

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



**COUNCIL MEETING AGENDA
CITY COUNCIL – CITY OF ONTARIO OREGON
TUESDAY, DECEMBER 27, 2022, 6:00 PM, MT**
[Zoom Link](#)

Pursuant to the Public Meetings Laws and Rules within the Oregon Revised Statutes, the City Council has the authority, ability, and standing to take action on any items on the Agenda, or add items to the Agenda, during the Study Session or Regular Meeting, as long as all public meeting notice requirements have been met.

1) CALL TO ORDER

Roll Call: Susann Mills ____ Sam Baker ____ John Kirby ____ Ken Hart ____
Michael Braden ____ Eddie Melendrez ____ Mayor Riley Hill ____

2) PLEDGE OF ALLEGIANCE

This Agenda was posted on December 23, 2022. Copies of the Agenda are available from the City Hall Customer Service Counter and on the city's website at www.ontariooregon.org.

3) MOTION TO ADOPT THE AGENDA

4) PUBLIC COMMENTS Citizens may address the Council; however, Council may not be able to provide an immediate answer or response. Out of respect to the Council and others in attendance, please limit your comment to three (3) minutes. Please state your name and city of residence for the record.

5) CONSENT AGENDA

A) Liquor License Change of Ownership - The Grocery Outlet

6) NEW BUSINESS

A) City Commitment to Valley Family Health Network Planning Grant

7) PUBLIC HEARING

A) Appeal of Planning Commission decision to uphold the Hearing Officer denial of a Conditional use permit under planning actions 2022-07-27CUP and 2022-09-31A being Planning Action 2022-11-33A, Scott Inc.

8) CORRESPONDENCE, COMMENTS AND EX-OFFICIO REPORTS

9) ADJOURN



**AGENDA REPORT
CONSENT AGENDA
December 27, 2022**

To: Mayor and City Council

FROM: Michael Iwai, Police Chief

THROUGH: Danny K. Cummings, City Manager

SUBJECT: LIQUOR LICENSE CHANGE OF OWNERSHIP - THE GROCERY OUTLET

DATE: December 15, 2022

PROPOSED MOTION:

I MOVE THE CITY COUNCIL TO APPROVE THE CHANGE OF OWNER OFF-PREMISES LIQUOR LICENSE APPLICATION FOR GROCERY OUTLET.

SUMMARY:

The business located at 2670 SW 4th Avenue, Ontario, Oregon, completed the “Change of Owner” liquor license sales through the Oregon Liquor Control Commission.

All necessary paperwork has been approved by the Oregon Liquor Control Commission office and is awaiting approval through the Ontario City Council.

BACKGROUND:

The criminal record process was completed on new owners/LLC (Whitney Bertrand and Nicholas Robarge). The records returned meeting state and local requirements. The application forms have been filled out appropriately and required fees have been paid. All permit and license requirements have been met through the Oregon Liquor Control Commission as well as through the City of Ontario Planning Department.

CURRENT SITUATION:

The Grocery Outlet (Grocery Outlet Inc) currently holds an Off-Premises liquor license at 2670 SW 4th Avenue, Ontario, Oregon. Grocery Outlet Inc. has sold The Grocery Outlet to JE3R LLC. The business will continue to operate under the name of The Grocery Outlet. The Oregon Liquor Control Commission requires a “Change of Ownership” application to change the liquor license ownership records for this establishment. Once this step is completed, the location will have the necessary license under the new owners, which will require renewal on a yearly basis.

ANALYSIS:

- A. **STRATEGIC PLAN** This application is a general action item showing an ownership change of an already established business within the City of Ontario. Therefore, it does not have a direct effect on the city's current strategic plan.
- B. **FINANCIAL** There is no financial impact of this action.
- C. **TIMING** Approval is required to show the new owners of this establishment.
- D. **POLICY/LEGAL** All legal steps have been followed to completion, with no negative feedback.

ALTERNATIVES:

Not approve the license application.

This has no true effect on the process, as the Oregon Liquor Control Commission may take the city's objections to the action into consideration but are not obligated to do so. They are the ultimate authority on the issuance of the license.

RECOMMENDATION:

Staff recommends that the City Council approve the Change of Ownership Off-premises liquor license for JE3R LLC.

ATTACHMENTS:

None



**AGENDA REPORT
NEW BUSINESS
December 27, 2022**

To: Mayor and City Council
FROM: Ken Hart
THROUGH: Danny K. Cummings, City Manager
SUBJECT: **CITY COMMITMENT TO VALLEY FAMILY HEALTH NETWORK PLANNING GRANT**
DATE: December 20, 2022

PROPOSED MOTION:

1. I MOVE THE CITY COUNCIL TO GIVE THEIR COMMITMENT TO VALLEY FAMILY HEALTH'S APPLICATION FOR A HRSA-23-036 NETWORK PLANNING GRANT AND AUTHORIZE THE MAYOR TO SIGN THE COMMITMENT LETTER AS ATTACHMENT 1 HERETO.

OR

2. I MOVE THE CITY COUNCIL NOT GIVE THEIR COMMITMENT TO VALLEY FAMILY HEALTH'S APPLICATION FOR A HRSA-23-036 NETWORK PLANNING GRANT AT THIS TIME.

OR

3. I MOVE THE CITY COUNCIL TO TABLE THIS ITEM TO A LATER DATE.

SUMMARY:

Ken Hart, Interim CEO, Valley Family Health to Present

BACKGROUND:

CURRENT SITUATION:

ANALYSIS:

- A. **STRATEGIC PLAN**
- B. **FINANCIAL**
- C. **TIMING**
- D. **POLICY/LEGAL**

ALTERNATIVES:

RECOMMENDATION:

Staff recommends

ATTACHMENTS:

1. Commitment Letter LoCHRSA-23-036_12-27-22



City of Ontario

Ontario City Council

444 SW 4th Street

Ontario, OR 97914

Voice (541)881-3223

Fax (541)889-7121

December 27, 2022

Kenneth Hart, Interim CEO
Valley Family Health Care
1441 N.E. 10th Ave.
Payette, ID 83661

RE: Letter of Commitment for HRSA-23-036 Network Planning grant

Dear Ken:

The City of Ontario offers this Letter of Commitment to Valley Family Health Care for the application your community health center is submitting to the Health Resources and Services Administration for a “Rural Health Network Development Planning Program” project. We understand that Valley Family proposes to serve as the “backbone organization” to set in place a network of health, social service, municipal, and community-based organizations to address the issue of homelessness in our region.

The City of Ontario commits to the **Common Agenda** outlined by the Project Goals stated below:

Goal 1: *Develop and adopt the operational structure and procedures for a Rural Network that builds empathetic community health responses tailored to the full range of needs of homeless individuals and families.*

Goal 2: *Conduct a comprehensive Needs Assessment and Environmental Scan to assess regional health and social needs related to housing and homelessness, along with surveying the opportunities for joint programming and resource collaboration among Network members and other community partners.*

Goal 3: *Charter a Comprehensive Regional Plan, based upon the results of Goal 2, and utilizing the structure and procedures from Goal 1. The plan will specify strategies to braid the efforts of municipalities, community-based organizations, law enforcement, mental health/health care/public health agencies, and civic groups across the region.*

Goal 4: *Implement multi-tiered reporting and communication strategies to mobilize and sustain community-wide awareness and shared commitment to the Regional Plan.*

The City of Ontario acknowledges the need for this type of community planning, and the need to address the needs of the homelessness within the City of Ontario and surrounding areas.

Thank you for inviting us to participate in this important community initiative. We fully support this planning project and look forward to hearing of your success in obtaining the award.

Sincerely,

Common Council of the City of Ontario
By and Through its Mayor
Riley J. Hill



**STAFF REPORT
PUBLIC HEARING
December 27, 2022**

To: City Council

FROM: Garrett Chrostek, City Attorney's Office

SUBJECT: **ACTION 2022-09-33A AN APPEAL OF PLANNING COMMISSION DECISION
AFFIRMING HEARINGS OFFICER DECISION ON PLANNING ACTION 2022-07-27CUP**

DATE: December 20, 2022

POTENTIAL MOTIONS:

1. I move to affirm the Planning Commission's decision to affirm the denial of 2022-07-27CUP based on the findings and interpretations of the Planning Commission as supplemented by the December 20, 2022 staff report
2. I move to reverse the Planning Commission's and approve 2022-07-27CUP subject to the following conditions of approval

SUMMARY:

On September 13, 2022, Hearings Officer Dan Cummings denied a request by Scott Matthews/Mathews, Inc. (collectively, "Applicant") for a Conditional Use Permit for a "Marijuana Retailer" facility on the property identified as Tax Lot 1100 on Assessor's Map 18S4703CB (the "Subject Property") under Planning File No. 2022-07-27CUP (the "Application"). The Application was principally denied because the proposal did not meet the requirements of (i) Ontario Municipal Code (OMC) 10A-59-15(A)(3) (1000 foot buffer requirement for Retail Retailer facility from a Public Facility zone) and (ii) OMC 10A-59-15(A)(7) (500 foot buffer requirement for Marijuana Retailer Facility from a Residential zone). The Applicant appealed the decision to the Planning Commission. After holding a public hearing on October 26, 2022, leaving the written record open,¹ and reconvening to deliberate the matter on November 16, 2022, the Planning Commission issued an order affirming the Hearing's Officer denial. The Applicant is now appealing the decision of the Planning Commission to the City Council.

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 local ban may be lifted,

¹ Certain submittals by opponents to the Application were rejected by the Planning Commission as either untimely submitted and/or outside the scope of permitted submissions given the constraints of the various segments of the open record period.

the City adopted Ordinance #2748-2018 on October 23, 2018, which, following the local ban being overturned, allows for various marijuana uses, within specified zones, and subject to specified criteria, standards, and review procedures.

As pertinent to this matter, Marijuana Retailer 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 between a Marijuana Retailer facility and a Public Facility zone and OMC 10A-59-15(A)(7) requires a 500-foot setback between a Marijuana Retailer facility and a Residential zone. The Application does not comply with the foregoing setbacks as shown on “Exhibit F” to the Hearings Officer’s decision.

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 Retailer facility on the Subject Property 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, under protest, submitted the Application. As explained in the Applicant’s burden of proof statement, the Applicant asserted that a Conditional Use Permit is not required because “the City agreed to approve a Marijuana Retailer facility on the [S]ubject [P]roperty 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 “Settlement Agreement”). The Applicant further argued that the 500 foot buffer adopted as OMC 10A-59-15(A)(7) was unenforceable because, according to the Applicant, it was improper to adjust the buffer between the first and second reading of the adopting ordinance. The Applicant made no argument with respect to the 1,000 foot buffer under OMC 10A-59-15(A)(3).²

The Hearings Officer denied the Application by finding (i) that no provision of the Settlement Agreement provided any entitlement for a Marijuana Retail facility on the Subject Property, (ii) that there was no basis to not enforce the ordinance adopting the 500 foot buffer, (iii) the Applicant did not have any nonconforming use right, and (iv) that the Applicant failed to meet its burden of proof with respect to several other approval criteria related to parking and landscaping.

The Applicant appealed the Hearings Officer’s decision to the Planning Commission and argued: (i) that Applicant has a nonconforming “retail” use for the Subject Property that extends to the proposed Marijuana Retailer facility and thus the proposed use is not a “new commercial use”; (ii) the Hearings Officer was biased, (iii) the Applicant is entitled to a Marijuana Retailer use under the Settlement Agreement, (iv) that adoption of any ordinances that would preclude a Marijuana Retailer use on the Subject Property violates the terms of the Settlement

² This buffer came into effect when the property addressed as 55 NE 2nd Avenue was rezoned from I-1 Light Industrial and I-2 Heavy Industrial to Public Facilities under Planning File No. 2022-01-04RZ, which was adopted by Ordinance #2801-2022 dated May 10, 2022 as referenced by Mr. Cummings at the October 26, 2022 Planning Commission Hearing. The decision approving the rezone was never appealed.

Agreement; and (vi) the ordinances that preclude a Marijuana Retailer use on the Subject Property were improperly adopted. The Applicant further argued that any remaining approval criteria that the Hearings Officer found to be unmet could be satisfied with conditions of approval.

The Planning Commission affirmed the Hearings Officer's decision and adopted the findings contained in the Hearings Officer's decision as supplemented by the staff report delivered to the Planning Commission. Notably, the Planning Commission also rejected the Applicant's request to approve the Application subject to a condition of approval that would require the Applicant to obtain a variance from any preclusive buffer requirements. The Applicant then appealed the Planning Commission's decision.³

CURRENT SITUATION/PROCEDURE:

The City Council will review the appeal *de novo*, meaning parties will have the opportunity to submit new evidence and the City Council is not otherwise limited to the record created before the Planning Commission.

SUBJECT APPEAL:

The Applicant's Notice of Appeal makes the following assignments of error in the Planning Commission's decision:

1). The [Planning Commission] decision fails to properly apply the applicable standards in the City's zoning code, in particular the [A]pplicant's prior nonconforming use of the [S]ubject [P]roperty 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: The Planning Commission did not find that the Applicant had any nonconforming use right to operate a Marijuana Retail facility because Applicant has not actually established a Marijuana Retail facility and there was no point in time when such a use could have been lawfully established. Prior to lifting the ban, Marijuana Retailer facilities within the City were illegal under state and/or local law. Following, the repeal of the local ban, the only lawful way to establish a Marijuana Retailer facility was by obtaining a Conditional Use Permit. Applicant never obtained such approval and has only applied for such a use through the present Conditional Use Permit proceedings.⁴

³ Butch Henry was added as an appellant on the application form for the instant appeal. Because Mr. Henry is identified as Chairman of the Board of Scott, Inc., and did not submit separate appeal materials, Mr. Henry is included in the term "Applicant" for purposes of the appeal to the City Council.

⁴ The Applicant previously filed a preliminary application for a Marijuana Retailer Conditional Use Permit for the Subject Property in 2018 for purposes of establishing priority for filing a final Marijuana Retailer Conditional Use Permit. Because of buffer restrictions between Marijuana Retailers, the City required a preliminary application to determine which Marijuana Retailers had priority for measuring this buffer. The Applicant's preliminary

Findings adopted by the Planning Commission further found that, per OMC 10A-05-35(2), the discontinuance of a nonconforming use of land for 6 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, the 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).

The Applicant further argued before the Planning Commission that the prior non-conforming use verification decision applicable to the Subject Property effectively allows for “general retail uses” that entitles the Applicant to operate a Marijuana Retailer facility. The prior non-conforming use verification decision in 2016-06-13NCU was for a “second hand/appliance store and an antique store” for the northern portion of the building on the Subject Property that is addressed as 444 and 445 North Oregon Street.⁵ The nonconforming uses previously verified on the Subject Property, to the extent still in operation, are thus far narrower than the Applicant’s assertion of a “general nonconforming retail use”. Moreover, findings adopted by the Planning Commission construe the City’s Zoning Ordinance as establishing the Marijuana Retailer use as a distinct and separate use from other “retail” uses given that there is a separate definition, separate call out in the use tables, and special approval criteria associated with Marijuana Retailers. This is a plausible interpretation of the Zoning Ordinance.⁶ Accordingly, even if the prior non-conforming use verification could be properly characterized as a “general nonconforming retail use”,⁷ this would not provide a basis to operate the specific use of a Marijuana Retailer facility on the Subject Property (whether contractually or by any operation of the City’s Zoning Ordinance). It must be further noted that the Applicant did not apply for any type of nonconforming use alteration, but instead filed for a Conditional Use Permit.⁸

application was denied for non-compliance with the 500-foot buffer from a Residential Zone. This denial was never appealed.

⁵ Applicant’s present proposal is for the southern portion of the building Subject Property, which space is addressed as 420 North Oregon Street and not subject to any nonconforming use verifications.

⁶ To the extent Applicant is relying on OMC 10A-01-35 to suggest that the “retail use is an existing lawful nonconforming use which, by operation of the City’s zoning ordinances, [means the Marijuana Retailer facility] is already conditionally permitted, it flows from the Planning Commission’s decision that OMC 10A-01-35 can be interpreted in the current proceedings as follows: (i) a Marijuana Retailer facility was never “established as of right under any previous regulations” because a Marijuana Retailer has never been established on the Subject Property and such a use was never authorized under any previous regulations, (ii) Marijuana Retailer facilities are a distinct and separate use from other retail uses such that even if Applicant has a “general retail” nonconforming use right it would not extend to the specialty use of Marijuana Retailer.

⁷ The Malheur County Circuit Court order, discussed below, also concluded that the Settlement Agreement did not provide any “general nonconforming use right to operate a retail business and does not grant a nonconforming use right to operate a retail marijuana dispensary on the property”.

⁸ OMC 10A-05-35 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. Applicant has not made any such request as part of the subject application or otherwise separately sought such approval.

2). *The City's decision, both the original decision and the decision on appeal also violates the [A]pplicant[s] right to an impartial decision maker, as the "[H]earings [O]fficer" is also the City's Planning Director (a fact not known to the [Applicant] at the time the [A]pplication was submitted), who has openly fought the Applicant[s] attempts to open another retail use on the [S]ubject [P]roperty.... Further, the "[H]earings [O]fficer's" participation in the proceedings considering the Applicant[s] appeal before the Planning Commission was equally improper, especially after Applicant[] raised procedural objections to the "[H]earings [O]fficer's participation" in the consideration of the [Application] became known to the [Applicant].*

Findings: Several years ago, the City made the policy decision to utilize in house staff as the Hearings Officer rather than incurring costs (or passing those costs off to applicants) for a third party to serve as the Hearings Officer. More specifically, because OMC 10B-01-25 allows for the overwhelming majority of land use decisions made by the City to be issued without a hearing, the City found it more efficient to just have staff prepare such decisions. Mr. Cummings, as the only planner employed by the City since the adoption of this practice, has served as the Hearings Officer since at least 2016. In accordance with OMC 10B-01-25, nearly all conditional use permits issued over the last several years have been issued without a hearing by Mr. Cummings in his capacity as Hearings Officer. Mr. Cummings, in his capacity as Hearings Officer, also issued the non-conforming use verification decision in 2016-06-13NCU submitted by Applicant. Prior to issuance of the Hearings Officer's decision, the Applicant never raised any objection to Mr. Cummings participation in the processing of the Application whether as the Hearings Officer or as a staffer that might provide the staff report for either a third party Hearings Officer or the Planning Commission. Mr. Cummings thus issued the challenged decision in the same manner as 2016-06-13NCU and similar Conditional Use Permits.⁹

As part of the appeal of the Hearings Officer's decision before the Planning Commission, the Applicant argued that Mr. Cummings is biased and further contested Mr. Cummings's participation at the public hearing before the Planning Commission.¹⁰ Mr. Cummings prepared a staff report and participated at the October 26th, 2022 public hearing. As part of that testimony, Mr. Cummings refuted the Applicant's assertions of bias but elected not to further participate during either the open record period or deliberations that occurred on November 16, 2022.¹¹ Because of this election, and because the written record was left open, the Applicant had the opportunity to respond to any and all statements that Mr. Cummings made to date in the proceedings before the Planning Commission. Furthermore, the resulting decision on the appeal was issued by the Planning Commission and the Applicant did not challenge the impartiality of the Planning Commission or any individual Planning Commissioner.

In the instant appeal, the Applicant again challenges the participation of Mr. Cummings as part

⁹ It must also be noted that no application for a variance was presented to Mr. Cummings and has not otherwise been submitted to date.

¹⁰ Challenges to Mr. Cummings participation in proceedings before the Planning Commission as a staff member first appeared in an October 25, 2022 letter from Applicant's attorney after Mr. Cummings had already prepared the staff report.

¹¹ Staff ordinarily participate in deliberations by clarifying the decisions to be made by the hearings body or answering questions. Staff is not the decision maker.

of initial Hearings Officer's decision and at the public hearing before the Planning Commission. While there are certainly arguments as to whether or not Mr. Cummings participation as described above is procedurally erroneous, Mr. Cummings has further elected, in an abundance of caution, not to participate in the proceedings before the City Council. While such an election will not wholly remove Mr. Cummings's participation from the record in these proceedings, it will allow the Applicant further opportunity to refute prior statements, evidence, and decisions from Mr. Cummings before a second hearings body that is not Mr. Cummings.

3). The City's decision breaches [the Settlement Agreement] in which the [A]pplicant is contractually entitled to operate a cannabis dispensary on the [S]ubject [P]roperty once the City of Ontario's ban on recreational dispensaries was lifted.

Findings: In its adopted findings, the Planning Commission found that the Settlement Agreement did not provide the Applicant any entitlement to a Marijuana Retailer facility.¹² Rather, under the Settlement Agreement, the Applicant's ability to establish any Marijuana Retailer facility on the Subject Property, should such uses become lawful in the future, depended on satisfying any requirements or approval criteria that might be adopted in the future with respect to Marijuana Retailer facilities. Nothing in the Settlement Agreement specified that the City was precluded from adopting land use regulations that might have the effect of precluding Applicant from establishing a Marijuana Retailer facility on the subject property.

It must also be noted that the Applicant initiated separate civil litigation against the City with respect to the Settlement Agreement. Subsequent to the close of the record in the proceedings before the Planning Commission, the Malheur County Circuit Court issued an order concluding that the Applicant does not have a contractual right under the Settlement Agreement to operate a Marijuana Retailer facility on the Subject Property.

4). The ordinance applied to the [S]ubject [P]roperty violates the contracts clause of both the Oregon and federal constitutions in that the ordinance breaches the [S]ettlement [A]greement.

Findings: The nonexistence of any contractual right to the proposed use is discussed above and in the Malheur County Circuit Court order. If there is no contractual right, any ordinance adopted by the City could not have the effect of violating the contract clause of applicable constitutions.

5). The ordinance which the City seeks to apply against the [S]ubject [P]roperty was improperly adopted, and is therefore invalid. The "[H]earings [O]fficer" could not, and did not, objectively consider the Applicant['s] objections to the ordinance because of the "[H]earings [O]fficer's" obvious bias in favor of the ordinance and prejudice against the Applicant[.]

¹² It is questionable whether the City can grant a land use approval for a prohibited use based on the potential for the use to become lawful in the future and even more questionable whether such a prospective approval could exempt a particular applicant from whatever criteria might be adopted as part of a subsequent authorization of the prohibited use. It was also noted in findings adopted by the Planning Commission that the Settlement Agreement was not subject to any notice or otherwise processed as a land use application.

Findings: As discussed above, the Hearings Officer was not the decision maker in the proceedings before the Planning Commission and will not be the decision maker for the instant appeal. To the extent of any bias by the Hearings Officer, the foregoing hearings bodies will have had an opportunity to consider the record (including Applicant's responses to the Hearings Officer's testimony, evidence, and decision) and render their own decisions.

Presumably, the "ordinance" to which the Applicant refers is Ordinance #2748-2018, which was adopted on October 23, 2018 and imposed the requirement for a 500 foot buffer between Marijuana Retailers and Residential zones, which the Application does not meet. The rationale for this assignment of error was stated in the Applicant's burden of proof statement as follows:

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 [Subject] 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 [Subject] 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.

As an initial matter, and as shown in its October 8, 2018 minutes, the Planning Commission recommended the that City Council adopt a 500 foot buffer between Marijuana Retailers and Residential zones. Secondly, the City Council received a host of public comments during the public hearing before the City Council as to the appropriate buffer from Residential zones. Third, city councils routinely make revisions to ordinances between a first and second reading. Nothing identified by the Applicant is inherently erroneous, particularly given that the possibility of a 500 foot buffer was plainly part of the public discussions. Even if there were procedural error in its adoption, Ordinance #2748-2018 became final, and was subject to acknowledgment, roughly four years ago. The time to raise procedural challenges has long passed.

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** OMC 10A, 10B and 10C.

ALTERNATIVES:

Whether or not the buffers specified in OMC 10A-59-15(A)(3) and OMC 10A-59-15(A)(7) apply to the Subject Property are threshold issues for the City Council to resolve as the Application

fails to meet these buffers and, generally speaking, would be subject to denial. If the City Council were to find that the Planning Commission erred in finding that the buffers apply, the City Council would have to determine whether or not to impose any conditions of approval. In the event the decision were to be overturned, the Hearings Officer's decision identified a number of potential conditions of approval. The Applicant identified a number of proposed revisions to the Hearings Officer's conditions of approval, and the basis for those proposals, in its materials. As noted above, the Applicant proposed to the Planning Commission, and will presumably propose to the City Council, that the City Council find that the buffers apply but nonetheless approve the Application with a condition of approval that requires the Applicant to obtain a variance from applicable buffers. The City Council largely has discretion as to how it wants to resolve the instant appeal, but may need to make additional findings based on the chosen resolution.

