copy of the Resolution is particularly problematic given his upcoming appeal (now, less than 5 days away) and the obvious prejudice that results – that is, the deprivation of his ability to meaningfully prepare for his upcoming hearing.

If Resolution PC-2022-33 does not exist, the question arises as to what exactly the Planning Commission believes it approved as part of its November 28, 2022, minutes. Did the Planning Commission (who acts as a whole body, not individual commissioners) agree on any of the findings to deny the Project? Or did the four "no" votes each have their own reasons for which a finding could or could not be made? Perhaps more troubling, how could the Planning Commission approve minutes (that were discussed at length), knowing that they had never been provided, let alone considered the non-existent Resolution? This so-called "approval" calls into question the validity of the entire administrative record related to PA-22-21 and is, therefore, yet another reason our client's due process rights have been violated by the City.

It is fundamental to due process that our client have knowledge of factual findings leading to the denial of its CUP application. As we noted in our February 6, 2023, correspondence, without written findings or notification as to the circumstances of denial, our client has been left to infer the bases for denial. Now, our client's due process rights have been dealt another blow regarding the cloud of uncertainty regarding the existence and approval of Resolution PC-2022-33.

For the reasons set forth in our February 6, 2023, correspondence and herein, the Applicant respectfully requests that the City Council overturn the Planning Commission's denial of the PA-22-21, and approve the CUP.

RUTAN & TUCKER, LLP

A. Patrick Muñoz

APM:mrs

cc: Brenda Green, City Clerk (*brenda.green@costamesaca.gov*)
Lori Ann Farrell Harrison, City Manager (*loriann.farrellharrison@costamesaca.gov*)
Kimberly Hall Barlow, Esq. (*khb@jones-mayer.com*)
Jennifer Le, Director of Economic and
Development Services (*JenniferLe@costamesaca.gov*)
Client