

CITY OF LA MESA
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March 19, 2019

City of La Mesa
City Council
8139 Alison Ave
La Mesa, CA 91942

Re: Appeal of CUP 17-96 located at 8760 Campo Road (the "Project")

Dear City Council Members:

Austin Legal Group, APC represents La Mesa Alternative Health, Inc. (the "Appellant") with regard to the appeal of CUP 17-96 approved by Planning Commission on March 6, 2019. This letter is submitted as the formal appeal pursuant to the requirements of the La Mesa Municipal Code ("LMMC") sections 2.08.051 and 24.02.080.

The following comments are submitted on behalf of Appellant and are expressly intended to become part of the administrative record for the Project. The Appellant, La Mesa Alternative Health, Inc., is located at 2221 Camino Del Rio South, Ste. 207, San Diego, CA 92118; its phone number is 619-444-0001. The Appellant appeals the Planning Commission's March 6, 2019 approval of the Project, CUP 17-96. The Appellant is an interested party in that its competing CUP application has been, and continues to be, negatively impacted by the March 6, 2019 Planning Commission decision to approve the Project. The Appellant has standing because letters were submitted on its behalf and oral testimony presented at the March 6, 2019 Planning Commission hearing in opposition of the Project.

This letter supplements the March 6, 2019 comment letter from this office, that was submitted to the Planning Commission regarding the public hearing for the Project. (A copy of the March 6, 2019 comment letter is attached hereto as Attachment A.) As discussed below, good grounds exist for this appeal, namely: (1) the project application for CUP 17-96 is incomplete and should not have been scheduled for hearing; (2) the City's approval process has been fundamentally unfair; and (3) the City abused its discretion by arbitrarily and inconsistently determining certain items were a condition of approval rather than a submittal requirement. Accordingly, the City Council should grant the Appellant's appeal and reverse the Planning Commission's decision to approve CUP 17-96.

I. THE PROJECT APPLICATION FOR CUP 17-96 IS INCOMPLETE AND SHOULD NOT HAVE BEEN SCHEDULED FOR HEARING

Of late, with respect to CUP 17-96 and CUP 17-90, City Staff has engaged in post review ad hoc rationalization of the way it handled both CUP 17-90, the Appellant's application, and CUP 17-96, including its decision to deem CUP 17-96 complete and set CUP 17-96 for hearing. City Staff's erroneous decision to deem 17-96 complete and set it for hearing does not mean CUP 17-96 is complete and, in fact, the Planning Commission lacked jurisdiction to consider CUP 17-96 because it was not, and is not, complete.

On February 28, 2019, this office notified the City of deficiencies in CUP 17-96. According to the Dispensary Supplemental Application, an applicant must submit 10 specific pieces of information pursuant to Section B, including Operating Procedures and property owner authorization, which CUP 17-96 failed to submit with its application or with its response to comments on November 8, 2018.

Upon disclosure of this information to the City, Mr. Kusiak immediately notified the applicant for CUP 17-96 by phone or email that its application was deficient (on February 28, 2019 or March 1, 2019) and allowed the applicant for CUP 17-96 to submit its Operating Procedures without being required to wait for the standard review process. It was arbitrary and capricious for Mr. Kusiak to allow CUP 17-96 to informally submit required information while simultaneously requiring CUP 17-90 to submit its waste management procedures (a component of the operating procedures) via the formal submittal process and wait 3 months for a response. If the City had applied the same standard of review to CUP 17-90, it would have been complete and ready for hearing upon submission of materials on August 23, 2018 - - more than 2 months prior to the date CUP 17-96 received its first comments from the City. If the City had applied the same standard of review to CUP 17-96, the Project would not have been heard at the March 6, 2019 Planning Commission hearing.

