



Legislation Text

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File #: 23-1081, Version: 1

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**TITLE:**

**APPEAL OF PLANNING APPLICATION 22-21 FOR A RETAIL CANNABIS STOREFRONT BUSINESS LOCATED AT 2001 HARBOR BOULEVARD, SUITES 101-103 (SOUTH COAST SAFE ACCESS)**

**DEPARTMENT: ECONOMIC AND DEVELOPMENT SERVICES DEPARTMENT / PLANNING DIVISION**

**PRESENTED BY: MICHELLE HALLIGAN, CONTRACT PLANNER**

**CONTACT INFORMATION: MICHELLE HALLIGAN, (714) 754-5608**

**RECOMMENDATION:**

Staff recommends the City Council:

- Uphold the Planning Commission's decision and adopt a Resolution to deny Planning Application 22-21; or
- Overturn the Planning Commission's decision and adopt a Resolution to approve Planning Application 22-21, subject to conditions of approval; or
- Remand Planning Application 22-21 back to the Planning Commission to reconsider the matter.

**APPLICANT OR AUTHORIZED AGENT:**

The authorized agent is Randall Longwith on behalf of Access Costa Mesa, Inc. dba South Coast Safe Access, and the property owner, Vaccher Family Trust.

**BACKGROUND:**

***Project Site / Environs***

The subject property is located at 2001 Harbor Boulevard. The approximate one-acre mid-block property is located on the west side of Harbor Boulevard, bounded by Charle Street to the west. The site is zoned C2 (General Business District) and is surrounded by C2 zoned properties to the north and south. Other commercial properties, zoned C1 (Local Business District), are located across Harbor Boulevard to the east. Residential properties, zoned R2-HD (Multiple-Family Residential District, High Density) are located across Charle Street to the west. The site has a General Plan Land

Use Designation of General Commercial.

Existing development on the subject property consists of a two-story, 21,086-square-foot commercial building. The first floor includes 4,667 square feet of retail space (3 tenant suites are proposed for the cannabis retail operation and currently vacant; two other tenant suites are occupied by Mar Vac (JV Electronics Inc.), an electronics retail business) and a 6,752-square-foot space for Mar Vac's warehouse. The second floor includes 5,947 square feet of office space (4 tenant suites are occupied by a counseling use, Yellowstone Recovery), which specializes in addiction recovery, and one tenant suite is occupied by Mar Vac for office use). The site includes a 66-space surface parking lot with ingress/egress on Harbor Boulevard and Charle Street.

### ***Application Request***

The applicant requests a Conditional Use Permit (CUP) to establish "South Coast Safe Access," a retail cannabis storefront. The proposed establishment would occupy a 3,720-square-foot area on the first floor, adjacent to Harbor Boulevard. The proposed cannabis retail establishment proposes to be open between the hours of 7 AM and 10 PM, seven days a week.

### ***Planning Commission Denial***

The application was heard by the Planning Commission at their November 28, 2022 meeting. One letter in support of the proposed project was received and states that the applicant's other businesses (located outside of the City) have been successful and the proposed use would be helpful to the City of Costa Mesa. Two letters in opposition to the proposed use were received. One of the opposition letters contained a statement in opposition to retail cannabis in general, and the other letter commented that the proposed cannabis establishment would negatively impact residential uses along Charle Street, and be incompatible with various youth programs and substance addiction recovery programs in the vicinity. Written comments were provided to the Planning Commission for consideration and are available at the link provided below in the Public Notice section of the report.

After receiving the staff report and staff presentation, considering the applicant's presentation, and considering public testimony, a motion was made to approve the Conditional Use Permit (CUP) and failed for lack of a second to the motion. A subsequent motion was then made to deny the application and was seconded.

Following the motion for denial, the Commission members provided comments on the motion. The Commissioners that supported the motion for denial stated that based on the evidence presented in the administrative record they could not make the necessary Conditional Use Permit finding that that the proposed use "is substantially compatible with developments in the same general area and would not be materially detrimental to other properties within the area". The Commissioners stated that the application was not compatible and would be detrimental to the counseling use with addiction recovery and rehabilitation programs operating in a suite located directly above the proposed cannabis retail establishment. The Commissioners that did not support the motion for denial stated that they could generally not differentiate the proposed site from other similar applications the Commission had approved, and that the individual business owners should individually manage site land use inconsistencies. In addition, it was noted that although the use is located in close proximity to the addiction recovery counseling use, the counseling operators were notified of the proposed

cannabis application and did not reach out to the Planning Commission indicating concern.

