



# Agenda Report

October 7, 2019

**TO:** Honorable Mayor and City Council

**FROM:** Planning & Community Development Department

**SUBJECT: APPEAL OF BOARD OF ZONING APPEAL'S DECISION ON DIRECTOR DECISION THAT THE "CONDITIONAL USE PERMIT: CANNABIS RETAIL" APPLICATION FOR 827 EAST COLORADO BOULEVARD SUBMITTED BY SWEETFLOWER PASADENA, LLC IS INCOMPLETE (PLN2019-00386)**

## **RECOMMENDATION:**

It is recommended that the City Council:

1. Adopt a determination that the proposed action is exempt from the California Environmental Quality Act (CEQA) under Section 15061(b)(3) of the State CEQA Guidelines. This exemption applies where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment; and,
2. Uphold the Board of Zoning Appeal's decision that SweetFlower Pasadena, LLC's "Conditional Use Permit: Cannabis Retailer" application is incomplete because it did not provide required information of which it had notice, specifically a location map prepared by a licensed surveyor.

## **EXECUTIVE SUMMARY:**

On June 5, 2018, Pasadena voters approved Ballot Measures CC and DD, which allow a limited number of cannabis (marijuana) businesses to operate within the City and levy a business license tax on commercial cannabis activity, respectively. The regulations allow for three types of commercial cannabis uses; retail, cultivation and testing laboratories. The regulations permit up to six commercial cannabis retailers, four cultivators and four testing laboratories.

Immediately after the regulations were approved by Voters, staff began to work on the implementation framework for the new Commercial Cannabis Program. With the purpose of implementing a transparent and fair process which is insulated from

economic and political influence, the City established a designated selection committee comprised of expert staff at a neutral, third-party consultant group with particular expertise in the field, Hinderliter, de Llamas & Associates Companies (HdL) to review, score and rank all initial applications.

The 31-day application filing period opened on January 1, 2019 and closed on January 31, 2020. At the completion of the filing period, a total of 128 applications were received, of which 122 were for the retailer category, three for the cultivation category, and three for testing laboratories. Review and scoring of the applications was completed by HdL in May 2019 at which time the six top-scoring applicants for the retailer category were identified and invited to interviews by members of City staff to confirm the contents of their applications, and to emphasize the importance to the City of the community benefits plan, site security and other issues. These interviews were monitored by the City's Internal Audit group; applicant scores and rankings were not affected by the City's interviews.

Following completion of the interviews, those same six top-scoring applicants for the retailer category were publicly announced on June 5, 2019 and the appellant (Sweetflower Pasadena, LLC) was among the selected applicants. A workshop was held with representatives for those six top applicants on June 12, 2019 where the *Conditional Use Permit: Cannabis Retailer (CUP)* application (Attachment A) was distributed and the processing of the CUP applications was explained. Staff spent approximately two-hours with the applicants' representatives and reviewed each and every section of the application and answered questions. The City's Internal Audit Group was also present at this workshop.

As it was explained to the applicant representatives, this *Conditional Use Permit: Cannabis Retailer* application is a new application for a new land use. This application is specifically for cannabis retailers and includes several requirements for supplemental documentation that are specific to retail cannabis use. Among other things, this new application requires demonstration of site control for a property that meets all of the City's distance separation requirements and compliance with other applicable regulations set forth in Section 17.50.066 D of the Zoning Code. Neither the application itself nor any of its requirements was shared with any applicant or applicant representative prior to the June 12<sup>th</sup> application workshop.

Also at the application workshop, applicant representatives were advised that each CUP application would be reviewed for completeness in the order received. Due to location requirements specified in the commercial cannabis zoning regulations limiting one cannabis retailer permit per Council District, staff specified that only the first complete application with a compliant location in each Council District would be processed. City staff also informed applicant representatives that responses to general questions regarding the application process would be provided via email to those in attendance at the workshop. Accordingly, in the days following the workshop, staff provided several

emails with questions asked by individuals that had attended the workshop and the staff response to the question.