ATTACHMENTS:

1. Application Materials for 2022-07-27CUP
2. Notice of Appeal to Planning Commission with copy of Hearings Officer's Decision
3. Planning Commission Staff Report
4. Applicant's October 25, 2022 Submittal
5. Applicant Final Argument to Planning Commission
6. Applicant's Notice of Appeal to City Council w/copy of Planning Commission Order
7. Hearings Officer's Decision in 2016-06-13NCU
8. Malheur County Circuit Court Order
9. October 8, 2018 Planning Commission Meetings Minutes



BENNU LAW

July 15, 2022

City of Ontario Planning and Zoning
Community Development Center
Attn: Dan Cummings
444 SW 4th 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)¹
- 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.

¹ 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 separate 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.

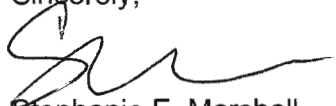
The Applicant will obtain a business license from the City and OLCC approval for a marijuana dispensary prior to initiating the use.

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 stylized, flowing script.

Stephanie E. Marshall

cc: client

encls.

City of Ontario Planning and Zoning Application Form

Mailing: 444 SW 4th 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 # _____

Date Received: _____

Fee: \$180.00 + \$120.00 = \$300.00

Time Received: _____

(Mailing & Advertising: \$120.00)

PDAC Date: _____

Accepted as Complete: _____

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 [Signature]

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

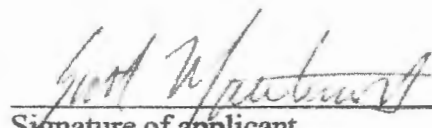
FILE # _____

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

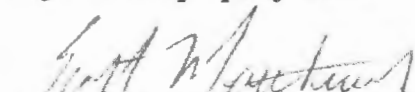
Date

Signature of applicant

Date

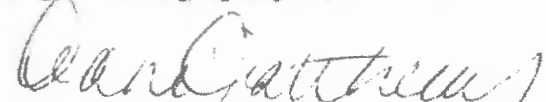
Signature of property owner

Date



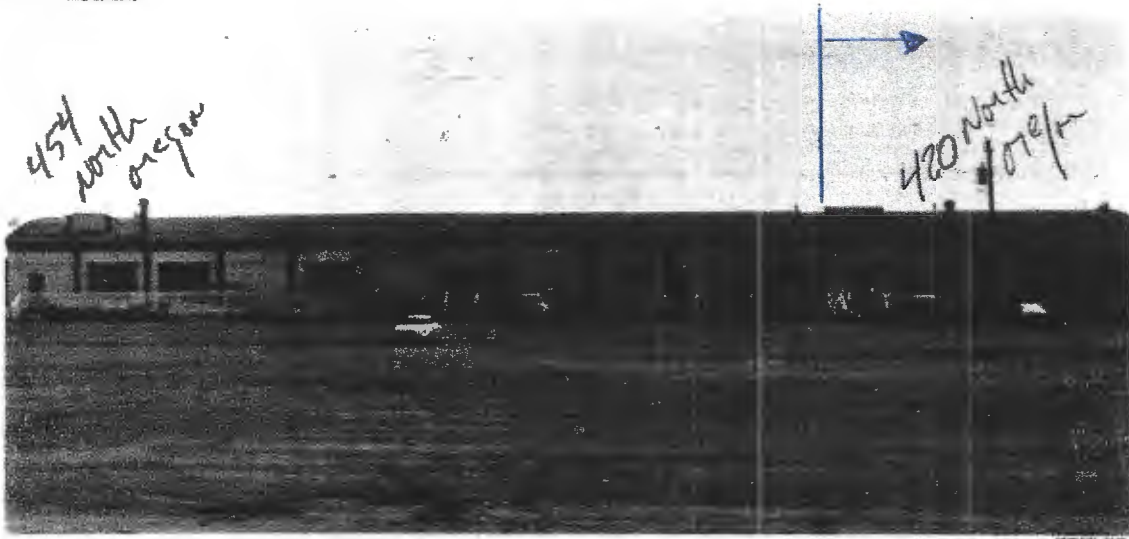
Signature of property owner

Date

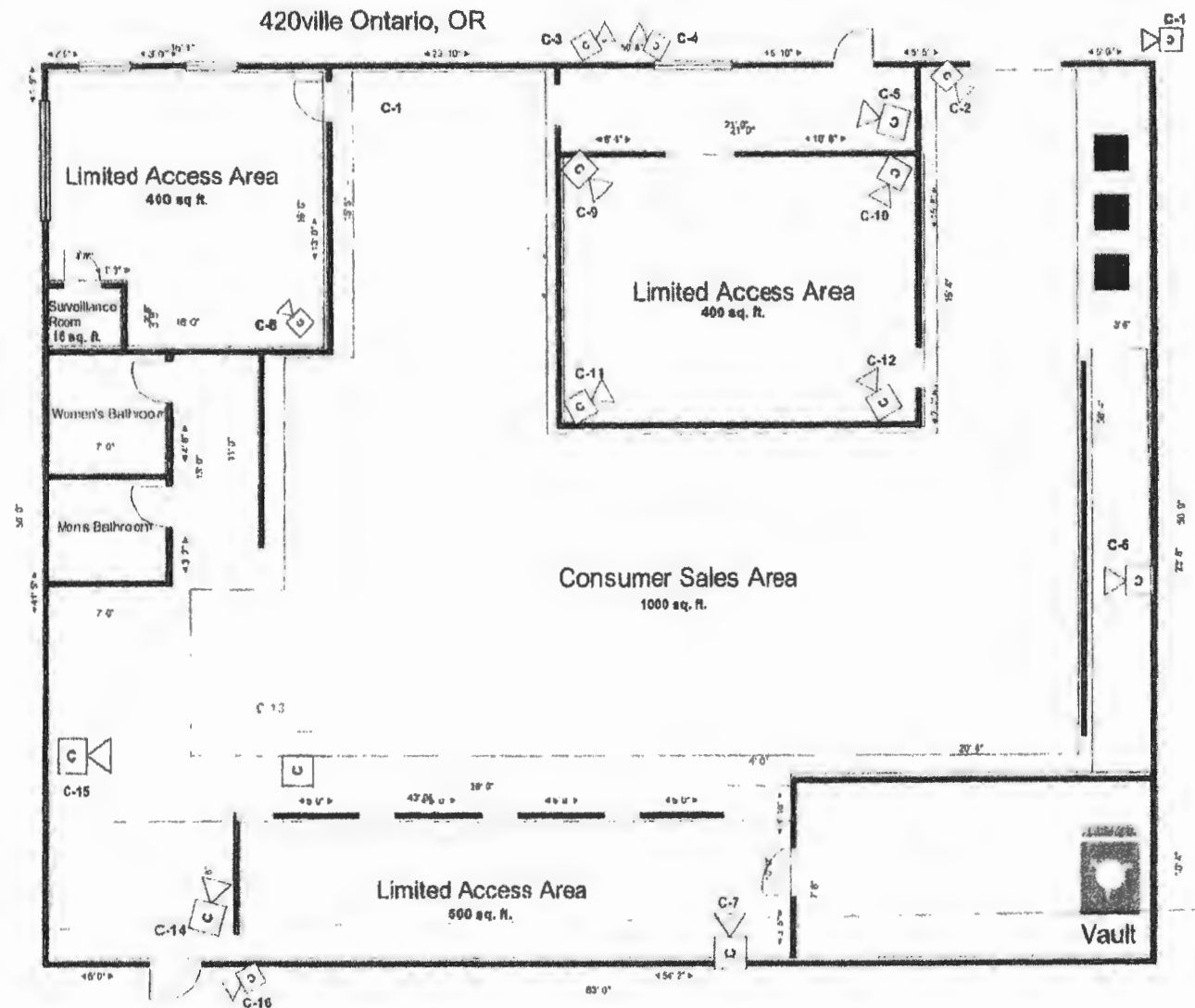


Signature of property owner

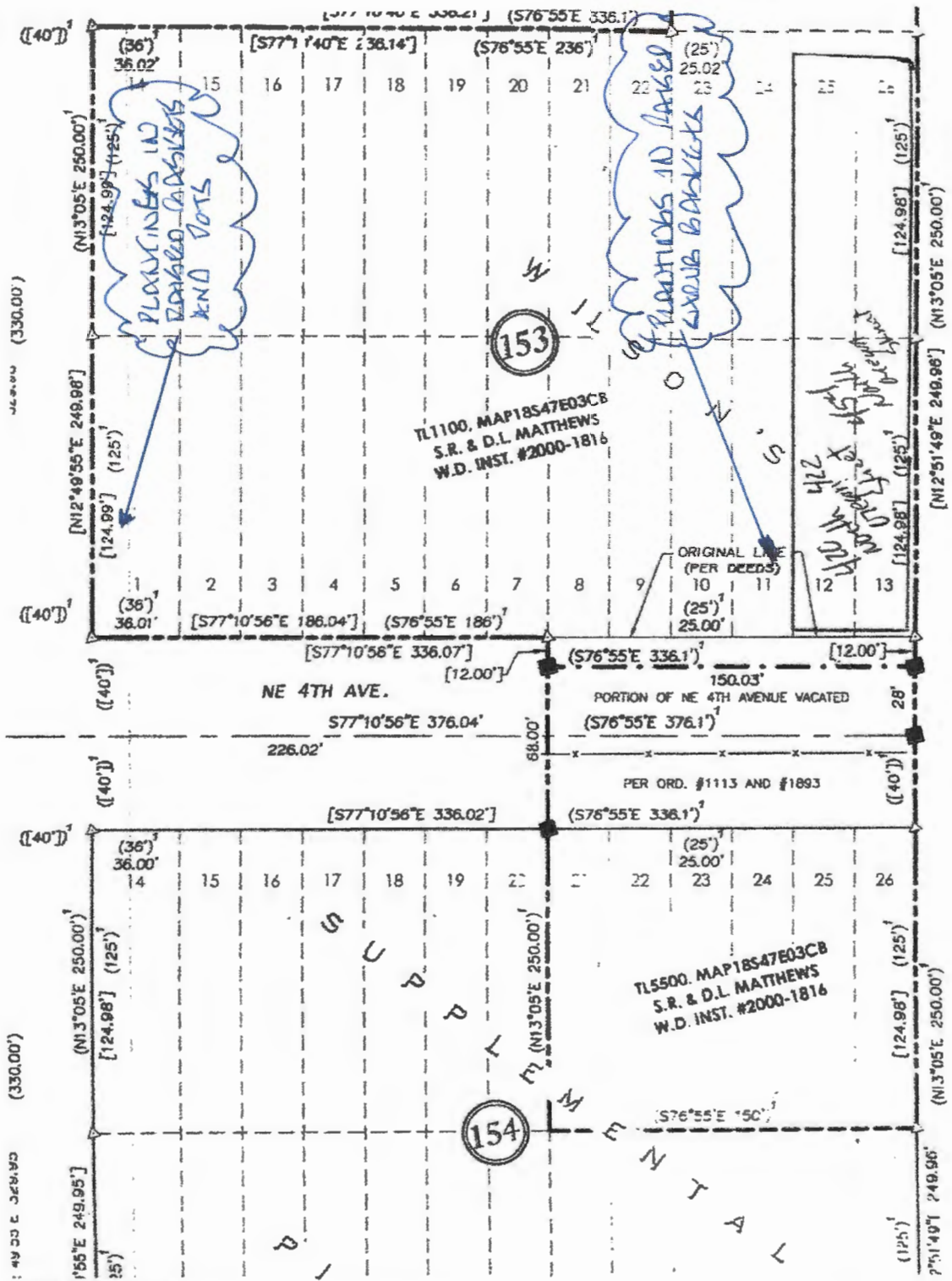
Date



420 N. OREGON STREET - BUILDING ELEVATION

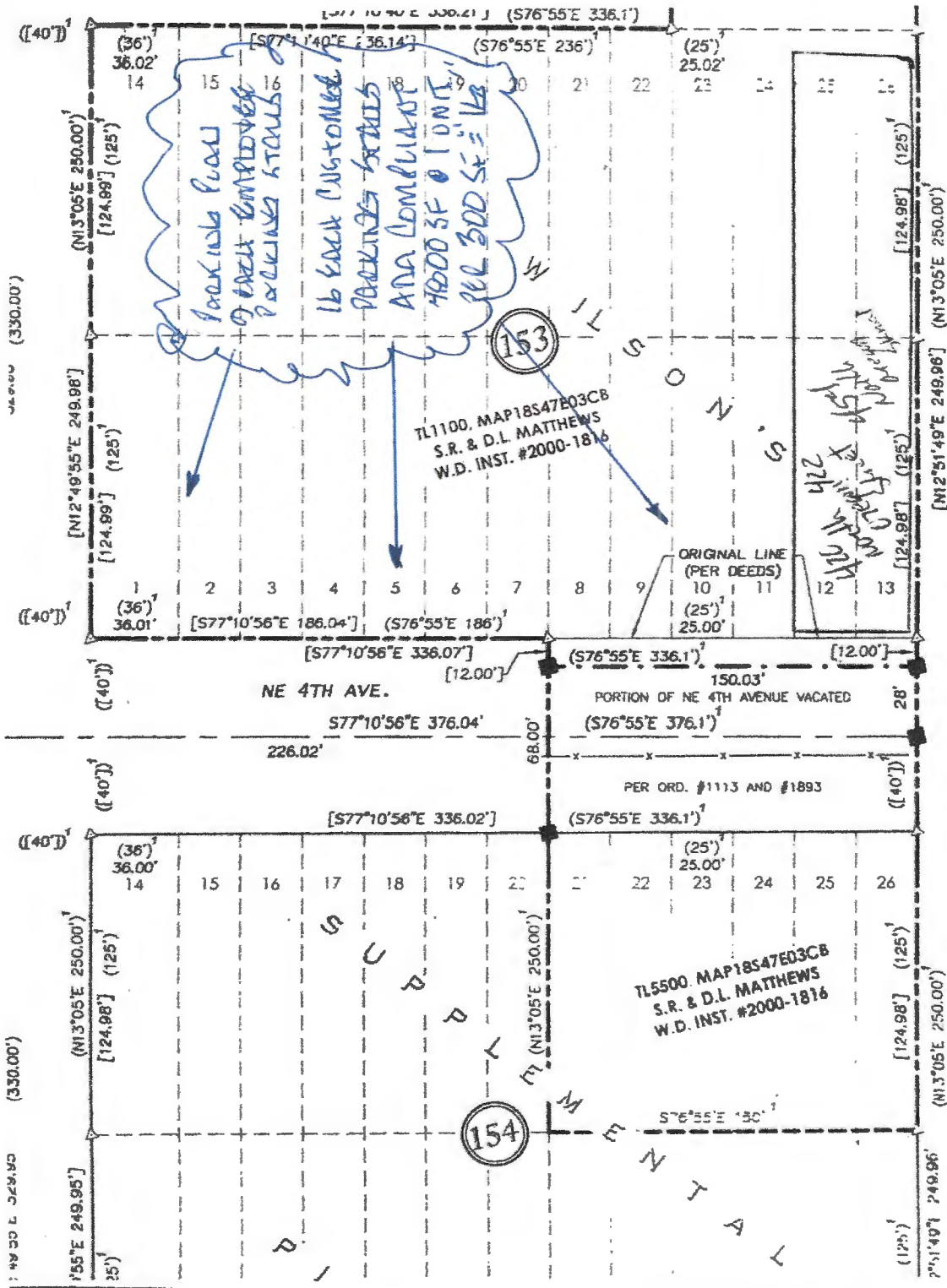


420 N DREXEL STREET, BUILDING INTERIOR LAYOUT



LANDSCAPE PLAN

420 N. DEKON STREET



City of Ontario Planning and Zoning Application Form444 SW 4th 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, 2022Time Received 9:33 amAccepted 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 MatthewsAddress P.O. Box 273, Emmett, ID 83617Telephone 208-724-7720Email 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 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Fax (541) 881-3251

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) 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.

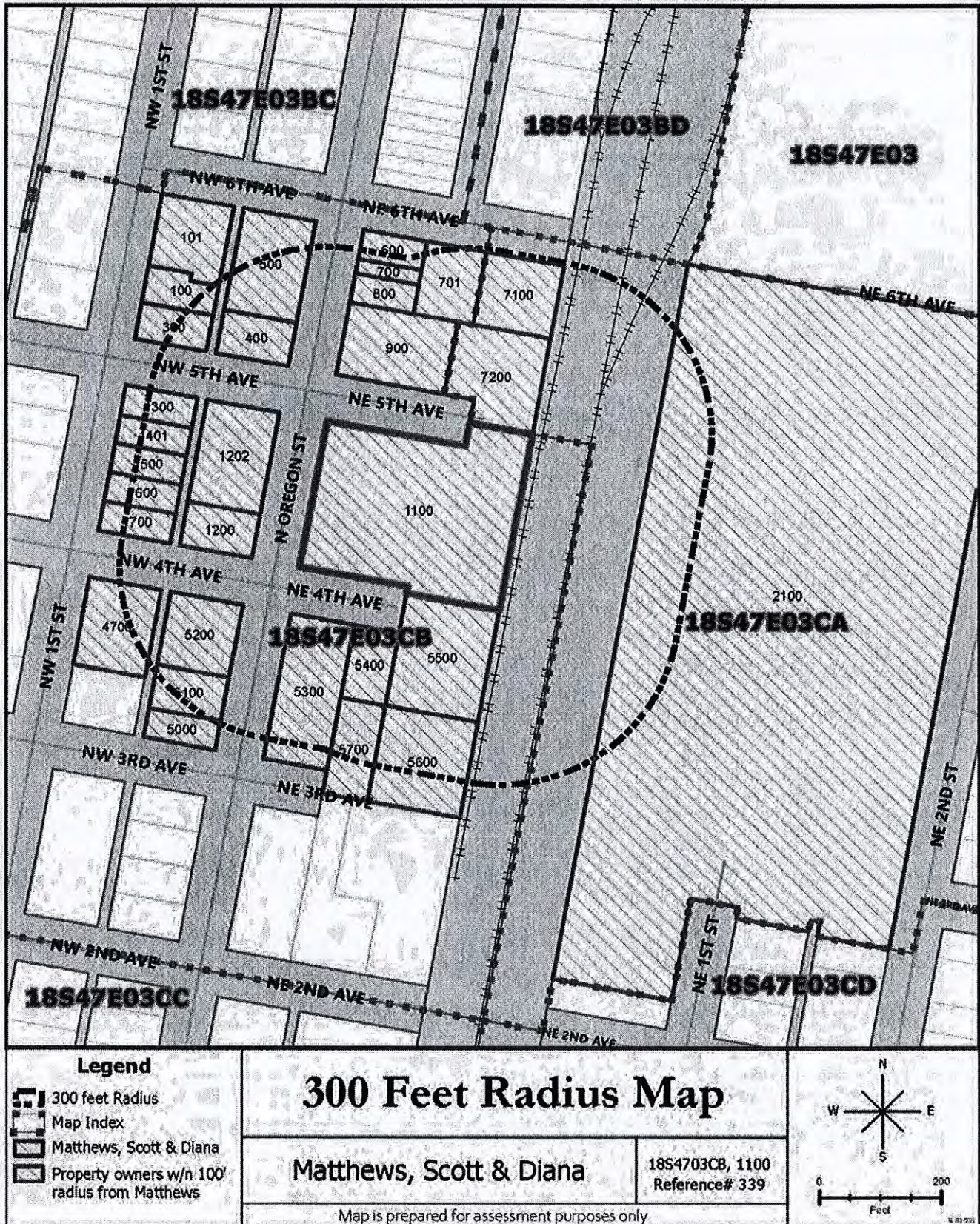
Sincerely,

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

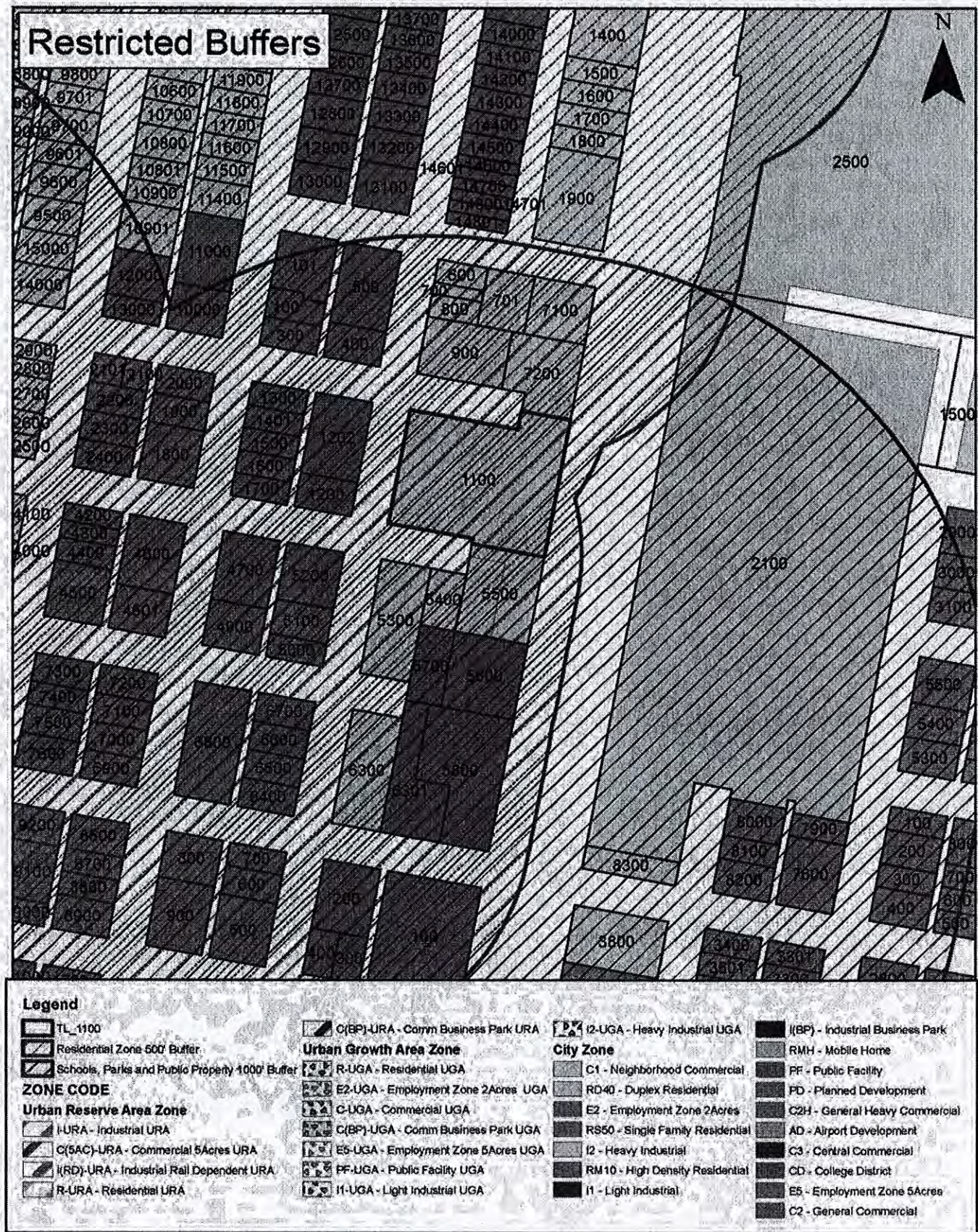
Dan K. Cummings
Community Development Director

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 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Dan.Cummings@ontariooregon.org

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 4th Avenue and NE 5th 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 4th Avenue (south side) and undeveloped NE 5th Avenue (north side). The property has access off North Oregon Street, as well as NE 4th and 5th Avenues. Neither NE 4th Street nor NE 5th 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 4th 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 meet, 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

