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VIA E-MAIL & U.S. MAIL

Merced City Council
C/O
Michael Hren, Principal Planner
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Harvest of Merced, LLC's Reply to Appeal by Jiva Life, LLC of Commercial Cannabis Business Permit #18-14R

1. This Appeal Is Not Against Resolution #4021 Approving CCBP #18-14R - It Is An Untimely Masked Appeal Of Ordinance 2498

Though Jiva Life, LLC ("Jiva Life") claims the appeal it filed on June 13, 2019 is an appeal against the June 5, 2019 City of Merced Planning Commission Resolution #4021 that approved Harvest of Merced, LLC's ("Harvest") Commercial Cannabis Business Permit ("CCBP") #18-14R, actually it is an appeal against Ordinance 2498.

Tellingly, not one of the various reasons mentioned in the appeal relate to or mention anything that actually transpired or failed to occur at the June 5, 2019 Planning Commission hearing. Rather, the appeal cites only to pre-June 5, 2019 actions taken by the City Council or the Planning Commission, or it alleges conjectured and unsubstantiated pre-June 5, 2019 acts of favoritism supposedly bestowed upon Medallion Wellness ("Medallion") and/or Harvest.

As such, Jiva Life's appeal is actually a disguised appeal against Ordinance 2498 that is based upon alleged events that took place months before June 5, 2019. For this reason, Jiva Life's appeal is untimely, an issue that will be discussed below in more detail.

2. Since The Planning Commission Approved Ordinance 2498 On January 23, 2019, Jiva Life's Appeal Was Filed More Than Five Months Late

In the last sentence of the first page of its appeal, Jiva Life states: "The Council should not rewrite the Code [referring to Ordinance 2498] to benefit a single entity that was previously disqualified because it was located too close to a school." Pursuant to Merced Municipal Code Section 20.74.030(B), an objection to Ordinance 2498 required an appeal to be filed with the

City Council within 5 business days of the Planning Commission's approval of Ordinance 2498. Since the Planning Commission approved Ordinance 2498 at its January 23, 2019 hearing, any appeal had to be filed on or before January 31, 2019. The record is void of Jiva Life filing such an appeal.

Instead, the record reflects that Rajiv Pottabathni, the Principal and Managing Director of Jiva Life appeared at the February 19, 2019 City Council hearing. Mr. Pottabathni made public comments opposing Ordinance 2498 stating that the ordinance favors one applicant, violates and circumvents procedural due process, creates an unfair advantage by creating a fifth applicant, and allowing for lot line adjustment by CCBP applicants. His public comments can be viewed at: http://cityofmerced.granicus.com/MediaPlayer.php?view_id=1&clip_id=276 beginning at 2 hours, 5 minutes of the recorded hearing and ending at 2 hours, 10 minutes, 25 seconds (2:05:00 to 2:10:25).

After Mr. Pottabathni's comments at the February 19, 2019 City Council hearing, the record shows no action was taken by Jiva Life until it filed the June 13, 2019 appeal - an appeal that was filed over five months late.

3. Jiva Life Has Even Missed Its 90-Day Time Limit To File A Petition For Writ Of Mandate To Invalidate Ordinance 2498

Not only has Jiva Life failed to file a timely administrative appeal to contest the validity of Ordinance 2498, Jiva Life has also missed its 90-day time limit to file a lawsuit seeking a Writ of Mandate to invalidate Ordinance 2498 on legal grounds (See, California Code of Civil Procedure § 1094.6(b) "Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final."). Pursuant to Merced Municipal Code 20.74.030(G), Ordinance 2498 became final on March 18, 2019, as soon as the City Council rendered its final approval. Merced Municipal Code 20.74.030(G) states the following:

Effective Date of Appeal Decisions. City Council Decisions. A decision of the city council is final and shall be effective on the date the decision is rendered.

Since the City Council approved Ordinance 2498 on March 18, 2019, Jiva Life would have had to file its lawsuit for Writ of Mandate on or before June 17, 2019, or ninety days after March 18, 2019. The record is void of Jiva Life filing such a lawsuit. As a result of the statute of limitations noted above, Jiva Life is now barred from filing a legally valid lawsuit against Ordinance 2498.

4. There Was No Final Denial Of CCP #18-14R

In its appeal, Jiva Life conveniently ends its background review of the procedural history on November 14, 2018. However, crucial proceedings occurred after November 14, 2018 that Jiva Life omits from the record. Harvest will now complete the record.

First of all, Jiva Life incorrectly lists the November 14, 2018 hearing as a hearing of the City Council, when in fact it was actually a Planning Commission hearing. At the November 14, 2018 Planning Commission hearing, the Planning Commission determined that the Wolfe

Education Center met the definition of a school, that the Harvest location was within 1,000 feet of a school and therefore denied CCBP #18-14R.

Thereafter, Harvest filed a timely appeal of the November 14, 2018 Planning Commission determination and its appeal was heard by the City Council on December 23, 2018. At the December 23, 2018 appeal hearing, the City Council reversed the Planning Commission's denial of CCBP #18-14R and remanded the issue back to the Planning Commission.

In between the time of this remand order by the City Council and the next appearance that was set for Harvest at the Planning Commission, on March 18, 2019, the City Council approved Ordinance #2498. Nearly three months later, on June 5, 2019, the Planning Commission approved CCBP #18-14R.