On June 12, 2019, the same day that the CUP application was distributed to the six selected top applicants, SweetFlower Pasadena LLC was the first to submit its application. Two additional applications were received that same evening, and all three applications, including the application submitted by the appellant, were for proposed locations in Council District 3.

	<b>Applicant</b>	<b>Date of Submission</b>	<b>Time Submitted</b>	<b>Proposed Location</b>	<b>Council District</b>
1.	SweetFlower Pasadena, LLC	June 12,2019	5:34 p.m.	827 E Colorado Blvd	3
2.	Harvest of Pasadena, LLC	June 12,2019	10:20 p.m.	169 W Colorado Blvd	3
3.	The Atrium Group, LLC	June 12, 2019	10:56 p.m.	70 W Union	3

On June 13th, the City issued an email (Attachment B) advising the representatives of all top six applicants that a question had been asked by an applicant representative regarding the CUP application requirement for a land surveyor. The City responded: *“As indicated on the Conditional Use Permit submittal checklist (page 1, Location Map), the radius map must be prepared by a licensed surveyor...”*

The requirement for the location map to be prepared by a licensed surveyor is imperative to the determination as to whether an application can be processed because only an appropriately licensed surveyor can LEGALLY verify with that the proposed location complies with the required distance separations from sensitive uses, as outlined in Section 17.50.066 D of the Zoning Code. Following the City’s June 13, 2019 email, applicant 3, The Atrium Group, resubmitted its CUP application to include a location map prepared by a licensed surveyor.

Also subsequent to the City’s June 13th email, SweetFlower submitted a letter on June 19, 2019 (Attachment C) asking that the City apply a *“complete, in good faith standard”* in reviewing their CUP application. The appellant included a statement explaining that their request is in response to *“clarifying emails provided by the City to applicants, including a sample location map, which contained information that further elaborated on the instructions received earlier during the Wednesday meeting.”*

On June 27, 2019, upon completion of the review of the submitted CUP applications, the City issued a letter to the appellant (Attachment D) indicating that its CUP application was not complete and would not be processed because the submitted location map was not prepared by a licensed surveyor (Attachment E). Also on June 27, 2019, the City issued a letter to applicant 2, Harvest of Pasadena, LLC, accepting their application as complete. As such, no other CUP applications will be processed for proposed locations in Council District 3. Applicant 3, The Atrium Group LLC, also submitted a complete application, but their application is on hold and will not be processed by virtue of this. Unless their application is withdrawn, The Atrium Group, LLC is currently second in line for Council District 3. If Harvest of Pasadena, LLC fails to obtain a CUP and/or any other required permit or approval, The Atrium Group would move to a first position and therefore have its CUP application processed.

Since the City's June 27, 2019 incomplete letter, the appellant has submitted three additional applications in attempts to file a complete application for the same location at 827 East Colorado Boulevard. The appellant's third and fourth submittal were accepted as complete, but there are other complete applications in Council District 3 that were submitted prior to the appellant's third application. And, as specified in the application workshop, only the first complete and code compliant application will be processed per Council District.

On July 3, 2019, the appellant submitted a *Request for Appeal* application (Attachment F) of the June 27, 2019 decision of the Director of Planning that SweetFlower's CUP application was incomplete. On August 7, 2019, the Board of Zoning Appeals conducted a public hearing on this item and voted (4-1) to adopt the environmental determination and uphold the Director's decision (Attachment G).

On August 19, 2019, the appellant submitted an appeal application to the City Council. Staff recommends that the City Council uphold the Board of Zoning Appeals' August 7, 2019 decision upholding the Director's decision that the June 12, 2019 *Conditional Use Permit: Cannabis Retailer* application submitted by SweetFlower was incomplete.

If the Board of Zoning Appeal's determination is overturned, this will invalidate the Director's determination to process two other CUP applications which were accepted as complete. The affected applications would be the ones submitted by Harvest of Pasadena, LLC and Integral Associates Dena, LLC. Those two applications would not be processed further as those two applications would lose their status as in conformance with distance separation requirements and/or exceeding the maximum number of retail establishments per district limitation.