Despite the arbitrary and prejudicial process by which the City allowed CUP 17-96 to augment its Project application, CUP 17-96 remains deficient because it continues to lack property owner authorization. As explained in detail in our February 28, 2019 letter, among other requirements, the Section A approval requires property owner authorization with notarized signatures and proof of possession of the premises. The City again informally notified the applicant for CUP 17-96 that it failed to provide property owner authorization and proof of possession and/or the information provided was insufficient. In response, the applicant for CUP 17-96 submitted a durable power of attorney and a lease option in the name of the name of the applicant Evergreen Evolution, LLC. For the reasons below, neither of these documents is legally sufficient to provide property owner authorization or proof of possession.

The Durable Power of Attorney Submitted By The Applicant For CUP 17-96 Is Invalid And Fails To Provide Authority By Property Owner Justice Is Coming, LLC

A man named Mr. Lambert signed the application for CUP 17-96, and related documents, on behalf of property owner Justice Is Coming, LLC. However, none of the documents provided to the City confirm that Mr. Lambert was authorized to sign on behalf of Justice Is Coming, LLC. The supplemental documents provided by the applicant on March 1, 2019 include a Durable Power of Attorney in the name of Summer Steele and a statement of information filed with the secretary of state on February 20, 2019 that identifies Summer Steele as Justice is Coming, LLC's Managing Member. However, Mr. Lambert

passed away on January 13, 2019. A durable power of attorney terminates upon the death of the principal. (Probate Code § 4152(a)(4).) The applicant failed to submit an operating agreement for Justice Is Coming, LLC and therefore there is no mechanism to determine what is to occur when the managing member of the LLC dies. The durable power of attorney became legally insufficient when Mr. Lambert passed away and remains legally insufficient through the date of this correspondence. As such, the administrative record for CUP 17-96 remains devoid of proper documentary support that Mr. Lambert was authorized in 2017 to sign on behalf of Justice Is Coming, LLC. There administrative record for CUP 17-96 is also devoid of proper documentary support that Ms. Steele is currently authorized to act on behalf of Justice Is Coming, LLC.

A Lease Option Does Not Equate to Possession

The City's Section A approval process requires proof of possession and approval of use by a deed, lease or lease assignment. CUP 17-96 meets none of these requirements and our office notified the City of this fatal deficiency on February 28, 2019. In violation of its own municipal code, and to the extreme detriment and prejudice of CUP 17-90, the City again immediately after our meeting identifying this deficient informally notified the applicant. On March 1, 2019, the applicant for CUP 17-96 provided the City with supplemental documentation which purports to cure its deficiencies. The applicant for CUP 17-96 submitted a new first page and signature page for the Option To Lease in the name of the applicant, Evergreen Evolution, LLC and provided a lease that is the exhibit to the option. Evergreen Evolution's decision to submit this March 1, 2019 documentation stemmed exclusively from the City's decision to inform the applicant that the Option to Lease did not name the applicant and that the Option to Lease was not a complete document as it did not include the lease as an exhibit. See Paragraph 1 of the Option to Lease. However, the documents the applicant for CUP 17-96 submitted to the City on March 1, 2019 fail to cure these deficiencies as explained below.

While the applicant for CUP 17-96 submitted a new signature page for the option in the name of the applicant, Evergreen Evolution, LLC, the supplemental application requires "proof of possession of the premises." The lease option states that Mr. Lambert is in possession. The supplemental application requires "proof of possession of the premises." Despite what the applicant was attempting to prove by submitting these documents on March 1, 2019, the Option to Lease actually provides proof that the applicant IS NOT in possession. Paragraph 6 of the Option to Lease states "Optionor can continue his business at the Premises and to use the carport/vehicle detail area of approximately 1,200 square feet while Optionee is seeking a conditional use permit from the City of La Mesa." The Option to Lease clearly states that the property is in the possession of the Optionor, Steven Lambert. Even if this does not clear up the possession issue, under California Law, an option to lease is not a lease but an irrevocable right to lease. *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co., (1991) 230 Cal. App. 3d 207, 222.* Possession is given to a tenant upon execution of a lease, not upon a right to lease. However, if there is any further doubt as to whether this Option to Lease is effective, the City simply needs to look at the person granting this Option to Lease, Steven Lambert. The property owner is Justice Is Coming, LLC, not Steven Lambert. Therefore, the property owner has not executed the Option to Lease. No possession is given under the Option to Lease under any scenario.

