

**APPELLANT JIVA MCE, LLC'S APPEAL OF CITY OF MERCED PLANNING COMMISSION
APPROVAL OF COMMERCIAL CANNABIS BUSINESS PERMIT #22-02R**

SUPPLEMENT #4

BRIEF IN SUPPORT OF APPEAL

Appellant Jiva MCE, LLC (“**Jiva**”) respectfully submits this fourth supplement to its November 14, 2022, appeal of the decision of the Merced City Planning Commission (the “**Commission**”) in approving Commercial Cannabis Business Permit #22-02R (the “**Appeal**”) of Culture Cannabis Club (“**Culture**”).

Standard of Review – De Novo

As set forth in the Merced Municipal Code, this Council reviews appeals of commercial cannabis licensing decisions *de novo*. See Merced Municipal Code (“MMC”) § 20.44.170(L)(8)(c)(vi)(f); see also *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1221 (2000) (under *de novo* standard, the “burden is on the applicant to establish to the satisfaction of a majority of the city council that the application should be approved. As a *de novo* hearing, all issues are before the reviewing body, in this case the city council.”).

Summary of Qualifications & Merits of Application, Scoring

Jiva is exceptionally qualified to serve as the next licensed cannabis retailer in the City of Merced. Of the eight scored sections and 49 different criteria enumerated on the City’s scoring rubric, ***Jiva got the maximum number of available points for the overwhelming majority – 43 out of the 49 criteria.*** See Exhibit A (Jiva MCE Application) (hereinafter referred to as “Jiva Application”). Indeed, Jiva was awarded the maximum number of available points for **Section 2 (“Geographical Preference/Neighborhood Relations”), Section 3 (“Facility Plan”), Section 4 (“Standards and Procedures for the Safe Operation of Facilities”), Section 6 (“Qualifications of Principals/Business Plan”), and Section 7 (“Employee & Public Relations”).**

Setting aside the points available for two criteria in Section 1 limited to medical-only operators, Jiva only lost points in three sections for the following ***four*** enumerated criteria: **Sections 5d and 5e**, which affords up to three *non-discretionary* points for combined prior experience of owners for MBNCs, **Section 8a**, which affords up to five *discretionary* points for community benefits, including but not limited to monetary contributions to local organizations or donating time to the local community, and **Section 9a**, which affords up to 14 total points.

Because this City Council reviews the merits of the CUPA decision *de novo*, Jiva briefly summarizes the merits of its Application as compared to the enumerated scoring criteria, below, before specifically addressing the City’s scoring error in Sections 5d and 5e and the City’s unsupported exercise of discretion in Sections 8 and 9 of the Scoring Criteria.

- **Section 1 – Prioritize Medicinal Cannabis Access**

- Jiva applied for a combined medical and adult-use dispensary, with delivery services. As a non-medical only dispensary, Jiva was awarded the total maximum points available pursuant to Criteria 1a and 1d.
- §5.1 of Jiva’s Application (pages 66-67; *see also* pages 68-104) demonstrates Jiva’s satisfaction of Criteria 1a and 1d and its entitlement to the maximum points available.
- Criteria 1b and 1c were inapplicable because they either contemplated adult-use only facilities or medicinal-only facilities.

- **Section 2 – Geographical Preference/Neighborhood Relations:**

- Jiva’s proposed location at 1121 W. Olive Avenue (STE B), Merced, CA 95348, will honor and uphold the values of the City and County, including the immediate Meadows/Loughborough neighborhood where the Applicant’s proposed CCB location is addressed.
- §5.2 of Jiva’s Application (pages 105-110; *see also* pages 111-117) demonstrates Jiva’s satisfaction of criteria 2a-2f and entitlement to the maximum number of points available.

- **Section 3 – Facility Plan**

- Jiva’s facility plan sets out its plan for facilities, site location and development of its CCB adult-use and medical retail storefront.
- §5.3 of Jiva’s Application (pages 118-126; *see also* pages 127-152) demonstrate Jiva’s satisfaction of criteria 3a-3d and entitlement to the maximum number of points available for those non-discretionary factors.

- **Section 4 – Standards and Procedures for the Safe Operation of Facilities**

- Jiva submitted detailed standards and procedures that demonstrate its commitment to compliance and its high standards for retail operations and procedures.
- §5.4 of Jiva’s Application (pages 153-220) demonstrates Jiva’s satisfaction of criteria 4a-4k and its entitlement to all points, including the discretionary points for enhanced security procedures, available in the discretion of the Selection Committee.