#### **BACKGROUND:**

##### ***Requirement for Preparation of Location Map by a Licensed Surveyor***

It is unlawful for anyone to do land surveying unless he or she is licensed by the State

of California to do so. The regulations pertaining to commercial cannabis include strict location requirements requiring precise measurements which can only be verified with certainty by a licensed surveyor. Pursuant to California Business and Professions Code Sections 8700-8705 (The Land Surveyors Act), the requirement for a Licensed Land Surveyor is a matter of public welfare. Section 8708 of the Land Surveyor's Act states in part, that "In order to safeguard property and public welfare, no person shall practice land surveying unless appropriately licensed..." Section 8726 defines what land surveying is, and importantly, indicates that Land Surveying includes locating property lines and boundaries of any parcel of land. Section 8726 (c) defines land surveying as work performed by an individual that: "Locates, relocates, establishes, or retraces any property line or boundary of any parcel of land..." State law further specifies that anyone practicing Land Surveying **MUST** be licensed. Section 8725 of the Land Surveyors Act states, "Any person practicing, or offering to practice, land surveying in this state shall submit evidence that he or she is qualified to practice **and shall be licensed under this chapter.**" [Emphasis added]

The City's Cannabis regulations allow for a maximum of six dispensary permits and further restricts the number to one per Council District. The regulations also require, in part, that the property lines of dispensaries be located 600 feet away from various specific sensitive receptors including residentially zoned properties, properties with faith congregations, schools, libraries, etc., and no closer than 1,000 feet from another dispensary (location requirements are established in PMC 17.50.066 D 5). Based on staff's initial evaluation of these requirements, a Draft Map was prepared and shared with the public in December 2018 with various *caveats* including a statement that the Map was *draft* and any proposed location would need to demonstrate compliance with established rules (Attachment H). Although the ordinance allows the City to issue up to six cannabis CUPs, the Draft Map identified fewer than six potentially compliant locations. It is possible that more compliant locations exist, but this is not probable.

In order to demonstrate compliance with the established rules, the CUP application requires the submittal of a location map which identifies the required distance separation radii of 600' and 1,000' from the boundaries of the proposed location and the identification of zones and uses within the properties located within the 600 foot radius. The location map must be prepared by a licensed surveyor. There are *bona fide* business reasons for this requirement. First, it is a matter of state law. The work involved in identifying parcel boundaries must be done by a licensed land surveyor. Secondly, GIS maps are not survey-level mapping data to be reliably used to determine precise distance separation measurements between property lines or zoning boundaries. Therefore, the City's Draft Map could not be reliably used for the purpose of verifying the qualification of a site for cannabis use and was never represented as such. Precise measurements are required to ensure that the locations proposed meet the requirements as outlined in Section 17.50.066 D 5 of the Zoning Code. The most precise work is reliably prepared only by a licensed surveyor and state law mandates that anyone practicing land surveying **MUST** be licensed.

### ***Six Applicants Vying for Fewer Than Six Spots***

Staff has recognized that it is unlikely that existing rules will allow all six top applicants to find a code-compliant location and obtain a cannabis permit. Applicants are also aware that there are a limited number of locations. Since the City's June 27, 2019 determination that the appellant's application was incomplete, representatives for the appellant – and representatives for another applicant whose CUP application is also not being processed – have continuously made claims and criticisms about the City's handling of the CUP application process, about staff interactions with other applicant representatives, about interpretation of code requirements or definitions of terms, and about the applicants whose CUP applications are currently being processed. Hundreds of hours have been spent by staff and outside counsel in reviewing records and responding to cannabis-related requests submitted pursuant to the California Public Records Act (CPRA) by these appellant representatives. Given the highly lucrative nature of this evolving industry and the limited site availability, it is expected that every step of the City's cannabis CUP application process will continue to be highly scrutinized.

### ***Board of Zoning Appeal's Public Hearing***

On July 3, 2019, Artin N. Shaverdian, attorney for appellant, submitted an appeal application to the Board of Zoning Appeals for an appeal of the Director's decision that SweetFlower's CUP application was incomplete. On August 7, 2019, the Board of Zoning Appeals conducted a public hearing on this item. A response to the appellant's claims was provided to the Board of Zoning appeals as a component of the August 7, 2019 Board of Zoning Appeals staff report (Attachment I). Staff presented the project and recommended that the Board of Zoning Appeals adopt the environmental determination and uphold the Director's decision. At the hearing, the appellant spoke in favor of overturning the Director's decision.