The Planning Commission denied the application request on a 4-2 vote.

Links to the staff report and meeting video for the November 28, 2022 Planning Commission hearing are provided below:

- Staff Report & Attachments -  
<https://costamesa.legistar.com/LegislationDetail.aspx?ID=5945896&GUID=BDEA2256-A0F6->
- Video -  
<https://costamesa.granicus.com/player/clip/3925?>

The final denial Resolution reflecting the November 28, 2022 Planning Commission action is provided as Attachment 4 to the report.

### ***Appeal of Planning Commission's Decision to Deny the Application***

On December 5, 2022 an appeal of Planning Commission's denial of the project was filed by David Dewyke, an owner of the proposed cannabis establishment. In addition to the appeal application, the appellant's attorneys submitted several follow-up letters to the City and requested an appeal hearing be scheduled before the Council on February 21, 2023. The appeal application and supplemental information is included as Attachment 3 of this report.

### **ANALYSIS:**

The following analysis addresses the topics raised in the December 5, 2022 appeal application.

Pursuant to CMMC Section 13-10(i)(2)(c), the Planning Commission has the authority to "approve, conditionally approve or deny applications for conditional use permits...". Additionally and pursuant to CMMC Sections 13-28(B) and 13-200.93(c)(1), subject to the approval of the Planning Commission, a CUP is required for the establishment of cannabis retail storefronts in a commercial zone. All cannabis operators in Costa Mesa are required to obtain a Conditional Use Permit (CUP). As defined in the CMMC, a CUP is "a discretionary approval usually granted by the Planning Commission which allows a use or activity not allowed as a matter of right, based on specified findings" [emphasis added]. Unlike uses that are listed in the CMMC that are permitted "by-right", a use that requires a CUP necessitates the Planning Commission to use their judgment to determine whether a proposed project meets the required CUP findings and should be entitled.

### **REQUIRED CUP FINDINGS**

As indicated above and pursuant to the CMMC, the Planning Commission must make findings in order to support a decision to approve or deny a conditional use permit. CMMC Title 13, Section 13-29(g), requires that the Planning Commission consider and make the following specific findings in conjunction with a CUP review:

- *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;*

- *Granting the 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; and*
- *Granting the 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.*

## ISSUES RAISED IN THE APPEAL

The appellant letter states that the basis for the Planning Commission denial for the subject application “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”.

To the contrary, the Planning Commission decision was based specifically on the findings required by CMMC Title 13, Section 13-29(g).

- ***The Planning Commission denial decision “is not supported by substantial evidence”***

The Planning Commission decision to deny the application was based on its determination that the project does not meet the findings required pursuant to CMMC Title 13, Section 13-29(g). Primarily, the Planning Commission could not make the required finding that “*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*”. The record of the Planning Commission’s decision indicates that the majority of the Planning Commission determined that the proposed cannabis use was not “substantially compatible” with the addiction recovery counseling use (“Yellowstone Recovery”) located on the same property (“same general area”).

The counseling use is called “Yellowstone Recovery Outpatient Treatment” and involves individual and group counseling for clients in addiction recovery for drugs and alcohol including marijuana (<https://www.yellowstonerecovery.com/>). On October 26, 2020, the Planning Commission approved Zoning Application 20-07 for a deviation in parking requirements for group counseling at Yellowstone Recovery. The counseling use is located in suites 200, 210, and 220 of the subject property (above the proposed cannabis retail use). The counseling use is permitted to operate between the hours of 9 AM and 9 PM, Monday through Friday, although staff may be onsite between 8 AM and 10 PM Monday through Friday and on weekends between 8 AM and 4 PM. The link to the October 26, 2020 Planning Commission staff report is provided below:

<http://ftp.costamesaca.gov/costamesaca/planningcommission/agenda/2020/2020-10-26/PH-2.pdf>

The appellant also argues that “the denial of the proposed project was not based on the rules and regulations that currently exist in the City’s Municipal Code”. The Municipal Code establishes rules and regulations for cannabis uses.