- **Section 5 – Prior Experience in Business Ownership and Management**

- Jiva submitted extensive evidence of the superior experience and diversity of its team. Specifically, Jiva’s Application highlighted the depth of experience for its corporate team, which collectively holds twenty-two (22) CCBs, of which ten (10) are retail storefronts and/or with delivery services.
- Jiva is 90% owned by minorities, is majority female-owned, and qualifies as a Disadvantaged Business Enterprise (DBE). Ownership includes a veteran and ex-

employee of Merced PD, a doctor, several parents, one City resident, and two locals to Merced County.

- Jiva's owners own and operate six (6) retail cannabis locations within less than 100 miles from the City of Merced, including in Oakland, San Leandro, Union City, Hayward, Tracy, and Stockton.
- Jiva also has extensive non-cannabis retail experience both within the City of Merced as well as ten (10) other retail locations within 100 miles of Merced. The combined prior experience of its proposed owners is more than 20 years of verified successful management of a non-cannabis retail facility.
- Jiva's diverse skill set includes finance, legal, marketing, retail sales, security, pharmacotherapy, manufacturing, food and beverage, hospitality, real estate, and community relations, as well as all relevant compliance and safety fields.
- The company is well-capitalized, having secured significant financing commitments in excess of startup costs. In short, we believe the Company's ability to deliver on the City's triple-bottom-line priorities (social, environmental, and financial) is unmatched.
- §5 of Jiva's Application (pages 221-288) demonstrates Jiva's satisfaction of criteria 5a-5g and Jiva's entitlement to the maximum number of points available under those criteria.

- **Section 6 Qualifications of Principals/Business Plan**

- As noted above, Jiva has an exceptionally qualified and diverse team uniquely poised to meet the needs of the Merced community when it comes to providing safe, affordable access to cannabis. Among other things:
 - At least one owner of Jiva's team is a military veteran with an honorable discharge (Eugene Drummond)
 - At least two members of Jiva's team are residents of the County of Merced (Shane Avila, Eugene Drummond)
 - At least one owner of Jiva's team is a full-time resident of the City of Merced (See Lee)
 - More than 50% of Jiva's ownership are full-time residents of Merced
 - Jiva qualifies as a Disadvantaged Business Enterprise ("DBE") according to the U.S. Department of Transportation
 - Jiva has documented proof of the required access to capital
 - Jiva's business plans have a valid pro forma for at least three years of operation
 - Jiva has documented agreements with cannabis distributors to supply products to their business
- §5.6 of Jiva's Application (pages 289-290; *see also* pages 291-332) demonstrate Jiva's satisfaction of criteria 6a-6j and Jiva's entitlement to the maximum number of points available under those criteria.

- **Section 7: Employee & Public Relations**

- Jiva's Application sets forth its detailed plan to promote local hiring, provide health benefits to employees, employee more than five people full-time, and ongoing public information programs to inform City residents about issues pertaining to cannabis.
- §5.7 of Jiva's Application (pages 333-341; *see also* pages 342-362) demonstrates Jiva's satisfaction of criteria 7a-7d and Jiva's entitlement to the maximum number of points available under those criteria.

- **Section 8: Community Benefits**

- Jiva's Application sets forth an extensive Community Benefits Plan, including a proposed Community Benefits Agreement, as a demonstration of Jiva's commitment to civic responsibility and acting as a steward of the health, safety, and economic vitality of the community.
- §5.8 of Jiva's Application (pages 363-405) demonstrates Jiva's satisfaction of criteria 8a regarding discretionary community benefits. Jiva received almost perfect scores in this category, but PM #3 awarded four points instead of the potential five points available for this plan.
- As set forth in further detail below, Jiva should have been awarded the maximum five points available for its community-benefits proposal based on the multi-pronged and broad community-benefits plan laid out in Jiva's Application.

- **Section 9: Discretion of the City Selection Committee**

- Jiva's Application demonstrates a commitment to the City and to the region unmatched by other applicants. As set forth in more detail below, Jiva should have been awarded 12-14 points minimum for the exceptional and outstanding features of its proposal and Application, particularly given the following considerations:
 - First in class location, without significant community opposition or objection (unlike CCBP #22-02, Culture) (*see* Application at p. 105-117);
 - Diverse, experienced, and inclusive leadership (*id.* at p. 335-36), including:
 - Majority female-owned
 - 90% owned by minorities
 - Veteran-owned leadership
 - Strong local ties to Merced
 - Commitment to improving the Merced Community
 - Environmental Sustainability & Impact Statement (*Id.* at p. 382)
 - Green practices and commitment to zero waste policy, preserving the earth, and responsible recycling programs, among others. (*Id.* at p. 382)
 - Partnerships with local organizations to support individuals who have been impacted by the war on drugs. (*Id.* at p. 383)
 - Educational awareness program, including provision of all customers and patients with up-to-date and scientific background materials. (*Id.* at p. 383)