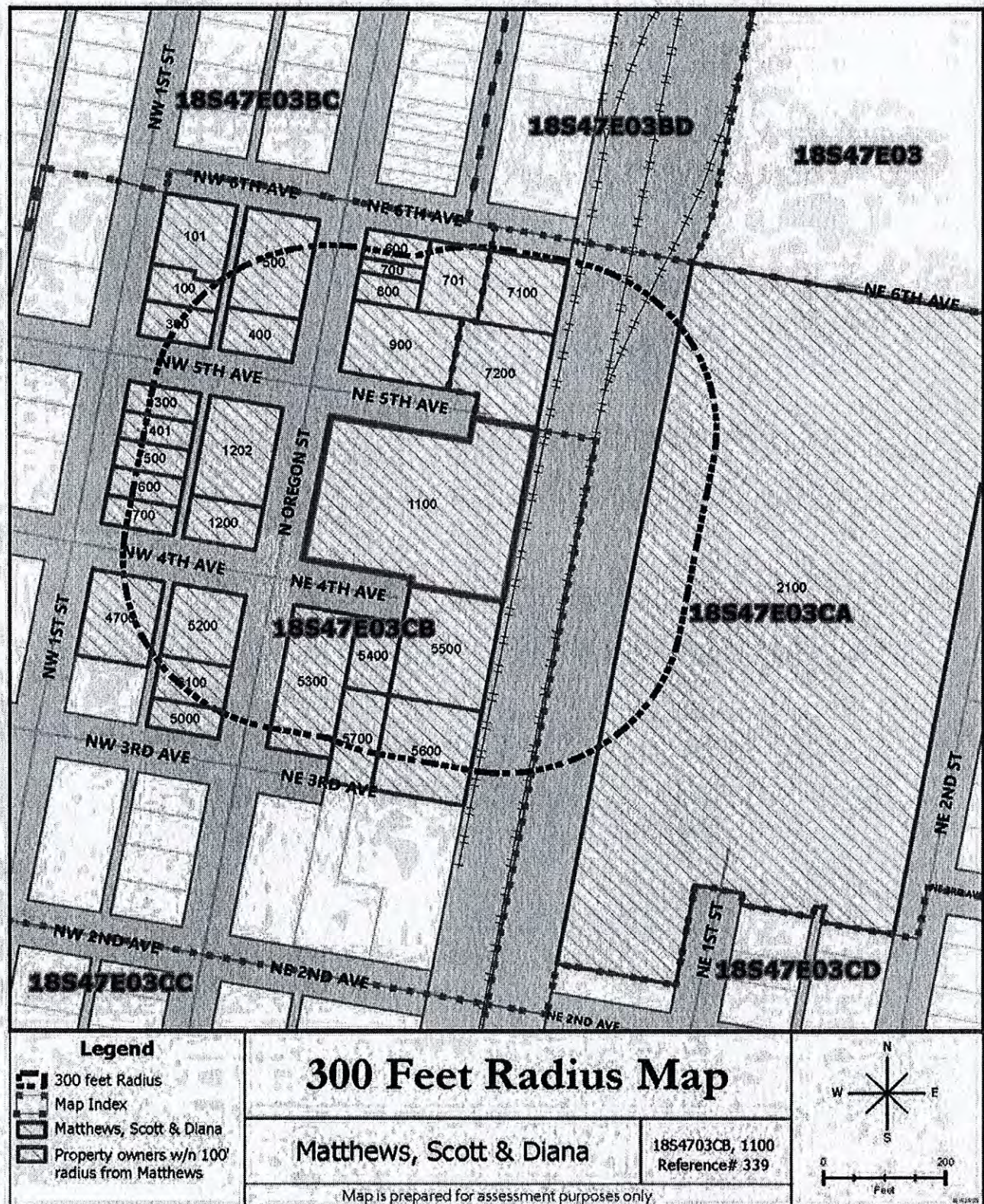


Exhibit "B"

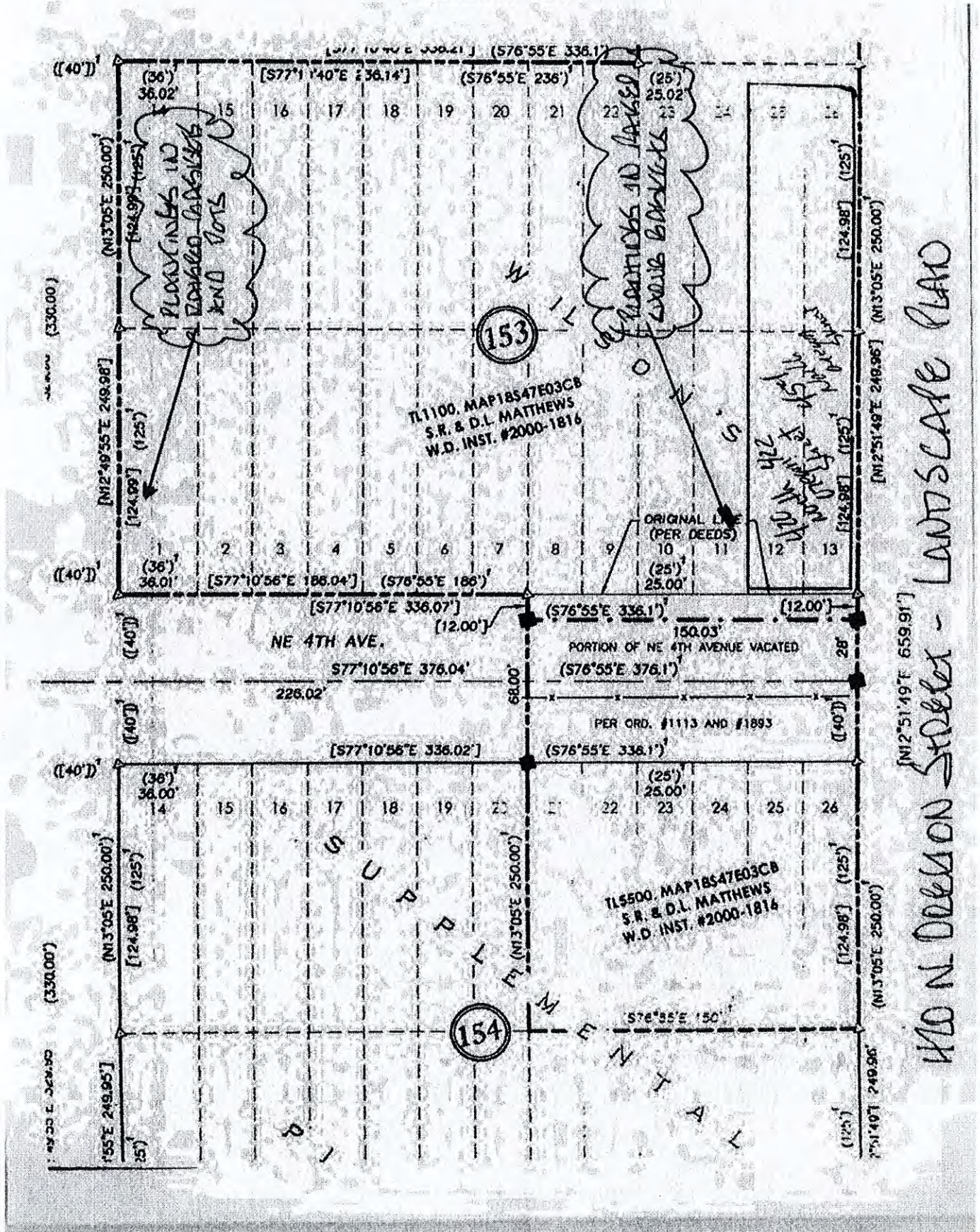
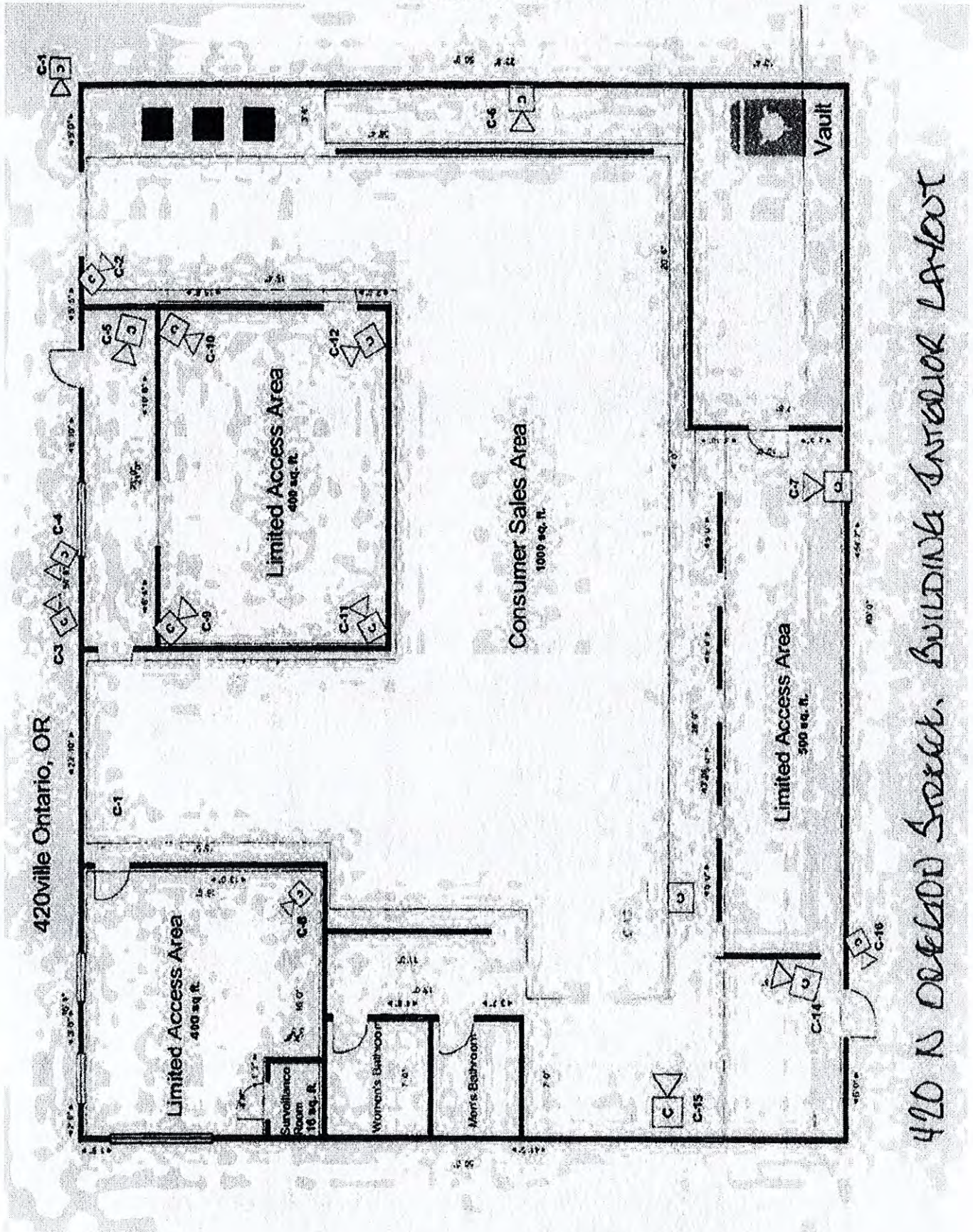


Exhibit "C"



420 N. Ontario Street, Building Interior Layout

Exhibit "D"

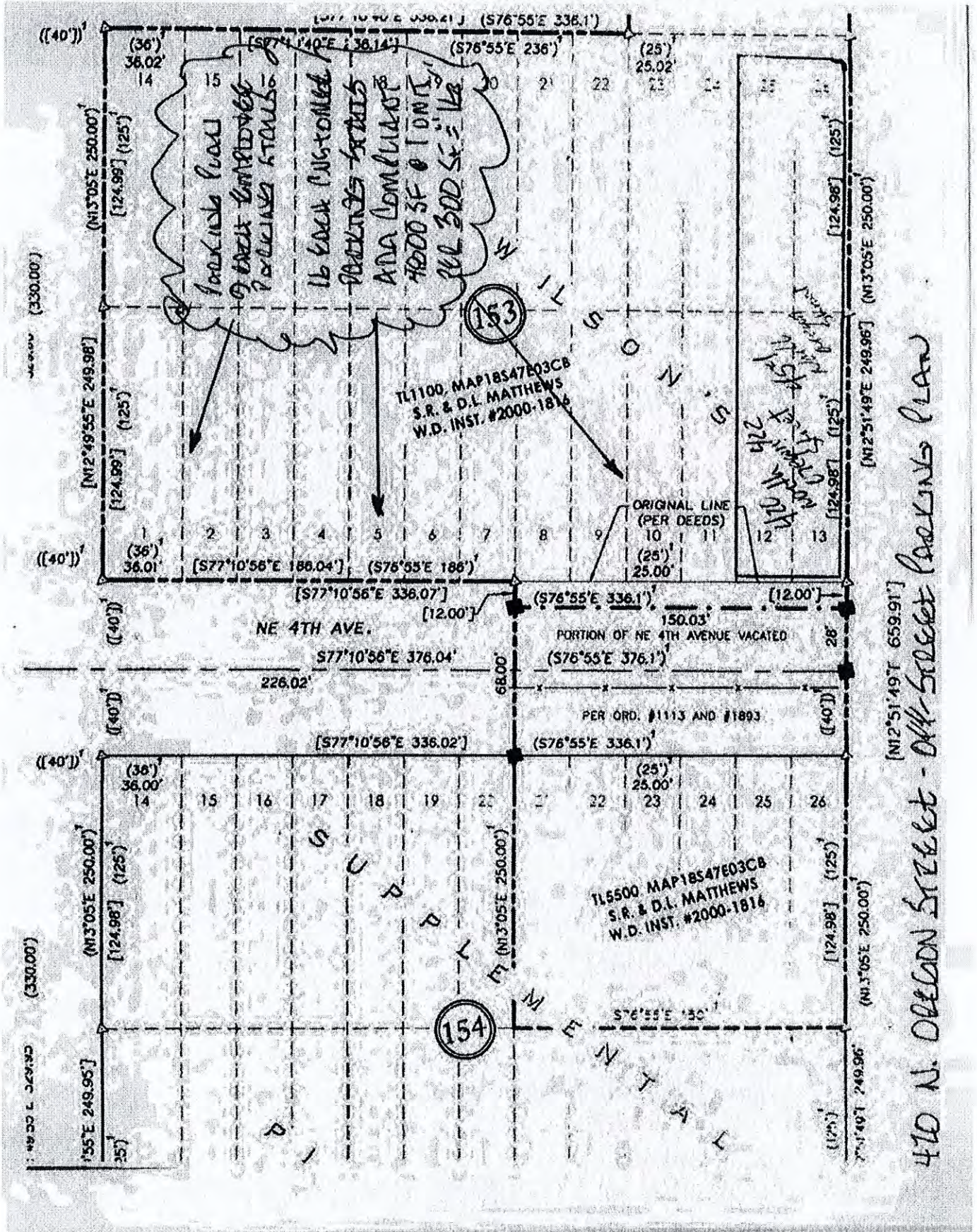


Exhibit "E"

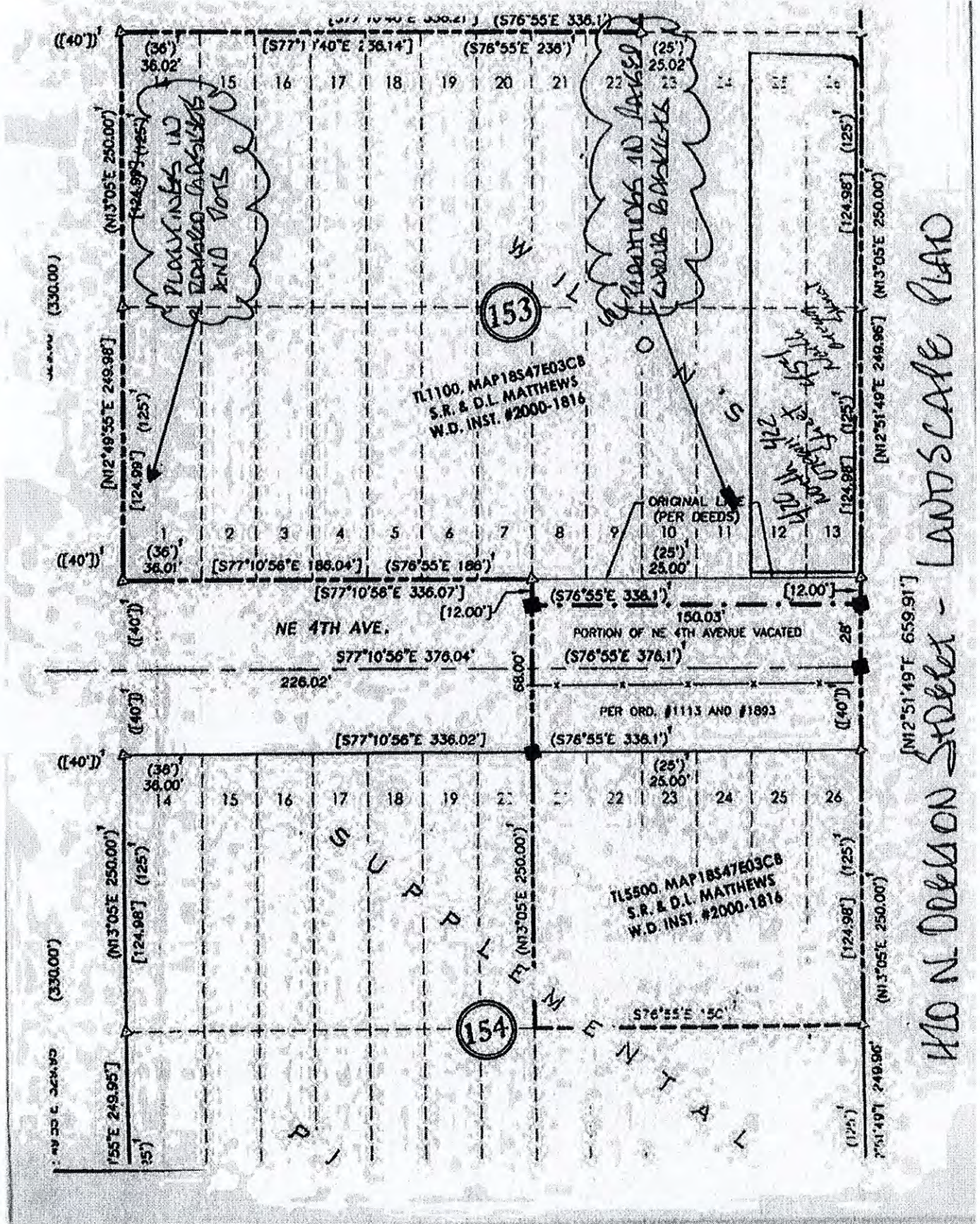
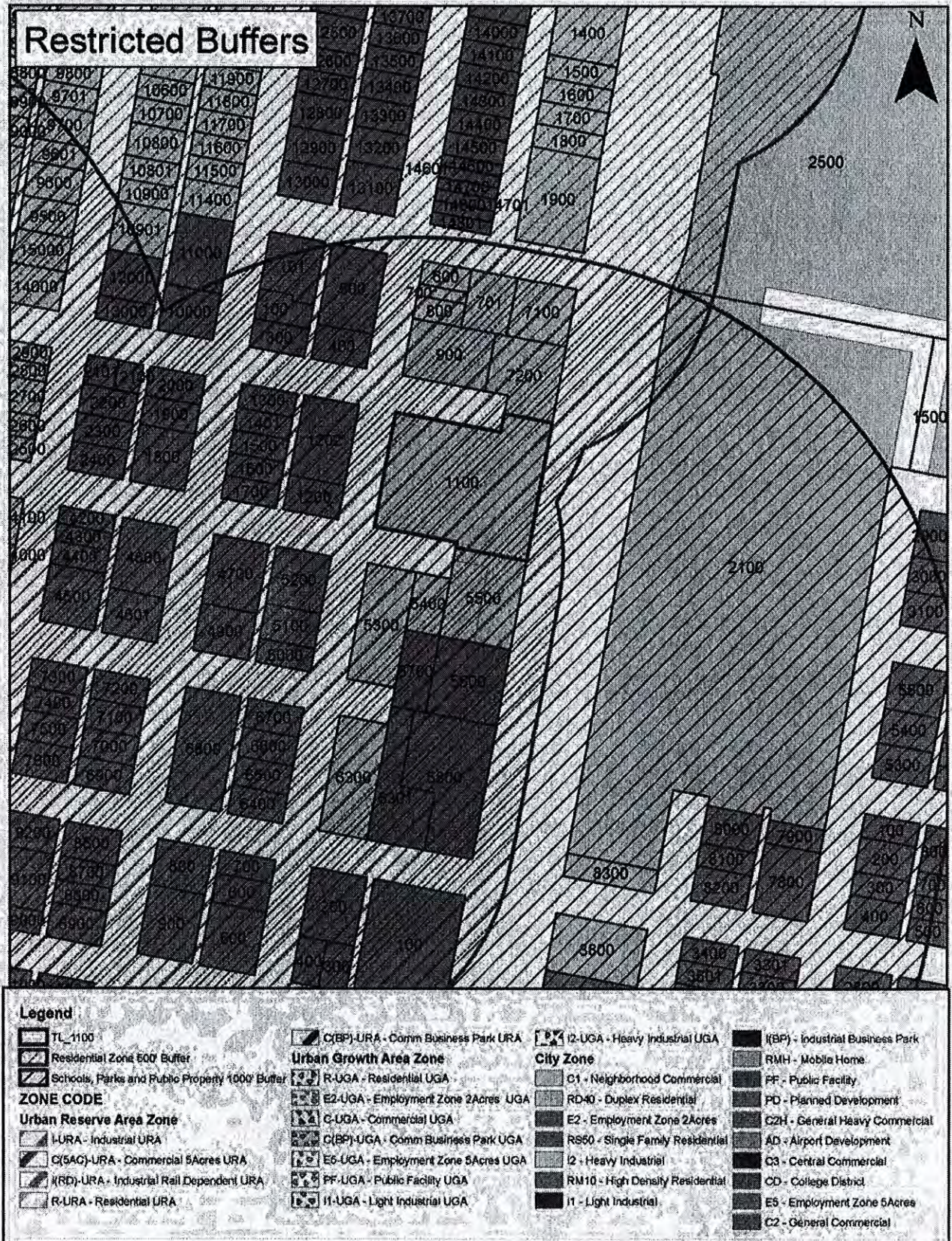


Exhibit "F"



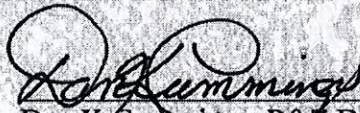
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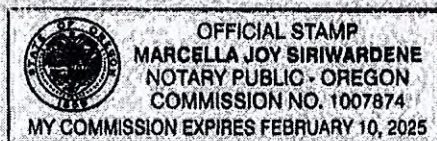
STATE OF OREGON)
County of Malheur) ss.
City of Ontario)

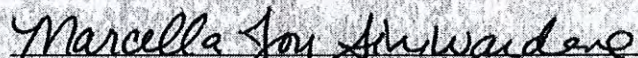
I, Dan K Cummings, being duly sworn, depose and say that I am the Planning and Zoning Director for the City of Ontario, Oregon.

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
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FIJI ENTERPRISES LLC
P O BOX 7906
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HARVEST ROCK CITY CHURCH INC
MINISTERIOS CRISTIANOS CASA
P O BOX 6723
BOISE, ID 83707

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SNJ ONLINE LLC
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LIFEWAYS INC
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ONTARIO, OR 97914

MICHAEL CONKLIN
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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, black and white photograph of an industrial facility at night. A large, bright light source, possibly the moon or a powerful lamp, is in the upper right corner. Several tall, thin smokestacks or chimneys are visible against the dark sky. The foreground is mostly in shadow, with some faint, illegible markings on a surface.



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

Attachment 3

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

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



October 25, 2022

via electronic mail (chrostek@bljlawyers.com) only

City of Ontario Planning Commission
444 SW 4th Street
Ontario, Oregon 97914

RE: City of Ontario Planning File 2022-07-27CUP (herein “Application”)

APPLICANT’S LETTER MEMORANDUM ON APPEAL

Members of the Ontario Planning Commission:

My name is Ross Day, I represent the applicants/appellants Scott and Diana Matthews (herein “Applicants”) in regards to the above-referenced Application. The purpose of this letter is to address the criteria identified in the city of Ontario’s (herein “City”) decision denying the Applicants’ Application (herein “Decision”).

As an initial matter, the Applicants do not believe they are required to seek a conditional use permit from the City. The Applicants’ existing use of the property at 432 N. Oregon Street (herein “Property”) for retail use is an existing lawful nonconforming use which, by operation of the City’s zoning ordinances, is already conditionally permitted.

Notwithstanding the foregoing, and without waiving their objections to the City’s requirement that the Applicants submit a conditional use permit application to operate a retail cannabis dispensary on the Property, the Applicants – as a sign of good faith and a willingness to work with the City to resolve their differences with the City – submitted the Application.

This Letter Memorandum will first address the criteria in the Decision in which Mr. Cummings concluded the Applicants failed to meet their burden of proof. Second, this Letter Memorandum will address the procedural errors in the Decision which demonstrate the Applicants’ rights to due process under Oregon law, the Oregon Constitution, and the Federal Constitution were violated. Finally, this Letter Memorandum proposes a pathway for approving this Application.

I. CRITERIA IDENTIFIED IN THE DECISION – APPLICANTS NOT MET BURDEN

The following criteria were identified by Mr. Cummings as criteria in which the Applicants’ failed to meet their burden:

- A. 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.

Applicants' Response: This conclusion by Mr. Cummings demonstrates the points made in Section II of this Letter Memorandum – namely that the Decision was not made by a neutral, unbiased decision maker. Mr. Cummings deemed the Application complete on July 25th, 2022. If the plans submitted by the Applicants were not detailed enough, Mr. Cummings could have requested more information from the Applicants, but he did not. In fact, Ontario City Code (herein “OCC”) §10B-02-25 required Mr. Cummings to notify the Applicants whether any information was missing from the Application within ten (10) days of submission of the Application.

Importantly, Mr. Cummings does not identify what additional information is necessary – or not in “clear enough detail” – to satisfy this criterion anywhere in the Decision. There is no criteria in the OCC that requires information be provided in “clear enough detail.”

