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November 20, 2018

VIA E-MAIL & U.S. MAIL

Merced City Council
678 West 18th Street
Merced, CA 95340

Attention: Mayor Mike Murphy; Mayor Pro Tempore Jill McLeod; Council Member Michael Belluomini; Council Member Kevin Blake; Council Member Josh Pedrozo; Council Member Anthony Levi Martinez; and Council Member Matthew Serratto.

Cc: City Manager Steve Carrigan, and Development Services Director Scott McBride

**RE: Appeal from November 14, 2018 Merced Planning Commission Hearing
Denying CCBP #18-14R**

Dear Mayor Murphy and Members of the City Council:

Applicant Harvest of Merced, LLC (hereafter "Harvest") hereby appeals the City of Merced Planning Commission's Denial of the above-referenced Commercial Cannabis Business Permit (hereafter "CCBP"). On November 15, 2018, the Merced City Planning Division served a Notice of the Planning Commission's Action regarding CCBP 18-14R on Harvest (hereafter "Notice of Action"). A true and correct copy of the Notice of Action is attached hereto, marked as Exhibit 1.

According to the Notice of Action, the Planning Commission denied CCBP #18-14R because it determined the properties located at 732 West 13th Street and 760 West 13th Street, (commonly referred to as the Wolfe Educational Center [hereafter "Wolfe Center"]) meet the definition of a school as per City of Merced Ordinance #2480. Harvest appeals this determination based on the following twelve grounds.

Grounds for Appeal

1. The Notice Of Action Does Not List Specific Findings Of Fact

As a result of this deficiency, Harvest can only guess as to how the Planning Commission reached its determination to deny CCBP #18-14R.

2. The Notice Of Action Does Not List Specific Evidence Or Facts To Support The Finding Denying CCBP #18-14R

The Planning Commission's Notice of Action only generally alleges that its decision was "Based upon the information in the record." As a result of this deficiency, Harvest can only guess as to what specific evidence or facts the Planning Commission relied on in reaching its determination to deny CCBP #18-14R.

3. The Definition Of School In Merced Ordinance 2480 Is Vague And Ambiguous And Violates Harvest's Due Process Rights

Specifically, Section 20.44.170(C)(47) defines school as follows:

"School" means any public or private school providing instruction in kindergarten or any of grades one (1) to twelve (12), inclusive, but does not include any private school in which education is primarily conducted in private homes or as otherwise provided in Health and Safety Code Section 11362.768(h).

The circular definition of "school" set forth above is vague and ambiguous because it merely defines the term "school" by using the term school limited to mean any public or private school providing K through 12 instruction.

4. The Planning Commission Incorrectly Applied The California Department Of Education's (hereafter "CDE") Definition Of The Term "Public School" Which Is A Three-Step Process

The CDE sets forth in its webpage (<https://www.cde.ca.gov/ds/si/ds/dos.asp>) a three-step process to determine if an entity is a public school.

Step 1:

According to the CDE, step one in the three-step process is to determine if an entity complies with eleven factors to qualify as a public school:

- (1) "Is supported with public funds.
- (2) Is authorized by action of and operated under the oversight of a publicly constituted local or state educational agency.
- (3) Provides educational services to all students who are enrolled.
- (4) Has an appropriately credentialed teacher (or teachers) who provides instruction.
- (5) Has at least one appropriately credentialed administrator, usually a principal, who is responsible for all aspects of school administration including supervision and evaluation of staff, fiscal responsibility, student discipline and safety, supervision and evaluation of curriculum, and assessment of academic achievement and school accountability.
- (6) Administers California statewide assessments to its students at the required grade levels.
- (7) Has an administrator, usually a principal, with access to and responsibility for maintaining official student records for all enrolled students.

- (8) With the exception of charter schools: Implements a curriculum that fully meets state requirements as specified in the California Education Code relating to required courses of study.
- (9) Is non-sectarian.
- (10) With the exception of charter schools: Contains a budget structure that is consistent with the budget structure of schools operated by the authorizing agency.
- (11) Is based in one or more buildings that are "Field Act" compliant,* unless exempt.”
(numbers added for clarity purposes).

Step 2:

If the entity meets all eleven of the above-referenced criteria, then it needs to be determined if the entity is a Program or a School. As stated by the CDE:

“In determining whether a given entity is a school or a program, consider the following questions:

Is the *educational component* of the entity *secondary* to its primary purpose, which is other than education?