- Discount programs for economically disadvantaged customers, including seniors, military Veterans, and SSI patients. (*Id.* at p. 384)
- Commitment to establishing art wall museum for local artisans to display artwork and potential mural painting. (*Id.* at p. 384)
- Development of innovative tech and hosting local hack-athons to encourage local innovators to tackle business operation problems as they arise. (*Id.* at p. 384)
- Health education programs and support for community food banks. (*Id.* at p. 384)
- Delivery services (upon permit issuance), which will enable delivery to homebound seniors and individuals who are unable to visit the dispensary, including terminally ill patients. (*Id.* at p. 385)

As set forth more specifically below, as to the three sections in which Jiva was not awarded the maximum number of points, Jiva respectfully submits the following points and authorities as to why the City erred in failing to award Jiva the maximum number of points available and why this City Council should grant Jiva's appeal on the merits.

* * *

Section 5: The City Failed To Award Jiva At Least Two Points For Prior Experience Under Criteria 5(e) By Failing to Credit Competent Evidence Entitling Jiva To Those Points

As demonstrated in its initial appeal and Supplement Nos. 1 and 2, the City erred in failing to award Jiva points for MBNC experience when Jiva submitted evidence and narrative that supported an award of points on that basis. Jiva should have been awarded a license in the 2022 licensing process because while it was awarded average score of 92.67, Jiva should have received at least two (2) additional points pursuant to Criteria 5e.

The criteria to obtain the full two points available for criteria 5e is proof of: "Combined prior experience of proposed owners is more than 3 years and up with a verified Mutual Benefit Non-Profit Corporation for cannabis in compliance with California law and proof of payment of taxes."

Here, Jiva should have been awarded two points because Jiva submitted the required evidence that (1) Dr. John Oram is an owner of Jiva MCE LLC based on the "Limited Liability Operating Agreement" for Jiva MCE, LLC dated January 23, 2022, located at Section 1 of Jiva's CCB Application; (2) Dr. John Oram owned CCSAC, Inc., based on Section 5 (Qualification of Owners) showing that Dr. John Oram is a 60% owner of CCSAC, Inc., which included small indoor medical cultivation facilities and a Type 7 manufacturer license, and publicly available and judicially noticeable public records, including the Statement of Information for CCSAC, Inc.; (3) CCSAC, Inc., is a Mutual Benefit Nonprofit Corporation for cannabis in compliance with California law, based on the Articles of Incorporation for CCSAC, Inc., located at Page 13 of Section 5 of Jiva's Application; and (4) CCSAC, Inc., paid taxes to the State of California and the City of Oakland for more than three years, based on proof of FTB Tax Returns from 2015-2016 (24 months) and City of Oakland tax receipts from April 2017-January 2020.

As noted in Jiva’s prior submission, Jiva and its principals, including Dr. John Oram whose Affidavit is submitted as Supplement #2 to the Appeal, are best-in-class operators with a long track record of cannabis industry experience. Dr. Oram founded CCSAC, a verified Mutual Benefit Non-Profit Corporation in continuous operation since 2011. Led by Mr. Raj Pottabathni, the Jiva organization has been awarded more than twenty (20) retail cannabis licenses in the state of California. Under the leadership of Jiva’s local partner, See Lee, Jiva is ready and willing to expand its important work to the benefit of Merced and its citizens. As noted in Supplement Nos. 1 and 2, the City’s failure to award these points constituted an abuse of discretion because Jiva submitted the same quantum of evidence required of other applicants who did receive those points—namely, Haven XIII LLC (“Haven”) and Bang Mingo LLC (“Bang Mingo”).

Section 8: Community Benefits

Section 8 of the scoring rubric adopted by the City in issuing licenses awards up to five discretionary points for benefits to the community, including “monetary contributions to local community organization, or donating time to local community organizations, or any other proposed community benefit acceptable to the City.”

