



SAN FRANCISCO PLANNING DEPARTMENT

Conditional Use Authorization Appeal 2161-2165 Irving Street Medical Cannabis Dispensary

DATE: November 27, 2017
TO: Angela Calvillo, Clerk of the Board of Supervisors
FROM: John Rahaim, Planning Director – Planning Department (415) 558-6411
Nancy Tran, Case Planner – Planning Department (415) 575-9174
RE: Board File No. 171128, Planning Case No. 2016-002424CUA
Appeal of the approval of Conditional Use Authorization
for 2161-2165 Irving Street
HEARING DATE: December 5, 2017
PROJECT SPONSOR: Brendan Hallinan, 345 Franklin Street, San Francisco, CA 94102 on behalf of
Barbary Coast Dispensary
APPELLANTS: (1) Flo Kimmerling, on behalf of the Mid-Sunset Neighborhood Association, 1282
26th Avenue, San Francisco, CA 94112
(2) Catherine and Salvatore Alioto, on behalf of the Sunset Merchants and
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INTRODUCTION

This memorandum and the attached documents are a response to the letters of appeal to the Board of Supervisors (“Board”) regarding the Planning Commission’s (“Commission”) approval of the application for Conditional Use Authorization under Planning Department Case Number 2016-002424CUA pursuant to Planning Code Sections 303 (Conditional Use Authorization) and 732 (Medical Cannabis Dispensaries), to establish a Medical Cannabis Dispensary (“MCD”) (d.b.a. “Barbary Coast Dispensary”) within existing vacant ground floor retail spaces at 2161-2165 Irving Street.

This memorandum addresses two separate appeals to the Board, the first filed on October 17, 2017 by Flo Kimmerling on behalf of the Mid-Sunset Neighborhood Association (“Kimmerling Appeal”) and the second filed on November 2, 2017 by Salvatore and Catherine Alioto on behalf of the Sunset Merchants and Neighbors Association (“Alioto Appeal”). The Kimmerling Appeal requests that the Board place additional conditions on the Commission’s approval while the Alioto Appeal requests that the Board overturn the Commission’s action in its entirety and disapprove the project.

The decision before the Board is whether to uphold, overturn, or amend the Planning Commission’s approval of an application for Conditional Use Authorization to allow the establishment of an MCD at the subject property.

SITE DESCRIPTION & PRESENT USE

The project is located at the corner of Irving Street and 23rd Avenue in Assessor's Block 1777, Lot 037. The subject property is located within the Irving Street Neighborhood Commercial District ("NCD") and the 65-A Height and Bulk District. The property is developed with a two-story commercial building containing a massage establishment and professional office on the second floor and four ground floor retail spaces. Two of the ground floor spaces are occupied by restaurants while the remaining two are currently vacant and, under the proposal, would be combined and occupied by the proposed MCD. The spaces in question were most recently occupied by an internet cafe and a produce shop. The subject property measures approximately 85 feet by 100 feet, with 8,500 square feet of lot area and approximately 65% lot coverage.

SURROUNDING PROPERTIES AND NEIGHBORHOOD

The Irving Street NCD is located in the Outer Sunset neighborhood and stretches along Irving Street from 19th to 27th Avenues. The District provides a selection of convenience goods and services for the residents of the Outer Sunset District. There is a high concentration of restaurants, drawing customers from throughout the City and the region. There are also a significant number of professional, realty, and business offices as well as financial institutions. The area surrounding this part of the Irving Street NCD is zoned RH-2 (Residential House, Two-Family).

The project site is located on the Irving Street commercial corridor between 22nd and 23rd Avenues. A variety of commercial establishments occupy ground floor storefronts in the Irving Street NCD, including restaurants, apparel stores, personal service, office and other types of retailers. Buildings in the vicinity range from two to three stories in height. Upper floors of buildings are generally occupied by offices or residential units. The subject property is adjacent to MUNI service via the 7 and 7X bus lines. It is also in proximity to 28, 28R, 29, N, NX lines as well as bicycle routes along 20th Avenue and Kirkham Street. The immediate area is not identified as part of the Vision Zero High Injury Network for pedestrians and cyclists.

There are no other MCDs currently located in proximity to the subject property; the nearest MCD is located roughly two miles away at 4811 Geary Boulevard within the Inner Richmond neighborhood.