The meeting was attended by representatives for several of the other top-scoring applicants. During public testimony, some of the representatives for the other top-scoring applicants spoke in support of the appellant's request, and others spoke in support of upholding the Director's decision. However, each applicant that spoke uniformly noted that the requirement for a map prepared by a licensed surveyor was clearly indicated to the group as of June 12, 2019 meeting. At the conclusion of the meeting, and after considering public testimony, the Board of Zoning Appeals voted (4-1) to adopt the environmental determination and uphold the Director's decision.

### **APPEAL OF BOARD OF ZONING APPEALS DECISION:**

On August 19, 2019, the appellant submitted an application to the City Clerk's Office for an appeal of the Board of Zoning Appeals' August 7, 2019 decision. The appellant has cited the following reasons for the appeal of the Board of Zoning Appeals' decision:

1. The appellant's CUP application was compliant with requirements of the Pasadena Municipal Code (P.M.C.); and,
2. The Director has no authority to promulgate cannabis regulations; and,
3. The standards for determination of completeness were changed a number of times; and,
4. No consistency or fairness in determining the completeness of CUP applications.

Responses to the Appeal:

1. *The appellant's CUP application was compliant with requirements of the Pasadena Municipal Code (P.M.C.)*

CLAIM: The SweetFlower cannabis retailer conditional use permit application was compliant in all respects with the requirements of the Pasadena Municipal Code and regulations lawfully promulgated thereunder.

RESPONSE: The appellant reasons their CUP application was 'complete' because it complies with the requirements identified in the Pasadena Municipal Code (P.M.C.). However, the application submittal requirements are not identified within the P.M.C. and the matter at hand is not whether the appellant's application is compliant with the Municipal Code, but whether the appellant submitted all of the required information and documentation required in the *Conditional Use Permit: Cannabis Retailer* application. And, as stated in the July 12, 2019 Director's letter to the appellant regarding the appeal application submission (Attachment J) and in the August 7, 2019 staff report to the Board of Zoning Appeals, there is no requirement in State Law or the Pasadena Municipal Code stating that the contents of any permit application be outlined in the Municipal Code. Thus, the submittal requirements for any of the City's land use permit applications cannot be found within the P.M.C. Each city may require different submittals in land use applications, and those requirements can be set forth in each individual application.

The appellant's legal counsel has also made statements questioning the Director's authority to create this CUP application and to establish specific additional submittal materials which are not identified in the ordinance. The Director's authority to both create this application and to identify additional submittal requirements are specified in Section 17.60.040 D (*Application Preparation and Filing*) of the Pasadena Municipal Code. This section states:

*The Director shall establish in writing the submittal requirements for permit applications required by this Zoning Code. All applications shall include the following submittal materials, **as well as any additional materials identified by the Director [emphasis added]**.*

The Zoning Code clearly articulates that the Director is not only authorized to create

application materials, but is *mandated* to do so. The Code dictates that, “The Director ***shall*** establish in writing the submittal requirements for permit applications required by the Zoning Code.”

This use permit for cannabis retailers is required pursuant to Section 17.50.066 D2 of the Zoning Code and, as such, the Director is authorized to create this *Conditional Use Permit: Cannabis Retailer* application. The cannabis regulations require that a proposed dispensary location be located on a parcel that is 600 feet from sensitive uses and 1,000 feet from another dispensary. Since only licensed surveyors are legally certified to locate parcel boundaries, the subject CUP application has a requirement that the map identifying the subject parcel and its distance to sensitive uses be prepared by a licensed surveyor. The application under appeal was submitted without a licensed survey map and was deemed incomplete.

*2. The Director has no authority to promulgate cannabis regulations*

CLAIM: The Department of Planning and Community Development Director (“Director of Planning”) has no authority to promulgate cannabis retailer conditional use permit regulations. Such authority is vested solely in the City Manager. Nevertheless, the Director of Planning has promulgated such regulations which have been applied in a manner detrimental to SweetFlower.