In § 5.8 of its Application, Jiva sets forth an extensive list of commitments demonstrating its exceptional commitment to and understanding of the needs of the Merced community. Among the commitments that Jiva made include:

- Creating a Charitable Contribution Fund (“CCF”) to provide support for local nonprofits, charitable organizations and initiatives selected by the City (Application at pp. 363-367, 369)
- Community Action Plan Donation, which pledges a donation of a specific set amount over the course of multiple years. (*Id.* at pp. 367-369)
- Contributing at least 500 volunteer hours with local nonprofit, neighborhood, and community events, with a “Local First” approach, reflecting a commitment to serve children/youth development services, substance abuse support and education programs, women and girls empowerment programs, minority community programs, affordable housing services, social services and support, homeless support programs, domestic violence prevention, veterans care assistance, LGBTQ+ advocacy, senior services and access programs, disability support and advocacy, and local arts and theater programs. (*Id.* at p. 369-379)
- In-kind donation drives to gather supplies and support for local nonprofits in Merced
- First Source Hiring, giving first City, then County residents first access to all new jobs in support of goal of hiring at least 75% of employees from local population. (*Id.* at p. 380)
- As a Disadvantaged Business Enterprise (“DBE”), owned 90% by minorities and majority female-owned, Jiva’s hiring practices will prioritize diversity and social equity around race, gender, sexual orientation, and socioeconomic background. (*Id.* at 380-381)
- Support for local sustainability initiatives including a detailed statement of green, sustainable policies and procedures. (*Id.* at p. 382-386).

Given the broad and comprehensive set of commitments Jiva has made to the Merced community, far exceeding even the list of potential examples of commitments to community benefits identified

to the City, Jiva respectfully submits that it should have been awarded a full five points by all three scorers for its Community Benefits.

Section 9: Discretion of City Selection Committee

Lastly, the City Selection Committee reserved a massive, discretionary 14 points (out of 100 points available), which could be awarded for purportedly “outstanding features, measures, or programs” beyond the minimum requirements. The City Selection Committee’s reservation of this massive amount of discretionary points in comparison to the 100 points available with virtually no direction as to how to exercise that discretion raises serious concerns about separation of powers, improper delegation of authority, and procedural due process given the outcome-determinative impact of the City’s delegation of uncontrolled and unfettered discretion to award over three times the points available for any other single criteria based on whoever demonstrates “outstanding features, measures, or programs” beyond the minimum requirements – whatever that means. *See generally Saleeby v. State Bar of California*, 39 Cal.3d 547, 564(1985) (“the due process safeguards required for protection of an individual’s statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one’s liberty”) (internal quotations omitted).

Setting aside Jiva’s well-founded due process concerns about the impact of the discretionary scoring section on the overall permitting process, the City Selection Committee awarded Jiva scores of 9, 11, and 10 points respectively, without articulating any basis for the exercise of their discretion. Notwithstanding Jiva’s concerns about the significance of these discretionary points in the City’s decision making process, the City should grant Jiva’s appeal because Jiva should have been awarded additional discretionary points, particularly in comparison to Culture, for: (1) the uniquely diverse and representative leadership of the Jiva team; (2) the preferred desirability of the Jiva location; and (3) the exceptional community benefit program set forth in Jiva’s Application.

In addition to Jiva’s position as a diverse, minority, women, and Veteran-owned business with a deep and comprehensive commitment to promoting the community good set forth as to Sections 5 and 8 above, Jiva should have been awarded additional discretionary points based on the exceptional desirability of its location, which clearly aligns better with the interests of the community than the current prevailing applicant, Culture.

The location identified by Culture in its Application, CCBP #22-02R, would permit the operation of an approximately 3,250 square foot medicinal and adult-use cannabis retail dispensary, including delivery, located in an existing building within the Thoroughfare Commercial (C-T) zone at 1111 Motel Drive. As noted in the April 3, 2023 appeal, the community has expressed significant concern that the proposed location will negatively impact the businesses in the surrounding areas and exacerbate traffic issues within the area. These problems would likely only exacerbate poor site circulation and lack of cohesion with nearby uses as additional grounds for the appeal, including lack of compliance with Merced Municipal Code § 20.10.010, which sets forth the applicable standards for acceptable uses in the C-T zone (none of which apply to Culture’s contemplated use). Specifically, because Culture’s proposed business will not cater to local motorists or people using the highways or who benefit from access to those highways, the proposed

use is not consistent with the Thoroughfare Commercial (C-T) zone as contemplated in Culture's Application (CCBP #22-02), which should have been reflected both in the discretionary scores awarded to Jiva (which should have been higher) and to Culture (which should have been lower).

In contrast, the proposed Jiva location at 1121 W. Olive Avenue in Merced is an ideal location for a cannabis retail facility. The proposed use is consistent with existing and approved uses for the building and commercial center in which the project is located. The project will meet CalGreen standards for sustainable retail development and employs adaptive reuse of an existing building and site with minimum waste and demolition. Jiva has committed to making voluntary upgrades to parking lot lighting, drought tolerant landscaping, and green building features.

Once again, we thank City Council and staff for their time and consideration of Jiva's Appeal as a whole.

Dated: April 12, 2023

DAVIS WRIGHT TREMAINE LLP

By: 
Nicole Phillis

Attorneys for Applicant
JIVA MCE, LLC