PROJECT DESCRIPTION

The Project Sponsor proposes to establish a new MCD for on-site sales of medical cannabis at the subject property. The project would not permit on-site medication (e.g. smoking, vaporizing, or consumption of edibles) or on-site cultivation for harvesting of medical product. The proposed hours of operation are 8:00 AM to 10:00 PM, seven days a week.

The proposal includes tenant improvements to the two retail spaces, which combined consist of approximately 2,600 square feet and 44 linear feet of frontage along Irving Street. No physical expansion of the building is proposed, and exterior work would be limited to signage only. The Planning Code does not require any off-street parking for the proposed change of use. The Project Sponsor would maintain

security guard presence during business hours and would install cameras within and around the facility for additional security.

The Project Sponsor's stated goal is to provide medical cannabis to registered patients within the Outer Sunset and other nearby neighborhoods, as there are currently no MCDs in the surrounding area. The Project Sponsor currently operates an MCD at 952 Mission Street within the western South of Market neighborhood.

BACKGROUND

On October 12, 2017, the Commission conducted a public hearing at a regularly scheduled meeting on Conditional Use Application No. 2016-002424CUA. Over two hours of public testimony was heard on this item, both in support of and in opposition to the proposed project, after which the Commission voted 6-0 (Commissioner Moore absent) to approve the application.

Opponents of the proposed MCD stated concerns including that the business would result in an increase in the amount of traffic, be detrimental to other businesses in the area, reduce the quality of life in the neighborhood, and imperil the safety of children and other nearby residents. Many opponents noted the nearby elementary school (Jefferson Elementary School), as well as other facilities that provide services to youth. Supporters of the proposed MCD discussed issues including Barbary Coast Dispensary's track record of existing business practices for their location on Mission Street, the project sponsor's commitment to the community, especially through charitable giving, and patient need for an MCD located in the Sunset neighborhood, where there are currently no MCDs.

CONDITIONAL USE AUTHORIZATION REQUIREMENTS

Planning Code Section 303 establishes criteria for the Commission to consider when reviewing all applications for Conditional Use approval. To approve the project, the Commission must find that these criteria have been met:

1. That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community; and
2. That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injurious to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:
 - a. The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;
 - b. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;
 - c. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

- d. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs; and
3. That such use or feature as proposed will comply with the applicable provisions of this Code and will not adversely affect the General Plan.
4. That such use or feature as proposed will provide development that is in conformity with the stated purpose of the applicable Use District.

In addition, Planning Code Section 202.2(e)(1) sets forth the following criteria that must be met by all MCDs and considered by the Planning Commission in evaluating the proposed use.

1. That the proposed site is located not less than 1,000 feet from a parcel containing the grounds of an elementary or secondary school, public or private, nor less than 1,000 feet from a community facility and/or recreation center that primarily serves persons under 18 years of age.
2. That the parcel containing the MCD cannot be located on the same parcel as a facility providing substance abuse services that is licensed or certified by the State of California or funded by the Department of Public Health.
3. No alcohol is sold or distributed on the premises for on or off site consumption.
4. If Medical Cannabis is smoked on the premises the dispensary shall provide adequate ventilation within the structure such that doors and/or windows are not left open for such purposes resulting in odor emission from the premises.
5. The Medical Cannabis Dispensary has applied for a permit from the Department of Public Health pursuant to Section 3304 of the San Francisco Health Code.
6. A notice shall be sent out to all properties within 300-feet of the subject lot and individuals or groups that have made a written request for notice or regarding specific properties, areas or Medical Cannabis Dispensaries. Such notice shall be held for 30 days.

APPELLANT ISSUES AND PLANNING DEPARTMENT RESPONSES

The concerns related to land use that have been raised in the Kimmerling Appeal and the Alioto Appeal are summarized below and are followed by the Department's response. Concerns are numbered and prefaced by a "K" in the case of those raised in the Kimmerling Appeal and an "A" in the case of those raised in the Alioto Appeal.

ISSUE K1: The Appellant proposes that restrictions or conditions developed under the current 45-day moratorium (or any extensions thereof) should be applied retroactively for the proposed MCD.

RESPONSE K1: On September 22, 2017, a moratorium on new MCDs [Board File Number 170865] took effect. The moratorium prohibited the Planning Commission from approving any new MCD except for those MCDs for which an application had been scheduled to be heard by the Commission as of September 11, 2017. Because the subject Conditional Use Application had been scheduled for hearing prior to that date, the moratorium allowed it to be considered for approval by the Planning Commission. Therefore, under the moratorium, the Board maintained its full authority and discretion to approve, disapprove, or modify this Conditional Use Authorization on appeal.