The Option to Lease has a lease exhibit that was to be executed upon exercise of the option. In case the City takes the position that the exhibit somehow is an enforceable lease, the City should look at 1.3 of the lease that lists TBD as the commencement date. "Under California law, distinguishing characteristics of a leasehold estate are that the lease gives the lessee the exclusive right to possession of the premises against all the world, including the owner, for a limited and **ascertained period of time**

[**Emphasis Added**]. *In re South Bay Expressway, L.P. United States Bankruptcy Court, S.D. California. June 27, 2011 455 B.R. 732.* The lease does not have a commencement date and therefore no ascertainable period of time as required by law. Exhibit A is merely intended to be the form of the lease once if and when the applicant exercises the option. At this point, the applicant clearly has no possession nor even a right to possession that can be shown from the documentation provided and therefore failed to meet the predicate requirements for its March 6, 2019 Planning Commission hearing.

II. THE CITY'S APPROVAL PROCESS HAS BEEN FUNDAMENTALLY UNFAIR

As stated above, Mr. Kusiak called to notify CUP 17-90 at 5:45 p.m. on Thursday February 28, 2019 that the CUP 17-90 was actually incomplete because the fire flow analysis was not included. Our office informed Mr. Kusiak that we had been informed by the City that a fire flow analysis was not required and would be required at building rather than during the CUP review process. The City has taken the same position with the photometric analysis. Mr. Kusiak responded that it was a "requirement of approval" and is listed as item # 72 of the Additional Standard Criteria.

Despite being previously informed that a fire flow analysis was not required, the Appellant's agent submitted fire flow documentation on Friday March 1, 2019 at approximately 11 a.m. **As no City employee was available that day to print the information on the "standard forms," equivalent information was submitted.** On Monday March 4, 2019 at 9:50 am the exact same information was submitted on the standard forms. The City took the position that the March 1, 2019 fire flow analysis did not meet City criteria because it was not on the "standard forms" even though the information is identical to that submitted on March 4, 2019. The City's inconsistent application of the submittal requirements has negatively affected CUP 17-90. First, the fire flow information was properly before the City on Friday March 1, 2019. Second, a fire flow analysis is not a requirement of submission. The Additional Standard Criteria are items that the applicant agrees to and are generally notes that are required on the plans and conditions of operational procedure and not submittal requirements. The Section B requirements require the submittal of Section A clearance, remaining fees and live scan. The Supplemental Application identifies that evaluation will continue of the following (**None are the completion of a fire flow analysis**):

- Completed Conditional Use Permit Application and Supplemental Application Packet
- A signed copy of La Mesa Standard Criteria (Attachment 1) and Additional Standard Criteria (Attachment 2) for the proposed facility type in the CUP application acknowledging that you have read, understand the criteria and the project will comply with the criteria.
- Operating Procedures including supplemental pages as needed.
- For an applicant with 20 or more employees, provide a statement that the applicant will enter into, or demonstrate that it has already entered into, and abide by the terms of a labor peace agreement.

- Structure of proposed business, e.g., sole proprietorship, corporation, LLC, partnership - include documentation which shows By-Laws, Articles of Incorporation, etc.
- If the proposed business is publicly traded submit an Ownership Statement for every person with over 5% controlling interest.
- Site Plan (copy of the same one submitted for CUP) including information showing compliance to La Mesa Municipal Code Chapter 24.23).
- Floor Plan (copy of the same one submitted for CUP) including information showing compliance to La Mesa Municipal Code Chapter 24.23.
- Applicant Certification stating all information contained on all application documents is true and accurate.
- Environmental Assessment/Initial Study Application Section B Requirements

Because the applicant for CUP 17-90 was previously notified that a fire flow analysis was not required, and is not a Section B requirement, it was arbitrary and capricious for the City to notify the applicant after business hours on a Thursday February 28, 2019 that the fire flow analysis was a required document. The City's sudden unexplained change of position was aggravated by the fact that no one was available on Friday March 1, 2019 to provide the standard forms the City decided it required for the fire flow analysis. The City's conduct with respect to CUP 17-90's fire flow analysis cannot be reconciled with its haphazard processing of CUP 17-96 and is an example of fundamental unfairness in the approval process.