OCC §10B-25-35 authorizes the Hearings Officer to impose conditions in order that the Application meets the requirements of the City’s ordinances. The Planning Commission can impose a condition requiring a more detailed site plan once Mr. Cummings reveals what additional information must be provided in “clear enough detail”.

- A. *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:*

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.

Applicants' Response: The conclusion reached by Mr. Cummings is not relevant to this criterion. This criterion asks whether the conditions imposed by the Decision are deemed necessary to protect the public health, safety, and general welfare. Mr. Cummings' superfluous arguments are irrelevant. As discussed more fully below, appropriate conditions of approval may be imposed to protect public health, safety, and general welfare.

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.

Applicants' Response: This is not a criterion. This is a direction for determining how much of the property must be landscaped. As noted above, Mr. Cummings should have contacted the Applicants requesting this information, which he did not do.

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.

Applicants' Response: As noted above, Mr. Cummings should have contacted the Applicants requesting this information, which he did not do.

However, the use of basic math demonstrates the Applicants have more than met their burden. The building located on the Property is roughly 24,000 square feet. The building will be used for retail, office space, and some warehouse use. Of those uses, the use requiring the greatest number of parking spaces is retail use, which requires 1 parking space for every 400 square feet of retail space. OCC §10A-57-75(6). Assuming all the floor space was used for retail, the Property would need approximately 60 parking spaces and 1 loading space.

The Property currently has over 250 parking spaces on three (3) loading spaces. This criterion is satisfied.

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.

Applicants' Response: The Applicants have been involved in ongoing litigation with the City for nearly 7 years. Since the City imposed its buffer requirements in 2018, the City *has never*, prior to the issuance of the Decision, alleged that operating a cannabis dispensary on the Property would violate subsection (A)(3). The Decision is the first time the Applicants became aware of the City's position that subsection (A)(3) applies to the Property in addition to subsection (A)(7).

Mr. Cummings has had at least four (4) years to notify the Applicants of the City's position but has apparently chosen to play "hide-the-ball" with the Applicants.

Regardless, the "buffer" criterion could be satisfied with the imposition of a condition of approval requiring the Applicants to obtain a variance of roughly 140 feet from subsection (A)(7) of §10A-59-15 of the OCC. As far as subsection (A)(3) is concerned, the same condition of approval could be imposed.

Unfortunately, Mr. Cummings has previously expressed his own opposition to any variance application submitted by the Applicants. Mr. Cummings' pronouncements again reflect his prejudgment bias towards the Applicants. The Applicants respectfully request the planning commission disregard any comments made by Mr. Cummings with respect to the likelihood of success of any variance application by the Applicants. Mr. Cummings' opinion should not, in any way, impact the planning commission's decision on whether to impose the condition of approval described herein.

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.

Applicants' Response: As explained above, the Applicants have at least 250 parking spaces on the Property. Assuming all 24,000 square feet of the building were to be used for retail cannabis (which it is not) and assuming 20 employees per 8-hour shift, operating 24 hours a day, 7 days a

week, the total number of parking spaces required under the OCC would be 140. The Property has nearly twice the number of required parking spaces even under the most extreme scenario. This criterion is satisfied.

II. APPLICANTS' OBJECTIONS TO THE DECISION

On page 4 of the Decision, Mr. Cummings states:

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 4th Avenue (south side) and undeveloped NE 5th Avenue (north side). The property has access off North Oregon Street, as well as NE 4th and 5th Avenues. Neither NE 4th Street nor NE 5th 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 4th Avenue along the entire frontage of the property to City street standards as noted above.

Mr. Cummings does not cite any provision of the OCC that requires the Applicants to improve NE 4th Street or NE 5th Street. The criteria cited by Mr. Cummings asks whether the streets which serve the proposed use can adequately accommodate the demands of the proposed use.

As the Decision acknowledges, the Property is accessed by North Oregon Street. The Property can also be accessed from NE 4th Street and NE 5th Street. Certainly, North Oregon Street, on its own, can accommodate the demands generated by the proposed use of the Property as a retail cannabis dispensary.

Put another way, there are no facts in the record which suggest that North Oregon Street cannot meet the traffic demands of the proposed retail cannabis dispensary. From the Applicants' perspective, it feels as though the City and Mr. Cummings want the Applicants to pay for the development of NE 4th Street, and are using this Application as leverage to accomplish that goal.¹ Unless the City and/or Mr. Cummings can identify a provision of the OCC that requires improvement of NE 4th Street, this condition of approval should be modified to require the Applicants to demonstrate that the existing streets can accommodate the demands generated by the new proposed use of the Property for a retail cannabis dispensary.

¹ To the extent this is what the City is attempting to accomplish, the City's demand that the Applicants improve NE 4th Street in exchange for the conditional use permit constitutes a taking of Applicants' Property in violation of the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Oregon Constitution. Applicants reserve the right to raise this issue on appeal to the Ontario City Council, the Oregon Land Use Board of Appeals, and any further appeals to a court of competent jurisdiction. The City is on notice of Applicants' intention to raise this issue in subsequent appeals.

III. PROCEDURAL OBJECTIONS TO THE DECISION

It is a fundamental right of every Oregonian who submits a land use application to have a decision on that land use application be made by an impartial, unbiased decision-maker. *Fasano v. Washington Co. Comm.*, 264 Or. 574, 588, 507 P.2d 23 (1973). Mr. Cummings is designated as the “Hearings Officer” charged with making the final decision on the Application. Mr. Cummings is hardly impartial or biased. For these reasons, this entire proceeding is likely tainted to such an extent as to substantially deprive the Applicants of a fair process.

Mr. Cummings, as the planning director for the City, has repeatedly argued against the Applicants’ attempts to open a recreational dispensary on the Property. The attached exhibits demonstrate Mr. Cummings’ irrefutable prejudgment bias against the Applicants and the Application:

<u>Exhibit</u>	<u>Description</u>
B	Declaration of Dan Cummings in Support of Motion to Dismiss Writ of Review
C	Second Declaration of Dan Cummings in Support of Summary Judgment
D	November 18 th , 2018 letter from Dan Cummings Denying “Line Order” to Applicants
E	Exhibit 1 with Dan Cummings Handwriting “VOID”
F	July 10 th , 2015 email from Dan Cummings denying Scott, Inc.’s use of the Property as a Dispensary

In each of the exhibits above, Mr. Cummings argued against the Applicants’ proposed use of the Property for a recreational dispensary before the Application was ever filed.

The Oregon Land Use Board of Appeals (“LUBA”) and the Oregon appellate courts have long held that in order to demonstrate bias, a party must establish that a decisionmaker either has a personal stake in the outcome of a decision, or that the final decisionmaker has prejudged the application. *Kittleson v. Lane County*, 20 Or. LUBA 286, 290 (1990); *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or. 76, 83, 742 P.2d 39 (1987).

Mr. Cummings has so prejudged the Application such that he is incapable of determining its merits based on the evidence and arguments presented by the Applicants. *Columbia Riverkeeper v. Clatsop County*, 267 Or. App. 578, 602, 341 P.3d 790 (2014). As far back as 2015 Mr. Cummings has argued against allowing a retail dispensary on the Property. The exhibits attached to this Letter Memorandum demonstrates that Mr. Cummings has so prejudged the Application that his participation constitutes a violation of the Applicants’ right to an impartial decisionmaker.

Indeed, Mr. Cummings' participation in any manner whatsoever related to the Application calls into question the validity of the entire proceeding. Not only has Mr. Cummings' participation in making the decision on the Application violated the Applicant's due process rights to an unbiased decisionmaker, but his continued participation in the appeals process also violates the Applicants' due process right to an impartial decisionmaker.

Again, LUBA and the Oregon appellate courts have recognized that bias may occur when a lower-level decisionmaker "taints" the record before the ultimate decisionmaker. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012); *Nez Perce Tribe v. Wallowa County*, 47 Or. LUBA 419, 432, *aff'd* 196 Or. App. 787, 106 P.3d 699 (2004). Mr. Cummings' Decision, and indeed his very participation in the consideration of the Application has tainted the process virtually beyond repair. To wit:

- In the section of the Decision entitled "**Summary & Background**", Mr. Cummings presents arguments on behalf of the Applicants – and then provides his own rebuttal to those arguments – not presented in the Application. On page 3 of the Decision, Mr. Cummings discusses operating a retail dispensary as a "nonconforming use". Nowhere in the Application do the Applicants use the phrase "nonconforming use", or assert a right to operate a retail dispensary as a "nonconforming use". Any discussion of a "nonconforming use" is outside the scope of the Application.
- Throughout the Decision Mr. Cummings alleges, essentially, there is not enough information to determine whether the Application meets the criteria for approval. As an example, Mr. Cummings alleges on page 4 of the Decision that the Application does not provide "clear enough detail". The Application was submitted on July 19th, 2022. On July 25th, 2022 Mr. Cummings deemed the Application to be complete. Mr. Cummings never requested additional information from the Applicants, which he could have done and the Applicants would have provided. By not asking for more information from the Applicants, Mr. Cummings manipulated the process to achieve his desired result – denial of the Application.
- For the first time since the City's marijuana ordinance went into effect, Mr. Cummings launches a new reason for rejecting the Application – the allegation that locating a retail dispensary on the Property would violate §10A-59-15(A)(3) of the OCC. The Applicants have been involved in ongoing litigation with the City for nearly 7 years. Since the City imposed its buffer requirements in 2018, the City has never, prior to the issuance of the Decision, alleged that operating a cannabis dispensary on the Property would violate subsection (A)(3). The Decision is the first time the Applicants became aware of the City's position that subsection (A)(3) applies to the Property in addition to subsection (A)(7). Mr. Cummings has had at least four (4) years to notify the Applicants of the City's position but has apparently chosen to play "hide-the-ball" with the Applicants on this alleged "new" violation of the OCC. Curiously, Mr. Cummings does not identify how operating a retail cannabis dispensary on the Property would violate §10A-59-15(A)(3) of the OCC, again withholding this information from the Applicants.

Mr. Cummings' participation in the consideration of the Application has resulted in a manifestly unfair, unconstitutional, and unjust process for the Applicants. The City must restart this process, taking every precaution necessary to ensure Mr. Cummings is not allowed to influence the Application in any way, shape, or form. Any steps short of this will most certainly lead to reversal and remand on appeal.

IV. PROPOSED PATH TO APPROVAL

Notwithstanding the foregoing sections of this Letter Memorandum, there is a path available to the City and the Applicants to reach approval of the Application. However, Mr. Cummings has already expressed his opposition to such a resolution. Because of Mr. Cummings' open, hostile bias towards the Applicants' and their desire to operate a retail cannabis dispensary on the Property, Mr. Cummings should not be involved in any way whatsoever with the consideration of the resolution proposed below. In other words, the City's failure to segregate Mr. Cummings from further participation or consideration of the Application will once again taint the process and deny the Applicants' their right to an impartial decision maker.

Attached as Exhibit A to this Letter Memorandum is a proposed list of conditions which could be imposed by the Ontario planning commission which, if satisfied, would cause the Application to meet the criteria for a conditional use permit under the OCC. This list is taken largely from the Decision, with the exception of a modification to the Decision's proposed condition #3 and the addition of condition #13.

Most notable is the addition of a requirement (as discussed above) that the Applicants obtain a variance for the 1000' and 500' buffers required by §10A-59-15(A)(3) and (A)(7), respectively, of the OCC. The variance application the Applicants would be required to submit would likely be considered by the planning commission, ensuring the planning commission would continue to have a "voice" in the resolution of the Applicants' dispute with the City.

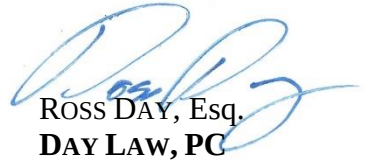
V. CONCLUSION

Thank you for taking the time to consider the Applicants' objections to the Decision. The Applicants sincerely appreciate your willingness to thoughtfully consider their position regarding the Application.

The good news in all of this is there is a path available to the planning commission – and the City – to get to an approval of the Application. The planning commission can approve the Application, subject to the conditions attached as Exhibit A to this Letter Memorandum. Once the Applicants satisfy the conditions of approval, the Applicants would be able to open the proposed retail cannabis dispensary on the Property.

To accomplish this result, the planning commission would simply move to approve the Application subject to the conditions listed on Exhibit A to this Letter Memorandum.

I look forward to appearing before all of you at the meeting of the planning commission scheduled for 6:00 p.m. (MST) on October 26th, 2022.


ROSS DAY, Esq.
DAY LAW, PC
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cc: Dustin Hawkins (hawkins@bljlawyers.com)
Mark Reinecke (reinecke@bljlawyers.com)
Jeremy Green (green@bljlawyers.com)
Garrett Chrostek (chrostek@bljlawyers.com)
Clients.

EXHIBIT A
APPLICANTS' PROPOSED 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 Applicants 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 Applicants must demonstrate the existing streets surrounding the Applicants' property can accommodate the proposed use of Applicants' property for a new, retail cannabis dispensary. Applicants must submit a traffic study from a traffic engineer which demonstrates the existing streets can accommodate the proposed use.
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 Applicants 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, Applicants 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 Applicants 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 Applicants 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 Applicants 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).
 13. Prior to issuance of a conditional use permit, the Applicants shall obtain a variance under Chapter 10B-30 of the Ontario City Code.

Exhibit B

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF MALHEUR

SCOTT INC., an Oregon Domestic
Business Corporation,

Petitioner,

v.

CITY OF ONTARIO, a political
subdivision of the state of Oregon,

Respondent.

Case No. 19CV40752

DECLARATION OF DAN K.
CUMMINGS IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS
PETITION FOR WRIT OF REVIEW

I, Dan K. Cummings, hereby declare:

1. I am employed as the planning director and economic development director for the City of Ontario, and have been so employed since June 1, 2015. In that capacity I supervise and manage all land use planning activities for the City of Ontario.

2. Before becoming Ontario planning director, I was employed since 1974 by CK3, LLC, an engineering and surveying firm that had a consulting contract with the city of Ontario to provide land use planning services. Between November, 2013 and June 1, 2015, when I was hired as planning director, I worked on a number of projects on behalf of the city of Ontario as a contract planner under the CK3 contract.

3. For three decades, including during the time that I worked with the city of Ontario as a contract planner, I worked for clients of CK3 on land use planning projects in Ontario and throughout eastern Oregon. That work required me to interact regularly with the Ontario planning department, although never on the same projects for which I was a contract planner for the city.

Page 1- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 All of this work gave me a familiarity with Oregon land use laws generally, and also with the
2 zoning ordinances of the city of Ontario and the policies and procedures of the Ontario planning
3 department.

4 4. I am also a licensed Oregon Professional Land Surveyor (PLS), and have held an
5 Oregon license in this field since 1988.

6 5. Until January 2, 2019, the City of Ontario never allowed retail marijuana
7 businesses to operate legally in the city limits. After Oregon voters passed Ballot Measure 91 in
8 2014 legalizing the recreational use of marijuana, the Oregon legislature passed HB 3400,
9 allowing certain cities in Oregon to ban retail marijuana businesses if more than 55% of the voters
10 in the county opposed Ballot Measure 91. The City of Ontario was eligible to impose a ban under
11 HB 3400, and the Ontario City Council passed a city-wide ban on retail marijuana businesses that
12 remained in effect until January 2, 2019, as discussed in more detail below.

13 6. On September 25, 2015, after I became Ontario planning director, the Petitioner,
14 Scott, Inc. filed a complaint (the "2015 complaint") in Malheur County Circuit Court Case No.
15 15CV1411 against the City of Ontario alleging that Scott, Inc. had a right to use real property in
16 the City of Ontario located at 432 North Oregon Street to operate a medical marijuana dispensary
17 despite the city-wide ban imposed by the Ontario city council on marijuana dispensaries in the
18 city limits.

19 7. I should note that for convenience, I am referring to 432 North Oregon Street as
20 the address of the property subject to the Petition for Writ of Review and the 2015 complaint,
21 even though that is not the address listed in the City of Ontario records. In my dealings with Scott,
22 Inc. and its president, Scott Matthews, over the years I have found that Scott Matthews generally
23 refers to his properties on North Oregon Street by a number of addresses that do not conform to
24 the City of Ontario's records, and in my correspondence and decisions about those properties, I
25 have attempted to refer to those properties using the records in the City of Ontario files. To my
26 knowledge, the use of different addresses in my documents from those used by Scott, Inc., does
27

28 Page 2- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 not represent confusion over the location of the properties but only the failure of Scott, Inc. and
2 Scott Matthews to follow the addresses used by the City of Ontario for those properties. When
3 I refer in this Declaration to the 432 North Oregon Street address, it is only because Scott, Inc.
4 uses that address.

5 8. Scott, Inc.'s parcel at 432 North Oregon Street was located in the City's Heavy
6 Industrial 1-2 zone, and is still located in the same zone.

7 9. In paragraphs 10 and 11 of its 2015 complaint, Scott, Inc. alleged that it was
8 entitled to maintain its parcel at 432 North Oregon Street as a medical marijuana dispensary as
9 a retail "nonconforming use" under Ontario Municipal Code ("OMC") Section 10A-01-35.

10 10. OMC Section 10A-01-35 reads the same now as it did in 2015, when the 2015
11 complaint was filed. It reads as follows:

12 10A-01-35 - APPLICABILITY, EXISTING USES OF RIGHT TO CONDITIONAL
13 USES.

14 Any existing structure or use established as of right under any previous regulations
15 and which is listed as a conditional use under this Title shall be a lawful
conditional use upon adoption of this Title.

16 11. In its 2015 complaint, Scott, Inc. asked the Court to declare that Scott, Inc.'s parcel
17 at 432 North Oregon Street was not subject to the City's ban on marijuana dispensaries. As
18 planning director for the City of Ontario, I was aware of Scott, Inc.'s 2015 complaint and worked
19 with the City attorney, Larry A. Sullivan, on the issues raised in the complaint.

20 12. From my reading of the 2015 complaint, I understood the purpose of the complaint
21 was to obtain the Court's authorization for Scott, Inc. to open a medical marijuana dispensary in
22 the I-2 zone at 432 North Oregon Street as a nonconforming use under OMC Section 10A-01-35,
23 regardless of the City of Ontario's city-wide ban on such dispensaries.

24 13. Several months after the complaint was filed, I became aware of a possible
25 settlement of the lawsuit, and was provided with a copy of the proposed settlement agreement,
26 which is attached as Exhibit "1" attached hereto.

27 14. In my capacity as planning director, I reviewed the settlement agreement set forth

28 Page 3- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 in Exhibit "1" before it was signed by the parties. Attached as Exhibit "2" is a partially illegible
2 copy of the signed settlement agreement provided by Scott, Inc.'s attorneys to the City attorney
3 and dated April 18, 2016. Exhibit "1" represents a more legible unsigned copy of the same
4 settlement agreement as Exhibit "2".

5 15. I also was aware that, as a result of the signing of the settlement agreement, Scott,
6 Inc. dismissed its 2015 complaint with prejudice.

7 16. After the settlement agreement was signed on April 18, 2016, and the 2015
8 complaint was dismissed with prejudice, I relied on the terms of paragraph 7 of the 2015
9 settlement agreement to approve nonconforming uses of two parcels owned by Scott, Inc., located
10 at 444 North Oregon Street and 454 North Oregon Street. These property locations differ from
11 the one that was the subject of the 2015 complaint.

12 17. The written decision I made on July 16, 2016, was to allow the Scott, Inc.'s parcel
13 located at 444 North Oregon Street in Ontario to be used as a second hand/appliance store; and
14 to allow the Scott, Inc.'s parcel located at 454 North Oregon Street to be used as an antique store.

15 18. After the dismissal with prejudice of the 2015 complaint, Scott, Inc. did not seek,
16 and my decision on July 26, 2016, did not address, any real property uses at 432 North Oregon
17 Street as nonconforming uses.

18 19. Scott, Inc. has never applied to the City of Ontario for a nonconforming use permit
19 for the portion of the building identified as 432 North Oregon Street.

20 20. On November 6, 2018, the voters in Ontario overturned the City of Ontario's ban
21 on various marijuana-related businesses, effective January 2, 2019.

22 21. In anticipation of that election result, in 2018 the Ontario City Council enacted
23 ordinances regulating the location and operation of marijuana-related businesses in some zones
24 and continuing to impose bans on marijuana-related businesses in other zones. The changes also
25 imposed so-called buffers between retail marijuana dispensaries themselves, and between
26 dispensaries and other uses, such as parks, residences and schools. The changes were to become
27

28 Page 4- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 effective only if the voters overturned the City's ban on marijuana businesses.

2 22. With those ordinance amendments, the only zones in which retail marijuana
3 businesses could legally operate were in zones specifically listing retail marijuana businesses as
4 conditional uses, subject to a variety of conditions that had to be satisfied in order to allow those
5 businesses to operate in those zones. In other words, none of the ordinance changes allowed retail
6 marijuana businesses to operate without applying for and receiving conditional use permits from
7 the City.

8 23. The zoning changes done in anticipation of the voters overturning the marijuana
9 ban included an amendment that, for the first time, allowed retail marijuana businesses in I-2
10 zones as conditional uses. None of the zoning changes allowed Scott, Inc., or other owner of real
11 property in the City of Ontario Heavy Industrial I-2 zone to operate any retail marijuana
12 businesses without submitting a conditional use application and obtaining a conditional use
13 permit from the City. Before that change, the City of Ontario zoning regulations have never
14 allowed retail marijuana businesses to operate in an I-2 zone, either as permitted uses or
15 conditional uses.

16 24. The City Council's zoning restrictions imposed in connection with overturning of
17 the City's ban on marijuana businesses included a restriction setting a 1,000 foot buffer between
18 those marijuana businesses. This had the obvious effect of limiting the number of dispensaries
19 that could be operated in the zones in which such businesses were conditionally allowed.

20 25. In the week before the November 6, 2018, election, people started lining up
21 outside my planning department office to apply for conditional use permits for retail marijuana
22 businesses in the event the voters overturned the ban on marijuana businesses. Even though the
23 ban would not be lifted until January 2, 2019, many of the people in line expressed the intention
24 to remain in line for 24 hours a day until the City would begin processing their conditional use
25 applications on January 2, 2019.

26 26. This is because the conditional use applicants who were in line first, and whose
27

28 Page 5- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 applications were processed first, might have a significant advantage in obtaining a conditional
2 use permit because they would get priority over later applicants who were within 1,000 feet of
3 that applicant's proposed retail marijuana business location.

4 27. Having a large group of people waiting outdoors on City property for several
5 weeks in cold weather raised public safety issues that the City Council addressed in Resolution
6 2018-140, which was enacted two days after the election. Resolution 2018-140 is attached as
7 Exhibit "3". This resolution established an orderly pre-application procedure for the Ontario
8 planning department to create a priority list of conditional use applications without requiring
9 applicants to wait in line until January 2, 2019.

10 28. On November 13, 2018, an individual, Scott Matthews submitted a completed pre-
11 application form to my office under Resolution 2018-140, to obtain a conditional use permit for
12 a retail marijuana dispensary at 432 North Oregon Street, the same address for which Scott, Inc.
13 has filed its petition for a writ of review.

14 29. According to the Oregon Secretary of State's website, Scott Matthews is the
15 president of and registered agent for Scott, Inc., an Oregon corporation.

16 30. I denied Scott Matthews' pre-application by a written decision dated November
17 30, 2018, which I mailed to Scott Matthews and also sent to him by email. The denial
18 incorporates the pre-application form and is attached as Exhibit "4".

19 31. The main reason I denied the pre-application is because the proposed location of
20 the retail marijuana dispensary at 432 North Oregon Street is not allowed under OMC 10A-59-
21 15, the zoning regulation that imposes buffers on retail marijuana businesses as conditional uses
22 in various zones, including the I-2 zone in which the parcel at 432 North Oregon Street is located.
23 OMC 10A-59-15 is attached as Exhibit "5".

24 32. According to OMC10A-59-15(A)7., retail marijuana businesses are subject to a
25 500 foot buffer from the nearest residential zone. 432 North Oregon Street is within 500 feet of
26 a residential zone as shown in the maps I prepared that are attached as Exhibits "6" and "7".

27
28 Page 6- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 Therefore, even with the 2018 zone change allowing a certain number of retail marijuana
2 businesses as conditional uses in an I-2 zone, Ontario zoning regulations do not allow a retail
3 marijuana dispensary at 432 North Oregon Street.

4 33. The maps shown in Exhibits “6” and “7” refer to the addresses used by the City
5 of Ontario rather than Scott Matthews. To my knowledge, the 420 address shown on the maps in
6 Exhibits “6” and “7” at the south end of the property is the same address referred to as 432 North
7 Oregon Street in the Petition and in other documents submitted to me by Scott, Inc. and Scott
8 Matthews.

9 34. No one ever filed a legal challenge to the decision I made in my November 30,
10 2019, denial letter.