While the moratorium was in place at the time of the Commission's action on the subject Conditional Use application, no additional restrictions or conditions were developed as part of it, and the moratorium has now lapsed. As such, this issue is moot.

ISSUE K2: The Appellant contends that students at nearby Jefferson Elementary school would be negatively impacted by walking past the proposed MCD. The Appellant proposes (1) prohibiting MCD operations during times of greatest student pedestrian traffic, specifically before 9 A.M. or between 2:30 P.M. and 4 P.M. on weekdays and (2) prohibiting any storefront display of products "enticing to children." visible from outside the dispensary.

RESPONSE K2: Minors are not permitted into any MCD; sale of medical cannabis to minors is strictly prohibited. Any violation risks the loss of operating license. To ensure adherence to regulations, trained security personnel for the MCD will be vigilant in verifying that patients have valid identification and recommendation for medical cannabis.

The proposed MCD's operational hours, between 8 A.M. and 10 P.M., are principally permitted within the Irving Street NCD and would comply with Section 3308 of the San Francisco Health Code. The Appellant's suggested hours are unusual and not consistent with existing, specific restrictions on MCD hours of operation as compared to other businesses.

With respect to the Appellant's concern regarding product display, California Health and Safety Code Section 11364.5, along with Article 33 of the San Francisco Health Code, prohibits medical cannabis products, including edible products, from being visible from outside the facility.

ISSUE K3: The Appellant proposes that the MCD provide security patrol during business hours to ensure general safety and adherence to the law.

RESPONSE K3: The proposed MCD would meet all the performance standards and requirements identified in Planning Code Section 202.2(e)(1) and would employ security personnel to help address any undesirable activities and ensure that patients are not consuming medical cannabis once immediately outside the establishment. The proposed MCD would employ a security guard on-site during business hours and would install cameras within and around the facility.

ISSUE K4: The Appellant proposes prohibiting the MCD from expanding its use size or scope of services offered, including future sale of adult use cannabis and delivery of cannabis.

RESPONSE K4: Significant changes to the approved MCD use or its conditions of approval (e.g. expansion of use size or conversion to delivery-only) would require Planning Commission approval of a new Conditional Use Authorization. With respect to adult use cannabis sales, while the Board is currently deliberating regulations, Department Staff anticipate that a permitting and/or licensing process will be required prior to allowing adult-use sales on a permanent and ongoing basis. This process would presumably involve an opportunity for input and appeal by interested parties.

ISSUE K5: The Appellant proposes prohibiting the MCD from operating after 8 P.M. so as to be consistent with the "average time of closure of the local Walgreens pharmacy."

RESPONSE K5: As discussed above, the proposed hours of operation are permitted as-of-right in the Irving Street NCD and further comply with the more restrictive operating hours for MCDs set forth in the Health Code. Additionally, while the pharmacy counter at the Walgreens location one block eastward typically closes at 9 P.M, the retailer itself typically remains open until 10:30 P.M. Furthermore, and with particular respect to pharmacies, the Planning Code provides a specific allowance for 24-hour operation so long as there is a licensed pharmacist on duty, prescription drugs are for sale, and adequate light/security for safety is provided between 11 P.M. and 6 A.M.

ISSUE K6: The Appellant “strongly insist[s] that the city monitor the consequences to the surrounding neighborhood.”

RESPONSE K6: The Planning Department fully shares the Appellant’s expectation that the proposed MCD operate in strict adherence to all applicable conditions of approval and City and State law. In conjunction with other involved City agencies (e.g. the Department of Public Health), the Planning Department will promptly and thoroughly review and address any reports to the contrary.

ISSUE K7: The Appellant has expressed concerns regarding “severe adverse effects on the community” during alleged heavy patronage of the proposed MCD during annual concerts in Golden Gate Park.

RESPONSE K7: As noted previously, the proposed MCD would serve only patients for whom medical cannabis has been proscribed by a physician. As such, and apart from the City questioning the medical decisions of a licensed physician, a connection between the proposed MCD and festivals in Golden Gate Park (e.g. Outside Lands, Hardly Strictly Bluegrass) is tenuous. Regardless, congestion in most neighborhoods abutting Golden Gate Park – along with patronage of a broad range of businesses in those neighborhoods - is typically increased during major events.