III. THE CITY ABUSED ITS DISCRETION BY ARBITRARTILY AND INCONSISTENTLY DETERMINING CERTAIN ITEMS WERE A CONDITION OF APPROVAL RATHER THAN A REQUIREMENT OF SUBMITTAL

CUP Submittal Inconsistencies

According to the CUP General Requirements the following are required elements of a CUP submittal; however, each of these items is not included on the plans submitted by the applicant for CUP 17-96:

- General Requirements: All improvement plans (site, landscape, grading and drainage plans, and elevations) must be consistent with each other.
- Site Plans: Location of all existing and proposed public improvements, right-of-ways, easements, and utilities.
- Site Plans: Location, height, dimensions, materials, finish and color of all retaining walls, decorative walls, fences, and screens.
- Site Plans: Access, location, and dimensions of refuse enclosures with materials and colors designated.

- Conceptual Grading Plans: The location and sizes of all existing and proposed underground utilities (water, sewer, and storm drains).
- Structural Floor Plans: Roof plan showing slope direction and mechanical equipment location, dimensions, and screening methods specified.

For each of the items listed above, the City has determined that the requirements do NOT apply to CUP 17-96 but they DO apply to CUP 17-90. CUP 17-90 was required to wait for written notice from the City and make corrections and submit plans in conformance with the above requirements. However, and to the contrary, the City has also stated that the above requirements may be waived in their entirety and were waived for CUP 17-96. These requirements are a pre-requisite to evaluation of a project. By arbitrarily allowing CUP 17-96 to waive these requirements while simultaneously requiring CUP 17-90 to wait for a comment letter, resubmit corrected plans, and wait 3 more months for the City to review the project, the City has acted arbitrarily and capriciously to the irreparable detriment of CUP 17-90. In addition, a Stormwater Applicability Checklist is required with all submissions. The documents provided by CUP 17-96 are missing 2 of the required sheets and therefor it cannot be deemed to be a complete project.

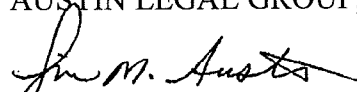
Landscape Plan and ADA Access Inconsistencies

Our office notified the City on February 28, 2019 that CUP 17-96 did not delineate the ADA accessible path and that the accessible path was obstructed by trees on the landscape plan. The City again informally notified the applicant for 17-96 of this deficiency and allowed the applicant to submit additional information without being required to wait for the standard review process. The supplemental documentation provided by the applicant for CUP 17-96 appears to cure the deficiency on the landscape plan (See Exhibit B.) Once again, if the City had applied the **same standard of review to CUP 17-90, e.g. allowing CUP 17-90 to informally submit information, it would have been complete and ready for hearing upon submission of materials on August 23, 2018 - - more than 2 months prior to the date CUP 17-96** received its first comments from the City. Once again, the City applied subjective and contradictory requirements to each respective application, which has resulted in a windfall to CUP 17-96 and has resulted in extreme irreparable harm to CUP 17-90.

* * *

For the reasons stated above, the Appellant respectfully requests the City Council reverse the Planning Commission's approval and deny CUP 17-96.

Sincerely,
AUSTIN LEGAL GROUP, APC


Gina M. Austin, Esq.

cc: Community Development Director

RECEIPT NUMBER: 02000153334
CITY OF LA MESA

RECEIVED BY: AMANDA
TODAY'S DATE: 03/19/19

PAYOR: AUSTIN LEGAL GROUP
REGISTER DATE: 03/19/19 TIME: 11:51

FORMAL APPEAL

CUP 17-96 PLANNING COMMIS \$100.00

TOTAL DUE: \$100.00

\$100.00

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CHECK : \$100.00
REF NUM: 6097