

**MISSION STATEMENT: TO CREATE A HEALTHY, SAFE, DIVERSE, AND PROSPEROUS CITY  
BY ENGAGING COMMUNITY MEMBERS TO DEVELOP AN ENRICHED QUALITY OF LIFE.**



**PLANNING COMMISSION MEETING AGENDA  
CITY OF ONTARIO OREGON  
WEDNESDAY, OCTOBER 26, 2022, 6:00 PM, MT**  
[Zoom Link](#)

**1) CALL TO ORDER**

Commissioner Blu Fortner \_\_\_\_\_ Commissioner Mike Allen \_\_\_\_\_ Commissioner James Grissett \_\_\_\_\_  
Commissioner John Hall \_\_\_\_\_ Commissioner John Briedenbach \_\_\_\_\_ Commissioner Max Twombly \_\_\_\_\_  
Chairman Ralph Poole \_\_\_\_\_

City Council Ex-Officio \_\_\_\_\_ City Manager \_\_\_\_\_  
Economic Development Director \_\_\_\_\_ Planning & Zoning Technician \_\_\_\_\_

**2) PLEDGE OF ALLEGIANCE**

**3) MOTION TO ADOPT THE AGENDA**

This Agenda was posted on October 13, 2022. Copies of the Agenda are available at the Community Development Center and on the city's website at [www.ontariooregon.org](http://www.ontariooregon.org).

**4) PUBLIC COMMENTS** Citizens may address the Planning Commission; however, the Planning Commission may not be able to provide an immediate answer or response. Out of respect to the Commissioners and others in attendance, please limit your comment to three minutes. Please state your name and city of residence for the record.

**5) PUBLIC HEARING**

A) Action 2022-09-31A an Appeal to Hearings Officer decision on Planning Action 2022-07-27CUP Scott Matthews

**6) HAND-OUTS/DISCUSSION ITEMS**

**7) COMMENTS FROM COMMISSIONERS**

**8) ADJOURN**



**AGENDA REPORT  
PUBLIC HEARING  
October 26, 2022**

To: Planning Commission

FROM: Dan Cummings, City Manager

SUBJECT: **ACTION 2022-09-31A AN APPEAL TO HEARINGS OFFICER DECISION ON  
PLANNING ACTION 2022-07-27CUP SCOTT MATTHEWS**

DATE: October 13, 2022

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**PROPOSED MOTION:**

- 1. I MOVE THE PLANNING COMMISSION AFFIRM THE DECISION OF THE HEARINGS OFFICER BASED ON THE FINDINGS OF FACTS SET FORTH IN THE HEARING OFFICER'S DECISION AS SUPPLEMENTED BY THE OCTOBER 13, 2022 STAFF REPORT.**
- 2. I MOVE THE PLANNING COMMISSION (INSERT NEW MOTION)**

**SUMMARY:**

On September 13, 2022 the Hearings Officer (Dan Cummings) denied a request by Scott Matthews for a Conditional Use Permit for a Retail Marijuana Dispensary because, amongst other matters, the proposal did not meet the requirements of (i) Ontario Municipal Code (OMC) 10A-59-15(A)(3) (1000 foot buffer requirement for Retail Marijuana Dispensary from a Public Facility zone), (ii) OMC 10A-59-15(A)(7) (500 foot buffer requirement for Retail Marijuana Dispensary from a residential zone) and (iii) failure to provide sufficient information to evaluate compliance with parking, setback, and landscaping requirements. The Applicant is appealing that decision. See Attachment 2 (Appeal Application).

**BACKGROUND:**

In November of 2018, the citizens of Ontario voted to remove a previously enacted local ban on marijuana uses within the city limits of Ontario. In anticipation that the ban may be lifted, the City engaged in extensive community outreach to develop standards and criteria for marijuana uses. This effort led to the adoption of Ordinance #2748-2018 on October 23, 2018, which, upon removal of the local ban, allows for various marijuana facilities, within specified zones, and subject to specified criteria, standards, and review procedures. As pertinent to this decision, marijuana retail facilities are allowed as a conditional use in the I-2 Heavy Industrial Zone provided standards and criteria established under OMC Title 10A-59 and other City Codes are met including, without limitation, OMC 10A-59-15(A)(3) and OMC 10A-59-15(A)(7). OMC 10A-59-15(A)(3) requires a 1000-foot setback from a Public Facility zone and OMC 10A-59-15(A)(7) requires a 500-foot setback from a residential zone (and is not met in the subject application as discussed below). See Attachment 3 Marijuana Restricted Area Map.

Notwithstanding the buffer requirements of OMC 10A-59-15(A)(3) and OMC 10A-59-15(A)(7), the Applicant submitted a Land Use Compatibility Statement (LUCS) for a marijuana retail facility on the property located at 420 North Oregon Street on May 25, 2022. Pursuant to the guidance in *Scott Inc. v. City of Ontario*, 503 P3d 502 (2021), the City refused to take action on the LUCS until the Applicant submitted an application for a conditional use permit.

The Applicant then applied, under protest, for a Conditional Use Permit to establish a marijuana retail facility on the subject property. See submitted application in Attachment 1. As explained in the Applicant's burden of proof statement, the Applicant contends that a conditional use permit is not required because "the City agreed to approve a marijuana retailer facility on the subject property when the then-existing moratorium/ban on dispensaries was lifted" pursuant to an agreement between the Applicant and the City dated April 18, 2016. The Applicant did not submit the referenced agreement as part of the application or provide any specific citations to provisions within the agreement supporting the quoted assertion, but presumably is referring to the following provision from the agreement:

*Changes in Law. If there is a change in Oregon law or Ontario ordinances to permit medical marijuana dispensaries or recreational marijuana businesses in the Ontario city limits, this Settlement Agreement shall not preclude Scott, Inc. from operating such a business in compliance with Oregon law and/or Ontario ordinances enacted hereafter.*

In the appealed decision, the Hearings Officer found that neither this provision, nor any other provision of the agreement, provides any entitlement for a Marijuana Retail facility. Rather, the Hearings Officer found that this provision provides that the agreement (as opposed to subsequently adopted land use regulations) "shall not preclude" the Applicant from operating a Marijuana Retail facility provided such business complies with applicable law. In other words, this provision simply provides that the Applicant can pursue any opportunities for a marijuana business that might arise under future enactments and is not waiving any such rights by entering into the agreement. The Hearings Officer found that neither this provision nor any other provision of the agreement prohibits the City from adopting land use or time, place, and manner restrictions that would preclude a marijuana business. Per the Hearings Officer's decision, to approve a retail marijuana facility on this subject property, the Applicant must comply with all the regulations and requirements of applicable law, including, without limitation, approval of a Conditional Use Permit (CUP) and compliance with all buffers related to Marijuana Retail facilities under OMC Chapter 10A-59.

Furthermore, the Hearings Officer found that the agreement could not even provide the type of entitlements alleged by the Applicant. First, the Applicant did not cite any authority for the proposition that a city can grant a land use approval for a prohibited use based on the potential for the use to become lawful in the future. Second, the Hearings Officer reasoned that the City cannot pre-expletively waive future generally applicable land use regulations (outside of the statutory development agreement process under ORS 94.504 to .528 and there is no record that such a development agreement exists). Third, to the extent cities have any of the foregoing authority, the Hearings Officer found that the agreement was not subject to any notice or otherwise processed as a land use application requisite for granting a land use entitlement.

The Hearings Office found that the Applicant could not have a nonconforming marijuana retail use as there was no point in time when such a use could have been lawfully established. Prior to lifting the ban, marijuana retail uses within the City were illegal under state and/or local

law. Following, the repeal of the local ban, the only way to lawfully establish a marijuana retail use is through the conditional use approval process. Applicant has never obtained such approval and has only now applied for such a use. It must be further noted that per OMC 10A-05-35(2), the discontinuance of a nonconforming use of land for six months out of any 12 consecutive months or change of nonconforming use of land to some other kind of nonconforming use constitutes abandonment and termination of the nonconforming use. To the extent the use could ever have been lawfully established, City is not aware of the Applicant ever obtaining appropriate licensures or paying applicable taxes that would otherwise be required if the use had ever been in operation (and particularly not within the past year). See Hearing officer's full decision included as part of the Appeal Application in Attachment 2.

#### **CURRENT SITUATION:**

#### **SUBJECT APPEAL:**

The Applicant's Notice of Appeal cites the following reasons as to why the Hearings Officer's decision is in error:

1). The City of Ontario's decision fails to properly apply the applicable standards in the City's zoning code, in particular the Applicant's prior nonconforming use of the subject property as a nonconforming retail use. The decision improperly describes the proposed use as a "new commercial use", when in fact the proposed use is similar in every respect to the use of the property currently.

**Findings:** Staff does not find any error in the Hearings Officer's decision with respect to non-conforming uses, which was summarized above. The proposal is properly characterized as a new marijuana retail use because no prior marijuana retail use has been approved or established on the subject property. It must be further noted that marijuana retailers are a distinct use from other retail or commercial uses as reflected in the use tables and special standards set out in the City land use regulations. Thus, Staff does not agree that any prior retail or commercial uses on the site, to the extent those uses were lawfully established and/or not subject to abandonment, could serve as the basis for finding that a non-conforming use exists for a marijuana retailer.

Staff further notes that Applicant's appeal materials describe the proposal as an effort to "open a new retail use on the subject property". This statement further supports the Hearings Officer's finding that the no marijuana retail use has been established on the subject property (and thus no establishment of a non-conforming use). It also implicates OMC 10A-05-35, which requires that a non-conforming use may not be altered or extended to another part of the structure or site without approval for a conditional use for a non-conforming use exception, which Applicant did not request as part of the subject application nor has Applicant separately sought such approval.

2). The City's decision also violates the Applicant's right to an impartial decision maker, as the "Hearings Officer" is also the City's Planning Director, who has openly fought the Applicant's attempts to open another retail use on the subject property.

**Findings:** The Hearings Officer/Planning Director disagrees with the Applicant's statement that he "openly fought the Applicant" or is otherwise biased. As is required for such positions, the Hearings Officer/Planning Director simply seeks to apply applicable land use regulations. The Hearings Officer/Planning Director has no personal disagreement or malice against the Applicant nor any predisposition towards the proposed use or property. In the Hearings Officer's/Planning Director's experience, the parties have always been very professional and friendly in all their communications with each other. Notably, there were no issues raised by the Applicant when the Hearings Officer/Planning Director indicated the application would initially be processed administratively by the Hearings Officer/Planning Director. In any event, and to the extent of any bias, the Applicant has invoked its right for the Planning Commission to review this matter, the Applicant will have an opportunity to challenge any individual Commissioner for bias, and any remaining Commissioners will constitute an unbiased decision body.

3). The City's decision breaches a prior agreement between the parties in which the Applicant is contractually entitled to operate a cannabis dispensary on the subject property once the City of Ontario's ban on recreational dispensaries was lifted.

**Findings:** Staff does not find any error in the Hearings Officer's decision with respect to any alleged contractual obligation. The Hearings Officer's finding on this issue are summarized above.

4). The ordinance applied to the subject property violates the contracts clause of both the Oregon and federal constitutions in that the ordinance breaches the settlement agreement between the Applicant and the City.

**Findings:** Staff does not find any error in the Hearings Officer's decision. The Hearings Officer determined that the document to which that Applicant is presumably referring does not contain any prohibition on the subsequent adoption of land use regulations. Because there was no breach of this instrument, there is no violation of state or federal constitutions.

5). The ordinance which the City seeks to apply against the subject property was improperly adopted, and is therefore invalid. The "Hearings Officer" could not, and did not, objectively consider the Applicant's objections to the ordinance because of the "Hearings Officer's" obvious bias in favor of the ordinance and prejudice against the Applicant.

**Findings:** The Applicant's submission alleged that various aspects of the ordinance adoption process were irregular and/or unfair, but did not cite any authority as to how those allegations invalidate an ordinance adopted several years ago that was not subject to any appeals. In staff's estimation, the cited actions are simply typical of legislative proceedings where proposed code language gets revised and refined during the course of the process. Furthermore, even if the allegations were meritorious, the Applicant did not cite any authority as to why procedural issues from a prior un-appealed land use action are subject to review as part of a subsequent conditional use review process. Staff again disputes the notion of bias particularly in the context of adhering to an acknowledged land use ordinance. Staff does not find any error in the Hearings Officer's determination that the adopted land use

regulations are applicable to Applicant's proposal.

**ANALYSIS:**

- A. **STRATEGIC PLAN** None
- B. **FINANCIAL** No financial costs at this time
- C. **TIMING** The time and place for the Public Hearing on the appeal have been meet.
- D. **POLICY/LEGAL** City Codes 10A, 10B and 10C.

**ALTERNATIVES:**

No alternative offered

**RECOMMENDATION:**

Staff recommends the planning commission weigh all the testimony, findings and facts presented in writing and at the public hearing and base their decision on legal findings.

**ATTACHMENTS:**

- 1. Attachment 1 Scott Matthews CUP Application
- 2. Attachment 2 Scott Matthews Appeal Application
- 3. Attachment 3\_TL\_1100\_RestrictedBuffers

# City of Ontario Planning and Zoning Application Form

Mailing: 444 SW 4<sup>th</sup> Street, Ontario, OR 97914

Community Development Center: 458 SW 3rd Street

Voice (541) 881-3222 or (541) 881-3224

Fax (541) 881-3251



## CONDITIONAL USE PERMIT

One or more "Round Table" discussions with the Preliminary Design Advisory Committee are a necessary step when a development of land is proposed and is highly recommended for all other types of proposals.

FILE # 2022-07-27 CUP

Date Received: 7-22-2022

Fee: \$180.00 + \$120.00 = \$300.00 pdv #621

Time Received: 4:50 pm

(Mailing & Advertising: \$120.00)

PDAC Date: \_\_\_\_\_

Accepted as Complete: 7-25-2022

### Scheduled for hearing(s)

Administrative decision \_\_\_\_\_

Hearings Officer \_\_\_\_\_

Planning Commission \_\_\_\_\_

City Council \_\_\_\_\_

### Applicant(s) – attach additional sheets as necessary

Name Scott Matthews

Address 432 North Oregon St

Ontario, Oregon 97914

Telephone 208-724-7720

email 420ville@gmail.com

signature Scott Matthews

### Property Owner(s) – attach additional sheets as necessary

Scott Matthews

Diane Matthews

Specific use requested: \_\_\_\_\_

☐ Attach additional sheets if needed to explain proposal.

☐ Submit site plan and/or building plan.

☐ Submit landscape plan.

☐ Submit off-street parking plan.

☐ Submit outdoor sign plan if signs are proposed.

If the application includes any site plans or other drawings, please submit electronic copies in pdf format

### Property information:

Address 420 North Oregon St

Tax Map # 18S4703CB 1100

Tax Lot #(s) 1100

Lot size 2.02

Zoning I2

Existing use Commercial

# CONDITIONAL USE PERMIT

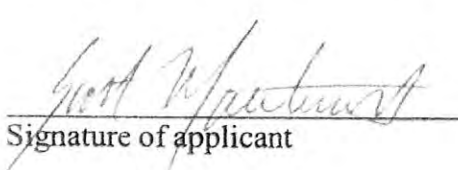
FILE # 2022-07-27 CUP

## Applicant is:

- ☒ The owner of the property  
☐ The purchaser of the property under a duly executed written consent of the owner to make such application  
☐ A lessee in possession of the property who has the written consent of the owner to make such authorization  
☐ The agent of any of the above, who is duly authorized in writing by the principal

## AUTHORIZATION:

I hereby consent that I am authorized to make the application for a conditional use permit and the statements within this application are true and correct to the best of my knowledge and belief. I verify that this is a legally created tract, lot or parcel of land. I understand that I have the right to an attorney for verification as to the creation of the subject property. I understand that any action authorized by the City of Ontario may be revoked if it is determined that the authorization was issued on account of false statements or misrepresentation.