ISSUE A1: The Appellant contends that the proposed MCD is not necessary or desirable and not compatible with the neighborhood.

RESPONSE A1: The Commission, by unanimous vote, determined otherwise. The proposed MCD would add a unique business type and would provide goods and services that are not otherwise available within the immediate District, nor within the broader Sunset neighborhood. Additionally, the size of the proposed use is in keeping with other storefronts on the block face, and is a principally permitted use size within the District. The space in question has been vacant for some time, and as such the proposal would help to activate this portion of the NCD while serving the changing medical needs of the City. As there are no other MCDs within two miles of the proposed location, the proposed MCD would function primarily as a neighborhood-serving use for those patients within the broader Sunset neighborhood. The proposed MCD is a locally-owned business that has several years of direct experience working in the medical cannabis industry within San Francisco.

ISSUE A2: The Appellant contends that notification of public hearings for, and community meetings regarding, the proposed MCD were inadequate.

RESPONSE A2: The Department is currently evaluating compliance with the Planning Code's requirements for neighborhood notice in association with the Commission's public hearing. The Project Sponsor conducted additional meetings open to the public and provided associated neighborhood notice, neither of which were required under the Planning Code.

ISSUE A3: The Appellant contends that the Sponsor "is actually intent" on establishing an adult use cannabis retailer with a smoking lounge rather than an MCD.

RESPONSE A3: The application that was approved by the Planning Commission and which is the subject of this appeal would authorize only the sale of medical cannabis products for use off site, and only then exclusively to patients for whom medical cannabis had been proscribed by a licensed physician. Any sale of cannabis for non-medical purposes would be subject to the regulatory framework put in place by the Board following January 1, 2018, when the State may begin issuing permits for adult-use consumption of cannabis.

With respect to future on-site consumption, the application does not authorize any on-site smoking, vaporizing, or any other type of consumption. An air filtration and odor-control system has been proposed by the sponsor as a means to limit any odors associated with cannabis and cannabis-products from being detectable outside of the establishment, rather than as a means to address any proposed on-site smoking.

ISSUE A4: The Appellant contends that the proposed MCD will exacerbate traffic conditions and jeopardize the safety of pedestrians.

RESPONSE A4: The Appellant has provided no evidence that the proposed MCD would negatively affect traffic in the immediate or broader neighborhood to any greater extent than would be the case should the space in question be re-tenanted with the current permitted land uses (retail and restaurant). The proposed MCD would comply with all Planning Code requirements with respect to parking and loading. As discussed above, the subject property is also well served by transit and bicycle routes. Potential safety issues associated with driving while under the influence of cannabis are not anticipated to be affected by the proposed MCD because the proposed MCD would not involve any on-site consumption of medical cannabis.

ISSUE A5: The Appellant contends that the MCD will "attract more congestion during concert weekends."

RESPONSE A5: Response K7, above, addresses this contention.

ISSUE A6: The Appellant contends that the MCD would have a negative effect on nearby existing businesses.

RESPONSE A6: In general terms, the Department is unaware of complaints made by merchants who have been negatively impacted by an operating MCD in the immediate area. On the contrary, vacant storefronts – such as those currently found at the subject property - are acknowledged as a detriment to the commercial vitality of a given corridor. Should the Board uphold the Commission's action, employees

and customers of the proposed MCD would be likely to patronize nearby existing businesses, thus supporting existing small businesses along the Irving Street NCD.

ISSUE A7: The Appellant contends that approval of the MCD will encourage clustering of other MCDs nearby.

RESPONSE A7: Neither the Health Code nor the Planning Code prohibit the clustering of MCDs in the Irving Street NCD. However, of the 49 MCDs that had received Planning Commission approval as of September 2017, the nearest is located two miles away. As such, it cannot be said that there is a clustering problem at present.

During the public hearing on this application, the Planning Commission noted that the minimum required separation between MCDs and sensitive uses (e.g. 1,000 feet from a school/community facility) significantly limits eligible locations for MCDs. The Commission observed that this leads to a geographic equity issue in which there is an overconcentration of MCDs in certain areas while there is a dearth in others.

Any future application for cannabis-related retail uses in the Irving Street NCD (or elsewhere in the City) would be subject to the discretionary permitting process required for all land use authorizations under the City Charter; if any member of the public were to have concerns regarding clustering in the future, such concerns could be addressed through any number of appeal avenues depending on the nature of that application and the final disposition of the cannabis regulations now under consideration by the Board.