Separation Requirements pursuant to CMMC Section 13-200.93(e) stipulates that no cannabis retail storefront use shall be located within 1,000 feet from a K-12 school, playground, licensed child daycare, or homeless shelter, or within 600 feet from a youth center as defined in CMMC Title 9, Chapter VI, Section 9-485, that is in operation at the time of submission of a completed cannabis

business permit application. The subject site complies with the required separation from the sensitive uses identified in this Code section.

Separately and in addition to the minimum separation requirements established by the Code, the CMMC also requires that the Planning Commission consider the CUP findings in making a decision to grant a CUP to a retail cannabis storefront. If the findings cannot be made, the Planning Commission is obligated to deny the CUP request. In this case, the Planning Commission reviewed the facts presented and determined that the cannabis retail use was not substantially compatible with the “Yellowstone” Recovery” addiction counseling use located on the subject property and above the proposed retail storefront. Therefore, the Planning Commission did consider “the rules and regulations that currently exist in the City’s Municipal Code” and made its determination that the proposed use did not meet the findings for granting a CUP.

At the Planning Commission hearing, when Commissioners inquired about the addiction counseling use, the property owner was not present and the applicant was unable to provide information regarding the use. The application for appeal stated that the counseling operator’s “lease expires in less than 30 days” and that they have “been advised they will not be permitted to remain as a holdover tenant.” In response to these statements, staff conducted a site visit and determined Yellowstone Recovery was still in full operation. Staff then requested supplemental documentation about Yellowstone Recovery’s lease agreement.

On Tuesday, February 14, 2023, the appellant provided two sublease agreements for the counseling use. The original sublease agreement for Yellowstone Recovery was effective March 1, 2015 to September 30, 2017. An extension of the sublease agreement was signed on October 1, 2020, but the timeframe of the sublease was listed as between October 3, 2017 and December 31, 2022. JV Electronics Inc. clarified in a letter dated February 10, 2023, that Yellowstone Recovery’s sublease expired on December 31, 2022. Yellowstone Recovery was informed by email on January 26, 2023 and by letter on February 11, 2023 that they must vacate the property no later than April 30, 2023. The applicant did not provide this information prior to or at the November 28, 2022 Planning Commission public hearing. However, the Council may consider this information, submitted after the appeal, in their “de novo” review.

As of February 15, 2023, staff observed that Yellowstone Recovery was still operating at the subject property.

- ***The Planning Commission denial decision “is arbitrary and capricious”***

Generally, a decision is considered “arbitrary and capricious” when a decision is made without reasonable grounds or adequate consideration of the circumstances. However in the case of the subject Planning Commission decision, the Planning Commission specifically agreed by majority vote that they could not make the CMMC required finding that “*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*”. The Planning Commission decision in regard to this finding was centered on their concern with the addiction recovery counseling use located on the same site and directly above the proposed cannabis retail storefront, and the inherent incompatibility

between the two uses.

The appellant indicates that “for the Planning Commission to attempt to impose new personal notice, open house, translation, and/or sensitive receptor 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”. However, many cannabis storefront applications have been approved after similar inquiries about the applicant’s outreach efforts and community feedback. During the hearing, the applicant’s representative indicated that they were not aware of the addiction recovery counseling operation and that there had not been any communication with the counseling business.

- ***The Planning Commission denial decision “is in violation of a settlement agreement between the City, the property owner and the applicant”***

The appellant argues that a previous settlement agreement between the City, the property owner and the applicant requires that the City “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”. The appellant further argues that the application “was not processed in good faith” because the Planning Commission denied the application “solely on personal opinion, biases and flagrant disregard of the standards set forth in Measure Q and the CMMC”.

The appellant’s statements are in error. The application was processed in good faith and a Planning Commission hearing was scheduled consistent with the agreed upon timeline (i.e., consistent with other Phase 1 applications whose pre-applications were submitted around the same time). The Settlement Agreement did not and cannot pre-commit or dictate the outcome of the Planning Commission’s decision ahead of the public hearing process.

The Planning Commission action does not reflect bias or flagrant disregard of the standards set forth in Measure Q and the CMMC. To the contrary, the Planning Commission diligently reviewed the subject application pursuant to the CMMC’s minimum standards and requirements for cannabis uses and the required findings for a CUP as contained in the CMMC.