11 35. On November 29, 2018, I received a letter from Scott, Inc., attached as Exhibit
12 “8”, claiming the right to operate a marijuana dispensary at 432 North Oregon Street, based upon
13 the “...Settlement Agreement dated April 18, 2016 and Oregon Law.” I am not aware of any
14 provisions of the April 18, 2016, Settlement Agreement or of Oregon law that give Scott, Inc. the
15 right to open a retail marijuana dispensary at 432 North Oregon Street. Scott, Inc., has received
16 no permits from the City of Ontario authorizing it to operate a dispensary at that location. I did
17 not respond to that letter.

18 36. On July 9, 2019, I received from Scott, Inc., a Land Use Compatibility Statement
19 (“LUCS”) form for a retail marijuana business with respect to the property at 432 North Oregon
20 Street. See Exhibit “1” to the Petition filed by Scott, Inc. I was familiar with that form. The form
21 is used by the Oregon Liquor Control Commission (“OLCC”). I completed that form the same
22 day and signed it. I completed that form by checking the boxes stating that the property was inside
23 the city limits, inside the UGB (i.e. urban growth area), in an I-2 Heavy Industrial zone, and that
24 the proposed land use is prohibited.

25 37. My completion of the LUCS form for Scott, Inc., was consistent with the written
26 decision I made for Scott Matthews more than six months earlier, on November 30, 2018, with
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28 Page 7- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT’S
MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

1 the respect to the same property address, as shown in Exhibit "4". Therefore, by the time I
2 completed the LUCS form, I had already decided in writing that the use of the property at the
3 address that Scott, Inc. refers to as 432 North Oregon Street as a retail marijuana business was
4 prohibited by the Ontario zoning regulations. My completion of the LUCS form did not require
5 me to make any new decisions as Ontario planning director other than the decision I had already
6 made in Exhibit "4".

7 38. The petition for a writ of review now filed by Scott, Inc., is for the same property
8 that was the subject of the 2015 complaint filed by Scott, Inc. that was dismissed with prejudice,
9 and for the November 13, 2018, pre-application that I denied on November 30, 2018.

10 39. In Paragraph 13 of Scott, Inc.'s Petition, Scott, Inc. alleges that it "... has a lawful,
11 non-conforming use right to operate a retail establishment on the Property." Although it is not
12 stated in the Petition, this appears to be a reference to the same nonconforming use ordinance,
13 namely OMC 10A-01-35, that was the subject of the 2015 complaint.

14 40. During my time as Ontario planning director since 2015, Scott, Inc. has never
15 made application for a nonconforming use permit for 432 North Oregon Street, either as a retail
16 establishment or for any other use. Several years ago, I created application forms for people to
17 apply for nonconforming use permits under OMC 10A-01-35. I also advised Scott Matthews of
18 the fact that such a form was available. Neither Scott Matthews nor Scott, Inc., has never
19 completed such a form.

20 41. I hereby declare that the above statement is true to the best of my knowledge and
21 belief, and that I understand it is made for use as evidence in court and is subject to penalty for
22 perjury.

23 Dated this 5th day of DECEMBER, 2019.

24 
25 DAN K. CUMMINGS

26 Planning Director, City of Ontario

27 Page 8- DECLARATION OF DAN K. CUMMINGS IN SUPPORT OF RESPONDENT'S
28 MOTION TO DISMISS PETITION FOR WRIT OF REVIEW

Exhibit C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MALHEUR

SCOTT, INC., an Oregon Domestic Business Corporation; SCOTT MATTHEWS and DIANA MATTHEWS, a married couple,	)	Case No. 20CV15718
	)	
Plaintiffs,	)	DECLARATION OF DAN CUMMINGS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT
	)	
v.	)	
	)	
CITY OF ONTARIO, a political subdivision of the state of Oregon,	)	
	)	
Defendant.	)	

I, Dan Cummings, hereby declare as follows:

1. I am the City Manager Pro-Tem and Community Development Director for the City of Ontario. I make this declaration in support of Defendant's Motion for Summary Judgment and Partial Summary Judgment based on personal knowledge and am competent to testify to the matters herein.

2. I began my employment with the City of Ontario as a planning director and economic development director on June 1, 2015. In this employment position I supervised and managed all land use planning activities in the City of Ontario.

3. On or about September 25, 2015, Scott, Inc. filed a complaint against the City of Ontario (the "2015 Complaint") in Malheur County Circuit Court, Case No. 15CV1411 (the "2015 Lawsuit").

1 4. The 2015 Lawsuit resulted in a settlement agreement between the parties, a copy
2 of which is attached hereto as Exhibit A. Attached hereto as Exhibit B is a partially legible copy
3 of the signed settlement agreement provided by Scott, Inc.'s attorneys to the City's attorney and
4 dated April 18, 2016. Exhibit A represents a more legible unsigned copy of the same settlement
5 agreement attached as Exhibit B.

6 *I hereby declare that the above statement is true to the best of my knowledge and belief, and that*
7 *I understand it is made for use as evidence in court and is subject to penalty for perjury.*
8

9
10 Executed this 13th day of July, 2022 in Ontario, Oregon.

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13 Dan Cummings
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Page 2 – DECLARATION OF DAN CUMMINGS IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

SETTLEMENT AGREEMENT

This Settlement Agreement, entered into this _____ day of _____, 2016, between SCOTT, INC., an Oregon corporation ("Scott, Inc.") and the CITY OF ONTARIO, an Oregon municipal corporation ("Ontario").

RECITALS:

A. Effective June 30, 2015, the Oregon legislature passed and the governor approved House Bill 3400 (2015), regulating the growing, processing, producing and dispensing of medical and recreational marijuana.

B. Prior to July 1, 2015, Scott, Inc., doing business as 420ville, submitted an application to the Oregon Health Authority to operate a medical marijuana dispensary at 432 N. Oregon Street, Ontario, OR 97914.

C. On July 16, 2015, Ontario enacted Ordinance No. 2704-2015, which imposed a ban ("Ontario's Ban") on recreational marijuana-related businesses and medical marijuana dispensaries, under the authority of Section 133 of HB 3400 (2015).

D. Thereafter, Scott, Inc. filed a civil complaint against Ontario in Malheur County Circuit Court Case No. 15CV1411 seeking a declaratory judgment that Scott, Inc. is exempt from Ontario's Ban pursuant to Section 133(6) of HB 3400 (2015). Ontario filed an answer in the civil case denying that Scott, Inc., is exempt from Ontario's Ban.

E. The parties desire to settle the litigation between them and to resolve other issues in connection with certain other businesses located in Ontario related to Scott, Inc. and its president, Scott R. Matthews.

AGREEMENT:

- 1) Truth of Recitals. The foregoing Recitals are true and correct and are incorporated into this Settlement Agreement.
- 2) Dismissal of Litigation. The parties shall promptly submit to the Malheur County Circuit Court a stipulated motion to dismiss with prejudice Case No. 15CV1411, along with a proposed judgment of dismissal in the forms attached hereto as Exhibits "1" and "2", respectively.
- 3) Waiver of Exemption under HB 3400. Scott, Inc. waives any claim that it might have for an exemption to Ontario's Ban on medical marijuana dispensaries under Section 133(6) of HB 3400 (2015).
- 4) 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.

- 5) Grow Site. Bunker Boys, LLC, is maintaining a medical marijuana grow site located at 432 N. Oregon Street ("the Grow Site"), and is registered to do so by the Oregon Health Authority pursuant to ORS 475B.420. The Grow Site provides medical marijuana to registered medical marijuana card holders and to a registered medical marijuana dispensary located in Huntington, Oregon, for medical use only.
 - a) The Ontario Ban in Ordinance No. 2704-2015 does not apply to the Grow Site.
 - b) The Grow Site is located in Ontario's I-2 zone. The Grow Site, as currently configured and operated, is not in violation of Ontario's I-2 zone and is a permitted agricultural use in said zone.
 - c) Unless there is a final judgment from an Oregon or federal appellate court of competent jurisdiction which holds federal law preempts Oregon from authorizing medical marijuana grow sites, Ontario will not rely on federal law as a basis to prohibit or regulate the operation of the Grow Site.
 - d) Ontario may regulate the Grow Site
 - (1) to the extent permitted under Oregon law;
 - (2) or to the extent allowed by Ontario's home rule authority;
 - (3) ; or to the extent that the Grow Site otherwise fails to comply with the Ontario City Code.
- 6) Grow Site Sign. Scott, Inc. will promptly remove the "Marijuana" sign located at 432 N. Oregon Street and will not replace it with any other sign advertising the availability of marijuana to the general public. Scott, Inc. may post a notice on the door of 432 N. Oregon St. of a size sufficient to notify medical marijuana card holders who come to the door that it is a registered medical marijuana grow site.
- 7) Secondhand Store as Nonconforming Use. The president of Scott, Inc., is Scott R. Matthews. Scott R. Matthews and his wife, Diana L. Matthews ("the Matthews") own the real property identified as Tax Lot 1100 by the Malheur County Assessor. Tax Lot 1100 includes the Grow Site at 432 N. Oregon St. and a separate business operating as a secondhand store ("the Secondhand Store") located at ____ N. Oregon Street. Based upon the information available to Ontario, the Secondhand Store qualifies as a nonconforming use pursuant to Section 10A-05-35 of the Ontario Zoning Title. In order to formally document the nature and extent of the use of the Secondhand Store as a nonconforming use, the Matthews shall submit to the Ontario Planning Department a completed Development Application on a form provided by Ontario. Ontario shall not charge the Matthews a fee for processing the application. Upon verification of the accuracy and completeness of the Development Application, Ontario will

provide to the Matthews, within 30 days or less, a written confirmation that the Matthews' use of the Secondhand Store, as documented in the Development Application, is a nonconforming use under the Ontario City Code.

- 8) Attorney Fees. If a legal proceeding is initiated to enforce or interpret the provisions of this Settlement Agreement, the prevailing party shall be entitled to recover against the nonprevailing party its costs and reasonable attorney fees incurred at trial and on appeal.
- 9) Complete Agreement. This Settlement Agreement represents the complete agreement between the parties. It replaces all other agreements. No other agreements shall be entered into unless they are in a writing signed by all of the parties.

EXECUTED ON DUPLICATE ORIGINALS

CITY OF ONTARIO

By:

SCOTT, INC.

By:

Ronald Verini, Mayor

Scott R. Matthews, President

Attest:

Tori Barnett MMC, Ontario City Recorder

Approved as to Form:

Ross Day, OSB# 002395
Of Attorneys for Plaintiff

Larry A. Sullivan, OSB# 783935
Attorney for Defendant

This Settlement Agreement, entered into this 18th day of April, 2016, between SCOTT, INC., an Oregon corporation ("Scott, Inc.") and the CITY OF ONTARIO, an Oregon municipal corporation ("Ontario").

RECITALS:

A. Effective June 30, 2015, the Oregon legislature passed and the governor approved House Bill 3400 (2015), regulating the growing, processing, producing and dispensing of medical and recreational marijuana.

B. Prior to July 1, 2015, Scott, Inc., doing business as 420ville, submitted an application to the Oregon Health Authority to operate a medical marijuana dispensary at 432 N. Oregon Street, Ontario, OR 97914.

C. On July 16, 2015, Ontario enacted Ordinance No. 2704-2015, which imposed a ban ("Ontario's Ban") on recreational marijuana-related businesses and medical marijuana dispensaries, under the authority of Section 133 of HB 3400 (2015).

D. Thereafter, Scott, Inc. filed a civil complaint against Ontario in Malheur County Circuit Court Case No. 15CV1411 seeking a declaratory judgment that Scott, Inc. is exempt from Ontario's Ban pursuant to Section 133(6) of HB 3400 (2015). Ontario filed an answer in the civil case denying that Scott, Inc., is exempt from Ontario's Ban.

E. The parties desire to settle the litigation between them and to resolve other issues in connection with certain other businesses located in Ontario related to Scott, Inc. and its president, Scott R. Matthews.

AGREEMENT:

- 1) Truth of Recitals. The foregoing Recitals are true and correct and are incorporated into this Settlement Agreement.
- 2) Dismissal of Litigation. The parties shall promptly submit to the Malheur County Circuit Court a stipulated motion to dismiss with prejudice Case No. 15CV1411, along with a proposed judgment of dismissal in the forms attached hereto as Exhibits "1" and "2", respectively.
- 3) Waiver of Exemption under HB 3400. Scott, Inc. waives any claim that it might have for an exemption to Ontario's Ban on medical marijuana dispensaries under Section 133(6) of HB 3400 (2015).
- 4) 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

- 5) Grow Site. Bunker Boys, LLC, is maintaining a medical marijuana grow site located at 432 N. Oregon Street ("the Grow Site"), and is registered to do so by the Oregon Health Authority pursuant to ORS 475B.420. The Grow Site provides medical marijuana to registered medical marijuana card holders and to a registered medical marijuana dispensary located in Huntington, Oregon, for medical use only.

Located @ 422, 430, 448 North Oregon SM

- a) The Ontario Ban in Ordinance No. 2704-2015 does not apply to the Grow Site.
- b) The Grow Site is located in Ontario's I-2 zone. The Grow Site, as currently configured and operated, is not in violation of Ontario's I-2 zone and is a permitted agricultural use in said zone.
- c) Unless there is a final judgment from an Oregon or federal appellate court of competent jurisdiction which holds federal law preempts Oregon from authorizing medical marijuana grow sites, Ontario will not rely on federal law as a basis to prohibit or regulate the operation of the Grow Site.
- d) Ontario may regulate the Grow Site

(1) to the extent permitted under Oregon law;

(2) or to the extent allowed by Ontario's home rule authority;

(3) ; or to the extent that the Grow Site otherwise fails to comply with the Ontario City Code.

- 6) Grow Site Sign. Scott, Inc. will promptly remove the "Marijuana" sign located at 432 N. Oregon Street and will not replace it with any other sign advertising the availability of marijuana to the general public. Scott, Inc. may post a notice on the door of 432 N. Oregon St. of a size sufficient to notify medical marijuana card holders who come to the door that it is a registered medical marijuana grow site.

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*SM * 444 Leased to Racial Garcia - what's up Appliance*

Page 2- SETTLEMENT AGREEMENT

*SM * 454 Deb's Antiques Leased to Debbie Stovall*

use of the Secondhand Store, as documented in the Development Application, for nonconforming use under the Ontario City Code.

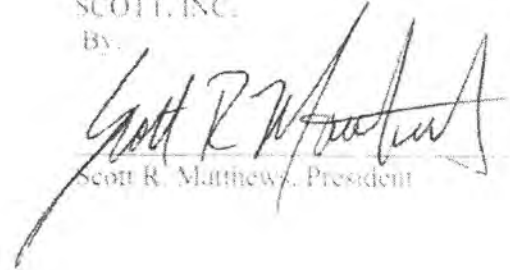
- 8) Attorney Fees. If a legal proceeding is initiated to enforce or interpret the provisions of this Settlement Agreement, the prevailing party shall be entitled to recover against the nonprevailing party its costs and reasonable attorney fees incurred at trial and on appeal.
- 9) Complete Agreement. This Settlement Agreement represents the complete agreement between the parties. It replaces all other agreements. No other agreements shall be entered into unless they are in a writing signed by all of the parties.

EXECUTED ON DUPLICATE ORIGINALS

CITY OF ONTARIO
By:


Ronald Verini, Mayor

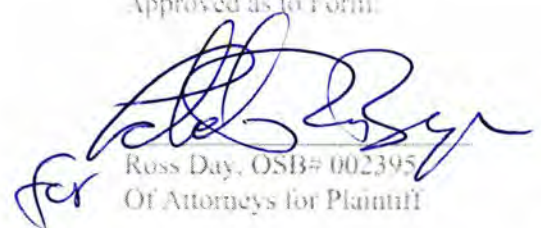
SCOTT, INC.
By:


Scott R. Matthews, President

Attest:


Toni Barnett MMC, Ontario City Recorder

Approved as to Form:


for Ross Day, OSB# 002395
Of Attorneys for Plaintiff


Larry A. Sullivan, OSB# 783935
Attorney for Defendant

Page 3- SETTLEMENT AGREEMENT

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2022, I served a true and correct copy of the foregoing DECLARATION OF DAN CUMMINGS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT on the following by the method indicated below, and addressed to the following:

Stephanie E. Marshall	<u> </u>	E-Serve
Bennu Law LLC	<u> X </u>	E-Mail
147 NE Alpenview Lane	<u> X </u>	Mail
Bend, OR 97701	<u> </u>	Fax
stephanie@bennulaw.com		

/s/ Dustin Hawkins

Dustin Hawkins, OSB #163944
Of Attorneys for Defendant
hawkins@bljlawyers.com

CERTIFICATE OF SERVICE

Exhibit D



City of Ontario
Community Development Director
444 SW 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Dan.Cummings@ontariooregon.org

November 30, 2018

Scott Matthews SENT VIA EMAIL & US MAIL
432 N. Oregon Street
Ontario, OR 97914
Email: japim2002@yahoo.com

Re: Line Order for Submission of Conditional Use Permit (CUP) on January 2, 2019 starting at 9:00 am (MST) at the Office of the City of Ontario Community Development Center.

On October 30, 2018, potential marijuana retail applicants began lining up in front of the City Community Development Department office hoping to establish the order of acceptance of an application as set by Ordinance 2748-2018. To preserve order and safety of the citizens of Ontario, the Community Development Director marked areas numbered to regulate the order of the persons standing in line based on when they showed up.

On November 8, 2018, the Ontario City Council by Resolution No. 2018-140 approved the procedures to review and process conditional use applications for marijuana retailers, this Resolution is not a Land Use Action and is a City Council procedural process to established the order for submittal and review of a Conditional Use permit which is a Land Use Action and must comply to all city codes pertaining thereto.

All Sites submitted under the Preliminary Application Process have been assigned a Priority Number for review and shall maintain that Priory Order throughout the Final Process until such time as a Site has been approved through the Conditional Use Process and has established the 1000 feet separation between retail facilities as established by City Code. Only Sites that have preliminarily established the control site for the 1000 feet buffer through the process, will be required to submit a Conditional Use permit on January 2, 2019, all others will hold their place in line as established in the Preliminary Application process. In the event that the first site fails to meet the requirements of the Conditional Use Permit process then the next site in order will be notified and shall submit a Conditional Use permit by the date in the notification letter to maintain their order of Priority.

Dear Applicant,

Under the Preliminary Application process you submitted 1 Site and it was given a Priority review number of 16 based on the order you submitted it to the Community Development Director (that you insisted to be submitted under our rules). The site is as follows:

Tax Lot 1100, Tax Map 18S4703CB, and a site address of 420 N. Oregon Street.

Your Site did not establish a 1000 feet buffer due to the fact that the application was not complete as per the requirements of Resolution 2018-140, more specifically the application did not contain the required sworn statement: "Sworn statement from the applicant that to the best of their knowledge that the applicant is not disqualified from receiving an OLCC marijuana retailer's license for this site" and more importantly as was stated to you in person and to your Agent dropping off the application that the above described property is fully inside the 500 feet Residential Buffer established by City

Code and therefore does not qualify for a Retail facility or any other Marijuana Activity or Facility allowed and regulated under the City Code established by City Ordinance #2748-2018.

Therefore this letter is your official notification the the Property stated above in this letter at the address of 420 N. Oregon, Tax Lot 1100, Tax Map 18S4703CB, is NOT ALLOWED to operate a Marijuana Retail Facility or any other Marijuana related facility allowed for and/or regulated by and under the Established City Code as per City Ordinance 2748-2018.

If you have any questions please give Dan Cummings a call at (541) 881-3222 or email him at Dan.Cummings@ontariooregon.org.

Sincerely,



Dan K. Cummings
Community Development Director
City of Ontario

Exhibit E



City of Ontario
Community Development Director
444 SW 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Dan.Cummings@ontariooregon.org

Exhibit 1
Procedure for Submission for a Conditional Use Permit Application by a Marijuana Retailer
Date: November 9, 2018

The City Council of the City of Ontario has approved Ordinance 2747-2018, effective as of January 1, 2019, which establishes zoning regulations in the event that the voters overturned the City's 2015 ban on marijuana businesses as a result of the November 6, 2018, election. Ordinance 2747-2018 set a buffer distance of 1,000 feet between marijuana retailers, both medical and recreational, and established that any conditional use permit application required by the Ordinance would be processed with a date and time stamp to establish setting of the 1,000 foot separation.

On October 30, 2018, potential marijuana retail applicants began lining up in front of the City Community Development Department office hoping to establish the order of acceptance of an application as set by Ordinance 2747-2018. To preserve order and safety of the citizens of Ontario, the Community Development Director marked areas numbered to regulate the order of the persons standing in line based on when they showed up.

On November 6, 2018, the voters overturned the City's ban on marijuana retail sales. On November 8, 2018, the Ontario City Council by Resolution No. 2018-140 approved the procedure set forth in this letter to review and process conditional use applications for marijuana retailers, as a supplement to, and not as an amendment of, Ordinance 2747-2018. In the event of any conflict between the procedure in this letter and Ordinance 2747-2018, the Ordinance shall control. The procedure is as follows:

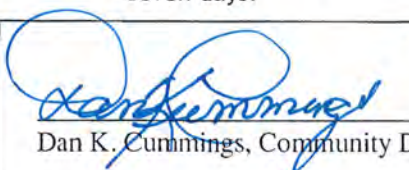
1. The procedure set forth herein creates a priority position for the processing of applications from applicants who desire to follow this procedure. For those applicants, the application process for conditional use permits for marijuana retailers will consist of two separate applications, consisting of a preliminary application and a final conditional use permit application.
 - a. The preliminary application shall 1) establish the location of an applicant's proposed marijuana retail site for the purpose of setting the required 1,000 foot buffer; 2) provide proof of the applicant's legal control of the site; and 3) include a sworn statement by the applicant that to the best of the applicant's knowledge the applicant is not disqualified from receiving an OLCC marijuana retailer's license for that site. If the preliminary applicant is not the owner of the site, written proof of authority to act on behalf of the owner must be provided. If the owner is not a person but is a corporation or limited liability company of which the applicant is an officer or member, proof of the applicant's authority to act on behalf of the corporation or limited liability company must be provided. The City will not accept multiple preliminary applications for the same site, nor will the City accept preliminary applications in which the same owner purports to give different applicants the authority to act on the owner's behalf for the same site.
 - b. Prior to December 26, 2018 at 5 p.m., preliminary applications will be processed based on the order in which persons are standing in line outside of the Planning Department office. The Planning Department will assign each person in line a number, and will

process preliminary applications based on that same order. Once a person has received a number, that person will not be required to remain in line.

- c. Any person who is in line on November 9, 2018 before 5 p.m. shall have until 5 p.m. on November 13, 2018, to submit the preliminary application information required above in order to maintain their priority position. The Community Development Director or his designee will give each person in line a copy of this letter, along with a processing number.
 - d. Any person who lines up after 5 p.m. on the date of this letter will be assigned the next number available and will be told that the person no longer has to remain in line to preserve that person's priority. Those persons will be given a copy of this letter when they receive a processing number and will have until 5 p.m. on the next business day to submit the required preliminary application information in order to preserve their processing number.
 - e. At 5 p.m. on December 26, 2018, the Community Development Department will stop assigning processing numbers to persons waiting in line. The Community Development Department will not accept preliminary applications from any persons standing in line after December 26, 2018, at 5 p.m. who have not received a processing number. Those persons instead must submit final conditional use applications, which will not be accepted for processing until January 2, 2019. Those final applications will be processed without receiving any processing priority other than based on the application's date and time stamp.
 - f. As preliminary applications are processed by the Community Development Department and the City determines where each site is located in relation to the 1,000 foot buffer for earlier site applications, the Community Development Department may suspend processing preliminary applications for sites that are inside a buffer preliminarily established by an earlier application. If the City rejects an earlier application, causing that application's buffer to be eliminated, the City will resume processing applications for sites that were previously inside that buffer based on the application's priority.
 - g. One applicant may submit multiple preliminary applications as long as each one is for a different site. The same proof set forth above must be provided for each application. The applicant shall inform the Community Development Director of the order in which the applicant wants each application processed, recognizing that the first application processed will set a buffer that may cause the suspension of processing of other applications submitted by the same applicant.
 - h. Preliminary applicants who control more than one site DO NOT have to submit all their sites at one time, but preliminary applications submitted later will not receive the same priority assigned to the applicant for the first preliminary application submitted. Any applicant wishing to submit later applications for other sites must stand in line to obtain a new processing priority for those applications.
2. For preliminary applications that have passed the City's initial review (i.e. applications that have not be rejected or suspended), those applicants who wish to maintain their priority position established herein shall return to line in front of the Community Development Department Building to deliver the final conditional use applications by no later than 9 a.m. on January 2, 2019, on forms supplied by the City, containing all the information required by Ordinance 2747-2018 and the City's Zoning Title to obtain a conditional use permit, along with the required fees. On January 2, 2019, the City will begin processing those final applications in the order of the applicant's priority position established herein, and they will be date and time stamped accordingly.
3. Any final application identifying a site that is within the buffer of an earlier application will be

date and time stamped by the City when processed, but the City will refund the fees paid with the application if the application is denied because it is within the site buffer of another final application that the City ultimately approves and grants a conditional use permit for.