  
\_\_\_\_\_  
Signature of applicant

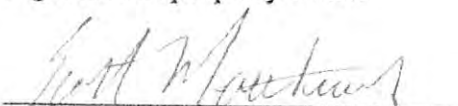
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Date

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Signature of applicant

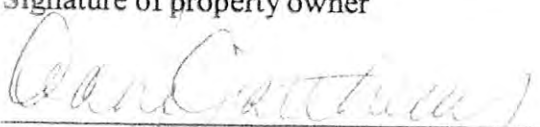
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Date

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Signature of property owner

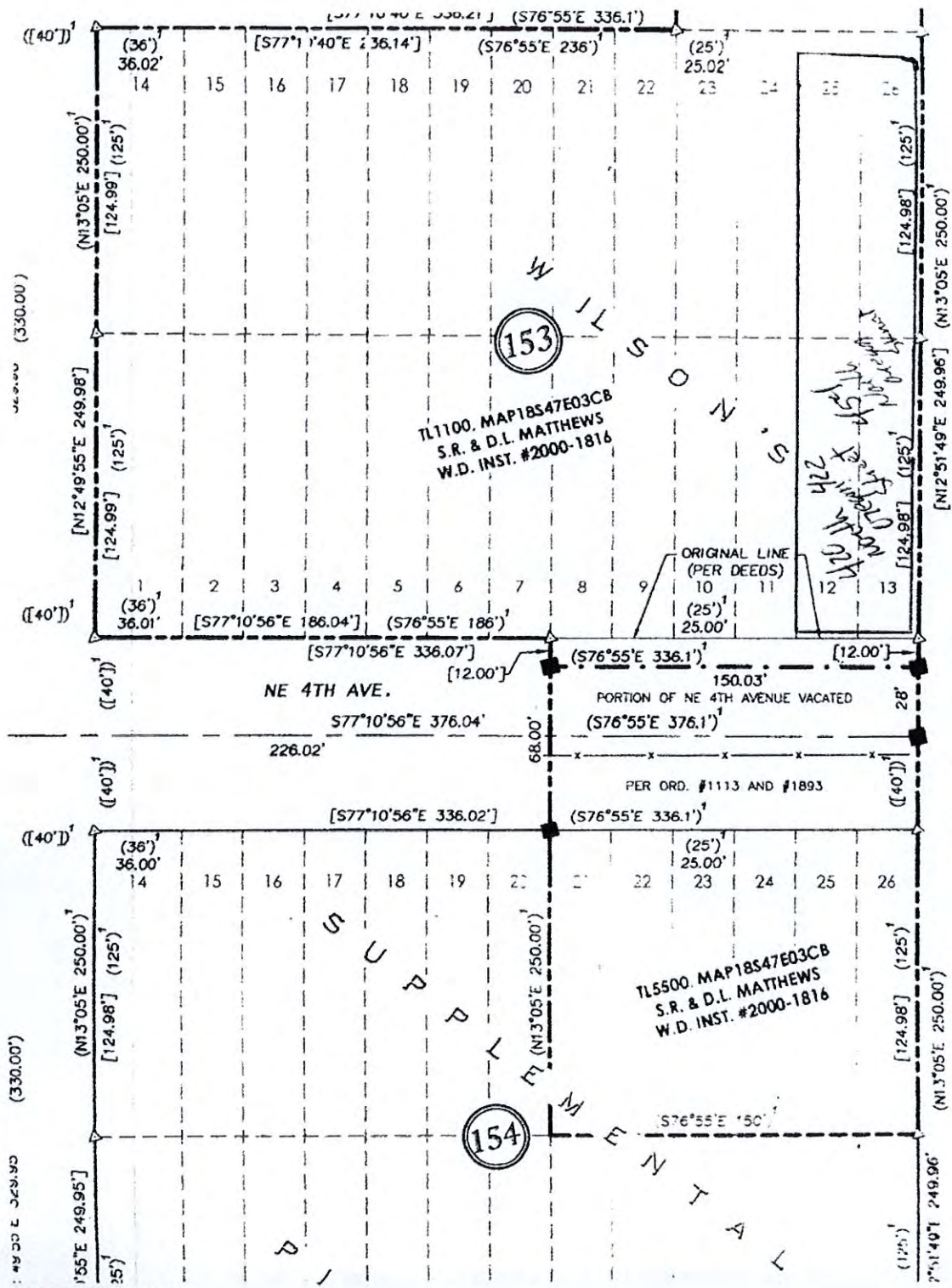
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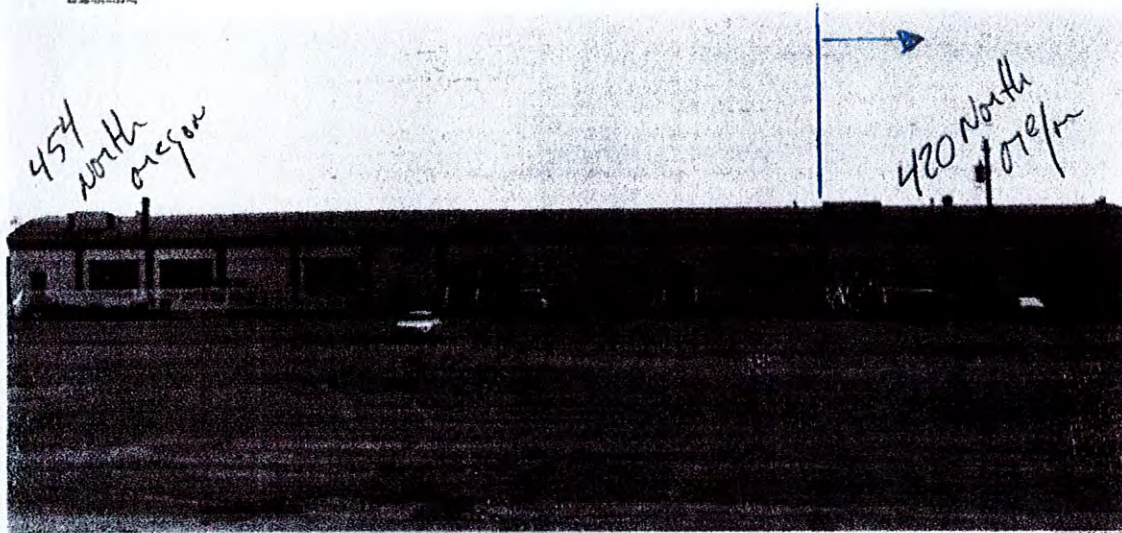
  
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Signature of property owner

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Signature of property owner

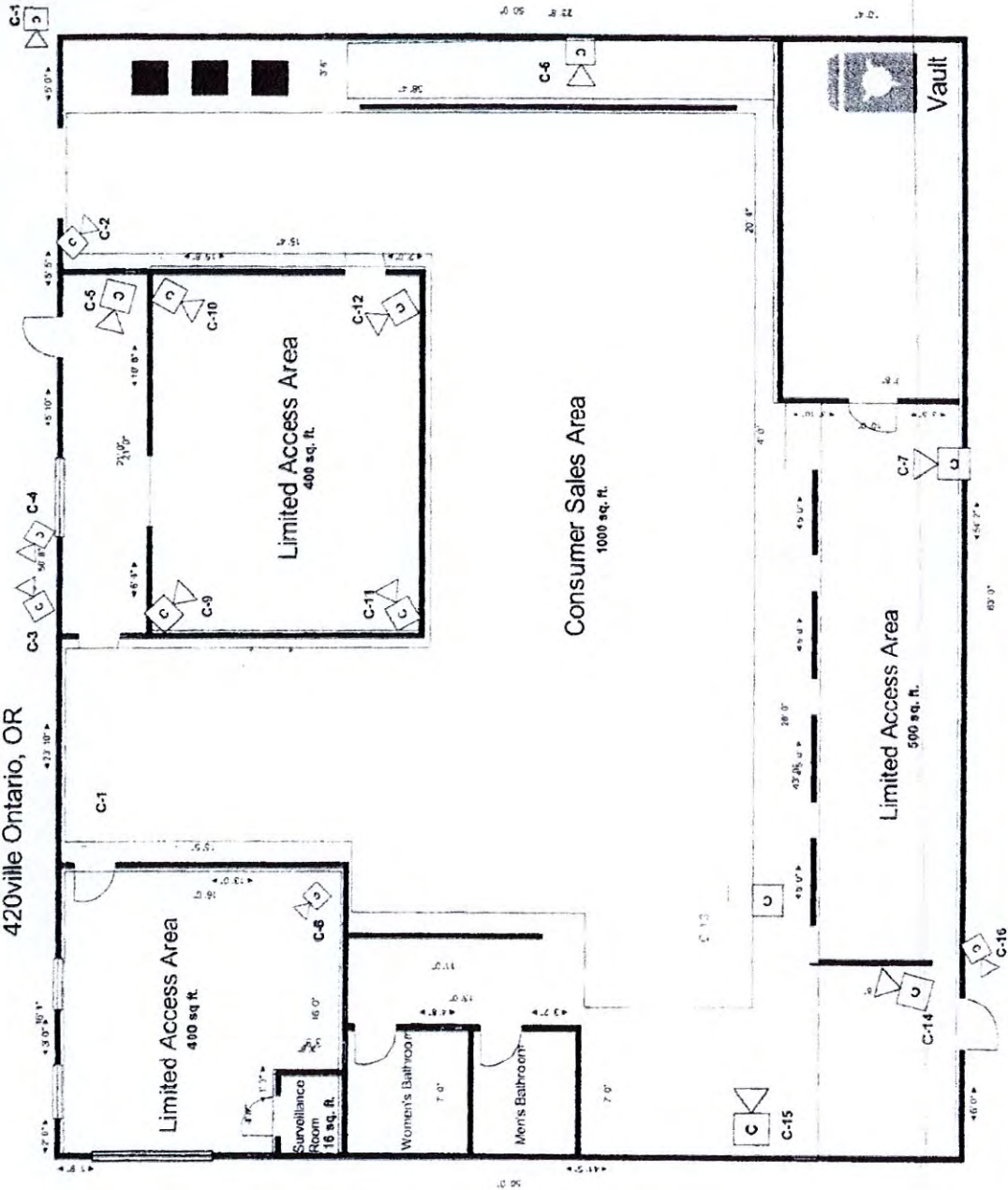
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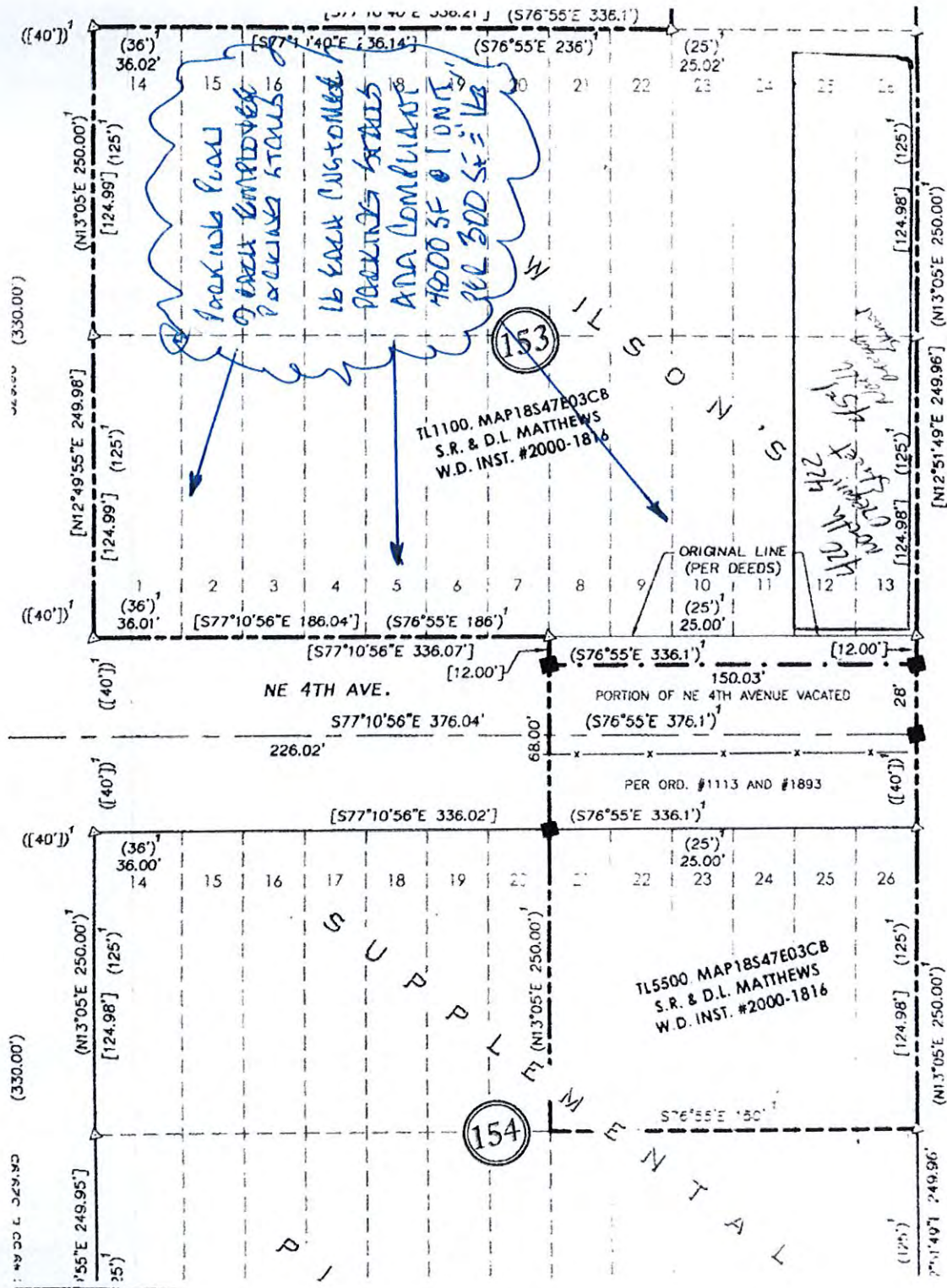
-i 420 N. OREGON STREET - BUILDING ELEVATION

420ville Ontario, OR



420 N OREGON STREET, BUILDING INTERIOR LAYOUT





470 N. OREGON STREET - 4TH STREET PARKING PLAN



# BENNU LAW

July 15, 2022

City of Ontario Planning and Zoning  
Community Development Center  
Attn: Dan Cummings  
444 SW 4<sup>th</sup> Street  
Ontario, OR 97914

VIA EMAIL AND U.S. FIRST CLASS MAIL, POSTAGE PRE-PAID

re: Application for Conditional Use Permit Under Protest

Dear Mr. Cummings:

This law firm and the undersigned represent Scott, Inc., the applicant ("Applicant") for the enclosed conditional use permit application. The Applicant does not believe the City is appropriately requiring it to apply for a conditional use permit for the proposed use of the property for a marijuana retailer (marijuana dispensary) located at 420 North Oregon Street in Ontario (the "Property"). You have advised otherwise by refusing to sign the Applicant's Land Use Compatibility Statement ("LUCS") on or about May 25, 2022. Therefore, this application is submitted under protest.

Submitted herewith are the following:

- Conditional Use Permit Application Form
- Application Fee (\$180 + \$120 = \$300)<sup>1</sup>
- Tax Map
- Site Plan/Building Plan
- Landscape Plan
- Off-Street Parking Plan

This letter constitutes the Applicant's burden of proof statement in support of the Application.

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<sup>1</sup> To be included in hard copy mailed to Mr. Cummings

As set forth in the City of Ontario – Notice of Decision dated July 26, 2016, the City has previously honored and relied upon the settlement agreement dated April 18, 2016 (the “Agreement”) between the City of Ontario and Scott, Inc. in a land use decision (Decision for Nonconforming Use) concerning the Property. The Applicant requests the same outcome for the Application submitted herewith, as the City agreed to approve a marijuana retailer facility on the Property when the then-existing moratorium/ban on dispensaries was lifted.

## **I. Standards and Criteria**

The Applicant submits that an application for a conditional use permit for a marijuana retailer facility on the Property is not required under the Agreement. The City agreed to approve such use when it lifted its marijuana ban. Because the ban has been lifted, the Applicant is entitled to approval of its proposed marijuana dispensary without additional process or review.

Because the City has refused to approve a LUCS for a marijuana retailer facility on the Property, the Applicant is unable to obtain a dispensary license from the Oregon Liquor Control Commission (“OLCC”). Therefore, the Applicant submits this Application under protest. Nothing herein shall be construed to be a waiver of the Applicant's rights or a concession to the applicability of the standards and criteria reviewed in this burden of proof.

### **A. Ontario Municipal Code (“OMC”) 10B-02-10 - APPLICATION AND STANDING TO INITIATE**

*An application for a land use action may be initiated by the owner of the property involved or an authorized agent. Authorization to act as an agent shall be in writing and filed with the application. The City Council, Planning Commission or the City Manager may initiate any appropriate type of proceeding.*

**FINDING:** This Application is initiated by the owner of the Property. No agent authorization is required. These criteria are met.

### **B. OMC 10B-02-10 - APPLICATION, FORM OF**

*Applications shall be filed on the appropriate form as prescribed by the City. Applications shall be signed by an authorized person, contain an adequate description of the property, any other specified information, and be accompanied by the site plan, all as deemed necessary by the Planning Official; appropriate fees shall be included.*

*When an application requires the submission of a site (plot) plan, that plan shall be submitted on eight and one-half × 11-inch sheets of medium that can be copied, or, if required by the Planning Official or the Director of Public Works, the plan shall be submitted on one or more sheets of printable medium a minimum of 18 × 24 inches in size and drawn to a scale of at least one inch equals 50 feet. The applicant may be required to supply a sufficient number of prints for all reviewing parties and files, or to pay the cost of making such prints. The site plan shall include the following information at a minimum:*

- 1. Date.*
- 2. North arrow.*
- 3. Name of project or action.*
- 4. Name, address and telephone number of the owner or authorized agent, if any.*
- 5. Name, address and telephone number of design professional responsible for the site plan, if any.*

6. *Written and graphic scale.*

7. *Legal description of the property by address or tax lot and map number or lot and block number or all of the forgoing.*

**FINDING:** The Application is submitted on the appropriate form, signed by an authorized person, contains an adequate description of the property, and is accompanied by a site plan containing the information listed above. The Applicant has included appropriate fees. The site plan shows that the area of the Property to which this Application pertains (420 North Oregon Street) is 50x96 feet in size, totaling approximately 4,800 square feet. These criteria are met.

### **C. OMC 10B-05-15 BURDEN, CRITERIA OF PROOF**

1. *The proponent of proposals shall have the burden of proving the justification of the request. The greater the impact of the request on an area, the greater is the burden upon the proponent.*
2. *The requested proposal must be supported by proof that it conforms to all applicable standards and criteria of the OMC. The Planning Official may require that proponents submit written evidence, facts and/or written findings substantiating such conformance, as part of the application.*

**FINDING:** The Applicant submits that the City has already analyzed the impact of approving a marijuana facility on the Property when it entered into the Agreement and agreed to allow the operation of a dispensary on the Property at such time as the marijuana ban was lifted. Further, the City determined that the request is justified when it agreed to settle a lawsuit in 2016 filed against the City by the Applicant concerning operation of a marijuana facility on the Property. Notwithstanding the foregoing, this Application is supported by proof that it conforms to all applicable standards and criteria of the OMC. These criteria are met.

### **D. OMC 10B-25-05 - PURPOSE AND AUTHORITY (CONDITIONAL USE PERMITS).**

*Certain types of uses require special consideration prior to their being permitted in a particular zone.*

*All uses permitted conditionally are declared to be possessing such unique and special characteristics as to make impractical their being included as outright uses in the particular zone as established by this Title. The location and operation of conditional uses shall be subject to review by the Hearing Officer prior to issuance of a conditional use permit. The purpose of review shall be to determine that the characteristics of a proposed conditional use shall be reasonably compatible with the type of uses permitted in surrounding areas, the size of the area required for the development of such uses, and such impacts as may occur from emissions of discharges into the air, land or water as well as impacts of noise, vibration, odor, heat, dust, glare and lighting; and for the further purpose of stipulating such conditions as be reasonable so that the basic purposes of this Title shall be served. Nothing herein shall require the City to grant a conditional use permit. The decision of the Hearing Officer shall be the final decision of the City unless an appeal is filed as authorized by this Title.*

**FINDING:** As previously noted, the Applicant submits that a proposed retailer marijuana facility on the Property was specially considered by the City when the parties entered into the Agreement. Therefore, no additional review or process is required, or allowed, under the Agreement for approval of the requested land use.