## **CITY COUNCIL DE NOVO HEARING**

Pursuant to CMMC Chapter 9, Appeal and Review Procedures, the City Council shall conduct a new or “de novo” review of the matter being appealed. Evidence that may be considered includes the Council staff report and the Planning Commission reports, Resolution, and findings. However, the hearing is not limited to the grounds stated for the appeal or the evidence that was previously presented to the Planning Commission. The City Council may exercise its independent judgment and discretion in making a decision. The City Council’s decision on the matter is final.

The Council may:

1. Uphold the Planning Commission’s decision and adopt a Resolution to deny Planning Application 22-21. A draft Resolution for denial is provided as Attachment 1 consistent with the Planning Commission decision.

2. Overturn the Planning Commission's decision and adopt a Resolution to approve Planning Application 22-21, subject to conditions of approval. A draft Resolution for approval is provided as Attachment 2 and includes applicable conditions of approval.
3. Remand Planning Application 22-21 back to the Planning Commission to consider the supplemental information provided by the appellant after the Planning Commission hearing.

### **ENVIRONMENTAL DETERMINATION:**

Per CEQA Guidelines Section 15270(a), CEQA does not apply to projects which a public agency rejects or disapproves. However, if the City Council desires to overturn the Planning Commission decision and approve the proposed use, the project is categorically exempt from the provisions of CEQA pursuant to CEQA Guidelines Section 15301 for the permitting and/or minor alteration of Existing Facilities, involving negligible or no expansion of the existing use. This project site contains an existing commercial building that has been used for commercial activities and the application does not propose an increase in floor area or other substantial expansion of the existing or prior commercial use.

### **ALTERNATIVES:**

The City Council has the following alternatives:

1. Deny the request. The City Council may uphold the Planning Commission's decision and adopt a Resolution to deny the request;
2. Approve the request, subject to conditions of approval. The City Council may overturn the Planning Commission's decision and approve the request subject to conditions of approval;
3. Remand the request back to the Planning Commission.

### **FISCAL REVIEW:**

There are no fiscal impacts with this agenda item.

### **LEGAL REVIEW:**

The City Attorney's Office has reviewed this report and approves it as to form.

### **PUBLIC NOTICE:**

Pursuant to Title 13, Section 13-29(d), of the Costa Mesa Municipal Code, three types of public notification have been completed no less than 10 days prior to the date of the public hearing:

1. Mailed notice. A public notice was mailed to all property owners and occupants within a 500-foot radius of the project site. The required notice radius is measured from the external boundaries of the property. (See attached Notification Radius Map.)
2. On-site posting. A public notice was posted on each street frontage of the project site.

3. Newspaper publication. A public notice was published once in the Daily Pilot newspaper.

As of this report, three written public comments have been received and are provided as an attachment to this report. Any additional public comments received prior to the February 21, 2023 City Council meeting will be provided separately.

Notice for the Planning Commission hearing was provided in the same manner as described above. For the Planning Commission hearing, three written public comments were received (labeled PH-3) and can be found at the link below.

- Planning Commission Public Comments:  
<https://costamesa.legistar.com/View.ashx?M=E3&ID=922033&GUID=AE7C3FD6-1F4E->

### **CITY COUNCIL GOALS AND PRIORITIES:**

This item is administrative in nature.

### **CONCLUSION:**

Yellowstone Recovery occupies the suites directly above the proposed cannabis storefront and is an individual and group counseling that specializes in alcohol and substance addiction recovery. After diligent review of the record and considering testimony from the public and the applicant, the Planning Commission determined that the proposed cannabis retail storefront was not a compatible use when located on the same property and directly below the addiction recovery use. Specifically, the Planning Commission could not make the required finding that *“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”*, and denied the application.

The applicant appealed the Planning Commission’s decision to deny the CUP request to the City Council. In conjunction with the appeal, the appellant also provided supplemental information showing that the counseling use’s lease expired in December 31, 2022. On January 26, 2023 via email and on February 11, 2023 via letter, JV Electronics Inc. notified Yellowstone Recovery that they are to vacate the property by April 30, 2023. As of the writing of this report, the addiction counseling use remains in operation at the site.

Since the City Council’s review of the application is “de novo”, the Council may approve, deny, or remand the application back to the Planning Commission.