4. If an applicant submits a final application identifying a different person or entity than was identified in the preliminary application by the applicant for a site, that application will lose any processing priority established for the applicant submitting the preliminary application. The processing priority established in this letter is intended to benefit only those applicants whose preliminary applications contain the same ownership and site control information as the final conditional use permit application.
5. Applicants who submit preliminary applications for sites in the City's urban growth area shall not be entitled a site buffer that gives them a priority position over sites within the City limits unless those applicants' sites are annexed into the City prior to the City's receipt of any other final conditional use applications for sites inside the City limits within that buffer.
6. The procedure established herein is intended to create an orderly procedure for processing final conditional use applications submitted to the City for processing, by establishing a processing priority for persons in line before January 2, 2019. Any applicant who chooses to submit only a final conditional use permit application rather than a preliminary application will not be disqualified from receiving a conditional use permit. However, that application will not receive any priority processing date earlier than the date on which the application is processed by the Planning Department on or after January 2, 2019, which will be after the processing date and time of a final application submitted by an applicant with a processing priority.
7. Up until the time that the City gives final approval to a conditional use permit application, the Community Development Director retains the right to eliminate the processing priority set forth herein for any applicant who engages in illegal, dishonest or bad faith activities or tactics to obtain a processing priority ahead of those with earlier priority dates or times. The City will investigate and respond to any written complaints received against an applicant allegedly engaging in such activities or tactics. Any decision by the Community Development Director to eliminate a particular applicant's processing priority may be appealed to the City Council for a final decision by submitting a written appeal to the Community Development Director within seven days.

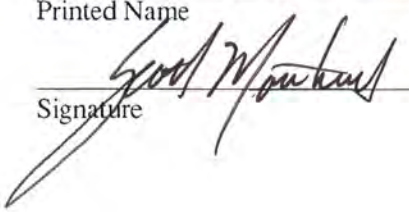

Dan K. Cummings, Community Development Director

16
Priority Number

I acknowledge receipt of this letter on the date and time set forth below:

Scott Matthews
Printed Name

Date: 11-13-2018 Time: 9:30 AM


Signature

*Denied is within the
500 feet Residential
Buffer; therefore
NOT ALLOWED*

Exhibit F

From: Dan Cummings [<mailto:Dan.Cummings@ontariooregon.org>]

Sent: Friday, July 10, 2015 12:07 PM

To: Ross Day; Larry Sullivan

Subject: RE: Scott Matthews v. City of Ontario

To all,

I would be fine with having a meeting to discuss the zoning issues of Mr. Matthews property if they would like to.

Wednesday afternoons are reserved for such meetings with city staff, so if Wednesday afternoons works for everyone it would be best for City staff.

As a note the issue with Mr. Matthews property is that it is Zoned I-2 Heavy Industrial (10A-41) of which 10A-41-09 EXPRESSLY PROHIBITED USES: (6) PROHIBITS COMMERCIAL AND RESIDENTIAL USES NOT SPECIFICALLY AUTHORIZED.

Under 10A-41-10 CONDITIONAL USES, COMMERCIAL, some commercial uses are allowed as a conditional use, but a Marijuana sales facility is not a listed use under the conditional uses and I cannot see how a

marijuana sales facility could meet the main criteria of the conditional use requirement which is and I quote: "The proposed use will primarily serve those who work in or do business with industries in the industrial zones, and there is a need for such use to provide service or goods to those who work in or do business with industries in the industrial zones," So in my opinion I cannot see how anyone could justify how the sale of Marijuana to persons working in the Industrial zone could or would meet the criteria in fact I would say no owner of any industrial activity would want their employees to be using marijuana. I am pretty sure Mr. Matthews was very aware that he needed to apply for a conditional use permit in this zone for a commercial use, as Scott Matthews applied for a conditional use permit under action 03-96-12 CUP for a Restaurant/Lounge in the past (which is a listed conditional use) and was approved. So had Mr. Matthews done as he had done in the past and followed the rules before he started construction on his new facility he would have been made aware that it is not allowed or at least went through the proper procedures and see if a reasoning could be found.

So I have to agree with Mr. Sullivan's opinion it does not matter what the out come of the LUBA case is, I cannot see how we could justify this type of use in the I-2 zone.

I am told that there has possible been some commercial business's run in this building in the past that my not meet the I-2 zone requirements, but running unauthorized business's that did not go through the process, is not a criteria of approving a new use as far as I can find in the city code.

Having said that I am very open to meeting with Mr. Matthews on looking into the possibility of him rezoning his property or if he can, finding a justification to allow his use in the I-2 zone meeting the criteria of the current code 10A-41. As a note on this I am looking into the possibility of rezoning the lands on both sides of North Oregon, but the proposed and possible justification with trading the zoning around is for zoning all these lands along North Oregon to C2 General commercial to match the zoning to the north and south of this area and not to the C2H zone. But again I am very open to Mr. Matthews thought and opinions on what this area should be rezoned as.

Respectfully,

Dan K. Cummings

City of Ontario

444 SW 4th Street

Planning & Economic Development Director

541-881-3222

Larry-



Attachment 5

November 16, 2022

via electronic mail (chrostek@bljlawyers.com) only

City of Ontario Planning Commission
444 SW 4th Street
Ontario, Oregon 97914

RE: City of Ontario Planning File 2022-07-27CUP (herein “Application”)

APPLICANT’S FINAL ARGUMENT ON APPEAL

Members of the Ontario Planning Commission:

Thank you again for your careful consideration of the Applicants’ appeal of the City’s Decision on the above-referenced Application.

As I explained in my letter to the Commission dated October 25th, 2022, Mr. Cummings’ participation in the consideration of the Application violates the Applicants’ basic due process rights. I am extremely confident that if the Applicants were to appeal the City’s Decision to LUBA (or the Oregon Court of Appeals), the City’s Decision would be remanded with instructions to remove Mr. Cummings from participating *in any manner* in the consideration of the Application.

In my October 25th, 2022 letter to the Commission, I offered a solution to the Commission that would address the procedural errors made by the City in its consideration of the Application, while at the same time protecting the Applicants’ right to have the Application considered by a truly neutral, unbiased decisionmaker.

I have re-attached as Exhibit A to this letter the proposed list of conditions which could be imposed by the Ontario planning commission which, if satisfied, would cause the Application to meet the criteria for a conditional use permit under the OCC. As I noted before, this list is taken largely from the Decision, with the exception of a modification to the Decision’s proposed condition #3 and the addition of condition #13.

Approving the Application with the attached conditions would not automatically mean that a recreational cannabis dispensary would open on the Applicants’ property.

Approving the Application with the proposed conditions would require the Applicants to submit a variance application. The Applicants would then work with the City’s counsel to arrange a process by which a neutral, unbiased decisionmaker would consider the Applicants’ variance

application, protecting the Applicants' rights to a fair process and protecting the City from an appeal to LUBA (at least on procedural grounds).

To accomplish this result, the planning commission would simply move to approve the Application subject to the conditions listed on Exhibit A to this Letter Memorandum.

Response to Malheur County Prevention Coalition Letter Dated November 2nd, 2022

The Malheur County Prevention Coalition submitted a letter dated November 2nd, 2022 (herein "MCPC Letter"), which does not present evidence, only legal argument. The planning commission allowed interested parties to submit evidence, not argument. The letter should be stricken.

Notwithstanding the foregoing, the MCPC Letter argues that a variance under OCC §10B-40-25 would not help the Applicants. The MCPC Letter goes on to argue that approving the Application with a condition requiring the Applicants to obtain a variance under OCC §10B-40-25 would be futile and should therefore be rejected by the planning commission.

What the MCPC Letter fails to inform the planning commission of is the variance procedure found in OCC §10B-30-05 *et. seq.* This section of the OCC does not have a limit on the size/scope of a variance available to an applicant.

The Applicants propose submitting a variance application under the procedure described in OCC §10B-30-05 *et. seq.* Applicants would submit the application, and presumably a public hearing would be held in which supporters of the variance application, and opponents of the variance application, would be allowed to express their opinions on the variance application, and the variance application would be considered against the criteria contained in the OCC.

Utilizing this process avoids the likelihood that the planning commission's decision would be reversed and remanded by an appellate body (such as LUBA or the Oregon Court of Appeals), provides the Applicants with a process that complies with the basic requirements of procedural due process, and allows the public an opportunity to weigh in on whether the Applicants should be granted a variance to the residential buffer requirements.

Thank you again for your consideration of the Applicants' appeal.


ROSS DAY, Esq.
DAY LAW, PC
ross@daylawpc.com

cc: Garrett Chrostek (chrostek@bljlawyers.com)
Clients.

EXHIBIT A
APPLICANTS' PROPOSED 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 Applicants 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 Applicants must demonstrate the existing streets surrounding the Applicants' property can accommodate the proposed use of Applicants' property for a new, retail cannabis dispensary. Applicants must submit a traffic study from a traffic engineer which demonstrates the existing streets can accommodate the proposed use.
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 Applicants 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, Applicants 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 Applicants 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 Applicants 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 Applicants 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).
 13. Prior to issuance of a conditional use permit, the Applicants shall obtain a variance under Chapter 10B-30 of the Ontario City Code.

City of Ontario Planning and Zoning Application Form444 SW 4th Street, Ontario, OR 97914**Permit Center Annex:** 458 SW 3rd Street

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

Fax (541) 881-3251

**Appeal of Hearings Officer Decision****FILE #** _____**Date Received** 11/28/22 YMS**Time Received** 2:39PM**Accepted as Complete** _____**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., Scott Matthews, and Butch Henry (individually and as Chairman of the Board of Directors of Scott, Inc.)Address P.O. Box 477, Payette, ID 83661Telephone 360-431-3624Email butchhenry47@gmail.comSignature Ross Day, o/b/o/ Scott Matthews**Action being appealed:** City of Ontario Planning File 2022-07-27CUP/2022-09-31A, Date of Mailing November 17, 2022 - Appeal of Planning Commission Decision on appeal.

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, both the original decision and the decision on appeal, violates the applicants' right to an impartial decision maker, as the "hearings officer" is also the City's planning director (a fact not known to the applicants at the time the application was submitted), who has openly fought the applicants' 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 (which is a valid, enforceable contract) between the Applicants 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 Applicants' objections to the ordinance because of the "hearings officer's" obvious bias in favor of the ordinance and the "hearings officer's" obvious prejudice against the Applicants. Further, the "hearings officer's" participation in the proceedings considering the Applicants' appeal before the Planning Commission was equally improper, especially after Applicants raised procedural objections to the "hearings officer's" participation once the "hearings officer's" participation in the consideration of the Applicant's application became known to the Applicants.

The aforementioned bases for appeal is not exhaustive of the Applicants' objections to the City's decision, and the Planning Commission's denial of the Applicants' appeal, in this matter. The Applicants reserve the right to raise additional arguments against the City's decision, and the Planning Commission's decision.

A copy of the City's original decision, as well as a copy of the Notice of Decision of the City of Ontario's Planning Commission are attached to this appeal form.

Please provide copies of any documents relating to this application/appeal to the appellants' attorney:

Ross Day	(503) 743-6460
Day Law, P.C.	ross@daylawpc.com
7831 St. Charles Street NE	
Keizer, Oregon 97303	

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 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Fax (541) 881-3251

**CITY OF ONTARIO
PLANNING COMMISSION- NOTICE OF DECISION**

Dear Interest Party, Affected Agency or Community Organization:

Type of Action: Appeal of Denial of Conditional Use Permit
Planning File: 2022-07-27CUP/2022-09-31A
Date of Decision: November 16, 2022
Date of Mailing: November 17, 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, Interested Party, Affected Agency, or Community Organization:

This letter provides official notice of a land use decision and outlines your potential rights to appeal that decision.

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 and denied by the City's Hearings Officer through the procedures outlined in OCC Chapter 10B-04. The applicant appealed the Hearings Officer's decision to the Planning Commission.

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: The City of Ontario Planning Commission **affirmed** the Hearings Officer's **denial** of a Conditional Use Permit for a Marijuana Retail Facility. **This decision is not final until this notice of decision is mailed and the 12-day appeal period has expired.**

ANY PERSON, AGENCY OR ORGANIZATION WITH STANDING UNDER OCC 10B-10-20 (A PARTY THAT PROVIDED WRITTEN OR ORAL TESTIMONY), MAY SUBMIT AN APPEAL OF THIS DECISION PRIOR TO THE DECISION BECOMING FINAL. OCC CHAPTER 10B-10 SETS OUT THE PROCEDURES FOR APPEALS. THE SPECIFIC DATE FOR FILING AN APPEAL IS NOTED BELOW. IF NOT TIMELY APPEALED, THE DECISION BECOMES FINAL AND IRREVOCABLE.

The appeal must be in writing on the form prescribed by City available at the community Development Center or on line at http://www.ontariooregon.org/Planning_Main.cfm, must contain the information required under OCC 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 November 29, 2022, at 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 Planning Commission decision will be heard "de novo" by the City Council. 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 full decision, or wish to review any materials in the record for this planning file (including the subject application and any recordings of public hearings), please contact Marcy Siriwardene, at 458 SW 3rd Street, Ontario, Oregon 97914: Telephone (541) 881-3224. Copies of the decision and all materials in the record for this planning file can be obtained at a reasonable cost.

Sincerely,



Marcy Siriwardene
City of Ontario

ORDER NO. 2022-01

AN ORDER OF THE CITY OF ONTARIO PLANNING COMMISSION AFFIRMING THE HEARINGS OFFICER'S DENIAL OF A CONDITIONAL USE PERMIT UNDER PLANNING FILES 2022-07-27CUP/2022-09-31A.

WHEREAS, Scott Matthews/Scott, Inc. (the "Applicant") filed an application for a conditional use permit for a marijuana retail facility in City's I-2 Heavy Industrial zone under Planning File No. 2022-07-27CUP (the "Application"); and

WHEREAS, the Application was administratively reviewed and denied by the City's Hearings Officer (the "Hearings Officer's Decision"); and

WHEREAS, Applicant timely filed an appeal of the Hearings Officer's Decision under Planning File No. 2022-09-31A; and

WHEREAS, the Ontario Planning Commission ("Planning Commission") provided appropriate notice of a public hearing on the appeal, held the public hearing on October 26, 2022, and left the written record open; and

WHEREAS, on November 16, 2022, the record was closed and the Planning Commission reconvened to conduct deliberations; and

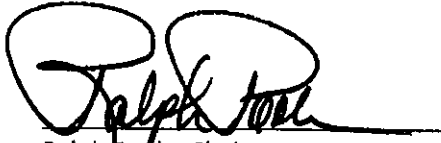
WHEREAS, after reviewing the record, the Planning Commission took formal action to exclude certain submittals during the open record period and to affirm the Hearings Officer's Decision.

NOW, THEREFORE, the Planning Commission orders as follows:

1. Findings. The above stated findings, those contained in the Hearings Officer's Decision, and those contained in the agenda report dated October 13, 2022, are hereby adopted and incorporated herein by reference.
2. Rejection of Open Record Submittals. The Planning Commission hereby rejects the open record submittals of Malheur County Prevention Coalition and Lifeways.
3. Affirmation of Hearings Officer's Decision. The Planning Commission hereby affirms the Hearings Officer's denial of the Application.
4. Notice of Decision. This Order No. 2022-01 (this "Order") memorializes the decision of the Planning Commission on the above referenced planning files. City staff is directed to send notice of the decision contained in this Order in accordance with applicable law.
5. Miscellaneous. All pronouns contained in this Order and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural includes the singular. The word "or" is not exclusive. The words "include," "includes," and "including" are not limiting. The provisions of this Order are hereby declared severable. If any section, subsection, sentence, clause, and/or portion of this Order is for any reason held invalid, unenforceable, and/or unconstitutional, such invalid, unenforceable, and/or unconstitutional section, subsection, sentence, clause, and/or portion will (a) yield to a construction permitting enforcement to the maximum extent permitted by applicable law, and (b) not

affect the validity, enforceability, and/or constitutionality of the remaining portion of this Order. This Order may be corrected by order of the Council to cure editorial and/or clerical errors.

ADOPTED by the Planning Commission of the City of Ontario and signed by the chair effective as of this 16th day of November, 2022.



Ralph Poole, Chair

ATTEST:



Marcy Sirinardene, Planning Tech



City of Ontario
Planning Department
444 SW 4th Street
Ontario, OR 97914
Voice (541) 881-3222
Fax (541) 881-3251
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 \(ontariooregon.org\)](#) 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.

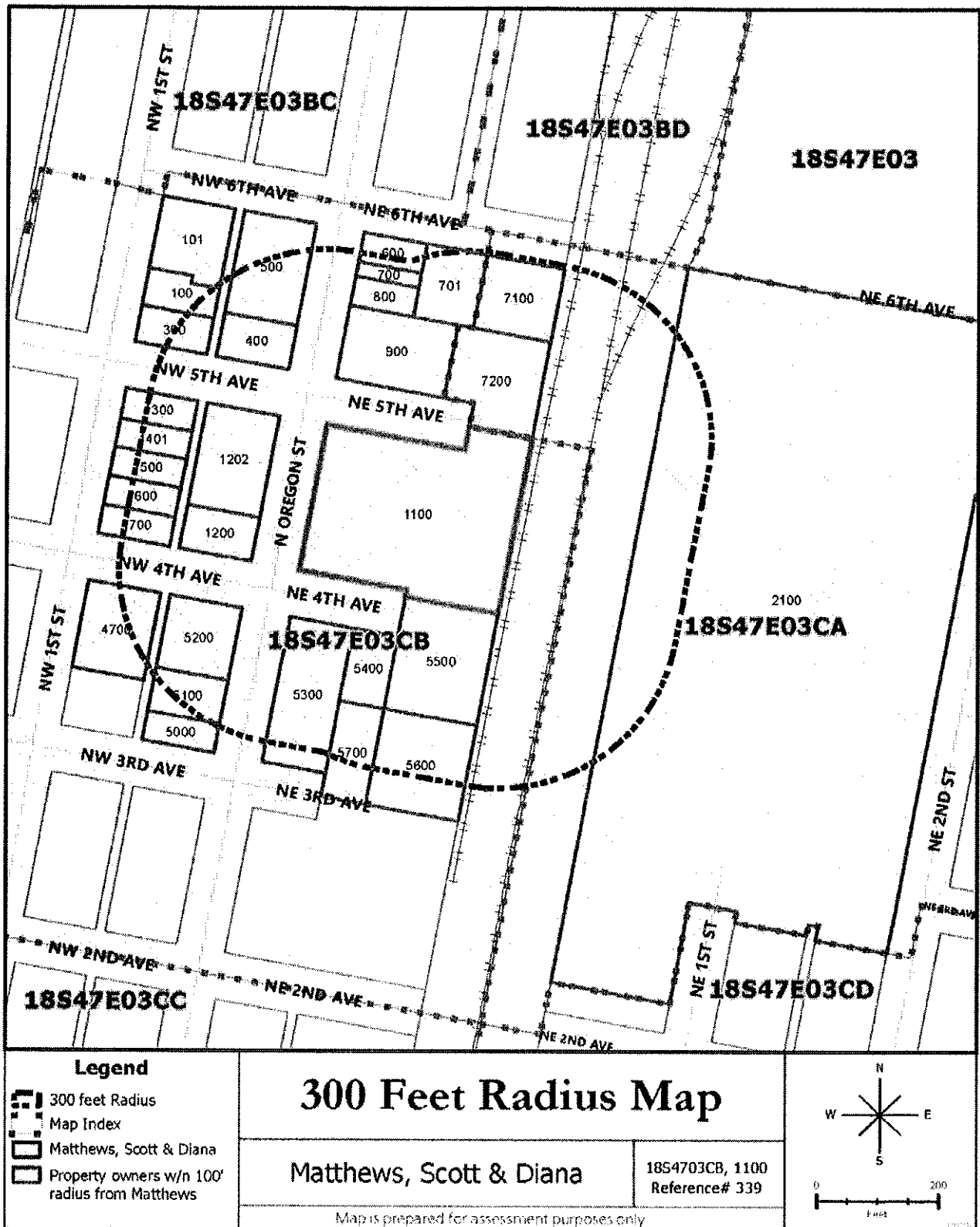
Sincerely,

A handwritten signature in black ink, appearing to read "Dan K. Cummings". The signature is fluid and cursive, with the first name "Dan" being more prominent.

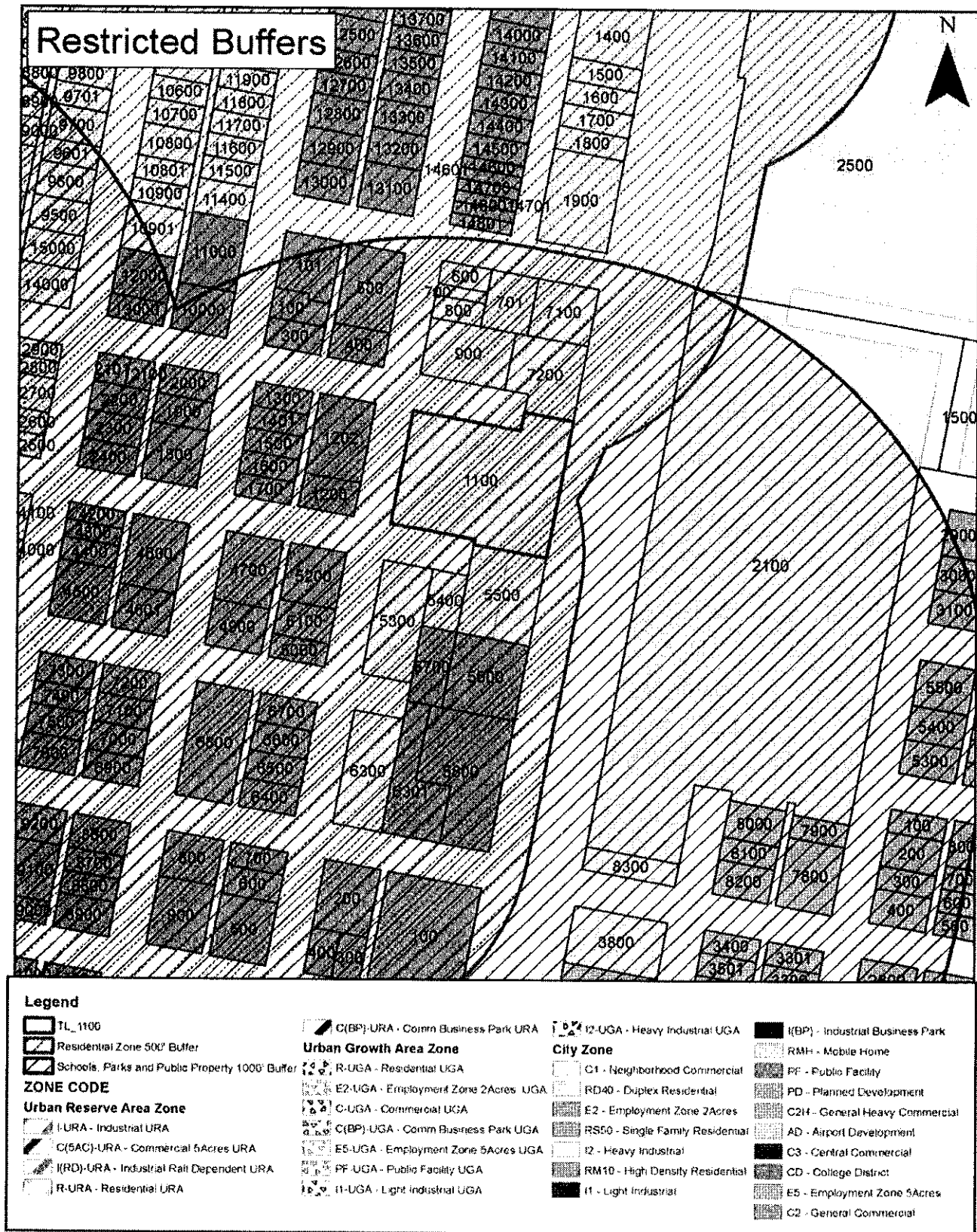
Dan K. Cummings
Community Development Director

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

300 feet Notification to Property owners Map



Restricted Area Map



City of Ontario 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 4th Avenue and NE 5th 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.