RESPONSE: The narrow issue before the City Council this evening is whether or not the SweetFlower application was complete. PMC 17.60.040 (d), discussed above, provides authority and requires the Director to establish written submittal requirements needed to process each application. The application requirements, including the licensed survey requirements were established by the Director as authorized by the Municipal Code.

*3. The standards for determination of completeness were changed a number of times*

CLAIM: The Department of Planning and Community Development violated the due process rights of SweetFlower by changing the standards for determining completeness of cannabis retailer conditional use permit applications a number of times following the opening of the application process and has not published clear, definitive requirements for such determinations.

RESPONSE: The standard for determining completeness of any zoning application is stipulated in Section 17.60.040 F which states:

*Filing date. The filing date of an application shall be **the date on which the Department receives the last submission, map, plan, or other material required as a part of that application** by Subsection A., in compliance with*



*Section 17.60.060 (Initial Application Review) and deemed complete by the Director.*

Pursuant to the aforementioned code, all vital materials required by the application must be submitted in order for an application to be considered 'complete'. For this *Conditional Use Permit: Cannabis Retailer* application, a 'complete application' entails submission of all documentation and information required in pages 1 through 3 of the application. Included on page 1 is the requirement for a location map prepared by a licensed surveyor, and such requirement was repeatedly communicated to all top applicants on various occasions, both in writing and in person. It was indicated verbally at the application workshop of June 12, 2019, in writing via the CUP application, and again in writing via email correspondence from the City to all top applicants, including the appellant, on June 13, 2019.

The City has remained fair and consistent in determining whether any CUP application is or is not complete. Specifically in regards to the determination as to whether the required location map was prepared by a licensed surveyor, the City has uniformly required that the location maps are signed and stamped by a licensed surveyor and also include a general statement affirming, at minimum, that the 600' and 1000' radii have been prepared by the undersigned licensed surveyor. Variations in the surveyor's statements have been accepted to the extent that the methodology used by the surveyor to map the location of the radii is included within the location map documentation and consistent with best practices. Pursuant to the Business and Professions Code Section 8764.5, the required statement may also indicate that the map was '*prepared under the direction of*' the undersigning surveyor. And, as specified at the June 12, 2019 application workshop, the accuracy of the map, including the radii, the methodology used to create the radii and the land use/zoning information, is subject to review and verification by the City during the CUP review process for those applications that have been determined to be 'complete'. If a map or its contents are found to be inaccurate or incomplete upon completion of a peer review by the City's land surveyor, the applicant will need to submit a new CUP application. The new application may not be processed if other complete and code compliant applications have been previously submitted by other applicants for proposed locations within the same Council District.

Also, at the August 7, 2019 Board of Zoning Appeals hearing, the appellant's legal counsel made several references to an email from City staff which he claimed was in support of the applicability of a '*complete in good faith standard*' in the City's determination of application completeness. The appellant's counsel verbally referenced one sentence from an email from staff dated June 12, 2019 in which staff communicated to the top applicants' representatives that "*we [the City] expect all applicants to submit their best application...*" The appellant did not provide a copy of this email to the Board of Zoning Appeals nor the context of the email, but asserted that this email supports their claim that the '*complete in good faith standard*' would be applied

and that applicants would be given the opportunity to rectify application deficiencies before a determination is made by the City regarding their CUP submission. However, the email was taken out of context because the sentences specifically preceding the quoted statement specify that incomplete applications will not be processed. The June 12, 2019 email from staff (Attachment K) states:

*"...Do not make any changes to the file after it is uploaded as this will void your application and you will be required to resubmit. Submission of an incomplete application will not 'hold your place' in line. If your application is incomplete, an appointment will not be issued and your application will be taken out of the queue. As indicated in today's meeting, we expect all applicants to submit their*

*best application at the time that the appointment is requested with the full body of information you want included for the CUP".*

Staff's statements in the June 12, 2019 email were in response to various questions asked by applicant representatives at the application workshop held earlier that day. Numerous questions were asked for clarification on the City's standards in reviewing the applications and determining application completeness. Some of the questions asked included varying scenarios where a minimally detailed application is submitted and whether the City will accept such applications or allow the applicant to revise their application once it is accepted as 'complete'. To discourage these incomplete filings and significant revisions, the City clearly explained that applications that do not contain the required submittal materials will not be considered complete and that revisions will be processed based upon the date and time of the last document submitted.