The Property is located in the I-2 (Heavy Industrial) zone, in which marijuana retailer facilities (indeed, all marijuana uses) are listed as a conditionally permitted use. As demonstrated herein, the location and

operation of a marijuana facility on the Property is "reasonably compatible" with the type of uses permitted in surrounding areas, the size of the area required for the development of such uses, and such impacts as may occur from emissions of discharges into the air, land or water as well as impacts of noise, vibration, odor, heat, dust, glare and lighting. With respect to the listed impacts in this provision, the operation of a marijuana facility on the Property will not result in any such impacts. There will not be any air, land or water emissions from the proposed use. The Applicant will agree to a condition of approval requiring compliance with all noise and odor requirements that specifically apply to marijuana uses. No vibration, heat, dust, glare and lighting impacts will occur as the result of the proposed use. Moreover, the Property is located within an industrial zone and is not surrounded by any sensitive uses. These criteria are met.

#### **E. OMC 10B-25-30 - REQUIRED FINDINGS, DECISION CRITERIA.**

*Prior to making decisions on conditional use applications, the Hearing Officer shall analyze the following criteria and incorporate such analysis into his decision and findings:*

- 1. The conditional use permit conforms to the requirements of this Title, including the site plan standards of this Title, and all other provisions of the City Code.*
- 2. The site for the proposed use is adequate in size and shape to accommodate said use, and all yards, spaces, walls and fences, parking, loading, landscaping, and other features required to make the use compatible with surrounding uses in the neighborhood.*
- 3. The site for the proposed use relates to streets and other public facilities adequately to accommodate the demands generated by the proposed use.*
- 4. The conditions stated in the decision are deemed necessary to protect the public health, safety, and general welfare.*

**FINDING:** This Burden of Proof details findings that show the conditional use permit conforms with applicable requirements of this Title and all other applicable provisions of the City Code. No new construction is proposed and the exterior of the Property will not change as a result of the proposed use. The Property is of adequate size and shape to accommodate the proposed use. The Applicant will agree to conditions of approval to further ensure compatibility with surrounding uses in the industrial zoned neighborhood, including walls and fences, parking, loading and landscaping. The Property is served by water, sewer, electricity, natural gas and is located on North Oregon Street. Public facilities can and will adequately accommodate the demands generated by the proposed use in this I-2 zoned neighborhood. The Applicant submits that the public health, safety and general welfare will not be harmed as a result of the proposed use; no additional conditions are required to protect the health, safety and general welfare of the community. These criteria are met.

#### **F. OMC 10A-41-01 – PURPOSE (I-2 HEAVY INDUSTRIAL ZONE)**

*To provide locations for industrial activities which do not meet the standards of the I-1 Zone. **The I-2 Zones are located so as to minimize or eliminate any adverse effects of the use permitted in such zones or commercial, residential and public open space areas. Specified industrial uses with particular offensive potential are permitted only as conditional uses.** In addition, it is intended to permit as conditional uses, limited commercial activity that will serve primarily those who work in or do business with the industries in this zone and will be of a kind and size that will not inhibit optimum industrial development in this*

*zone. Industrial areas have unique location and plot size requirements and are scarce. Therefore the intrusion of commercial activity is detrimental to the intended use of industrial land is discouraged.*

*(emphasis added)*

**FINDING:** The purpose of the I-2 zones, which by its terms, "are located so as to minimize or eliminate any adverse effects of the use permitted in such zones or commercial, residential and public open space areas," and the recognition that specified industrial uses with "particular offensive potential" are permitted only as conditional uses, is evidence of the nature of the I-2 zone which acts to separates heavy industrial uses preventing uses in the zone from affecting commercial, residential and public open space areas. Moreover, the requirement for a conditional use permit for those uses with "particular offensive potential," requires an analysis of the impact ***on other uses permitted in the I-2 zone***, and does not extend beyond the boundaries of that zone, which is for the purpose of siting the most intensive uses permitted (outright or conditionally) in the City.

Thus, it is no surprise that OMC 10A-41-09 lists residential uses as "Expressly Prohibited." This is so that there is no conflict between heavy industrial uses permitted outright and conditionally with residential, or other more sensitive uses.

#### **G. OMC 10A-41-10 - CONDITIONAL USES, COMMERCIAL**

*The conditional commercial uses listed below may be permitted in the I-2 Zone upon application of the standards for all conditional uses and the following additional standard: The proposed location and size of the proposed commercial use will not substantially interfere with the development of the industrial zones for industrial uses.*

- 1. Automatic or self-service care or truck washes.*
- 2. Gasoline service stations.*
- 3. Retail food stores not to exceed 2,000 square feet of gross floor area.*
- 4. Bars, taverns, cocktail lounges, restaurants or combinations thereof not to exceed 3,000 square feet gross floor area.*
- 5. Job printing and duplication.*
- 6. Radio or television towers and related facilities, subject to a structure height limitation in the AH, Airport Hazard Overlay Zone.*
- 7. Automobile service establishments as defined herein.*
- 8. Marijuana retailer as provided in [Chapter 10A-59](#);*
- 9. Marijuana laboratory as provided in [Chapter 10A-59](#);*

10. Marijuana wholesaler as provided in [Chapter 10A-59](#);
11. Marijuana producer as provided in [Chapter 10A-59](#);
12. Marijuana processor non-flammable as provided in [Chapter 10A-59](#);
13. Marijuana processor flammable as provided in [Chapter 10A-59](#); and
14. Marijuana grow site medical as provided by State regulations and as provided in [Chapter 10A-59](#).

**FINDING:** The proposed marijuana retailer use is listed as a conditionally permitted use in the I-2 zone. As set forth herein, the Application meets all applicable standards and the additional standard of, "*The proposed location and size of the proposed commercial use will not substantially interfere with the development of the industrial zones for industrial uses.*" The use is proposed in an existing building, and is not of a size or in a location that will interfere with development of other industrial uses in the I-2 zone. In fact, comparing the proposed use to other listed conditional commercial uses in the I-2 zone, the proposed marijuana retailer use will be less intensive from a traffic, noise and odor standpoint than automatic or self-service care or truck washes, Gasoline service stations, and automobile service establishments.

The use also will be far less impactful than the conditionally permitted **industrial** uses in the zone, which include, among other things, potentially dangerous uses such as animal slaughtering, stockyards or holding pens, rendering of dead animals or slaughter by-products, waste water treatment plants, power plants, solid waste energy recovery plant, solid waste transfer stations, solid waste recycling plants, manufacture of industrial inorganic and organic chemicals, including alkalis and chlorines, industrial and medical gases, fertilizers, agricultural chemicals and pesticides, poisons, manufacture of plastics, synthetic resins, nonvulcanizable elastomers, synthetic rubber, man-made fibers, adhesives, explosives, and pyrotechnics, processing of asphaltic paving mixtures, ready-mix Portland cement concrete, and manufacture of tires and tubes, rubber reclaiming. OMC 10A-41-13.

#### H. OMC 10A-41-30 - PERFORMANCE STANDARDS

*Each structure or use permitted as of right or conditionally in the I-2 Zone shall meet the following performance standards:*

1. *Conduct of use. No permitted or permissible use shall be conducted in any manner which would render it noxious or offensive by reason of dust, refuse matter, odor, smoke, gas fumes, noise, vibration or glare.*
2. *Enclosure. All manufacturing or processing activities shall be completely enclosed in buildings, except as provided by the conditional use section of this Chapter.*
3. *Outdoor storage. Junk, salvage, auto wrecking and similar operations shall be fenced, screened or limited in height so as to block substantially any view of such material from any point located on an abutting street or from any point less than eight feet above grade within any abutting residential or commercial zone. However, this Section shall not be deemed to require more than an opaque fence or screen not more than ten feet in height and not longer than the full perimeter of the subject*

development site, and further provided such screening may be reduced in height so as to avoid shading a solar collector on adjoining property when so requested by the adjoining property owner or a government official. No outdoor storage of materials which could be blown into the air or strewn about by wind shall be permitted.

4. *Loading. Truck loading and unloading operations shall take place entirely within the site and shall not be so located as to interfere with pedestrian routes.*
5. *Fire hazard. No operation shall be established which fails to meet the fire code which is adopted into the Ontario City Code and any applicable State or Federal codes.*
6. *Noise. Noise shall be muffled as available technology permits so as to not be objectionable due to intermittence, beat frequency or shrillness and shall meet any State standards.*
7. *Sewage and liquid waste. All operations shall comply with Title 8, Ontario City Code and any applicable regulations of State or Federal agencies responsible for pollution control. No wastes of a chemical, organic or radioactive nature shall be injected or buried in the ground or stored in the open on the surface except in approved containers.*
8. *Odor. The emission odors that are generally agreed to be obnoxious to any considerable number of persons is prohibited. Observations shall be made at the property line of the establishment generating the odors. As a general guide to classification of odor, it is deemed that odors of putrefaction, hydrogen sulfide, fermentation and rendering processes, are objectionable while odors associated with baking, coffee roasting or nut roasting are normally not considered obnoxious. To reduce odors the open air cooling of products with aromatic emissions shall be avoided. Floors, machinery storage containers and other surfaces shall be clean of material which is potentially odor causing.*
9. *Vibrations. All machines shall be mounted so as to minimize vibration. Vibration shall not be so excessive as to interfere with heavy industrial operations on nearby premises.*
10. *Glare and heat. All glare and heat producing operations, such as welding arcs and open furnaces, shall be shielded so that they are not visible from the property line and surfaces near the glare source shall be of a type which will minimize the reflection of such glare beyond the property line. No heat from equipment or furnaces shall raise the temperature of materials or ambient air at the property line more than three degrees Fahrenheit.*
11. *Interpretation. Whenever it cannot be decided by reasonable observation that a performance standard is being met, it shall be the responsibility of the operator of the use to supply evidence or engineering data to support the contention that a standard is being met. The standards are designed, except where referring to other codes, to be judged by ordinary human senses and not by the minute detail of scientific quality instruments.*

**FINDING:** Compared to other industrial uses in the zone, permitted outright and conditionally, the proposed use will not be noxious or offensive from the standpoint of fire hazard, odor, vibrations, glare and heat. No outdoor storage is proposed or contemplated; all permitted activities will take place within the building on the Property. All loading/unloading will take place on site and will not interfere with pedestrians. The Applicant will

agree to a condition of approval requiring it to supply evidence or engineering data to support the contention that all standards are being met. These criteria are met.

**I. OMC 10A-59-10 - MARIJUANA RELATED OPERATIONS AND ACTIVITIES AS CONDITIONAL USE IN C-1, C-2 AND C-3, C-2H, E-2, E-5, I-1, AND I-2 ZONES.**

*Unless lawfully prohibited by Section 3-23-1 and any amendments thereto imposing a ban on marijuana within the jurisdiction of the City of Ontario, the following uses if listed under being allowed by a conditional use, are conditional uses in the C-1, C-2, C-3, C-2H, E-2, E-5, I-1 and I-2 zones, as provided in Chapters 27, 29 and 33 of [Title 10A](#): marijuana businesses defined in Section 10A-03-134.1.1; marijuana grow sites medical defined in Section 10A-03-134.1.2; marijuana processing sites defined in Section 10A-03-134.1.4; marijuana processor flammable defined in Section 10A-03-134.1.5; marijuana processors non-flammable defined in Section 10A-03-134.1.6; a marijuana producer recreational defined in Section 10A-03-134.1.7; marijuana recreational facility defined in Section 10A-03-134.1.8; marijuana retailers defined in Section 10A-03-134.1.9; marijuana testing laboratory defined in Section 10A-03-134.1.10; marijuana wholesalers defined in Section 10A-03-134.1.11; and medical marijuana facilities defined in [Section 10A-03-134.5](#).*

**FINDING:** Per this provision, the proposed use is a marijuana retailer defined in Section 10A-03-134.1.9. The Property is located in the I-2 zone in which marijuana uses are conditionally permitted, subject to special conditions in OMC 10A-59-15. Again, as previously discussed, the restrictions in the OMC on the operation as a marijuana retailer on the Property are not applicable to the Applicant pursuant to the Agreement.

**J. OMC 10A-59-15 - MARIJUANA RELATED OPERATIONS AND ACTIVITIES GENERAL AND SPECIAL CONDITIONS IN THE C-1, C-2, C-3, C-2H, E-2, E-5, I-1 AND I-2 ZONES.**

*All marijuana operations and activities located in the C-1, C-2, C-3, C-2H, E-2, E-5, I-1 and I-2 zones are subject to [Chapter 10B-25](#) ("Conditional Use Permits") of [Title 10B](#), and to the conditions generally imposed upon conditional uses in these zones and to the application fee set by most recent fee resolution. The following special conditions shall also apply to all marijuana operations and activities:*

*(A) Location Restrictions. Marijuana operations and activities are prohibited in the following locations, with distances measured from the closest points of the respective lot lines:*

*1. Within 1,000 feet of a public or private elementary or secondary school, or a career school attended primarily by minors, including but not limited to:*

- a) All Ontario 8C Schools.*
- b) St. Peter Catholic School.*
- c) Treasure Valley Christian School.*
- d) Four River Community School.*

*2. Within 1,000 feet of a non-commercial facility used primarily for the care, education or recreation of minors existing at the time of this ordinance which are:*

- a) *Ontario Head Start Center.*
- b) *Oregon Child Development Coalition (OCDC).*
- c) *Malheur County Child Development Center.*
- d) *Treasure Valley Relief Nursery.*
- e) *Ontario Boys and Girls Club.*
- f) *Any School operated by Malheur Education Service District (ESD).*

- 3. *Within 1,000 feet of a property zoned as PF Public Facility or UGA-PF Public Facility UGA, excepting therefrom the Oregon Department of Transportation lands adjacent to East Idaho Avenue and the City of Ontario Water Treatment Plant lands East of East Lane and the Ontario Public Works Department lands located at 1551 NW 9th Street;*
- 4. *Within 1,000 feet of property designated by the City of Ontario as a public park in a City Park Master Plan as long as that property remains designated by the City as a public park;*
- 5. *Within 1,000 feet of another medical marijuana retail facility;*
- 6. *Within 1,000 feet of another marijuana recreational retail facility;*
- 7. *Within 500 feet of residential zones, including those designated in Chapter 11 (RS-50), Chapter 13 (RD-40), Chapter 17 (RM-10), Chapter 19 (R-MH), and Chapter 52 (UGA-R) of [Title 10A](#);*
- 8. *On the same tax lot as a smoking club; or*
- 9. *Any combination of the above.*

**FINDING:** The Property is within all applicable distance requirements under these provisions, except for subsection (7), "Within 500 feet of residential zones..." At the time the City decided to lift its marijuana ban, which in and of itself permitted the Applicant to open a marijuana retail facility on the Property, the City considered the adoption of marijuana-specific code provisions. The distance restriction from residential zones was increased from 250 feet, considered by the Planning Commission and recommended to the City Council to a new, more restrictive distance of 500 feet in a deliberate effort by the City to foreclose the Applicant from opening a marijuana facility on the Property. The widened restriction radius was not subject to public comment but instead was changed in the proposed ordinance between the first and second readings. Not only is there no showing of increased protection of health, safety and welfare of the residential zone with the restrictive radius – particularly given the other, intensive uses in the Heavy Industrial zone – but the City's enactment of this specific restriction violates the terms and intent of the Agreement.

For these reasons, the Applicant submits that subsection (7) is not applicable to the proposed use. Given that the use meets all other requirements of the OMC, and particularly in consideration of the parties' Agreement

the purpose and other permitted (and prohibited uses) in the I-2 zone, the City should determine that these criteria are met, or are excused.

*(B) Other Restrictions. Marijuana operations and activities are subject to the following additional restrictions:*

- 1. A facility shall be designed so that all transactions occur within the interior of the facility, out of the view of the public. All doorways, windows and other openings shall be located, covered or screened in such a manner to prevent a view into the interior from any exterior public or semipublic area. Walk-through windows, drive-through windows or other outside delivery systems are prohibited.*
- 2. Any and all marijuana operations and activities are considered a change of use and any existing and new structures used for such operations shall be brought up to and/or constructed to current building codes and standards, including but not limited to the American Disability Act (ADA), parking standards and providing for public bathrooms for the business customer use including persons waiting to be serviced.*
- 3. All Medical and recreational marijuana retail facilities shall be required to provide parking as per [Section] [10A-57-75\(4\)](#) as follows: One space for each employee, full or part time on the largest shift, plus one space for each 300 square feet of gross floor area. Parking for all marijuana operations and activities shall comply with off-street parking and loading requirements [Sections] [10A-57-60](#) through [10A-57-100](#).*
- 4. The facility must use an air filtration and ventilation system which, to the greatest extent feasible, confines all objectionable odors associated with the facility to the premises. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.*
- 5. The facility shall be located in a permanent building, not in a trailer, cargo container or motor vehicle. Any manufactured building shall be a commercial grade design and construction certified by the State of Oregon.*
- 6. The exterior of the facility shall have an exterior consistent with other buildings on abutting lots in the neighborhood so as not to cause blight.*
- 7. All marijuana operations, activities and or facilities must install and maintain all security devices required by the licensing body either the Oregon Health Authority (OHA) or the Oregon Liquor Control Commission (OLCC).*
- 8. All medical and recreational marijuana retail facilities within the C-3 zone shall have a large enough indoor waiting area as to not allow large customer lines outdoors along the public sidewalks and rights of ways or blocking any entrances to other adjacent businesses.*
- 9. Prior to commencing business operations, a facility must have a current business license issued by the City of Ontario under Chapter 22 of Title 3 of the Ontario City Code and the licensed by the Oregon*

*Health Authority (OHA) or the Oregon Liquor Control Commission (OLCC) for the type of operation allowed.*

*10. All marijuana operations and activities shall be on a conditional use application prescribed by the Ontario Planning Director and shall include all the items and attachments noted and required in the application along with all fees required by code and current resolution. The application will be date and time stamped as received by the Planning Department only, to set the order of review. The application will be reviewed by the Planning Director for completeness and compliance to established buffers before it is accepted for consideration. Any incomplete application or one not meeting the established buffers shall be returned to the applicant for corrections and/or additional required information and once returned will be time stamped and dated again. Once the application is accepted as complete by the Planning Director the date accepted as complete shall be the priority dated for establishing the buffer between marijuana retailers if the application is approved and all licensing and development requirements are met.*

*11. The conditional use permit is governed by [Section] [10B-25-40](#) and the marijuana conditional use permit shall have a time limit of 12 months and become void if conditions are not met, unless an extension is granted for good cause under [Section] [10B-25-40\(3\)](#).*

*12. The conditional use permit (CUP) must be approved by the Ontario Planning Department before any Land Use Compatibility Statement (LUCS) will be signed by the Ontario Planning Department for any of the Marijuana State Business License or Registration required by the State of Oregon and/or City of Ontario.*

**FINDING:** As shown on the submitted site plan, all transactions will occur within the interior of the facility and out of view of the public. All doorways, windows and other openings will be designed to prevent a view into the interior from any exterior area. No walk-through, drive-through or other outside delivery system is proposed. The Applicant will remodel the existing building, if necessary, to current building codes and standards including the ADA, parking standards and providing for public bathrooms.