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-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 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 purposed 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 4th Avenue (south side) and undeveloped NE 5th Avenue (north side). The property has access off North Oregon Street, as well as NE 4th and 5th Avenues. Neither NE 4th Street nor NE 5th 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 4th 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 "A"

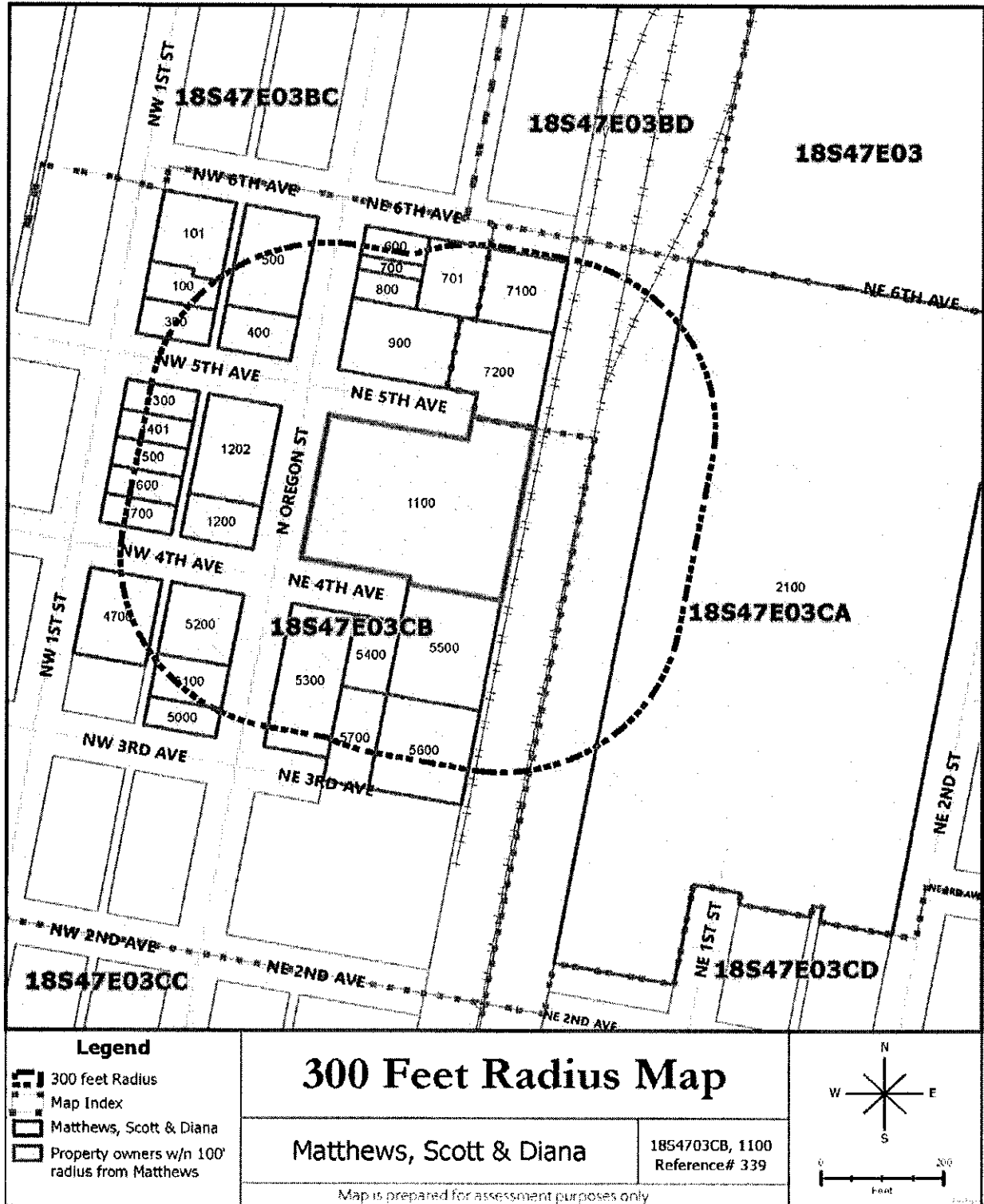
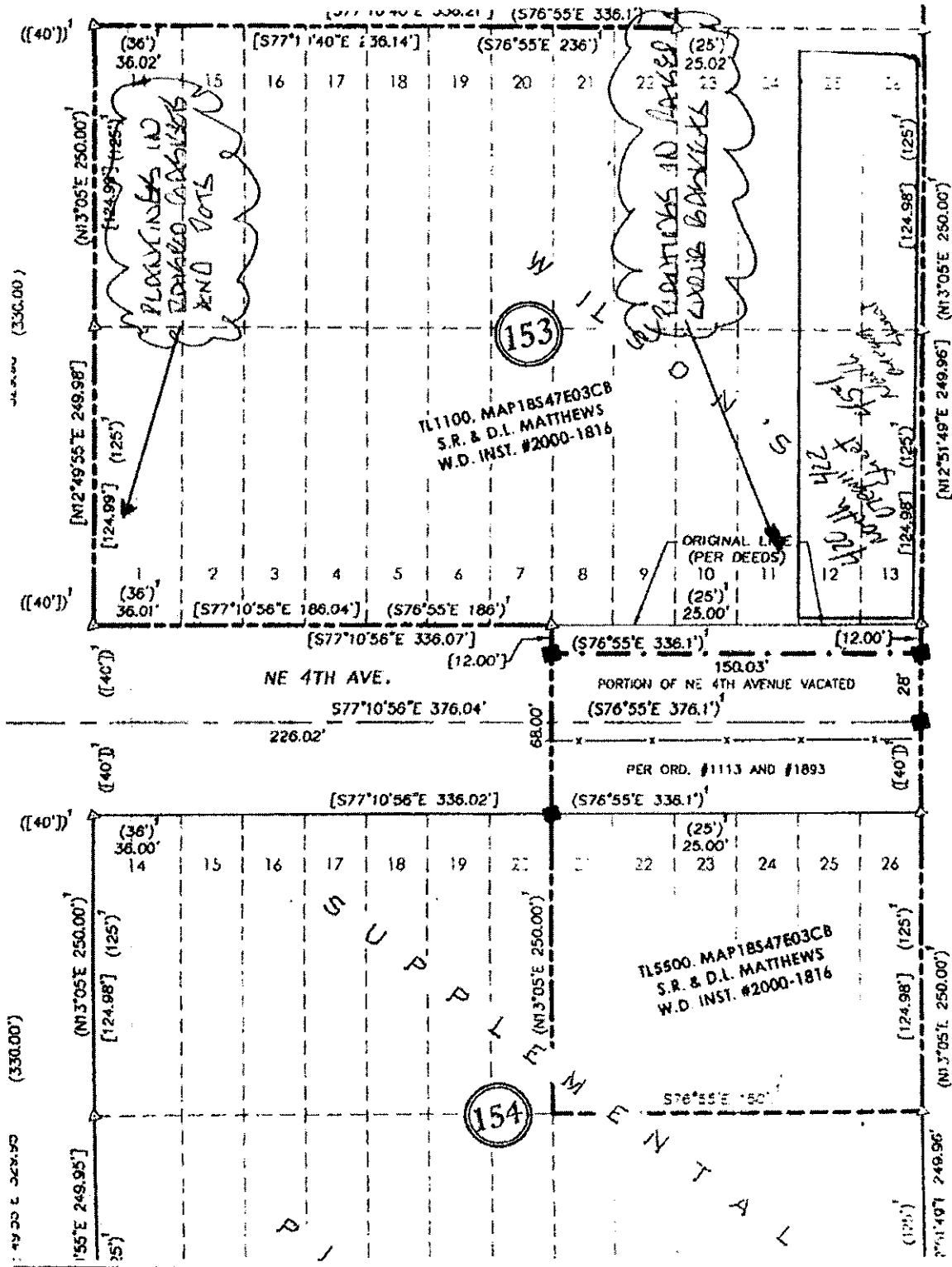
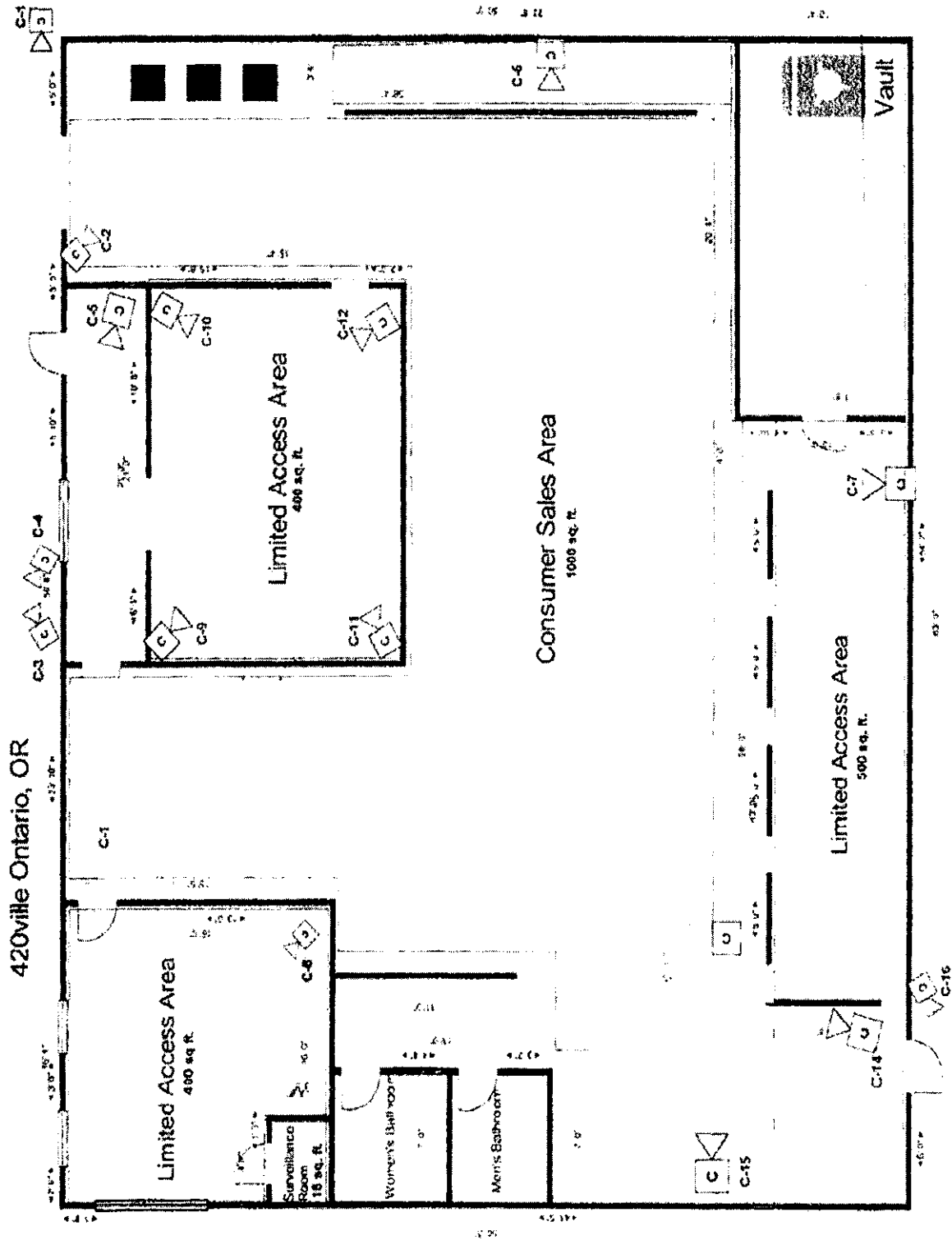


Exhibit "B"



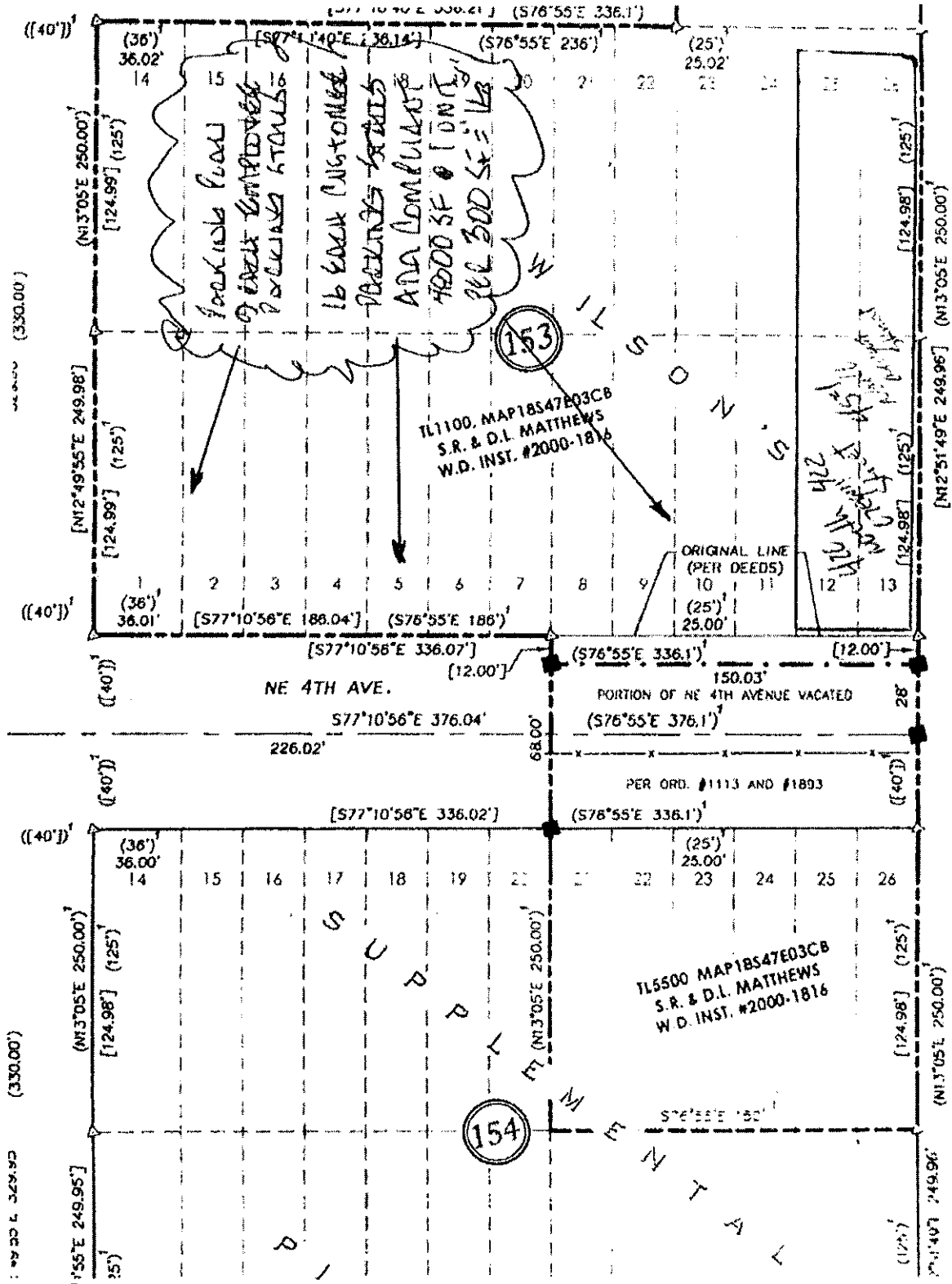
420 N. DEERSON STREET - LANDSCAPE PLAN

Exhibit "C"



420 N DEERWOOD STREET, BUILDING INTERIOR LAYOUT

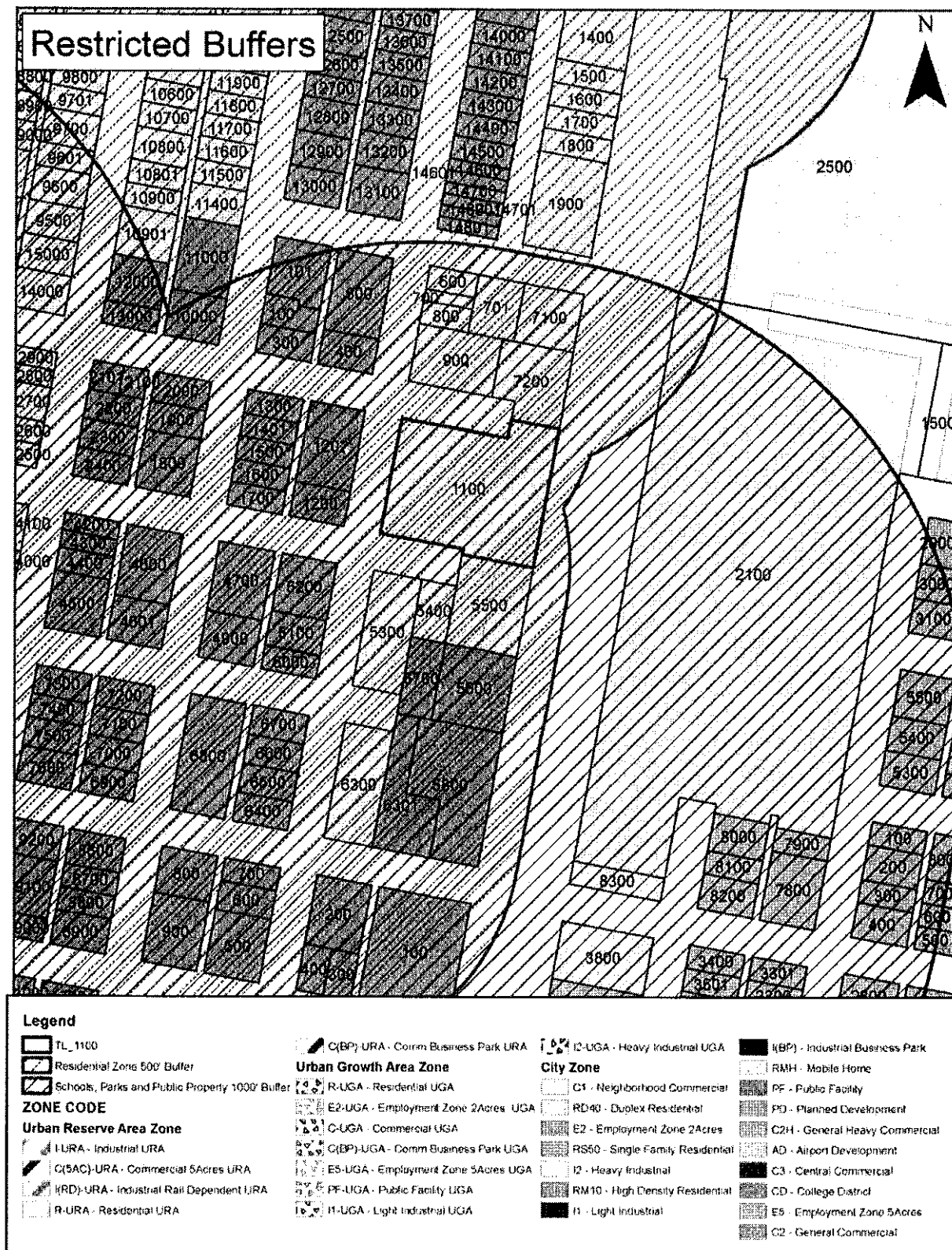
Exhibit "D"



410 N. OREGON STREET - OFF-SHORE PARKING PLAN

440 N. OREGON STREET - LANDSCALE PLAZA
[N12°51'49" E 659.91']

Exhibit "F"



AFFIDAVIT OF MAILING



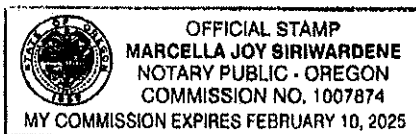
STATE OF OREGON)
County of Malheur) ss.
City of Ontario)

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
24 NE 4TH AVE
ONTARIO, OR 97914

PETRIDGE, STEPHANIE L
452 NW 1ST ST
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

FITZGERALD, MAUREEN
1224 6TH AVE N
PAYETTE, ID 83661

KISIEL, JOHN R
4660 52 HWY
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:

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

A grainy, high-contrast black and white photograph. The upper portion of the image shows a dark, textured surface, possibly a wall or ceiling, with a bright, circular light source in the upper right corner. Below this, the image is mostly black and indistinct, with some faint, blurry shapes that could be interpreted as figures or objects in a dark space. The overall quality is poor, with significant noise and loss of detail.



**City of Ontario
Planning Department**

444 SW 4th Street
Ontario, OR 97914
Voice (541) 881-3224
Fax (541) 881-3251

Dan.Cummings@ontariooregon.org

CITY OF ONTARIO- NOTICE OF DECISION

Dear Property Owner, Affected agency or Community Organization:

Type of Action: Hearing's Officer Decision for Nonconforming Uses
Planning File: 2016-06-13NCU
Date of Decision: July 26, 2016
Date of Mailing July 27, 2016

Site Address: 444 and 445 North Oregon Street.

Applicant/Agent:

Scott R & Diana L. Matthews
P.O. Box 273
Emmett, ID 83617
(208) 724-7720

Property Owners:

Scott R & Diana L. Matthews (Applicants)
P.O. Box 273
Emmett, ID 83617
(208) 724-7720

DECISION: The City of Ontario Planning Director (Dan K. Cummings acting as Hearing's Officer) approved the nonconforming use of two business types in a portion of the existing building having the address' of 444 and 445 North Oregon Street as per the Agreement between the City of Ontario and Scott, Inc. being Scott R. Matthews and Diana L. Matthews.

Dear Property Owner:

Section 10B-04 of the Ontario City Code requires that you be sent notice of a land use decision; this decision is based on Section 7 of the Agreement between yourselves and the City of Ontario dated April 18, 2016.

The Ontario **Hearing's Officer, on July 26, 2016**, acting under the authority granted by Title 10B of the Ontario City Code, reviewed, modified and approved the above referenced request under the design criteria and standards set forth in Title 10A, 10B and 10C of that Code. This decision is the final decision as it was agreed upon by an action performed by the Ontario City Council in a regular meeting of the Ontario City Council. But will be null and void if all conditions are not met in the agreement and the approval as noted in the Staff report.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan K. Cummings", is written over the word "Sincerely,".

Dan K. Cummings
Community Development Director

City of Ontario Department of Community Development-Planning Division
HEARINGS OFFICER STAFF REPORT
For
Request for Approval of a Nonconforming Use
2016-06-13NCU

REPORT DATE: July 26, 2016

REPORT PREPARED BY: Dan K. Cummings, Planning & Zoning Director

I. GENERAL INFORMATION AND FACTS

Applicant/Agent: Scott R & Diana L. Matthews (Applicants)
P.O. Box 273
Emmett, ID 83617
(208) 724-7720

Property Owners: Scott R. & Diana L. Matthews
P.O. Box 273
Emmett, ID 83617
(208) 724-7720

Land Use Review: 10A-05-35 - NONCONFORMING USE

Property Description: Tax Lot 1100, Reference No. 339, Map 18S4703CC, and being Lots 24 thru 26 of Block 154, All of Block 153 and portions of vacated NE 4th Avenue and NE 5th Avenue, Wilson's Supplemental Plat to Ontario.

Location: Parcel is located East of N. Oregon Street, West of the Union Pacific Railroad Right of Way, North of NE 4th Avenue and South of NE 5th Avenue at the address of 444 and 445 North Oregon Street.

Existing Development: The existing structure appears to have been built sometime in 1947 as a Warehouse by Ontario Grain Company. Sometime in the early to mid-80's a portion of the structure was being used as Plumbing Supply Store and Automotive parts store. Currently the same portions are being used as a Second Hand/appliance Store and an Antique store.

Proposal: As part of a Settlement Agreement between the City of Ontario and Scott, Inc., dated April 18, 2016, it was

agreed to allow the portions of the building with the Second Hand/Appliance Store and the Antique Store to exist as nonconforming uses.

Zone: Heavy Industrial (I-2) Zone

Applicable Overlay Zone(s): None

Size of Tracts: Approximately 105,900 square feet

II. APPLICABLE STATE; COMPREHENSIVE PLAN; ORDINANCE PROVISIONS

Section 10B-05-25 through 10A-05-35 of the Ontario City Code (OCC) allows for existing nonconforming uses to continue so long as it remains the same. Section 10B-04 contains procedural rules for Hearings Officer review and decisions.

The proposed development must also comply with other applicable provisions of the Ontario City Zoning Ordinance, 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 considered to be consistent with the Comprehensive Plan.

III. NATURE OF REQUEST

To allow the portions of the existing building with the Second Hand/Appliance Store and the Antique Store to exist as nonconforming uses.

IV. DECISION CRITERIA

A. Ontario Municipal Code; Title 10A OMC (Ontario Municipal Code)

10A-05-35 NONCONFORMING USES. The following are the basis for the use of the Existing Structure:

If a use of a building, structure, or land exists at the effective date of adoption or amendment of this Title and such use is not allowed in the zone under the terms of this Title, the uses may continue so long as it remains otherwise lawful, subject to the following provisions:

- 1. A nonconforming use or structure may continue but may not be altered or extended to another part of the structure or site without approval as a conditional use for a nonconforming use exception.*

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, and thereafter the use of the land must conform to the regulations of the zone in which it is located.*
3. *A nonconforming use may be changed to any use of the same or a lesser degree of nonconformity, or a use permitted in the zone in which the use is located. When a nonconforming use has been changed to more nearly conforming use or to a permitted use, it shall not thereafter be changed back to a use with a greater degree of nonconformity. For purposes of this Subsection, a use shall be deemed to have been so changed when an existing nonconforming use shall have been terminated and a use with a lesser degree of nonconformity or a permitted use shall have commenced and continued for a period of seven days. The principal permitted uses listed under a specific zone shall be interpreted to have the same degree of nonconformity for purposes of this Section.*

If a nonconforming structure containing a nonconforming use is destroyed by any cause to an extent exceeding 60 percent of its true cash value as indicated by the records of the Malheur County Assessor, a future structure or use on the site shall conform to this Title, or approval for restoration to the prior nonconforming use must be obtained within one year of occurrence of the destruction.