Do students, who are enrolled in the entity, remain members of the school that referred them?

Do all students enroll on a part-time basis?

If the answer to *any* of those three questions is *yes*: This entity is not a school, and it may be a program.” (emphasis original)

Step 3:

According to the CDE website, after addressing the questions in step 2, the CDE states:

“Next, consider these questions:

Except for State Special Schools, can the entity, if it accommodates grade twelve students, grant a diploma to its graduates?

Do the students have full access to all of the facilities and amenities of the entity?

If the answer to *either* of those two questions is *no*: This entity is not a school, and it may be a program. (emphasis original)

5. The Foster Youth Program In Room W-12 Does Not Qualify As A School

The Foster Youth Program in Room W-12 does not qualify as a school because:

- (i) Students remain members of their assigning school;
- (ii) All students only receive part-time intermittent instruction;

- (iii) No CDS Code for the 760 West 13th Street address.

6. The Adult Special Education Program In Room W-13 Does Not Qualify As A School

The Adult Special Education Program in Room W-13 does not qualify as a school because:

- (i) The Adult Special Education students who are enrolled at the Wolfe Center remain members of their assigning school (the Merced County Special Education). Any certificate of completion for these adult special education students would not list the Wolfe Center as the issuing entity, that certificate could only be issued by the Merced County Special Education because the Wolfe Center has not been issued a site specific CDS Code;
- (ii) Currently, The Adult Special Education Program is not granting diplomas to any of its students;
- (iii) There is no CDS Code for the 760 West 13th Street address.

7. Since The Property Located 760 West 13th Street [APN 031-313-013; Lot 8, 2 Of 12] Is Not A School, The Sensitive Use 1,000 Foot Buffer Zone Measured From Property Line To Property Line Set Forth In Merced Municipal Code Section 20.44.170(E)(3)(f) Does Not Apply

Since neither the Foster Youth Program nor the Adult Special Education Program instruction that takes place on the property located 760 West 13th Street [APN 031-313-013; lot 8, 2 of 12] is not a school, the sensitive use 1,000 foot buffer zone measured from property line to property line set forth in Merced Municipal Code section 20.44.170(e)(3)(f) does not apply, CCBP #18-14R should have been granted.

8. Neither The 732 West 13th Street Nor The 760 West 13th Street Address Is A “School” According To The California Department Of Education CDS Codes

The only CDS Code associated with West 13th Street is located one block south of the Wolf Center at the Merced County Office of Education District Offices located at 632 West 13th Street. The 632 West 13th Street address has two CDS codes assigned to it which are umbrella district wide codes:

CDS Code 24-74476-2490019 – Merced County Regional Occupation Program
CDS Code 24-10249-6069199 – Merced County Special Education

9. Unfair Hearing

On the date of the Planning Commission hearing, November 14, 2018, at approximately 12:00 noon the property owner of the Harvest property, Stephen Tinetti received an unsolicited telephone call from a Merced City Planning Commissioner he knows personally. The Commissioner advised Mr. Tinetti that Harvest should stay its permit

and apply for a property split or partition. The Commissioner requested Mr. Tinetti not to disclose the Commissioner's name. Mr. Tinetti has not disclosed the Commissioner's name to Harvest. This unsolicited communication from a Commissioner requesting to remain anonymous raises serious questions regarding the integrity of the Planning Commission's fact finding and decision making process. This is especially concerning to Harvest since none of the Commissioners noted for the record that such a communication occurred.

10. Harvest Relied On Merced City Public Records Pertaining To 760 West 13th Street [APN 031-313-013; Lot 8, 2 Of 12] That Lists The Property As Residential

Harvest relied on the following Merced City public records pertaining to the 760 west 13th street addresses [APN 031-313-013; lot 8, 2 of 12] that show the property is not a school:

- (A) Merced's General Plan for the Wolfe Center is zoned as High to Medium Density Residential Use;
- (B) Neither the 732 West 13th Street [APN 031-313-012; Lot 7 2 of 12] nor the 760 West 13th Street address [APN 031-313-013; Lot 8, 2 of 12] is shown as a school, future school, or as public general use;
- (C) In 1997 a Conditional Use Permit (hereafter "CUP") for a Regional Occupational Program was granted only for the 732 West 13th Street [APN 031-313-012; Lot 7, 2 of 12] parcel;
- (D) The 760 West 13th Street address [APN 031-313-013; Lot 8, 2 of 12] parcel was not part of the Conditional Use Permit;
- (E) There has not been a Lot merger on record of the 732 West 13th Street [APN 031-313-012; Lot 7, 2 of 12] and the 760 West 13th Street [APN 031-313-013; Lot 8, 2 of 12] parcels; and
- (F) The lack of any record that shows the 760 West 13th Street [APN 031-313-013; Lot 8, 2 of 12] parcel was ever added to the CUP, or that any application for a separate CUP was ever filed.

11. The Purpose Of The 1,000 Foot Buffer Zone Does Not Apply To The Special Education Adult Students Since They Are Bussed Into And Away From The Wolfe Center And Are Always Under Constant Adult Supervision

Pursuant to the evidence on record, the purpose of the 1,000 foot buffer zone does not apply to the special education adult students because they are bussed into and away from the Wolfe Center and always remain under constant adult supervision. Therefore, there is no possibility of these students wondering by or in some manner being exposed to the Harvest business located on the other side of Highway 99 at 863 West 15th Street.

12. If The City Of Merced Finds The Wolfe Center To Be A School, It Should Nonetheless Issue A Variance Pursuant To California Code Of Regulations Section 5026(B)

The City Council should issue a variance to its self-imposed 1,000 foot buffer zone for two reasons. First, the purpose of the 1,000 foot buffer zone does not apply to the special education adult students because they are bussed into and away from the Wolfe Center and are always under constant adult supervision. Therefore, there is no possibility of these students wondering by or in some manner being exposed to the Harvest business located on the other side of Highway 99 at 863 West 15th Street.

Second, it would be unfair to impose such a finding on Harvest since none of the City of Merced public records indicated or currently indicate that a school exists at the 760 West 13th Street [APN 031-313-013; Lot 8, 2 of 12] parcel.

The City of Merced may authorize the Harvest of Merced, LLC permit pursuant to California Code of Regulations Section 5026(b). California Code of Regulations Section 5026(b) states:

Notwithstanding subsection (a), if a local jurisdiction has issued a license or permit to conduct commercial cannabis activity at a premises that is located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center, the Bureau may approve the premises for licensure if the following conditions are met:

- (1) The applicant submits a copy of a valid license or permit from the local jurisdiction with the application for licensure; and
- (2) The local jurisdiction notifies the Bureau that the applicant is in compliance with all applicable local ordinances and regulations pursuant to Business and Professions Code section 26055(g)(2)(C).

Respectfully submitted,

GORDON REES SCULLY MANSUKHANI, LLP

Douglas Smurr



EXHIBIT 1



November 15, 2018

Ben Kimbro, Director of Public Affairs
Harvest of Merced
Via Email: bkimbrow@harvestinc.com

RE: Commercial Cannabis Business Permit Application #18-14R for Retail Sales at 863 W 15th St.

Dear Mr. Kimbro,

After a public hearing on November 14, 2018, the Planning Commission has determined the following:

- The properties at 732 W. 13th St. and 760 W. 13th St. meet the definition of 'school' as per City of Merced Ordinance #2480.
- The property at 863 W. 15th St. is within 1,000 feet of a school.

Based upon the information in the record and the above determinations, the Planning Commission has denied permit #18-14R. Any decision of the Planning Commission may be appealed to the City Council under the terms of Merced Municipal Code Section 20.44.170(L)(3) excerpted below. Any appeal of the Planning Commission's action must be received within 5 business days of this action or by no later than 5:00 p.m. on Wednesday, November 21, 2018. The appeal must be accompanied by an application fee of \$374 as set forth in City Council Resolution #2017-67. The appeal must be in writing in the form of a letter addressed to the City stating the pertinent facts and the basis for the appeal.

If you have any questions, please feel free to call me at (209) 385-4768 or email me at hrenm@cityofmerced.org.

Sincerely,


Michael Hren, AICP,
Principal Planner

Cc: Douglas Smurr, dsmurr@asm.com
Steve White, steve@harvestinc.com
Paul Nowak, paul@harvestinc.com