The submitted site plan shows that a total of 9 parking stalls will be provided for employees, plus one space for each 300 square feet of gross floor area, for a total of 16 additional parking stalls. Overall, the Applicant proposes a total of 25 parking stalls. Parking will comply with off-street parking and loading requirements as set forth in OMC [10A-57-60](#) through [10A-57-100](#).

The proposed facility will use an air filtration and ventilation system which, to the greatest extent feasible, confines all objectionable odors associated with the facility to the premises. The facility will be located in a permanent building and the exterior will have an exterior consistent with other buildings on abutting lots in the neighborhood.

The Applicant will obtain a business license from the City and OLCC approval for a marijuana dispensary prior to initiating the use.

The Applicant will agree to conditions of approval to ensure consistency with these criteria.

## II. CONCLUSION

For all the foregoing reasons, City Staff should recommend approval of the Application to the Hearings Officer. Alternatively, City Staff should refund the application fee to the Applicant and make an administrative decision approving the proposed use, consistent with the Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephanie E. Marshall', with a long horizontal flourish extending to the right.

Stephanie E. Marshall

cc: client

encls.

# City of Ontario Planning and Zoning Application Form

444 SW 4<sup>th</sup> Street, Ontario, OR 97914

Permit Center Annex: 458 SW 3rd Street

Voice (541) 881-3224 / (541) 881-3222

Fax (541) 881-3251



RECEIVED  
9/26/22



## Appeal of Hearings Officer Decision

FILE # \_\_\_\_\_

Date Received Sept 26, 2022

Time Received 9:33 am

Accepted as Complete SEPT 26, 2022

Fee: \$180.00

Fee: \$180.00 + \$60.00 = \$240.00

(Mailing & Advertising: \$60.00)

Scheduled for hearing(s)

Planning Commission \_\_\_\_\_

City Council \_\_\_\_\_

### Applicant (Appellant):

Name Scott, Inc. and Scott Matthews

Address P.O. Box 273, Emmett, ID 83617

Telephone 208-724-7720

Email 420bunkerville@gmail.com

Signature \_\_\_\_\_

Action being appealed: City of Ontario Planning File 2022-07-27CUP, Date of Mailing: 9/14/2022

**Reason for appeal (Described) :** The City of Ontario's decision fails to properly apply the applicable standards in the City's zoning code, in particular the applicant's prior nonconforming use of the subject property as a nonconforming retail use. The decision improperly describes the proposed use as a "new" commercial use", when in fact the proposed use is similar in every respect to the use of the property currently.

The City's decision also violates the applicant's right to an impartial decision maker, as the "hearings officer" is also the City's planning director, who has openly fought the applicant's attempts to open another retail use on the subject property.

The City's decision breaches a prior agreement between the parties in which the applicant is contractually entitled to operate a cannabis dispensary on the subject property once the City of Ontario's ban on recreational dispensaries was lifted.

**If possible, please provide electronic copies with your application,  
or make arrangements to email them to staff.**

### OFFICE USE ONLY

120 day time limit

Accepted as complete \_\_\_\_\_

Final decision by \_\_\_\_\_

DLCD 45-day notice required

Y/N \_\_\_\_\_ Date mailed \_\_\_\_\_

Date of first hearing \_\_\_\_\_

Notice of Pending Hearings Officer Decision or Hearing

Date mailed \_\_\_\_\_

Notice to media

Publication date \_\_\_\_\_

Emailed \_\_\_\_\_

Notice of Decision

Date mailed \_\_\_\_\_

Appeal deadline \_\_\_\_\_

Associated applications

\_\_\_\_\_

**(Reason continued):** The ordinance applied to the subject property violates the contracts clause of both the Oregon and federal constitutions in that the ordinance breaches the settlement agreement between the applicant and the City.

The ordinance which the City seeks to apply against the subject property was improperly adopted, and is therefore invalid. The "hearings officer" could not, and did not, objectively consider the applicant's objections to the ordinance because of the "hearings officer's" obvious bias in favor of the ordinance and prejudice against the applicant.

The aforementioned bases for appeal is not exhaustive of the Applicant's objections to the City's Decision in this matter. The Applicant reserves the right to raise additional arguments against the City's Decision in this appeal and any other appeal proceedings before the City of Ontario.

A copy of the City's Decision, as well as a copy of the City's notice, are attached as Exhibit 1 to this appeal form.

**Please provide copies of any documents to the appellant's attorney:**

Ross Day email: ross@daylawpc.com (email copies are fine)

Day Law, P.C. T: 503-743-6460

7831 St. Charles Street NE

Keizer, Oregon 97303

**This appeal is made under protest and with full reservation of rights of the appellant**

**Ontario Municipal Code Title 10B – Administrative Procedures for Land Use Regulation**  
**10B-05-15 BURDEN, CRITERIA OF PROOF.**

1. The proponent of proposals shall have the burden of proving the justification of the request. The greater the impact of the request on an area, the greater is the burden upon the proponent.
2. The requested proposal must be supported by proof that it conforms to all applicable standards and criteria of the OMC. The Planning Official may require that proponents submit written evidence, facts and/or written findings substantiating such conformance, as part of the application.

**CHAPTER 10B-10 - APPEALS**

**10B-10-05 - COUNCIL REVIEW OF RECOMMENDATIONS ON LEGISLATIVE ACTIONS AND ZONE CHANGES.**

The ultimate decision-making authority for legislative actions and zone changes brought under the provisions of this Title shall rest with the City Council. Certain actions of the Planning Commission are in the form of a recommendation to the City Council. The land use actions for which the Commission provides only a recommendation to the Council are amendments of the comprehensive plan and zoning ordinances or Zoning Map.

**10B-10-10 - FINAL ACTION, HEARINGS OFFICER, COMMISSION, COUNCIL, APPEALABLE.**

Unless otherwise provided for in this Chapter, where final decision authority is granted by this Title to the Hearings Officer, Planning Commission or City Council, that decision shall be the final action of the City unless an appeal is received pursuant to this Chapter.

#### **10B-10-15 - TIME LIMIT ON APPEAL.**

1. Written notice of appeal of Hearings Officer and Planning Commission Decisions as required by these standards must be filed with the Planning Director no later than 12 days from the date written notice of the decision is mailed.
2. Appeal of a City Council Decision shall be to the Oregon Land Use Board of Appeals (LUBA) in accordance with the guidelines in ORS 197.830, and must be filed with LUBA no later than 21 days from the date the decision was final, which is the date the decision was reduced to writing.

#### **10B-10-20 - APPEAL, STANDING.**

Any party to a decision may appeal that decision provided that such appeal is filed within the guidelines of the appeal procedures in this Chapter. In order to have standing and be considered a party to a decision rendered by a decision maker authorized herein, written or oral testimony must have been provided in compliance with the requirements of these standards.

#### **10B-10-25 - APPEAL PROCEDURE.**

After written notice of appeal of a Hearings Officer or Planning Commission Decision has been filed, a hearing date will be scheduled at which time the decision-maker authorized by these standards will consider the appeal. Appeal hearings at the Planning Commission and City Council shall be "de novo," or new, hearings, and submittal of new evidence and testimony shall be allowed. An appeal resulting from Hearings Officer Decision shall be to the Planning Commission; an appeal resulting from a Planning Commission decision shall be to the City Council; an appeal of a City Council decision shall be made to the Oregon Land Use Board of Appeals in accordance with ORS 197.830 and is a record review, not a "de novo" hearing. An issue which may be the basis for an appeal to the Land Use Board of Appeals, shall be raised no later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.

Except for appeals from the decision of the Hearing Officer, Appellants must have appeared in person, by agent or in writing before the review authority, and have objected to the decision, raising issues with sufficient specificity so as to afford the Planning Commission, City Council or the parties an adequate opportunity to respond to each issue, as set forth in this Chapter, for the application being considered. The City Manager may have standing on any matter based on objections by any City Department Head who registered a proper objection at the hearing.

#### **10B-10-30 - NOTICE OF APPEAL TO PLANNING COMMISSION AND/OR CITY COUNCIL.**

The notice of appeal shall be filed with the Planning Director in writing and shall include the following:

1. The action number of the Final Order for which review by higher authority is sought.
2. If not submitted by the applicant, a statement of the interest of the appellant, to determine the appellant's standing as a party to the action.
3. The appellant's name, address and phone number.
4. Payment of fees for an appeal as provided for in this Title.

#### **10B-10-35 - APPEAL TO PLANNING COMMISSION.**

The Planning Commission shall hear all appeals of Hearings Officer decisions in a de novo public hearing. The hearing before the Commission shall be noticed in the same manner as for all public hearings, and the Appellant shall be present at the hearing, either in person or through an authorized representative. The Planning Commission may consider the record of the Hearings Officer's action, but shall not base their decision solely on that decision.

#### **10B-10-40 - TIME LIMIT FOR APPEAL CONSIDERATION.**

The Commission shall consider an appeal at the earliest possible opportunity given notice requirements and Planning Department workload.

#### **10B-10-45 - DECISION OF PLANNING COMMISSION ON APPEAL**

1. Upon review of an appeal, the Commission may affirm, reverse, or modify, in whole or in part, the decision and findings of the lower review authority and may add findings.
2. The Commission's action on a Hearing Officer's decision is itself appealable to the City Council. The presiding officer at the hearing shall advise those appearing for either side, that to have standing to appeal a Planning Commission decision to the City Council, they must address issues with "sufficient specificity" that will allow the decision maker and all present to respond to the issue.
3. Upon written request to the Planning Director, any person may have a copy of the hearing tapes and have a transcript of a hearing prepared; if the City is requested to provide the transcription, the full cost of that transcription shall be paid by the person requesting the transcription.

#### **10B-10-50 - APPEAL TO CITY COUNCIL.**

The City Council shall hear all appeals of Planning Commission decisions in a de novo public hearing. The hearing before the Council shall be noticed in the same manner as for all public hearings. The Council may consider the record of the Planning Commission's action, but shall not use the Planning Commission decision as the sole basis for their decision.

#### **10B-10-55 - TIME LIMIT FOR APPEAL CONSIDERATION.**

The Council shall consider an appeal at the earliest possible opportunity given notice requirements and Planning Department workload.

#### **10B-10-60 - DECISION OF CITY COUNCIL ON APPEAL.**

1. Upon review of an appeal, the Council may affirm, reverse, or modify, in whole or in part, the decision and findings of the lower review authority and may add findings.
2. The Council's action on a Planning Commission decision is appealable only to the Oregon Land Use Board of Appeals (LUBA), and only in the manner prescribed by ORS 197.830. The presiding officer at the hearing shall advise those appearing for either side, that to have standing to appeal a City Council decision to LUBA, they must address issues with "sufficient specificity" to enable the decision maker and all present to respond to the issue.

**Incomplete applications, or insufficient information, may result in delay or denial of the application.**



**City of Ontario  
Planning Department**

444 SW 4<sup>th</sup> Street  
Ontario, OR 97914  
Voice (541) 881-3222  
Fax (541) 881-3251

[Dan.cummings@ontariooregon.org](mailto:Dan.cummings@ontariooregon.org)

**CITY OF ONTARIO  
HEARING'S OFFICER- NOTICE OF DECISION**

Dear Property Owner, Affected agency or Community Organization:

Type of Action: Conditional Use Permit.  
Planning File: 2022-07-27CUP  
Date of Decision: September 13, 2022  
Date of Mailing: September 14, 2022

**APPLICANT**

**Scott Matthews/Scott, Inc.  
432 North Oregon Street  
Ontario, OR 97914  
(208) 724-7720**

**PROPERTY OWNER/ADDRESS**

**Scott R. Matthews  
Diana L. Matthews  
P.O. Box 273  
Emmett, ID 83617**

**Dear Property Owner, Affected agency or Community Organization:**

Section 10B-04-30 of the Ontario City Code (OCC) requires that you be sent notice of a land use decision and be apprised of your rights to appeal that decision if you so desire.

**BACKGROUND:** The above referenced applicant submitted an application for a conditional use permit for a marijuana retail facility for the property addressed as 420 North Oregon Street, Ontario, OR designated as Reference #339, Tax Map # 18S4703CB, Tax Lot 1100, which is located in City's I-2 Heavy Industrial zone. The application was administratively reviewed by the City's Hearings Officer through the procedures outlined in OCC Chapter 10B-04.

**APPLICABLE CRITERIA:** The applicable approval criteria are set out in the Hearings Officer's decision and include OCC CHAPTER 10B-25, CONDITIONAL USE PERMITS; CHAPTER 10A-41, I-2 HEAVY INDUSTRIAL ZONE; CHAPTER 10A-43, INDUSTRIAL ZONES SPACE LIMITS TABLE; CHAPTER 10A-57, GENERAL PROVISIONS; and CHAPTER 10A-59, MARIJUANA RELATED OPERATIONS AND ACTIVITIES

**DECISION:** Based on the requirements set under OCC Chapter 10A-59, the City of Ontario Hearing's Officer **Denied** the requested Conditional Use Permit for a Marijuana Retail Facility, under 10A-59-15A(3) and 10A-59A(7) (required buffers for marijuana uses) and for failing to meet the applicant's burden of proof with respect to landscaping and parking requirements. **This**

decision is not final until this notice of decision is sent, and the 12-day appeal period has expired.

ANY PERSON, AGENCY OR ORGANIZATION RECEIVING THIS NOTICE, INCLUDING RESIDENTS, WHO ARE AGGRIEVED BY THE ACTIONS OF THE HEARING OFFICER, MAY SUBMIT AN APPEAL OF THIS DECISION PRIOR TO THE DECISION BECOMING FINAL. AN APPEAL OF THIS DECISION BY THE HEARINGS OFFICER MUST BE TO THE CITY OF ONTARIO PLANNING COMMISSION. THOSE RECEIVING THIS NOTICE OF DECISION HAVE 12 DAYS FROM THE DATE OF THIS NOTICE OR THE DATE NOTED BELOW TO APPEAL; AFTER 12 DAYS FROM THE DATE OF THIS NOTICE OR THE DATE NOTED BELOW, IF NOT APPEALED, THE DECISION BECOMES FINAL AND IRREVOCABLE.

The appeal must be in writing on the form prescribed by the Planning Director available at the community Development Center or on line at land use- appeal application 2018.pdf ([ontariooregon.org](http://ontariooregon.org)) and must contain the information required under City Code 10B-10-30, and must be accompanied with the required fee of \$240.00.

An appeal must be received no later than 5:00 P.M. on September 27, 2022, in the offices of the City of Ontario Department of Community Development, Planning Division, at 458 SW 3rd Street, Ontario, Oregon 97914. A timely appeal of a Hearings Officer or Planning Official decision will be heard by the City of Ontario Planning Commission as a “de novo”, or new, hearing within approximately 30 days of receiving a timely appeal. This matter may not be appealed directly to the Oregon Land Use Board of Appeals (LUBA) under ORS 197.830.

If you have any questions regarding this Notice of Decision, wish to review the decision, or wish to review any materials in the record for this planning file (including the subject application), please contact Dan Cummings, Community Development Director, at 458 SW 3rd Street, Ontario, Oregon 97914: Telephone (541) 881-3222. Copies of the decision and all materials in the record for this planning file can be obtained at a reasonable cost.