Jiva Life incorrectly alludes to a final denial when it states in section I, A of its appeal that: "The Commission Denied Harvest The Permit Because Harvest Was Located Within 1,000 Feet Of A School." There was no final denial of CCP #18-14R. Rather, what actually occurred on June 5, 2019 was the Planning Commission undertook the remanded Harvest issue as directed by the City Council. At that hearing of June 5, 2019, the Planning Commission properly applied the law and voted to approve CCBP #18-14R.

5. The City Did Not Rewrite The Code To Change How Harvest Measured Its Distance To The School, Nor Did The City Award A Fifth Permit So Medallion Would Not Object To Harvest's Permit – The City Rewrote The Code To Best Protect Its Residents.

Jiva Life alleges conjectured and unsubstantiated acts of favoritism supposedly bestowed upon Medallion and Harvest that occurred back on March 4, 2019. These include allegations to change how Harvest measured its distance to the Wolfe Center, as well as awarding a fifth CCBP to Medallion to buy its silence. In its appeal Jiva Life loosely claims that:

Without providing any explanation why, as part of Ordinance Number 2498, the City increased the number of Cannabis Permits from four to five by amending Code section 20.44.170(F)(1) accordingly. The only apparent explanation why the City chose to increase the number of Cannabis Permits it was awarding was so Medallion - the fifth ranked applicant - would receive a permit and would withdraw its objection to the Harvest Permit. (Page 3 to 4 of Jiva Life Appeal).

The truth of the matter is quite different. First of all, Medallion never withdrew its objection to the Harvest permit. Second, at the February 19, 2019 hearing, Mayor Mike Murphy provided a sound and well-reasoned explanation to Mr. Pottabathni as to why the City Council was revising the ordinance. Note that Mr. Pottabathni was the only person from the public to speak regarding Ordinance 2498. So in the quote below, when reference is made "To the point during public hearing," the Mayor is referring to the comments made by Mr. Pottabathni.

To the point during the public hearing about the comment regarding not ever changing or revising the ordinance - our job is to protect our residents and when we are talking about sensitive uses we are going to make sure it fits for the best protection of our residents and sometimes that merits change. I just want to

make sure that is clear and that is part of our responsibility and our prerogative up here. (http://cityofmerced.granicus.com/MediaPlayer.php?view_id=1&clip_id=276 beginning at 2 hours, 13 minutes (2:013:00)

Once again, Mr. Pottabathni and his attorney are carelessly making unsubstantiated allegations with no basis in fact – the actual record contrasts mightily to this reoccurring defect.

6. The City Did Not Show Favoritism To Harvest In The Permit Selection Process

Lastly, Jiva Life contends that the City of Merced failed to implement its cannabis permit process in a uniform and objective manner. In support of this argument, once again Jiva Life can only allege conjectured and unsubstantiated reasons. This is clearly demonstrated when it states:

For some subjective reason, Harvest was allowed special dispensation and was awarded the Permit in spite of the Code's requirements. To accomplish that end, the City modified the permitting and application process mid-stream so that Harvest could amend its Permit application and further allowed Harvest to artificially change how distance to the Center would be measure. [sic] (Appeal, p 5)

What Jiva Life fails to note, is that the codes they are complaining about apply to all CCBP applicants, not just to Harvest. These codes apply equally to Jiva Life, Medallion, Harvest, and all the other 19 cannabis applicants. It is noteworthy that nowhere in its six-page appeal does Jiva Life cite to an actual section of the Merced Municipal Code to show how the code unfairly applied only to Harvest and to the exclusion of the other 21 cannabis applicants. The reason no citation was made by Jiva Life is simple to explain. No such favoritism exists.

CONCLUSION

The appeal filed by Jiva Life is frivolous and void of probable cause. Jiva Life is relying upon facts it has no reasonable cause to believe to be true and is also seeking recovery upon legal theories that are untenable under the facts known to it. Actually, Jiva Life initiated this appeal solely for the purpose of depriving Harvest of its rightful and beneficial use of its property.

Furthermore, for the reasons set forth above, it is apparent that the attorney for Jiva Life neglected to reasonably investigate the facts and law of this matter before filing this appeal. Yet on top of all these serious shortcomings, Jiva Life has the gall to assert that it should be awarded Harvest's cannabis permit. The City Council should treat this appeal for what it is by issuing a decision based on the facts and the record - and not on Jiva Life's unsubstantiated conjecture!

Respectfully submitted,

GORDON REES SCULLY MANSUKHANI, LLP



Douglas Smurr
Attorneys for Harvest of Merced, LLC

PROOF OF SERVICE

Re: Appeal by Jiva Life, LLC of Commercial Cannabis Business Permit #18-14R

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP, 3 Parkcenter Drive, Suite 200, Sacramento, California 95825 . On the date below, I served the following document/s:

Harvest of Merced, LLC's Reply to Appeal by Jiva Life, LLC of Commercial Cannabis BUSINESS Permit #18-14R

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ by personally delivering the document(s) listed above via First Legal Support Services messenger to the person(s) at the address(es) set forth below.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at Sacramento, addressed as set forth below.

Merced City Council C/O Michael Hren, Principal Planner 678 W. 18 th Street, Merced, CA 95340	Jeffrey H. Belote, Esq. CLARK HILL, LLP One Embarcadero Center, Suite 400 San Francisco, CA 94111 <i>Attorneys for Jiva Life, LLC</i>
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 12, 2019, at Sacramento, California.

_____/S/
Elizabeth Scott