*4. No consistency or fairness in determining the completeness of CUP applications*

CLAIM: The Department of Planning and Community Development violated the due process rights of SweetFlower by failing consistently to fairly apply the requirements of the Pasadena Municipal Code (and ultra vires regulations) for determinations of completeness of cannabis retailer conditional use permits.

RESPONSE: The City has remained fair and consistent in determining whether any CUP application is or is not complete. Similar to any other land use permit, verification of compliance with City codes is a distinct process which is secondary from the determination as to whether an application submission is complete.

And, as indicated in the response to the appellant's claim #3, in determining whether the required location map was prepared by a licensed surveyor, the City has uniformly required that the location maps are signed and stamped by a licensed surveyor and also include a general statement affirming, at minimum, that the 600' and 1000' radii have been prepared by the undersigned licensed surveyor. Variations in the surveyor's statements have been accepted to the extent that the methodology used by the surveyor to map the location of the radii is included within the location map

documentation. Pursuant to the Business and Professions Code Section 8764.5, the required statement may also indicate that the map was '*prepared under the direction of*' the undersigning land surveyor. However, "prepared under the direction of" is distinct from "reviewed by," as the latter is wholly a passive act that does not comply with the Land Surveyors Act, Section 8726 (c)'s definition that land surveying work is performed by an individual that: "Locates, relocates, establishes, or retraces any property line or boundary of any parcel of land..." And, as specified at the June 12, 2019 application workshop, the accuracy of the map, including the radii, the methodology used to create

the radii and the land use/zoning information, is subject to review and verification by the City during the CUP review process for those applications that have been determined to be 'complete'.

### **ENVIRONMENTAL ANALYSIS:**

This action has been determined to be exempt from CEQA pursuant to State CEQA Guideline Section 15061(b)(3); the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. As the action under consideration concerns a determination based on the intent of the Zoning Code, no specific physical construction is contemplated.

### **CONCLUSION:**

The appellant was well informed in advance of submission of its application as to the City's requirements for a complete application. All other CUP applications received for Commercial Cannabis Retailers have complied with the requirement to include a location map prepared by a licensed surveyor. Further, the applications have been reviewed fairly and consistently in the manner consistent with how other land use applications are processed wherein the determination of application completeness does not involve a substantive review and evaluation of the materials submitted. And, there is no requirement in state law or in the Pasadena Municipal Code that the contents of a complete application be set forth in the P.M.C. Pursuant to Section 17.60.040 D (*Application Contents and Fees*) the City can determine which additional application materials are required based on the specific land use application being prepared.

**FISCAL IMPACT:**

There is no fiscal impact as a result of this action and will not have any indirect or support cost requirements.

Respectfully submitted,



---

DAVID M. REYES  
Director of Planning & Community  
Development

Prepared by:

Reviewed by:



---

Guille Nuñez  
Management Analyst IV



---

Jennifer Paige, AICP  
Deputy Director

Approved by:



---

STEVE MERMELL  
City Manager

Attachments: (11)

- Attachment A – Conditional Use Permit: Cannabis Retailer Application
- Attachment B – Email from City to Top Applicants dated June 13, 2019
- Attachment C – Email from SweetFlower Pasadena LLC to City dated June 19, 2019
- Attachment D – Status Letter dated June 27, 2019
- Attachment E – SweetFlower's Location Map submitted on June 12, 2019
- Attachment F – Request for Appeal Application submitted on July 3, 2019
- Attachment G – Decision Letter for Board of Zoning Appeals Hearing dated August 8
- Attachment H – Draft Cannabis Map
- Attachment I – Staff Report for August 7, 2019 Board of Zoning Appeals Hearing
- Attachment J – Letter from City dated July 12, 2019
- Attachment K – Email from City to Top Applicants dated June 12, 2019