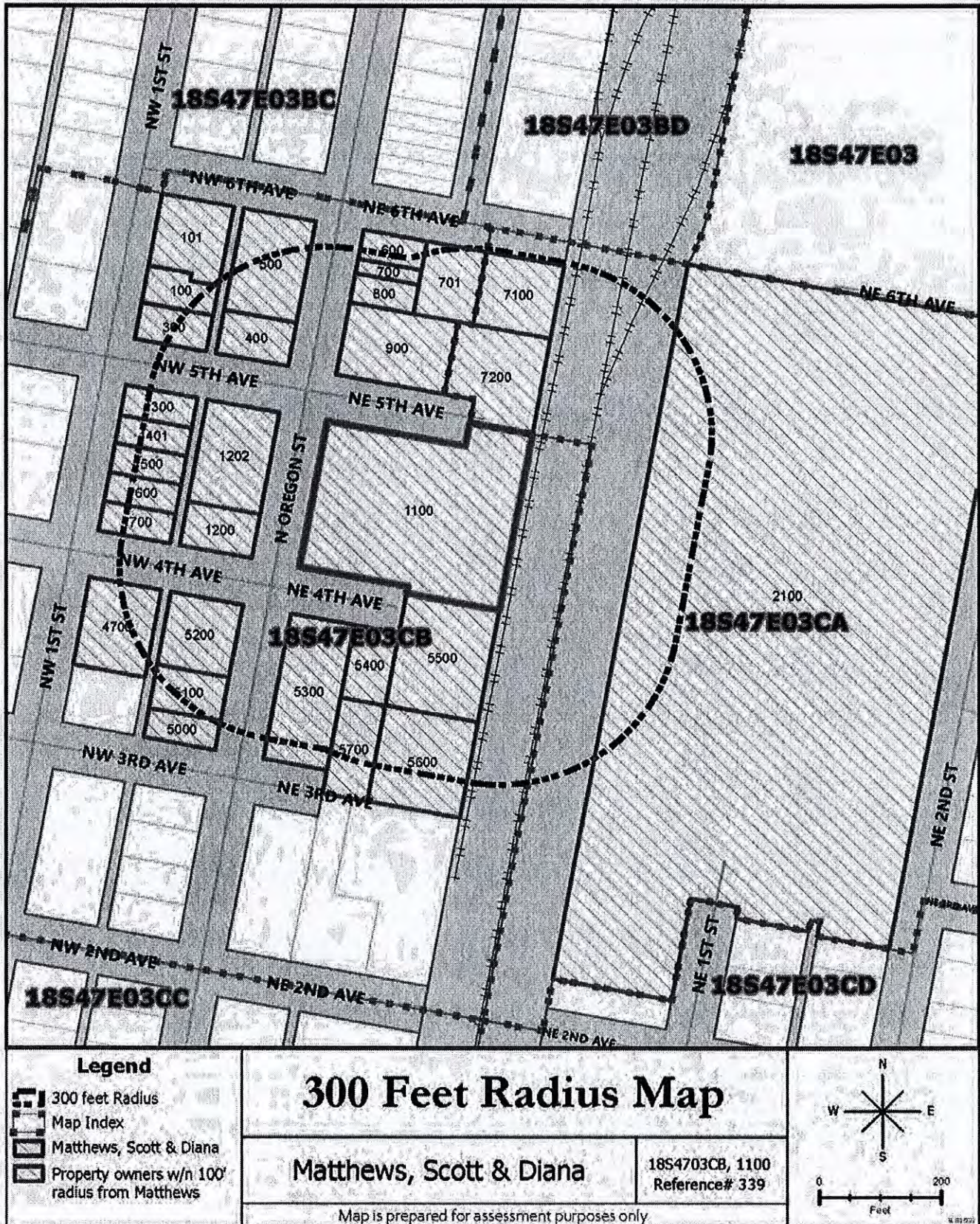
Sincerely,

A handwritten signature in black ink, appearing to read "Dan K. Cummings", is written over a light gray rectangular background.

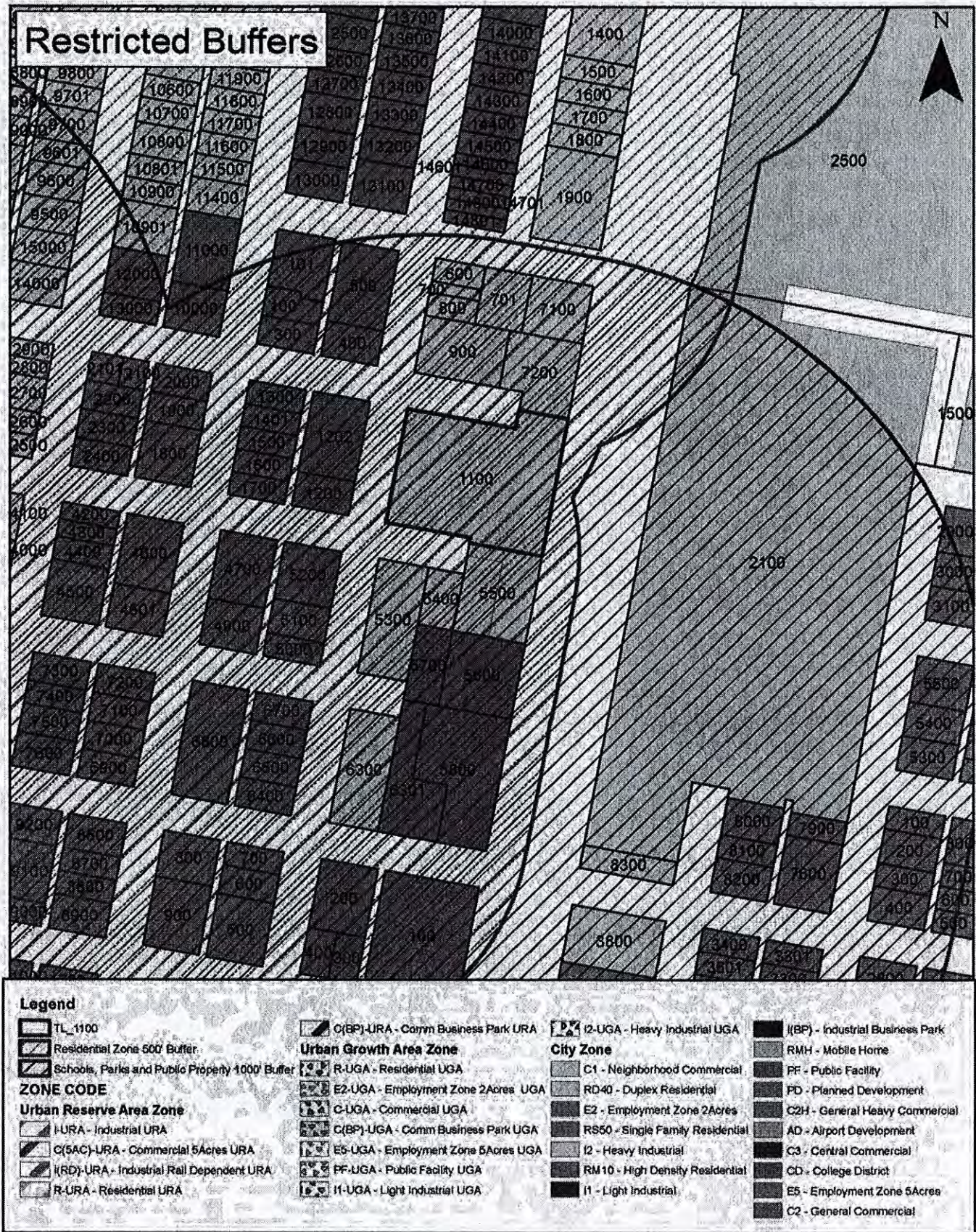
Dan K. Cummings  
Community Development Director

Property owner notification map Attached  
Restricted Area Map (Buffer Zones) Attached

# 300 feet Notification to Property owners Map



# Restricted Area Map





City of Ontario  
Community Development Director  
444 SW 4<sup>th</sup> Street  
Ontario, OR 97914  
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**City of Ontario Department of Community Development-Planning Division**  
**Hearings Officer Decision**  
**Request for Approval of a Conditional Use Permit**  
**2022-07-27CUP**  
**DECISION DATE: September 13, 2022**

**Decision Prepared By: Dan K. Cummings, Community Development Director**

**I. GENERAL INFORMATION AND FACTS**

**Applicant/Agent:** Scott Inc./Scott Matthews  
432 North Oregon Street  
Ontario, OR 97914  
(208) 724-7720

**Property Owners:** Scott R. Matthews  
Diana L. Matthews  
P.O. Box 273  
Emmett, ID 83617

**Land Use Review:** Conditional Use Permit **10A-41-10 (8)**.

**Property Description:** Tax Lot 1100, Tax Map 18S4703CB, Property address is 420 North Oregon Street, Ontario, Oregon 97914.

**Location:** Located east and west between North Oregon and Union Pacific RR ROW and north and south between NE 4<sup>th</sup> Avenue and NE 5<sup>th</sup> Avenue. (Exhibit "A")

**Existing Development:** The property is partially developed with an older multi-tenant building, which is approximately 24,000 square feet in size according to County Assessor records.

**Proposal:** To establish a Marijuana Retail Facility under City Code 10A-59 Marijuana Related Operations and Activities.

**Zone:** I-2 Heavy Industrial

**Size of Property:** The total site is 2.02 acres according to the Malheur County website and the application.

{21789050-01507569;2}

## **II. Summary & Background:**

In November of 2018, the citizens of Ontario voted to remove a previously enacted local ban on marijuana uses within the city limits of Ontario. In anticipation that the ban may be lifted, the City engaged in extensive community outreach to develop standards and criteria for marijuana uses. This effort led to the adoption of Ordinance #2748-2018 on October 23, 2018, which, upon removal of the local ban, allows for various marijuana facilities, within specified zones, and subject to specified criteria, standards, and review procedures. As pertinent to this decision, marijuana retail facilities are allowed as a conditional use in the I-2 Heavy Industrial Zone provided standards and criteria established under Ontario City Code (OCC) Title 10A-59 and other City Codes are met including, without limitation, OCC 10A-59-15(A)(3) and OCC 10A-59-15(A)(7). OCC 10A-59-15(A)(3) requires a 1000-foot setback from a Public Facility zone and OCC 10A-59-15(A)(7) requires a 500-foot setback from a residential zone (and is not met in the subject application as discussed below). See Exhibit “F” Marijuana Restricted Area Map made a part hereof.

Notwithstanding the buffer requirements of OCC 10A-59-15(A)(3) and OCC 10A-59-15(A)(7), the applicant submitted a Land Use Compatibility Statement (LUCS) for a marijuana retail facility on the property located at 420 North Oregon Street on May 25, 2022. Pursuant to the guidance in *Scott Inc. v. City of Ontario*, 503 P3d 502 (2021), the City refused to take action on the LUCS until the applicant submitted an application for a conditional use permit.

The applicant then applied, under protest, for a Conditional Use Permit to establish a marijuana retail facility on the subject property. As explained in the applicant’s burden of proof statement, the applicant contends that a conditional use permit is not required because “the City agreed to approve a marijuana retailer facility on the Property when the then-existing moratorium/ban on dispensaries was lifted” pursuant to an agreement between the applicant and the City dated April 18, 2016. The applicant did not submit the referenced agreement as part of the application or provide any specific citations to provisions within the agreement, but presumably is referring to the following provision from the agreement:

*Changes in Law. If there is a change in Oregon law or Ontario ordinances to permit medical marijuana dispensaries or recreational marijuana businesses in the Ontario city limits, this Settlement Agreement shall not preclude Scott, Inc. from operating such a business in compliance with Oregon law and/or Ontario ordinances enacted hereafter.*

The Hearings Officer disagrees that this provision, or any other provision of the agreement, provides any entitlement to a Marijuana Retail facility. Rather, the provision of the agreement obliquely referenced by the applicant provides that the *agreement* (as opposed to subsequently adopted land use regulations) “shall not preclude” the applicant from operating a Marijuana Retail facility provided such business complies with applicable law. In other words, this provision simply provides that the applicant can pursue any opportunities for a marijuana business that might arise under future enactments and is not waiving any such rights by entering into the agreement. Neither this provision nor any other provision of the Agreement prohibits the City from adopting land use or time, place, and manner restrictions that would preclude a marijuana

business. Accordingly, to approve a retail marijuana facility on this subject property, the applicant must comply with all the regulations and requirements of applicable law, including, without limitation, approval of a Conditional Use Permit (CUP) and compliance with all buffers related to Marijuana Retail facilities under OCC Chapter 10A-59.

Furthermore, the Hearings Officer does not find that the agreement could ever provide the type of entitlements alleged by the applicant. First, the applicant does not cite any authority for the proposition that a city can grant a land use approval for a prohibited use based on the potential for the use to become lawful in the future. Second, the City cannot pre-emptively waive future generally applicable land use regulations (outside of the statutory development agreement process under ORS 94.504 to .528 and there is no record that such a development agreement exists). Third, to the extent cities have any of the foregoing authority, the agreement was not subject to any notice or otherwise processed as a land use application requisite for granting a land use entitlement.

To the extent the applicant suggests that the applicant can pursue the marijuana retail facility as a nonconforming use. The applicant could not have a nonconforming marijuana retail use as there was no point in time when such a use could have been lawfully established. Prior to lifting the ban, marijuana retail uses within the City were illegal under state and/or local law. Following, the ban being overturned, the only way to lawfully establish a marijuana retail use is through the conditional use approval process. Applicant has never obtained such approval and has only now applied for such a use. It must be further noted that per OCC 10A-05-35(2), the discontinuance of a nonconforming use of land for six months out of any 12 consecutive months or change of nonconforming use of land to some other kind of nonconforming use constitutes abandonment and termination of the nonconforming use. To the extent the use could ever have been lawfully established, City is not aware of the applicant ever obtaining appropriate licensures or paying applicable taxes that would otherwise be required if the use had ever been in operation (and particularly not within the past year).

### **III. Applicable Ordinance & Comprehensive Plan Criteria and Standards:**

The proposed development must comply with applicable provisions of the OCC and the City of Ontario Comprehensive Plan. Generally, unless otherwise noted, if a request is found to be consistent with the Zoning Ordinance it is normally considered to be consistent with the Comprehensive Plan.

#### **CHAPTER 10B-25 CONDITONAL USE PERMITS**

- A. 10B-25-05 PURPOSE AND AUTHORITY.** *Certain types of uses require special consideration prior to their being permitted in a particular zone. All uses permitted conditionally are declared to be possessing such unique and special characteristics as to make impractical their being included as outright uses in the particular zone as established by this Title. The location and operation of conditional uses shall be subject to review by the Hearing Officer prior to issuance of a conditional use permit. The purpose of review shall be to determine that the characteristics of a proposed conditional use shall be reasonably compatible with the type of uses permitted in surrounding areas, the size of the area required for the development of such uses, and such impacts as may occur from*

*emissions of discharges into the air, land or water as well as impacts of noise, vibration, odor, heat, dust, glare and lighting; and for the further purpose of stipulating such conditions as be reasonable so that the basic purposes of this Title shall be served. Nothing herein shall require the city to grant a conditional use permit. The decision of the Hearing Officer shall be the final decision of the City unless an appeal is filed as authorized by this Title.*

**Conclusion:** As discussed below the proposed Marijuana Retail facility is a conditional use in the I-2 Zone. The OCC specifies that Conditional Use Permit applications are reviewed by the Hearings Officer or the Planning Commission. The Community Development Director has been designated by the city as the Hearings Officer and will review this application.

**B. 10B-25-30 REQUIRED FINDINGS, DECISION CRITERIA.** *Prior to making decisions on conditional use applications, the Hearing Officer shall analyze the following criteria and incorporate such analysis into his decision and findings:*

1. *The conditional use permit conforms to the requirements of this Title, including the site plan standards of this Title, and all other provisions of the City Code.*

**Conclusion:** The applicable approval criteria for the subject application are set forth in this decision. The submitted site plan in the application does not meet the requirements of OCC 10B-02-15 and 10B-02-20 in clear enough detail to make a final decision therefore, the proposal does not comply with all applicable provisions of the City Code and therefore does not meet the requirements of this criterion.

2. *The site for the proposed use is adequate in size and shape to accommodate said use, and all yards, spaces, walls and fences, parking, loading, landscaping, and other features required to make the use compatible with surrounding uses in the neighborhood.*

**Conclusion:** The proposal can likely meet applicable approval criteria with respect to size of structures for the proposed use, required parking, setbacks, and landscaping. However, the submitted plans lack sufficient detail to fully evaluate this criterion. If approved, more detailed plans will be required before City will issue building permits and/or a marijuana retail facility license.

3. *The site for the proposed use relates to streets and other public facilities adequately to accommodate the demands generated by the proposed use.*

**Conclusion:** The property is located between North Oregon Street (front) and Union Pacific Railroad Right of Way (rear) and between undeveloped NE 4<sup>th</sup> Avenue (south side) and undeveloped NE 5<sup>th</sup> Avenue (north side). The property has access off North Oregon Street, as well as NE 4<sup>th</sup> and 5<sup>th</sup> Avenues. Neither NE 4<sup>th</sup> Street nor NE 5<sup>th</sup> Avenue are constructed to city standards which requires the extension of city sewer and water main lines as well as curb, gutter, and sidewalks at a minimum.

If the Conditional Use Permit is approved, the applicant will be required to improve NE 4<sup>th</sup> Avenue along the entire frontage of the property to City street standards as noted above.

4. *The conditions stated in the decision are deemed necessary to protect the public health, safety, and general welfare.*

**Conclusion:** The application is not consistent with the applicable approval criteria as noted herein. As discussed below, in the event that the use is determined to not be prohibited by the OCC, the Hearings Officer has identified conditions of approval that would be sufficient to meet this criterion.

#### CHAPTER 10A-41, I-2 HEAVY INDUSTRIAL ZONE

- A. *10A-41-10 CONDITIONAL USES, COMMERCIAL. The conditional commercial uses listed below may be permitted in the I-2 Zone upon application of the standards for all conditional uses and the following additional standard: The proposed location and size of the proposed commercial use will not substantially interfere with the development of the industrial zones for industrial uses. .... 8. Marijuana retailer as provided in Chapter 10A-59;*

**Conclusion:** Marijuana retailers are allowed as a conditional use in the I-2, subject to the standards in 10A-59 and other provisions of the OCC as discussed in this decision.