Nothing contained in this Title shall require any change in the plans, construction, alteration, or designated use of a structure for which a permit has been issued by the City and construction has commenced prior to the adoption of this Title; provided the structure, if nonconforming or intended for a nonconforming use, is completed and in use within two years from the time the permit is issued.

V. FINDINGS OF FACT

1. On April 18, 2016 the Ontario City Council approved a settlement agreement whereas the City agreed to grant a nonconforming use status to a portion of the existing structure located at 444 and 454 North Oregon Street being the northerly portion of the structure as shown as Exhibit “B” in the submitted application and made a part of this report. Said portions of the structure and the non-conforming uses are as follows:
 - a. 444 North Oregon as a Second Hand/Appliance Store.
 - b. 454 North Oregon Street as an Antique Store.
2. The application includes all of the necessary documentation to make a determination for approval based on the agreement.

VI. SUMMARY CONCLUSIONS AND CONDITIONS OF APPROVAL

1. The application is complete and includes the materials necessary to determine that the criteria and standards in the agreement are met.
2. The nonconforming uses may continue as stated above but may not be altered or extended to another part of the structure or site.
3. The discontinued use of the structure for above stated use for six months out of any 12 consecutive months or change of nonconforming use to some other kind of nonconforming use constitutes abandonment and termination of the nonconforming use, and thereafter the use of the land must conform to the regulations of the zone current I-2 Heavy Industrial use.
4. The nonconforming use status of the portion of the existing structure as shown on Exhibit "B" attached and made a part of this report are as follows:
 - a. 444 North Oregon as a Second Hand/Appliance Store.
 - b. 454 North Oregon Street as an Antique Store.

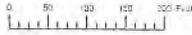
VII. EXHIBITS (Attached and included as part of this report).

Exhibits: "A" Tax Map
"B" Site Map

cc: Property owners
File

Exhibit "A"

THIS MAP WAS PREPARED FOR
ASSESSMENT PURPOSE ONLY



N.W.1/4 S.W.1/4 SEC 3 T.18S. R.47E. W.M.
MALHEUR COUNTY
1" = 100'

18S47E03CB
ONTARIO

Cancelled
200
702
920A1
920A2
1000
1201
1400
4800
5300A1
5800 THRU
6200
8200 THRU
9100
9200 THRU
9900



Exhibit "B"



FILED

Malheur County Circuit Court

NOV 04 2022

Time 3:05 p.m. By

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MALHEUR

SCOTT INC., an Oregon Domestic Business Corporation; SCOTT MATTHEWS and DIANA MATHEWS, a married couple,	)	Case No. 20CV15718
Plaintiffs,	)	ORDER GRANTING DEFENDANT'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT AND PARTIAL
vs.	)	SUMMARY JUDGMENT
	)	
CITY OF ONTARIO, a political subdivision of the state of Oregon	)	
Defendant.	)	

Defendant filed Defendant's Motion for Summary Judgment and Partial Summary Judgment on July 19, 2022. Defendant filed Declaration of Dustin Hawkins in Support of Defendant's Motion for Summary Judgment and Partial Summary Judgment and Declaration of Dan Cummings in Support of Defendant's Motion for Summary Judgment and Partial Summary Judgment on July 19, 2022. The Plaintiffs filed Plaintiffs' Response to Defendant's Second Motion for Summary Judgment on August 12, 2022. The Plaintiffs filed Exhibits 1, 2, and 3 on August 12, 2022. The Defendant filed Defendant's Reply to Plaintiffs' Response to Defendant's Motion for Summary Judgment and Partial Summary Judgment on August 29, 2022. The Defendant filed Declaration of Larry Sullivan in Support of Defendant's Reply to Plaintiffs' Response to Defendant's Motion for Summary Judgment and Partial Summary Judgment and Declaration of Dustin Hawkins in Support of Defendant's Reply to Plaintiffs' Response to Defendant's Motion for Summary Judgment and Partial Summary Judgment on August 29, 2022.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PARTIAL
SUMMARY JUDGMENT

1 The court having considered the parties' filings, the record herein, and being fully advised, finds:

2 Defendant has moved for summary judgment on Plaintiffs' First Claim for Relief (Breach
3 of Contract), Third Claim for Relief (Violation of the Contracts Clause of the U.S. Constitution),
4 and partial summary judgment on all other claims. Defendant argues that summary judgment
5 should be granted because the Settlement Agreement is unambiguous and did not grant Plaintiffs
6 a general nonconforming use right to operate a retail business or a specific right to operate a
7 retail marijuana dispensary.
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9 This court has not previously considered Defendant argument that that summary
10 judgment should be granted because the Settlement Agreement is unambiguous and did not grant
11 Plaintiffs a general nonconforming use right to operate a retail business or a specific right to
12 operate a retail marijuana dispensary in these proceedings. The Defendant did not raise that
13 argument in Defendant's first Motion for Summary Judgment. The court declined to rule on the
14 issue when asked to do so in Defendant's Request for Clarification and Reconsideration of Order
15 on Plaintiff's [Defendant's] Motion for Summary Judgment because the issue was not raised in
16 the first Motion for Summary Judgment. Therefore, Plaintiffs' arguments that the court should
17 not entertain Defendant's current motion or that the court should apply the law of the case
18 doctrine are not persuasive.
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22 The court must first examine the Settlement Agreement and determine if it is either
23 ambiguous or unambiguous. *Yogman vs. Parrot*, 325 Or 358, 361 (1997). The inquiry ends if
24 the Settlement Agreement is unambiguous. *Id.* To interpret the contractual provisions of the
25 Settlement Agreement the court must first look at the four corners of the document. *Yogman vs.*
26 *Parrot*, 325 Or 358, 361 (1997). The Settlement Agreement in this case acknowledges two uses
27 for the disputed property: 1) a marijuana grow site; and 2) a second-hand store. (Settlement
28

1 Agreement Sec. 5). Section 7 of the Settlement Agreement specifically identifies two second-
2 hand businesses that will be permitted to operate as a nonconforming use. (Settlement
3 Agreement Sec. 7). The Settlement Agreement specifically articulates the nonconforming uses
4 that will be permitted on the property. The Settlement agreement does not grant a general
5 nonconforming use right to operate a retail business and does not grant a nonconforming use
6 right to operate a retail marijuana dispensary. (Settlement Agreement). Section 4 states that if
7 there are changes in the law that allow medical marijuana dispensaries or recreational marijuana
8 dispensaries the Settlement Agreement will not preclude Plaintiffs from doing so. However,
9 Section 4 does not grant Plaintiffs a contract right to operate a retail marijuana dispensary.
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12 The four corners of the Settlement Agreement are clear and unambiguous. The
13 Settlement Agreement does not grant Plaintiffs a general nonconforming use right to operate a
14 retail business and does not grant a nonconforming use right to operate a retail marijuana
15 dispensary on the property. Defendant is entitled to summary judgment on Plaintiffs' First
16 Claim for Relief (Breach of Contract), Third Claim for Relief (Violation of the Contracts Clause
17 of the U.S. Constitution), Count III of the Fourth Claim for Relief (Violation of Article I, Sec. 18
18 of the Oregon Constitution), and partial summary judgment on the remaining claims.
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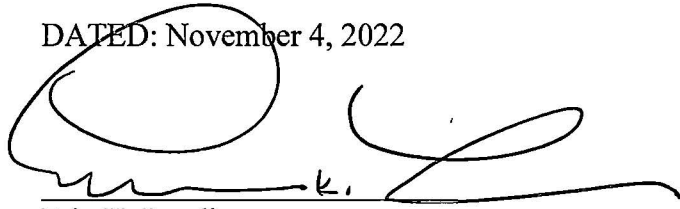
22 **IT IS HEREBY ORDERED: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
23 **IS GRANTED ON PLAINTIFFS' FIRST CLAIM FOR RELIEF (BREACH OF**
24 **CONTRACT), THIRD CLAIM FOR RELIEF (VIOLATION OF THE CONTRACTS**
25 **CLAUSE OF THE U.S. CONSTITUTION), AND COUNT III OF THE FOURTH CLAIM**
26 **FOR RELIEF (VIOLATION OF ARTICLE I, SEC. 18 OF THE OREGON**
27 **CONSTITUTION). DEFENDANT'S MOTION FOR PARTIAL SUMMARY**
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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PARTIAL
SUMMARY JUDGMENT

Verified Correct Copy of Original 11/4/2022

1 JUDGMENT ON THE REMAINING CLAIMS IS GRANTED TO THE EXTENT THAT
2 THOSE CLAIMS RELY UPON AN ALLEGATION THAT THE SETTLEMENT
3 AGREEMENT GRANTED PLAINTIFFS' A GENERAL NONCONFORMING USE
4 RIGHT TO OPERATE A RETAIL BUSINESS OR NONCONFORMING USE RIGHT
5 TO OPERATE A RETAIL MARIJUANA DISPENSARY.
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DATED: November 4, 2022

A handwritten signature in black ink, appearing to read 'Erin K. Landis', written over a horizontal line.

Erin K. Landis
Circuit Court Judge

PLANNING COMMISSION MEETING MINUTES

**Monday
October 8, 2018**

Attachment 9

The Ontario Planning Commission was called to order at 7:00 pm in the Council Chambers of City Hall. Commission members present were Chairman Ralph Poole, John Hall, John Briedenbach, Richard Newman, Cindy McLeran, Craig Smith, and Max Twombly were present.

City Staff present were Dan Cummings, Community Development Director and Marcy Siriwardene, Planning and Zoning Technician. Betty Carter, City Council Ex-Officio, and Adam Brown, City Manager, were present as well.

The meeting was recorded on tape and the tape is on file at the City Community Development Center. The Agenda for this meeting was emailed on or before October 1, 2018. Copies of the Agenda were available at the City Community Development Center.

Chairman Ralph Poole led everyone in the Pledge of Allegiance.

ADOPTION OF AGENDA

John Hall moved, seconded by Richard Newman, to adopt the agenda of the October 8, 2018 meeting. Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 7/0/0.

ADOPTION OF MINUTES

John Briedenbach moved, seconded by John Hall, to adopt the minutes of the June 11, 2018 meeting. Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 7/0/0.

There were no objections to Planning Commission jurisdiction and no abstentions or ex-parte contact.

UNSCHEDULED PUBLIC APPEARANCES OR COMMENTS

Robert Golden, Ontario, lived west of Love's Travel Stop and wanted to let the Planning Commission know that he wanted to annex into the city as the NW side of town would be a good area for dispensaries.

Chairman Poole told Robert that he should speak to the Planning Director, Dan Cummings, about the annexation process.

A lady in the audience asked the Planning Commission why they were discussing marijuana zones if the city had not voted in favor of it yet.

Chairman Poole answered that it took many days for both the Planning Commission and City Council to make a decision and have it in place if Marijuana Dispensaries are voted into the city.

PUBLIC HEARING ACTION 2018-08-15ZA: A REQUEST BY THE CITY OF ONTARIO TO AMEND THE CITY ZONING AND DEVELOPMENT CODE, TITLE 10A ONTARIO MUNICIPAL CODE TO ESTABLISH APPROPRIATE STANDARDS AND LOCATIONS FOR THE ESTABLISHMENT OF MARIJUANA OPERATIONS AND ACTIVITIES.

Dan Cummings, Community Development Director, presented the staff report.

II. SUMMARY & BACKGROUND

The State of Oregon by legislative enactment has established a process for the licensing and registration of certain marijuana facilities and dispensaries. Currently, the city zoning regulations do not address or allow these uses. An Initiative has been put on the November 6, 2018 ballot in an effort to remove the current marijuana ban within the city limits. The City Council has directed the drafting of appropriate regulations and standards governing the time, manner and place where marijuana facilities and dispensaries may be allowed within the Ontario city limits should the ban be overturned by a vote of the people.

As proposed, the amendments would:

- Amend Title 10A by repealing Title 10A-58 entitled "Medical Marijuana Facilities" and adding a new Title 10A-59 entitled "Marijuana Related Operations and Activities" and providing general and specific conditions for the establishment of these uses under a conditional use permit.
- Amend Chapter 10A-03 by adding a new section 10A-03-134.1 through 10A-03-134.11 providing definitions for marijuana operations and activities.
- Amend Title 10A by prohibiting marijuana operation and activities in all zone districts unless explicitly designated as a conditional use in specific zone districts.
- Amend the following Chapters 10A-27-10, 10A-29-10, 10A-31-10, 10A-33-10, 10A-39-10, 10A-41-10 and 10A-52-205 to designate certain marijuana operations and activities as conditional use in the C-1 (Neighborhood Commercial), C-2 (General Commercial), C-2-H (Heavy General Commercial), C-3 (Central Commercial), I-1 (Light Industrial), I-2 (Heavy Industrial) and UGA-E-2 (Urban Growth Area Employment 2 - upon annexation) zone districts.
- Amend Chapter 10A-57-137 sign advertising.

Refer to Exhibit A the draft ordinance for the text of the specific amendments.

- The Ontario City Council established a Marijuana Ad Hoc Committee to review the effects and impacts to the City of Ontario due to the legalization of marijuana in the State of Oregon. When a local initiative and referendum to remove the ban that the City of Ontario placed on the operations and activities of marijuana, the Council asked the committee for recommendation on regulations and standards governing the time, manner and place of marijuana operations and activities within the city limits.
- The committee, comprising of 5 members who are Pro marijuana and two members who are anti-marijuana, met in several public meetings and formulated their recommendation summarized in the attached Exhibit "B" and those recommendation for buffer setbacks are shown in Exhibit "A" in Blue. It is noted some of the recommendations are not addressed in these planning codes and will be addressed in the business licensing codes when and if the ban is lifted.
- The existing buffer setbacks established under Title 10A-58 are shown in Purple.
- Staff recommended buffer setbacks are shown in Red.

- All other buffers shown in black are being recommended by both the Ad Hoc Committee and City Staff and established under Chapter 10A-58 previously.

III. PREVIOUS PLANNING COMMISSION ACTION

On Monday April 13, 2015 the Commission acted on planning action 2015-03-06 ZCA on the creation of Chapter 10A-58 entitled "Medical Marijuana Facilities".

IV. FINDINGS OF FACT

1. The Oregon Legislature enacted House Bill 3460 in 2013 (ORS 475.314) which requires the Oregon Health Authority to develop and implement a process to register medical marijuana facilities.
2. Under Oregon law, local governments may regulate the operation and location of certain types of businesses within their jurisdiction except when such action is specifically preempted by state law.
3. The City of Ontario substantive zoning regulations and administrative requirements are contained Titles 10A, 10B and 10C of the Ontario City Code.
4. Amendments to Title 10A has been initiated by the City Council in accordance with Section 10B-15, Ontario City Code.
5. Amendment actions are first referred to the Ontario Planning Commission for a public hearing and recommendation to the City Council.
6. The appropriate legal notice has been provided for this hearing.

Conclusion:

The City, from time to time, may amend its zoning regulations in response to emerging technologies or business concepts or changes in state law. The proposed amendments to Title 10A, Ontario City Code are in response to changes in state law are intended to provide reasonable regulations for the operation of marijuana operations and activities in certain zones under a conditional use permit.

V. RECOMMENDATION

Staff recommends that the City of Ontario Planning Commission recommend to the City Council, the adoption of the proposed amendments attached as Exhibit A, based on the Findings of Fact and establishing of the recommended buffer distances as recommended by City Staff.

VI. SUGGESTED MOTIONS FOR APPROVAL

A. Planning Commission Action (refer to Exhibit "A" for sections):

- 1) I move that the Planning Commission recommend under Section 9, 10A-59-15 (A) (5) a _____ feet buffer from another marijuana recreational facility. (0') (350') (1000')
- 2) I move that the Planning Commission recommend under Section 9, 10A-59-15 (A) (6) a _____ feet buffer from all residential zones as noted in the text of Exhibit "A". (200') (350') (500').
- 3) I move the Planning Commission recommend under Section 9, 10A-59-15(B)(3) and 10A-59-25(B)(3) the parking requirement of Option _____.

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- a) 10A-57-75 (4) one space for each employee and one for each 300 square feet as per text in Exhibit "A".
- b) 10-57-75(6) one space for every 300 square feet of gross space.
- c) Other (state):

- 4) I move that the Planning Commission recommend under Section 9, 10A-59-25 (A) (5) a _____ feet buffer from another marijuana recreational facility. (0') (350') (1000')
- 5) I move that the Planning Commission recommend under Section 9, 10A-59-25 (A) (6) a _____ feet buffer from all residential zones as noted in the Text of Exhibit "A". (200') (200') (500').
- 6) State any other motions:
- 7) I move that the Planning Commission accept the above Findings of Fact, above motions, and the amended Exhibit "A" and recommend to the City Council, the approval and adoption of the proposed amendments to the Ontario Zoning Ordinance establishing the location and standards for the establishment of medical marijuana dispensaries within the City of Ontario.

VII. Exhibits

Exhibit "A" Draft Zoning Amendments

Exhibit "B" Ad Hoc Committee recommendations.

Exhibit "C-1" and "C-2" Maps showing proposed buffers with 200 feet residential buffer.

Exhibit "D-1" and "D-2" Maps showing proposed buffers with a 500 feet residential buffer by Ad Hoc.

Exhibit "E-1" and "E-2" Maps showing proposed buffers at 200 feet in certain areas and 350 feet in other areas by staff.

Exhibit "F" Map from Oregon Liquor Control Commission (OLCC) showing the 1000 feet buffer around State Certified Public Schools.

Exhibit "G" Picture that shows possible lines if too few dispensaries or insufficient development codes.

Attachments: Letters received by the Planning Department as of September 26, 2018. (Any letters received after September 26, 2018 will be presented at the Public hearing).

LETTERS READ INTO THE RECORD and found in Planning File number 2018-08-15ZCA:

Bill Williams, Ontario

Pam Williams, Ontario

Judith Sherwood, Ontario

Jann Lindley Bell, Ontario

Doris Lindley, Ontario

Dayna Plummer and Dan Thach

Jerry Gray, Ontario

Rita McGraw, Ontario

Shawna Peterson, Ontario, Yturri Rose

Public Comments:

Ad Hoc Committee Members:

Steven Meland, Ontario, Hot Box Farms

Eddy Rodriguez

John Kirby, Ontario

Andy Peterson, Ontario

Steven Meland, Ontario, proponent

Community Members:

Lori Duckworth, Portland
Dustin Millard, Ontario
Manny Alvarado, Ontario
Glen Banner, Ontario
Jeremy Archie, Portland
Judith Kirby, Ontario
Robert Golden, Malheur County
Jim Forrester, Ontario
Elna & George Pionaar, Ontario
Ken Hart, Ontario
Steven Atkinson, Ontario
Judy Sherwood, Ontario
Shawna Peterson, Ontario
Tim Brewer, Ontario

DISCUSSION

Commissioner Smith mentioned that Moore Park had always been a park since for 20 years and before that it was motel. There was a sign that posted it as a park.

Commissioner Hall said that Moore Park and the Train Depot Park should both be considered parks. He said they were both in the City park plan.

Commissioner Newman commented that the City couldn't just ignore the fact that the property had been being used as parks for so long.

Commissioner Briedenbach mentioned how the community was using Moore Park for Farmer's Markets each week and how the Depot Park was used for the bike ride and that the City maintained it and that it was treated as a park.

Commissioner Twombly agreed.

Commissioner Hall didn't think there should be a buffer zone between dispensaries and wanted to go with Dan Cumming's suggestions on parking requirements.

Commissioner Briedenbach wanted to know if changes can be reviewed later and then changed, if need be in the future regarding buffers.

Mr. Cummings said that the process for changing buffer zones would be the same process in the future as it was at that time.

Larry Sullivan, The City Attorney, stated that it would be easier to loosen restrictions in the future then to tighten them up in the future.

Commissioner Briedenbach stated that businesses should be in competition with each other, the City should not get in the middle of it. He thought that 1,000 feet separation was too much.

Commissioner McLeran wanted to know the distance of a city block.

Mr. Cummings answered that our blocks were 250 wide by 350 feet making it one dispensary per block or with the 1,000 foot buffer it would be one every three blocks.

Commissioner Smith was not in favor of the 350' or 1000' buffer.

Commissioner Smith was not in favor of a buffer between dispensaries.

Chairman Poole commented that parking would be one of the biggest issues and he questioned if one parking space per 300 square feet of building space would be enough parking spaces. He didn't know what would happen if customers showed up and there weren't enough parking spaces for them.

Mr. Cummings said that most business people would plan to have enough parking spaces based on the number of customers that they expected, in addition to the parking requirements, otherwise, they would be pushing their parking onto their neighbors. The Planning Commission could increase the parking requirements to more than a retail store, if they wanted to.

A lady in the audience commented that the businesses in the downtown area did not have enough parking for their customers.

Chairman Poole did not agree with her.

Commissioner Hall mentioned that there was one dispensary that was serving a large area and that if there were several dispensaries, the parking would be divided between them.

Mr. Cummings spoke about and explained to the Planning Commission what "reasonable" buffers were and commented on the different maps and what they meant.

Commissioner Briedenbach thought that the residential buffer needed to be at least 500 feet because people didn't want to have a marijuana dispensary in their back yard.

APPROVAL OF MARIJUANA RECREATIONAL FACILITY BUFFERS

Cindy McLeran moved, seconded by Max Twombly, to recommend under Section 9, 10A-59-15 (A) (5) a 350 feet buffer from another marijuana recreational facility. Roll call vote: Smith-no; McCleran-yes; Twombly-yes; Hall-no; Briedenbach-no; Newman-yes; Poole-yes. Motion carried 4/0/3.

Max Twombly moved, seconded by John Briedenbach, to recommend under Section 9, 10A-59-15 (A) (6) a 500 feet buffer from all residential zones as noted in the text of Exhibit "A". Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 7/0/0.

Craig Smith moved, seconded by Richard Newman, recommend under Section 9, 10A-59-15(B)(3) and 10A-59-25(B)(3) the parking requirement 10A-57-75 (4) one space for each employee and one for each 300 square feet as per text in Exhibit "A". Roll call vote: Smith-yes; McCleran-no; Twombly-yes; Hall-yes; Briedenbach-no; Newman-yes; Poole-yes. Motion carried 5/0/2.

Max Twombly moved, seconded by Richard Newman, to recommend under Section 9, 10A-59-25 (A) (5) a 350 feet buffer from another marijuana recreational facility. Roll call vote: Smith-no; McCleran-yes; Twombly-yes; Hall-no; Briedenbach-no; Newman-yes; Poole-no. Motion failed 3/0/4.

John Hall moved, seconded by John Briedenbach, to recommend under Section 9, 10A-59-25 (A) (5) a 0 feet buffer from another marijuana recreational facility. Roll call vote: Smith-yes; McCleran-yes; Twombly-no; Hall-yes; Briedenbach-yes; Newman-no; Poole-yes. Motion carried 5/0/2.

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Richard Newman moved, seconded by Craig Smith, to recommend under Section 9, 10A-59-25 (A) (6) a 500 feet buffer from all residential zones. Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 7/0/0.

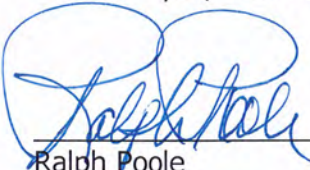
John Briedenbach moved, seconded by Craig Smith, that the Planning Commission recognizes the Depot Park and Moore Park as part of the City Park system until further use ("further use" clarified by the City Attorney). Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-no; Poole-yes. Motion carried 6/0/1.

MOTION TO APPROVE FINDING OF FACTS

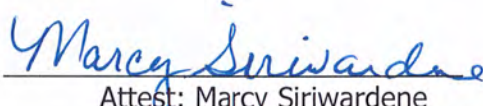
Cindy McLeran moved, seconded by Richard Newman, to accept the above Findings of Fact, above motions, and the amended Exhibit "A" and recommend to the City Council, the approval and adoption of the proposed amendments to the Ontario Zoning Ordinance establishing the location and standards for the establishment of marijuana operations and facilities within the City of Ontario. Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 6/0/1.

ADJOURN

John Hall moved, seconded by Cindy McLeran, to adjourn the meeting. Roll call vote: Smith-yes; McCleran-yes; Twombly-yes; Hall-yes; Briedenbach-yes; Newman-yes; Poole-yes. Motion carried 7/0/0.



Ralph Poole
Chairman



Attest: Marcy Siriwardene
Planning & Zoning Technician