- B. *10A-41-20 - SPACE LIMITS. The building, development site, and yard dimensions applicable to the I-2 Zone are found on the Industrial Space Limits Table, Chapter 10A-43. More than one principal industrial building may be constructed on two development sites of over 75,000 square feet.*

**Conclusion:** The Industrial Space Limits Table is addressed below.

- C. *10A-41-25 - MISCELLANEOUS PROVISIONS. The provisions of Chapter 10A-57, Miscellaneous Provisions shall apply in addition to the performance standards specific to I-2 Zone.*

**Conclusion:** The provisions of Chapter 10A-57 are addressed below.

- D. *10A-41-30 - PERFORMANCE STANDARDS. Each structure or use permitted as of right or conditionally in the I-2 Zone shall meet the following performance standards:*
  1. *Conduct of use. No permitted or permissible use shall be conducted in any manner which would render it noxious or offensive by reason of dust, refuse matter, odor, smoke, gas fumes, noise, vibration or glare.*
  2. *Enclosure. All manufacturing or processing activities shall be completely enclosed in buildings, except as provided by the conditional use section of this Chapter.*
  3. *Outdoor storage. Junk, salvage, auto wrecking and similar operations shall be fenced, screened or limited in height so as to block substantially any view of such material from any point located on an abutting street or from any point less than eight feet above grade within any abutting residential or commercial zone. However, this Section shall not be*

*deemed to require more than an opaque fence or screen not more than ten feet in height and not longer than the full perimeter of the subject development site, and further provided such screening may be reduced in height so as to avoid shading a solar collector on adjoining property when so requested by the adjoining property owner or a government official. No outdoor storage of materials which could be blown into the air or strewn about by wind shall be permitted.*

*4. Loading. Truck loading and unloading operations shall take place entirely within the site and shall not be so located as to interfere with pedestrian routes.*

*5. Fire hazard. No operation shall be established which fails to meet the fire code which is adopted into the Ontario City Code and any applicable State or Federal codes.*

*6. Noise. Noise shall be muffled as available technology permits so as to not be objectionable due to intermittence, beat frequency or shrillness and shall meet any State standards.*

*7. Sewage and liquid waste. All operations shall comply with Title 8, Ontario City Code and any applicable regulations of State or Federal agencies responsible for pollution control. No wastes of a chemical, organic or radioactive nature shall be injected or buried in the ground or stored in the open on the surface except in approved containers.*

*8. Odor. The emission odors that are generally agreed to be obnoxious to any considerable number of persons is prohibited. Observations shall be made at the property line of the establishment generating the odors. As a general guide to classification of odor, it is deemed that odors of putrefaction, hydrogen sulfide, fermentation and rendering processes, are objectionable while odors associated with baking, coffee roasting or nut roasting are normally not considered obnoxious. To reduce odors the open air cooling of products with aromatic emissions shall be avoided. Floors, machinery storage containers and other surfaces shall be clean of material which is potentially odor causing.*

*9. Vibrations. All machines shall be mounted so as to minimize vibration. Vibration shall not be so excessive as to interfere with heavy industrial operations on nearby premises.*

*10. Glare and heat. All glare and heat producing operations, such as welding arcs and open furnaces, shall be shielded so that they are not visible from the property line and surfaces near the glare source shall be of a type which will minimize the reflection of such glare beyond the property line. No heat from equipment or furnaces shall raise the temperature of materials or ambient air at the property line more than three degrees Fahrenheit.*

*11. Interpretation. Whenever it cannot be decided by reasonable observation that a performance standard is being met, it shall be the responsibility of the operator of the use to supply evidence or engineering data to support the contention that a standard is being met. The standards are designed, except where referring to other codes, to be judged by ordinary human senses and not by the minute detail of scientific quality instruments.*

**Conclusion:** The foregoing criteria could be met with conditions of approval requiring on-going compliance with the requirements of OCC 10A-41-30.

## CHAPTER 10A-43, INDUSTRIAL ZONES SPACE LIMITS TABLE

- A. 10A-43-01 - PURPOSE AND APPLICABILITY.** *The specifications for minimum yard space, height, lot dimensions and other attributes, pertaining to structures or permitted uses, in the following table shall apply to all developments in the applicable zone.*

- 1. Maximum height: None.*
- 2. Minimum lot size: 6,000 square feet.*
- 3. Yard space requirements:*
  - Front yard: 0 feet.*
  - Rear yard: 5 feet.*
  - Side yard: 10 feet.*
  - Maximum lot coverage: Not to exceed 90 percent of the total lot area.*

**Conclusion:** The existing structure was built in 1947 and is not proposed to be expanded or other dimensionally modified as part of the application.

## CHAPTER 10A-57, GENERAL PROVISIONS

- A. 0A-57-05 - MISCELLANEOUS PROVISIONS.** *The following provisions apply to all zones as appropriate and not otherwise preempted by specific provisions in the text of an individual zone. Unless otherwise specified, the miscellaneous provisions shall apply in addition to any provisions specific to an individual zone.*

**Conclusion:** The criteria of OCC Chapter 10A-57 are applicable to the subject application.

- B. 10A-57-10 - GENERAL SITE PERFORMANCE STANDARDS.** *The following general environmental performance standards shall apply to all developments and in addition to any specific standards shall apply to all developments and in addition to any more specific standards for a zone or use:*

- 1. Health hazards. All materials including waste shall be stored, and all land and structures shall be maintained, in a manner which will not attract, or aid in the propagation of insects or rodents, or otherwise create a health hazard.*
- 2. Noise and vibrations. No use shall emit noise beyond its property lines which exceeds current Oregon Department of Environmental Quality (DEQ) noise standards for such uses. No equipment, machinery, or facility shall be operated so as to generate vibration which exceeds DEQ Standards.*
- 3. Air quality. No use shall emit dust, smoke, gases, or create objectionable odors, which exceed current Oregon Department of Environmental Quality air quality standards.*
- 4. Heat and glare. Except for exterior lighting, operations producing heat or glare shall be conducted entirely within an enclosed building or completely screened area.*

5. *Exterior lighting. Lights illuminating sites or structures shall be installed and maintained such that their illumination is not directly beyond the property line.*

6. *Energy efficiency. All sites and structures shall be developed, designed, constructed, and maintained so as to be as energy-efficient as practical, including but not limited to: Compliance with applicable building code energy standards; orientation of buildings and facilities so as to maximize energy conservation or promote utilization of renewable energy resources; utilization of landscaping to reduce the heating and cooling needs of structures; or utilization of similar techniques to achieve energy conservation and renewable resource development in general.*

**Conclusion:** The foregoing criteria could be met with conditions of approval requiring on-going compliance with the requirements of OCC 10A-57-10.

C. *10A-57-15 - VISION CLEARANCE. Vision clearance shall apply to all zones unless specifically excepted. Vision clearance shall mean a triangular area at the street corner of a corner lot, the space being defined by a line across the corner, the ends of which are located at the curb face a distance of 50 feet from the point of intersection of the extended curb lines. The area shall not contain any planting, walls, structures, or temporary or permanent obstruction exceeding 30 inches in height, measured from the top of the curb or, where no curb exists, from the established street center line grade. The foregoing provision shall not apply to public utility poles; trees trimmed (to the trunk) to a line at least eight feet above the level of the intersection; supporting members of appurtenances to permanent buildings existing on the date these standards became effective; official warning signs or signals; places where the contour of the ground is such that there can be no cross-visibility at the intersection; or to signs mounted eight feet or more above the ground and whose supports do not constitute an obstruction. Portable signs, merchandise, or vehicles for sale shall be considered obstructions to visibility in applying this Section.*

**Conclusion:** The foregoing criteria could be met with conditions of approval requiring on-going compliance with the requirements of OCC 10A-57-15. If approved, clear vision areas must be depicted on more detailed plans required for issuance of building permits and/or a marijuana retail license.

D. *10A-57-40 - LANDSCAPING REQUIRED. All new development, and changes of use, including the construction of parking lots, shall have at least six percent of the development site area in landscaping, as defined herein, except where another standard is specified for a definite use, group of uses, or a zone.*

**Conclusion:** The subject application constitutes new development and/or a change of use. Landscaping is required.

E. *10A-57-41 - LANDSCAPING, INDUSTRIAL ZONES. Landscaping for Industrial Zones shall be determined using the sum total area of office space, space open to the public, and parking area; not the total lot area.*

**Conclusion:** The applicant has not identified which portions of the building, other than the specific unit in which the proposed marijuana retail use is proposed, are office space and/or open to the public. Without this information, the Hearings Officer cannot evaluate whether the proposed landscaping (which provide numerical information) is sufficient to meet applicable requirements. The applicant has not met its burden of proof.

**F. 10A-57-42 - LANDSCAPING, EXISTING STRUCTURES.** *A change of use that involves use of an existing structure may qualify for a reduction of the required six percent of the total lot area; however, all non-driveway street frontage must be landscaped as required by 10A-57-55(2) below. The following standards, at a minimum, shall apply to those lots qualifying for a reduction:*

**Conclusion:** The applicant has not sought a reduction in required landscaping or provided any information that would allow for a determination of whether the subject property qualifies for a reduction.

**G. 10A-57-55 - LANDSCAPING, PERFORMANCE STANDARDS.** *All landscaping required by this Title shall comply with the following performance standards:*

*1. 65 percent minimum of the required six percent of the development site area landscaping shall be green and growing and shall be irrigated. This required coverage does not include the anticipated mature overhead canopies of new trees. The area of trees counted toward the minimum coverage shall be the canopy areas of new trees and existing trees at the time of planting. Plans shall be submitted with any required permit information that show the amount of landscaping in square feet that is required for the lot; the amount of landscaping proposed and the location of what is proposed; and, a description of the type of irrigation system. Landscaping that is not maintained is a violation of this Code and a property owner may be subject to enforcement under the provisions of Title 10A and any other applicable City Code, and Oregon Law.*

*2. Required landscaping shall be distributed so that all non-driveway street frontages are landscaped, including in Industrial Zones, even if the area so used exceeds six percent of the total area required, including Industrial Zones. All of the required area cannot be satisfied by the use of remote and otherwise unusable portions of the development site.*

*3. Plantings used to screen a space frequently used by the public, such as a parking lot, shall have a combination of higher and lower growing species so as to provide for sight clearance at exits; for visual separation from the street, and for openings to allow police surveillance from the street.*

**Conclusion:** Once the total landscaping requirement is met, the foregoing criteria could be met with conditions of approval requiring that the required amount of landscaping meet the foregoing criteria. If approved, the applicant will be required to submit detailed landscaping plans depicting compliance with all landscaping requirements for city approval and must then install landscaping in accordance with the approved plan prior to issuance of building permits and/or a marijuana retail license.

**H. Landscaping required by this Title shall comply with the following additional standards for new commercial uses and multi-family dwellings.**

4. A combination of deciduous and evergreen trees, shrubs, and ground covers shall be used for all planted areas, the selection of which shall be based on local climate, exposure, water availability, and drainage conditions, among other factors. A list of acceptable trees, shrubs, and ground covers is available at the Public Works Department. The Public Works Director shall be responsible for maintaining this list. When new vegetation is planted, soils shall be amended and irrigation shall be provided, as necessary, to allow for healthy plant growth. The selection of plants and related materials shall be based on the following standards and guidelines:

5. All of the following standards shall be met for parking lots with six or more spaces, in addition to the requirements of paragraph 4 above. If a development contains multiple parking lots, then the standards shall be evaluated separately for each parking lot.

a. A minimum of ten percent of the total surface area of all parking areas, as measured around the perimeter of all parking spaces and maneuvering areas, shall be landscaped. Such landscaping shall include canopy trees distributed throughout the parking area. At a minimum, one tree per ten parking spaces shall be planted over and adjacent to the parking area.

b. All parking areas with more than 12 spaces shall provide landscape islands with trees that break up the parking area into rows of not more than ten contiguous parking spaces. Landscape islands shall have dimensions of not less than 48 square feet of area (not including curbs) and no dimension of less than six feet, to ensure adequate soil, water and space for healthy plant growth.

c. Wheel stops, curbs, bollards, or other physical barriers are required along the edges of all vehicle-maneuvering areas to protect landscaping from being damaged by vehicles. Trees shall be planted not less than two feet from any such barrier, and not less than four feet from any such barrier (except bollards) at the front of a parking stall.

d. Trees planted in tree wells within sidewalks or other paved areas shall be installed with root barriers, consistent with applicable nursery standards.

6. Landscaping located at the corner of a lot abutting a street intersection will meet the vision clearance standards of Section 10A-57-15 of this Code.

7. Applicant is required to submit a landscape plan showing the location of all required landscaping and a table listing plants proposed, as well as a table showing compliance with the green and growing requirements.

...

**Conclusion:** The applicant is proposing a new commercial use (the proposed use is identified as a commercial use in OCC 10A-41-10), the foregoing criteria are applicable. The foregoing criteria could be met with conditions of approval requiring that the required amount of landscaping meet the foregoing criteria. As noted above, a condition of approval will be imposed in the event of the application is approved.

- I. 10A-57-60 - OFF-STREET PARKING AND LOADING REQUIREMENTS.; 10A-57-62 - APPLICABILITY, GENERAL PROVISIONS. Every use established and every building erected or altered shall have permanently maintained parking spaces and loading spaces in accordance with the provisions of this Section except as specifically exempted or modified by other provisions of this Title.*

**Conclusion:** Applicant is establishing a new use (and OCC 10A-59-15(B)(2) requires the property to become compliant with current parking standards.

- J. 10A-57-70 - REQUIRED PARKING SPACES. Parking and loading space requirements are listed herein by one of three categories A, B, and C which differentiate uses according to whether the parking must be on-site; customer parking on-site but employee parking off-site, and all or part of the required spaces off-site.*

**Conclusion:** OCC 10A-59-15(B)(3) sets out the parking standards for marijuana retailers. However, it appears that the marijuana use will only occupy roughly 2,400 square feet of the 24,000 square foot building. The applicant has not provided any information about parking demand for the remainder of the building and thus the Hearings Officer cannot evaluate whether the provided parking is sufficient to meet total parking demand (including required loading spaces) on the property. The applicant has not met its burden of proof.

#### CHAPTER 10A-59, MARIJUANA RELATED OPERATIONS AND ACTIVITIES

- A. 10A-59-15 - MARIJUANA RELATED OPERATIONS AND ACTIVITIES GENERAL AND SPECIAL CONDITIONS IN THE C-1, C-2, C-3, C-2H, E-2, E-5, I-1 AND I-2 ZONES.*

*All marijuana operations and activities located in the C-1, C-2, C-3, C-2H, E-2, E-5, I-1 and I-2 zones are subject to Chapter 10B-25 ("Conditional Use Permits") of Title 10B, and to the conditions generally imposed upon conditional uses in these zones and to the application fee set by most recent fee resolution. The following special conditions shall also apply to all marijuana operations and activities:*

*(A) Location Restrictions. Marijuana operations and activities are prohibited in the following locations, with distances measured from the closest points of the respective lot lines:*

- 3. Within 1,000 feet of a property zoned as PF Public Facility or UGA-PF Public Facility UGA, excepting therefrom the Oregon Department of Transportation lands adjacent to East Idaho Avenue and the City of Ontario Water Treatment Plant lands East of East Lane and the Ontario Public Works Department lands located at 1551 NW 9th Street;*

7. *Within 500 feet of residential zones, including those designated in Chapter 11 (RS-50), Chapter 13 (RD-40), Chapter 17 (RM-10), Chapter 19 (R-MH), and Chapter 52 (UGA-R) of Title 10A;*

**Conclusion:** The applicant acknowledges that the subject property does not comply with the foregoing buffer from residential zones. The applicant does not address subsection (A)(3), but the subject property also falls within the required buffer under this subsection. As discussed above, the Hearings Officer does not find that the applicant is exempt from compliance with these buffers based on any prior agreement with the City or nonconforming use. The applicant further argues that the (A)(7) requirement was improperly adopted. While the Hearings Officer disputes the applicant's characterization of the adoption process, it is ultimately immaterial as the argument is an improper collateral attack on Ordinance #2748-2018 (and there is no suggestion that (A)(7) was improperly adopted). Because these standards are not met, and cannot be met with a condition of approval, the Hearings Officer must deny the application.

*(B) Other Restrictions. Marijuana operations and activities are subject to the following additional restrictions:*

*1. A facility shall be designed so that all transactions occur within the interior of the facility, out of the view of the public. All doorways, windows and other openings shall be located, covered or screened in such a manner to prevent a view into the interior from any exterior public or semipublic area. Walk-through windows, drive-through windows or other outside delivery systems are prohibited.*

**Conclusion:** The foregoing criterion could be met with a condition of approval. No walk-through/drive-through/outside delivery system is proposed or permitted.

*2. Any and all marijuana operations and activities are considered a change of use and any existing and new structures used for such operations shall be brought up to and/or constructed to current building codes and standards, including but not limited to the American Disability Act (ADA), parking standards and providing for public bathrooms for the business customer use including persons waiting to be serviced.*

**Conclusion:** Requirements for parking are addressed above and below. Compliance with current building codes and standards will be evaluated as part of building permits for tenant improvements for the proposed use. To the extent no building permit is required, Applicant must commission an inspection and remedy any deficiencies prior to issuance of any City marijuana retail license.

*3. All Medical and recreational marijuana retail facilities shall be required to provide parking as per [Section] 10A-57-75(4) as follows: One space for each employee, full or part time on the largest shift, plus one space for each 300 square feet of gross floor area. Parking for all marijuana operations and activities shall comply with off-street parking and loading requirements [Sections] 10A-57-60 through 10A-57-100.*

**Conclusion:** As noted above, the applicant addressed parking requirements for the marijuana retail use, but has not provided sufficient information to evaluate total parking demand for the building (and thus whether the spaces allocated for the marijuana retail use are needed to meet demand for other uses on the property). The applicant has not met its burden of proof.

*4. The facility must use an air filtration and ventilation system which, to the greatest extent feasible, confines all objectionable odors associated with the facility to the premises. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.*

*5. The facility shall be located in a permanent building, not in a trailer, cargo container or motor vehicle. Any manufactured building shall be a commercial grade design and construction certified by the State of Oregon.*

*6. The exterior of the facility shall have an exterior consistent with other buildings on abutting lots in the neighborhood so as not to cause blight.*

*7. All marijuana operations, activities and or facilities must install and maintain all security devices required by the licensing body either the Oregon Health Authority (OHA) or the Oregon Liquor Control Commission (OLCC).*

*8. All medical and recreational marijuana retail facilities within the C-3 zone shall have a large enough indoor waiting area as to not allow large customer lines outdoors along the public sidewalks and rights of ways or blocking any entrances to other adjacent businesses.*

*9. Prior to commencing business operations, a facility must have a current business license issued by the City of Ontario under Chapter 22 of Title 3 of the Ontario City Code and the licensed by the Oregon Health Authority (OHA) or the Oregon Liquor Control Commission (OLCC) for the type of operation allowed.*

**Conclusion:** The foregoing criteria could be met with conditions of approval.

*10. All marijuana operations and activities shall be on a conditional use application prescribed by the Ontario Planning Director and shall include all the items and attachments noted and required in the application along with all fees required by code and current resolution. The application will be date and time stamped as received by the Planning Department only, to set the order of review. The application will be reviewed by the Planning Director for completeness and compliance to established buffers before it is accepted for consideration. Any incomplete application or one not meeting the established buffers shall be returned to the applicant for corrections and/or additional required information and once returned will be time stamped and dated again. Once the application is accepted as complete by the Planning Director the date accepted as complete shall be the priority dated for establishing the buffer between marijuana retailers if the application is approved and all licensing and development requirements are met.*

**Conclusion:** The City notified the applicant in advance of accepting the application that the property would not meet required buffers. The applicant asserted its alternative discussed in this decision and insisted that the city process the application. Because the applicant will not be approved, the applicant will not have any priority with respect to buffers between the subject property and other marijuana retailers.

*11. The conditional use permit is governed by [Section] 10B-25-40 and the marijuana conditional use permit shall have a time limit of 12 months and become void if conditions are not met, unless an extension is granted for good cause under [Section] 10B-25-40(3).*

*12. The conditional use permit (CUP) must be approved by the Ontario Planning Department before any Land Use Compatibility Statement (LUCS) will be signed by the Ontario Planning Department for any of the Marijuana State Business License or Registration required by the State of Oregon and/or City of Ontario.*

**Conclusion:** To the extent approved, the foregoing would be conditions of approval.

#### **IV. SUMMARY CONCLUSIONS AND DECISION**

The application for a conditional use permit to allow for a Marijuana Retail Facility has not demonstrated compliance with the applicable approval criteria and is hereby **denied** a Conditional based on the findings and conclusions contained in this decision.

As the Hearings Officer anticipates that this decision will be appealed. In the event this decision is appealed, and the appellate body determines that the application meets or can meet all standards of approval, the Hearings Officer recommends the following conditions of approval

1. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application

2. Prior to issuance of building permits and/or a marijuana retail license, the applicant must submit for City review, and receive City approval of, a revised site plan depicting compliance with all applicable setback, wall, fence, parking, drive aisle, loading space, public improvement, and clear vision area standards.

3. Prior to issuance of building permits and/or a marijuana retail license, the Applicant must improve 4th Street along the entire property frontage to City standards.

4. At all times, the marijuana retail use must meet the standards of OCC 10A-41-30.

5. At all times, the marijuana retail use must meet the standards of OCC 10A-57-10.

6. If no building permits will be issued, the applicant must commission a private inspection of the subject property for compliance with building and fire code requirements. Prior to issuance of a marijuana retail license, applicant must submit the results of the private inspection

to City for City approval and make all corrections identified by the private inspection and/or City's review.

7. Prior to issuance of building permits and/or a marijuana retail license, the applicant must submit for City review, and receive City approval of, a revised landscaping plan compliant with OCC 10A-57-40 to 10A-57-55.

8. Prior to issuance of building permits and/or a marijuana retail license, the Applicant must install the landscaping depicted in the City approved landscaping plan.

9. Prior to issuance of building permits and/or a marijuana retail license, the applicant must improve the parking area to City standards including, without limitation, installation of parking lot landscaping, installation and signage for accessible parking spaces, striping of parking stalls to required dimensions, designation of required loading spaces, screening required by OCC 10A-57-89, and compliant parking lot lighting.

10. At all times, the marijuana retail use must meet the standards of OCC 10A-59-15(B)(1), (4), (5), (6), and (7)

11. At all times, the applicant must obtain and maintain all applicable state and local licensing for the marijuana retail use.

12. The conditional use permit will expire unless the foregoing conditions of approval are met within 12 months after this decision becomes final unless an extension is granted for good cause under OCC 10B-25-40(3).

#### **VIII. Exhibits:**

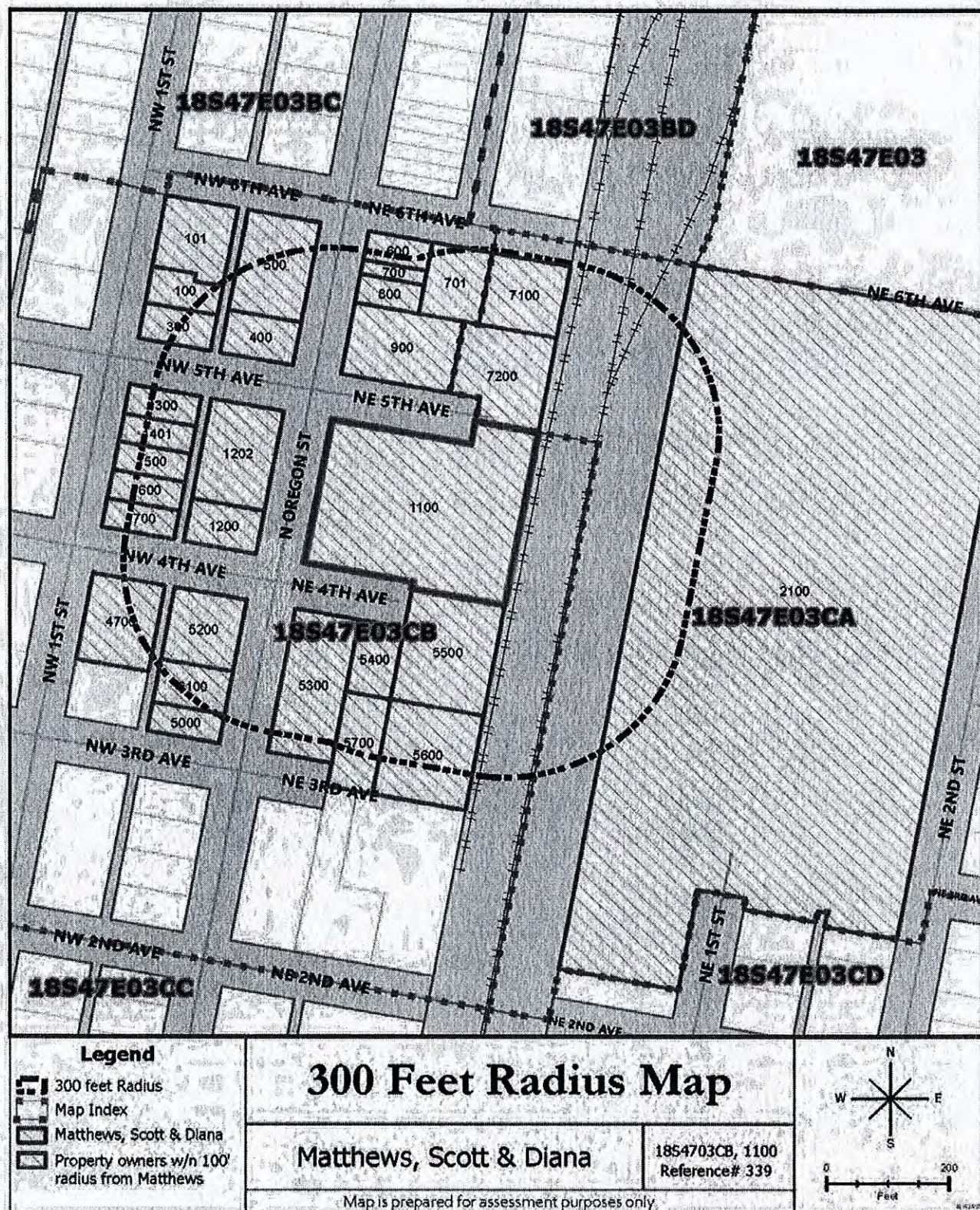
- |             |                                                            |
|-------------|------------------------------------------------------------|
| Exhibit "A" | Site Vicinity Map (also notification map)                  |
| Exhibit "B" | Proposed Site Plan (subject to change)                     |
| Exhibit "C" | Proposed Floor Plan of Retail Facility (subject to change) |
| Exhibit "D" | Proposed Off-Street Parking Plan                           |
| Exhibit "E" | Proposed Landscape Plan                                    |
| Exhibit "F" | Marijuana Restricted Area Map                              |

#### **Denied by Hearings Officer:**

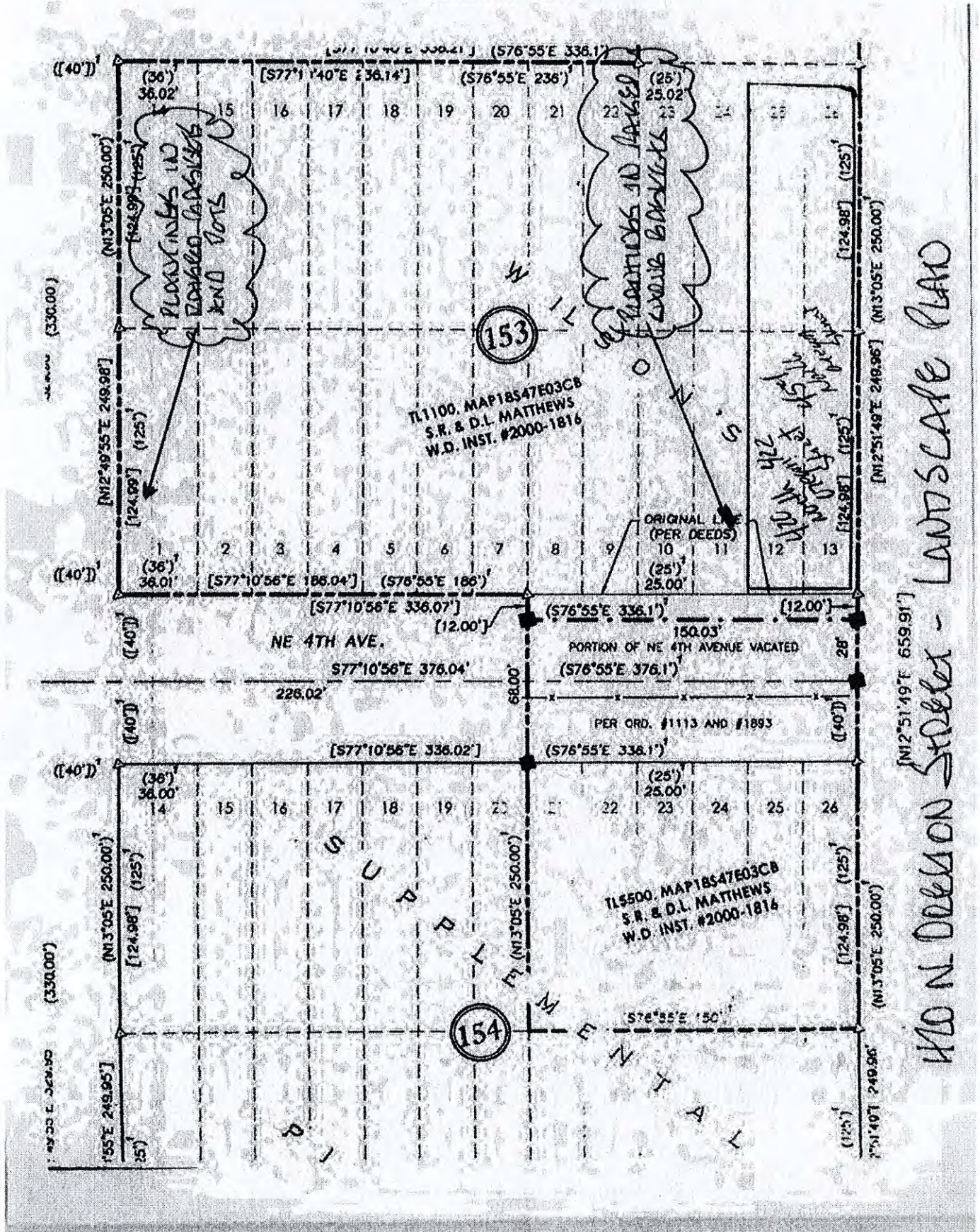


Dan K. Cummings  
Community Development Director

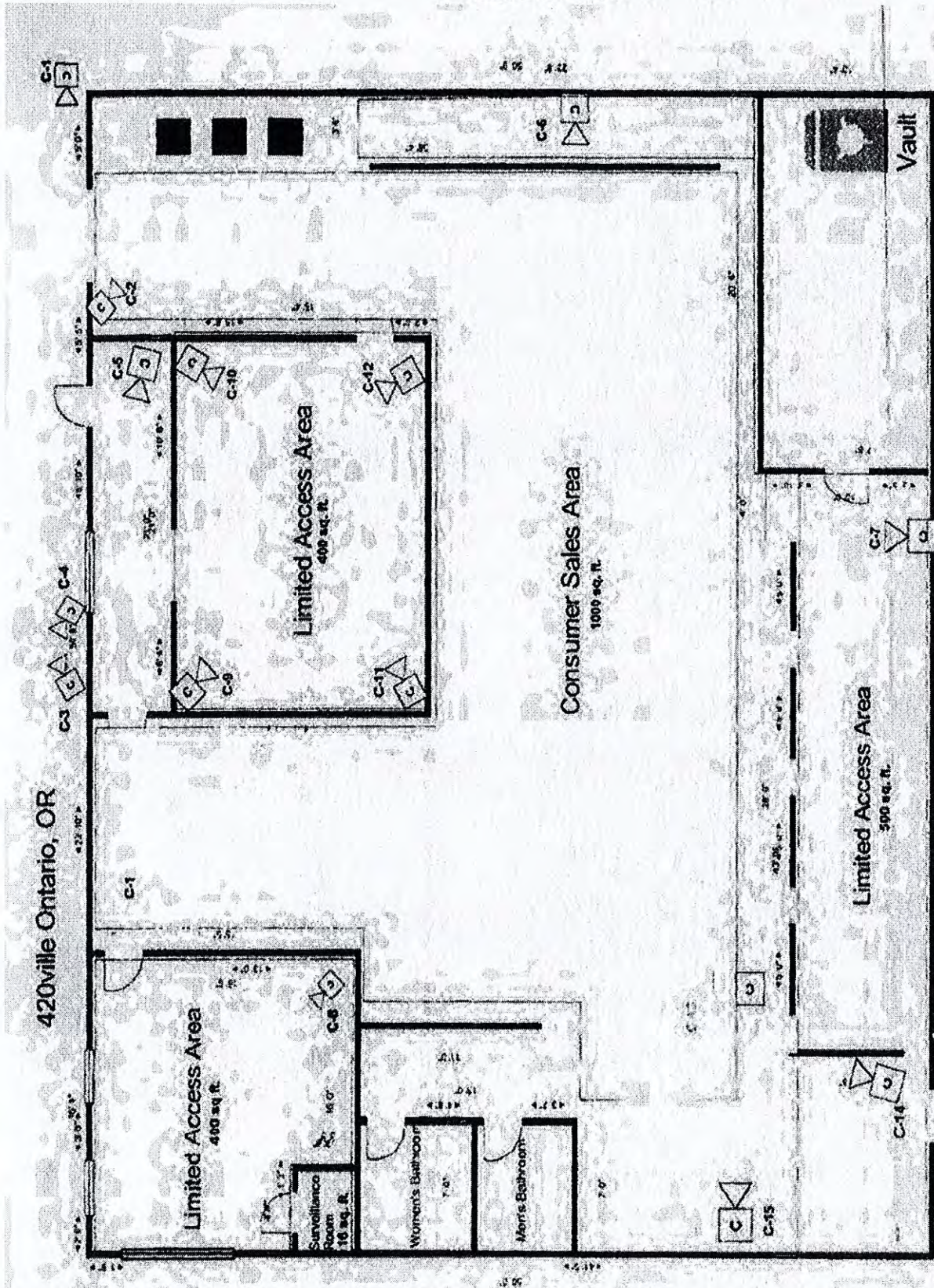
cc: Applicant, Property owner  
File



# Exhibit "B"

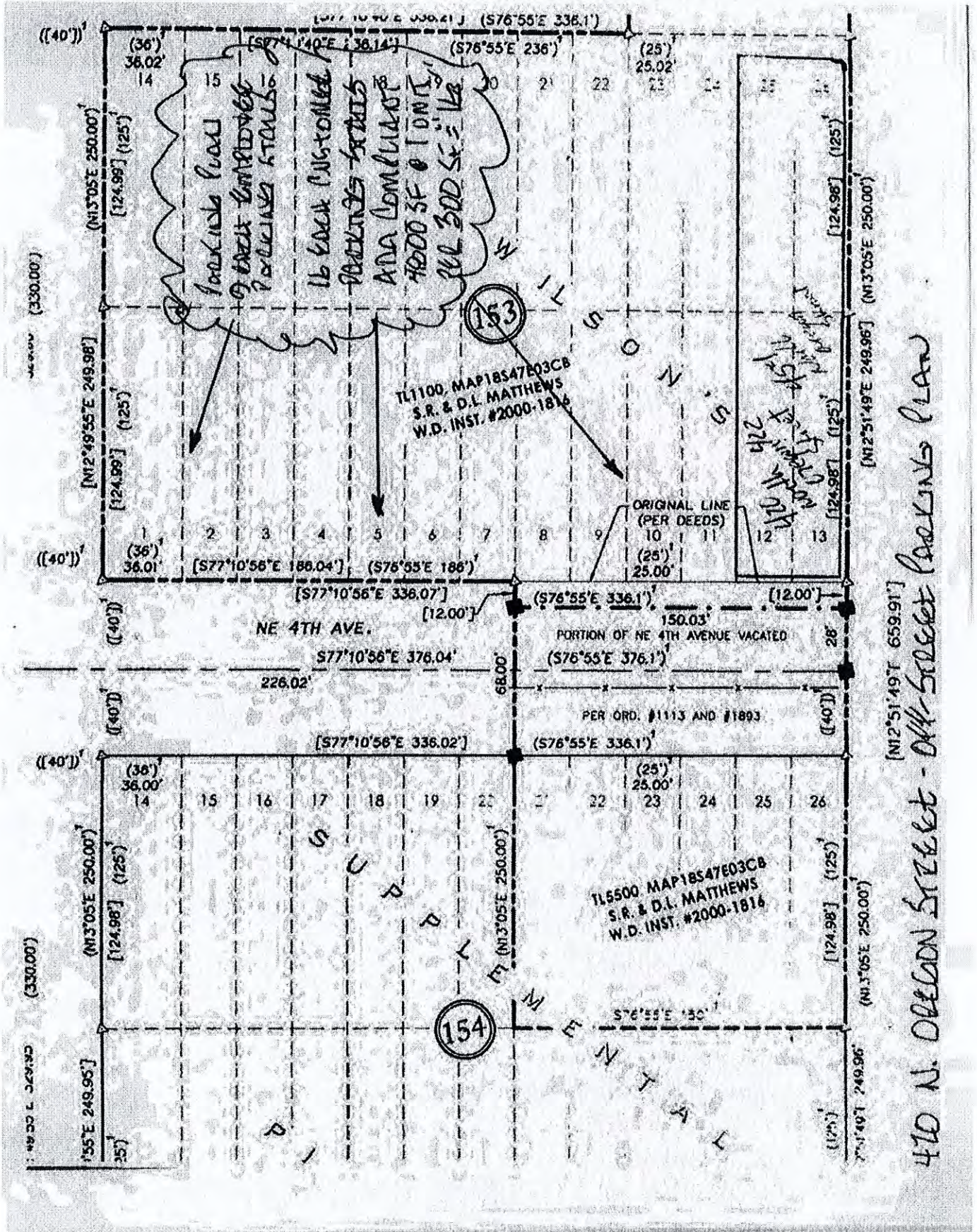


# Exhibit "C"

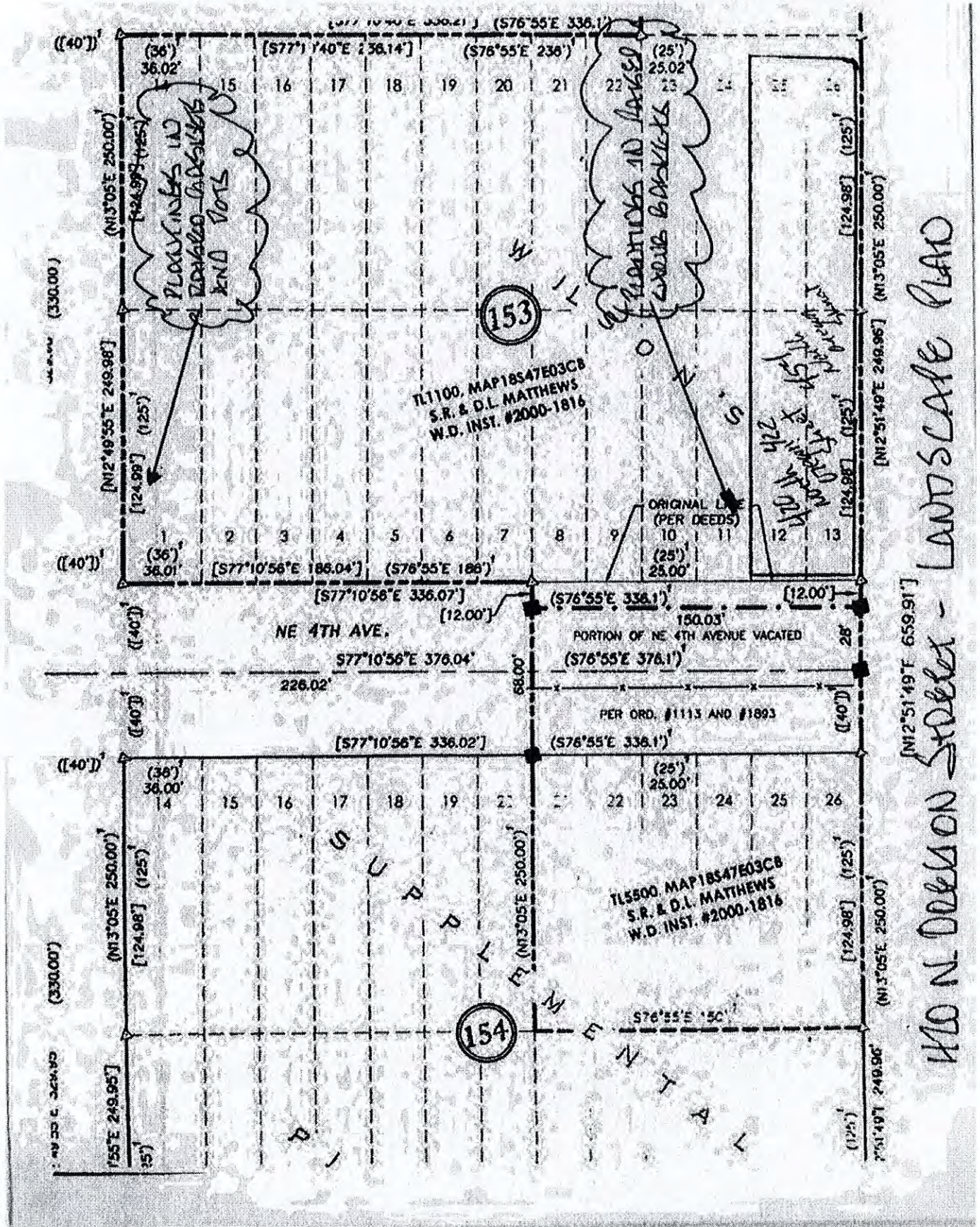


420 N. Ontario Street, BUILDING INTERIOR LAYOUT

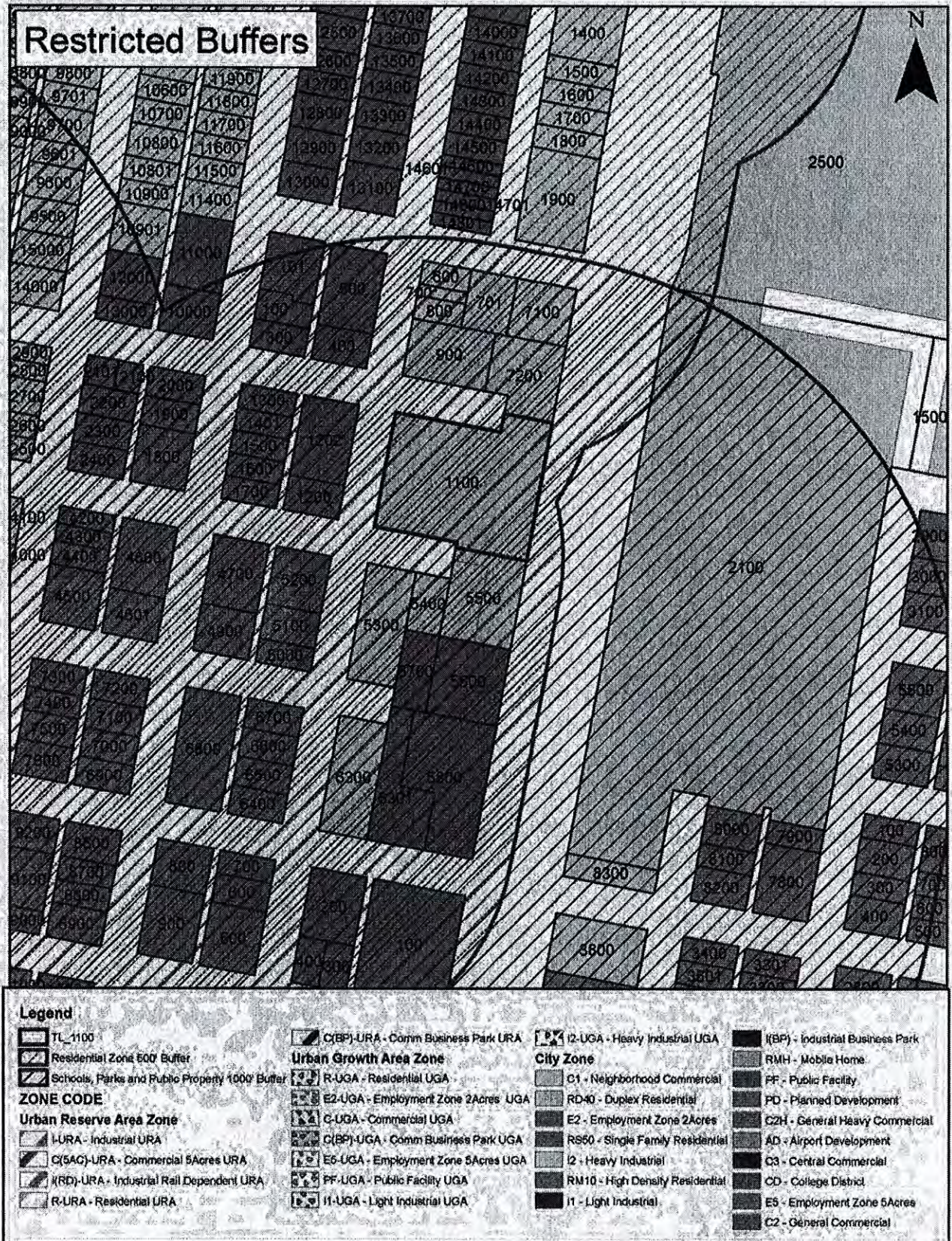
# Exhibit "D"



# Exhibit "E"



# Exhibit "F"



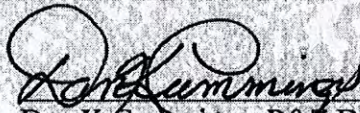
# AFFIDAVIT OF MAILING



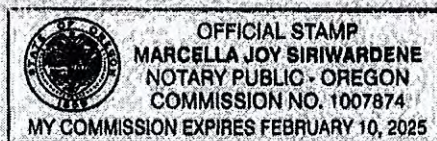
STATE OF OREGON )  
County of Malheur ) ss.  
City of Ontario )

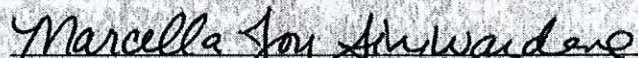
I, Dan K Cummings, being duly sworn, depose and say that I am the Planning and Zoning Director for the City of Ontario, Oregon.

That on the 14th day of SEPTEMBER, 2022, I mailed by United States First Class Mail, in a sealed envelope with postage prepaid, a copy of a notice of the City of Ontario Planning Commission & City Council Meeting for a Public Hearing regarding Land Use Action #2022-07-27 CUP, to the applicant(s), property owner(s), adjacent property owners, affected agencies, and all those otherwise entitled to notice as set forth in Sections 10B-03-10 and 10B-04-15, the original of which is attached hereto, addressed to each, at his/her/their/its last known address as obtained from the Malheur County Assessor's data, as set out in the attached mailing list.

  
Dan K. Cummings, P&Z Director

Subscribed and sworn to before me this 14th day of September, 2022.



  
Notary Public for Oregon

My Commission Expires: February 10, 2025

10WESTIDAHO LLC  
7437 ELMORE RD  
FRUITLAND, ID 83619

BEAL, JONATHAN D  
P O BOX 938  
ONTARIO, OR 97914

FIJI ENTERPRISES LLC  
P O BOX 7906  
BOISE, ID 83707

HARVEST ROCK CITY CHURCH INC  
MINISTERIOS CRISTIANOS CASA  
P O BOX 6723  
BOISE, ID 83707

MASS, MICHAEL  
3831 E 22 N  
RIGBY, ID 83442

MILLS, ARVIN E  
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PETRIDGE, STEPHANIE L  
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ONTARIO, OR 97914

SANCHEZ, ROGELIO  
410 NW 1ST ST  
ONTARIO, OR 97914

WOODS, STEVEN E & SANDRA F  
3555 S CADDIS WAY  
BOISE, ID 83716

523 N OREGON LLC  
1008 S LATAH  
BOISE, ID 83705

BIG HORN OIL CO LLC  
C/O FRANK BLANKINSHIP  
P O BOX 754  
BAKER CITY, OR 97814

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PAYETTE, ID 83661

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ONTARIO, OR 97914

MATTHEWS, SCOTT R & DIANA L  
P O BOX 273  
EMMETT, ID 83617

MILLS, ZACHARY C  
7437 ELMORE RD  
FRUITLAND, ID 83619

PROJECT DOVE  
P O BOX 980  
ONTARIO, OR 97914

SCHNEPP, JOHN  
P O BOX 448  
ONTARIO, OR 97914

SCOTT MATTHEWS  
432 NORTH OREGON STREET  
ONTARIO, OR 97914

AMERICOLD REALTY INC  
C/O MARTIN GOLDEN  
10 GLENLAKE PKWY NE, SUITE 600  
ATLANTA, GA 30328

DODSON, GLEN R  
SNJ ONLINE LLC  
P O BOX 592  
ONTARIO, OR 97914

GOUGH, JANETTE  
510 NW 1ST ST  
ONTARIO, OR 97914

LIFEWAYS INC  
702 SUNSET DR  
ONTARIO, OR 97914

MICHAEL CONKLIN  
6616 BLUE SKY LN  
CHARLOTTE, NC 28269

ONTARIO, CITY OF  
444 SW 4TH ST  
ONTARIO, OR 97914

ROMERO, MANUEL CORTES  
333 N OREGON ST  
ONTARIO, OR 97914

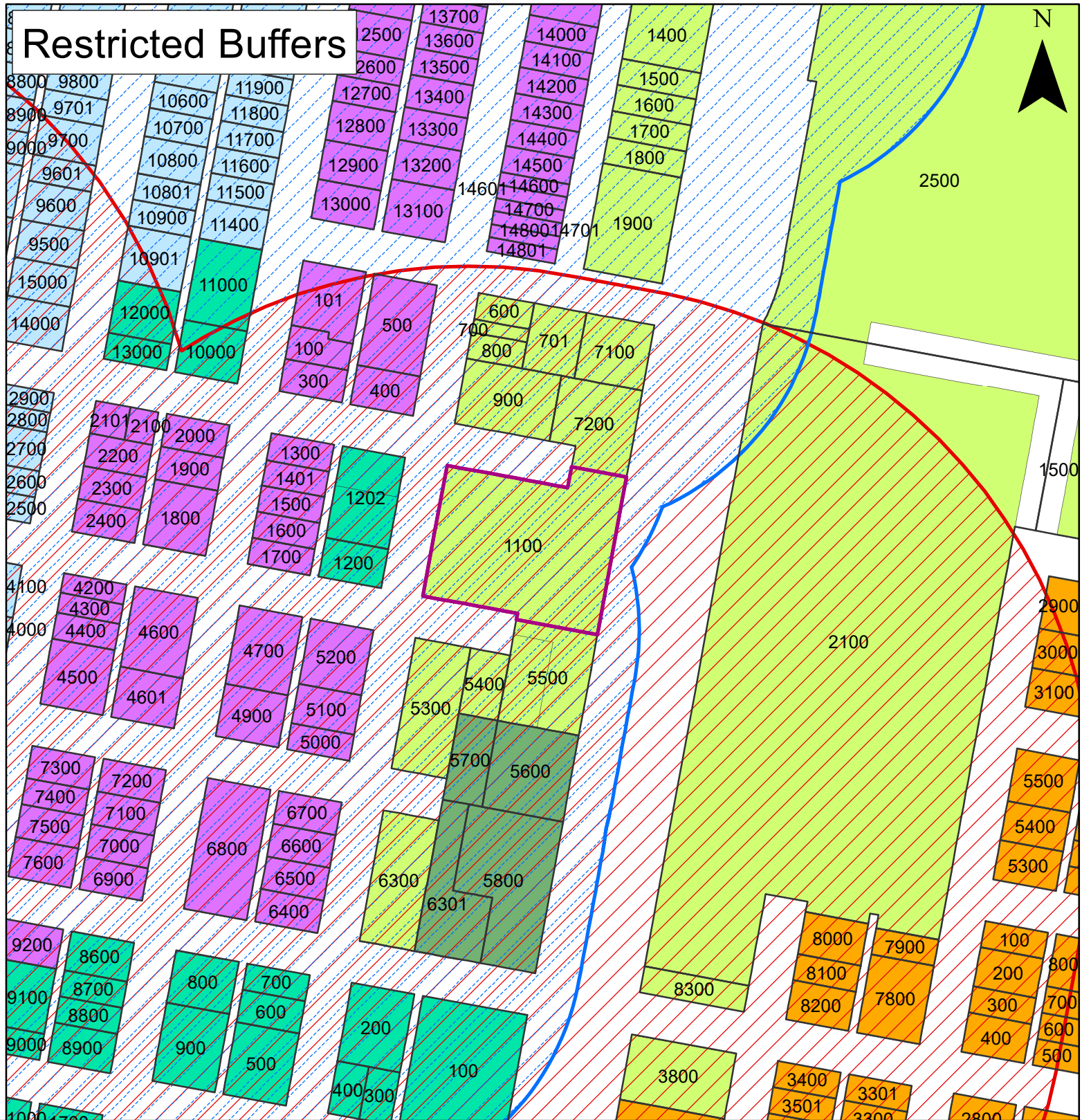
WEAVER, MICHAEL & NANCY  
NANCY WEAVER  
4107 SW BADGER CT  
REDMOND, OR 97756

I, Dan K. Cummings, the Community Development Director for the City of Ontario, Oregon,  
HEREBY CERTIFY:

Dan K. Cummings 9/14/22  
Dan K. Cummings, Director Date

A dark, grainy photograph of an industrial facility at night. A large, bright light source, likely the moon, is in the upper right. Several tall smokestacks or chimneys are visible against the dark sky. In the foreground, there is a dark, silhouetted structure, possibly a building or a large piece of equipment, with some faint, illegible text visible on its side.

# Restricted Buffers



## Legend

TL\_1100

Residential Zone 500' Buffer

Schools, Parks and Public Property 1000' Buffer

## ZONE CODE

### Urban Reserve Area Zone

I-URA - Industrial URA

C(5AC)-URA - Commercial 5Acres URA

I(RD)-URA - Industrial Rail Dependent URA

R-URA - Residential URA

C(BP)-URA - Comm Business Park URA

### Urban Growth Area Zone

R-UGA - Residential UGA

E2-UGA - Employment Zone 2Acres UGA

C-UGA - Commercial UGA

C(BP)-UGA - Comm Business Park UGA

E5-UGA - Employment Zone 5Acres UGA

PF-UGA - Public Facility UGA

I1-UGA - Light Industrial UGA

I2-UGA - Heavy Industrial UGA

### City Zone

C1 - Neighborhood Commercial

RD40 - Duplex Residential

E2 - Employment Zone 2Acres

RS50 - Single Family Residential

I2 - Heavy Industrial

RM10 - High Density Residential

I1 - Light Industrial

I(BP) - Industrial Business Park

RMH - Mobile Home

PF - Public Facility

PD - Planned Development

C2H - General Heavy Commercial

AD - Airport Development

C3 - Central Commercial

CD - College District

E5 - Employment Zone 5Acres

C2 - General Commercial