ISSUE A8: The Appellant contends that a storefront MCD is not necessary in the Sunset; delivery services should suffice.

RESPONSE A8: The project allows for the establishment of an MCD which would serve patients who live in the Sunset and who stand to benefit from a Medical Cannabis Dispensary located closer to their residence. In-person services at an MCD can help tailor a treatment regimen to individual patient needs. Much like with conventional medical treatments and products, in some cases medical cannabis patients can advantage themselves from home delivery services, while in other cases an in-person consultation at a brick-and-mortar setting leads to better health outcomes.

ISSUE A9: Throughout the Alioto Appeal, it is suggested that the Board should disapprove the proposed MCD owing to the concentration of youth in the immediate and broader neighborhood and the effects of the proposed MCD on those under 18 years of age.

RESPONSE A9: Limiting youth access and exposure to cannabis is a core value of the City. To that end, the Planning Code identifies specific land uses (e.g. schools) close to which MCDs may not locate. Furthermore, the Health Code and State Law provide for strict limits (discussed above) for signage and public product display, respectively. These and other controls were adopted in order to provide for a clear, consistent framework to limit youth access and exposure, and the proposed MCD would comply with all of them. Furthermore, during the deliberation, the Commission expressed disagreement that

outright prohibition of the proposed MCD - or any other MCD - would limit risks to youth, instead stating that improved education and open discussion on the matter is more effective.

SUMMARY RESPONSE

Contrary to the appeals, the Planning Commission found the proposed MCD to be necessary and desirable for the community as it would provide goods and services that are not otherwise available within the District, nor beyond the immediate District and within the surrounding, broader Sunset neighborhood. The Commission determined that the project complies with all Section 303(c) Conditional Use criteria along with all other applicable provisions of the Planning Code. The Commission considered the proposed MCD to be a benefit in part because the vacant storefront would be activated and occupied by a successful operator with a sterling track-record at its Mission Street location. Specifically, the Planning Commission found as follows:

The size of the proposed use is in keeping with other storefronts on the block face, and [the size] is a principally permitted use size within the District. While a merger with the adjacent storefront is proposed on the same lot, it does not exceed the use size limitation allowed. The proposed Medical Cannabis Dispensary (MCD) will add a unique business type and would provide goods and services that are not otherwise available within the District, nor beyond the immediate District and within the surrounding, broader Sunset neighborhood. The nearest MCD to the project site is approximately 2 miles away, located along Geary Street in the Inner Richmond neighborhood.

The proposed MCD will be located within an existing building that has been vacant for several years. The existing storefront will be replaced and upgraded with high-quality materials, and should serve to enhance the District.

The proposed MCD would not permit any cultivation or processing of medical cannabis on site, nor would the proposed MCD permit any smoking, vaporization, or other means of consumption of medical cannabis on site. The MCD will employ a security guard on site who can help to ensure that patients are not medicating once immediately exiting the premises. The proposed MCD will have a mechanical system designed to keep any potential odors from passing into pedestrian space, and as such, should not generate any noxious or offensive emissions such as noise, glare, dust and odor.

The proposed project is consistent with the stated purposes of the Irving Neighborhood Commercial District in that the intended use is located at the ground floor, will provide compatible convenience goods and services for the residents of the Outer Sunset District during daytime hours, and will encourage the street's active retail frontage. The proposed MCD, while primarily intended to serve those residents of the Outer Sunset neighborhood, does have some potential to draw patients from around the City and region; however, these trips are likely to be limited due to the availability of MCDs in other neighborhoods throughout the City and due to the proposed location's site away from highways.

CONCLUSION

Despite having implemented a regulatory framework for medical cannabis more than ten years ago, and despite having nearly 50 MCDs operating in the City today, the entire Sunset District is devoid of any

such use. This stands in marked contrast to decades of local and state law¹ supporting patient access to medical cannabis.

The Appellants in this case variously ask that the Board modify or overturn a unanimous decision by the Planning Commission in which it found, with the recommendation of Department Staff, that the proposed use at the subject property was necessary and desirable, that the elimination of a vacant storefront in-lieu of an active institutional use appropriate, that the geographic equity of MCDs for medical cannabis patients laudable, and the Project Sponsor's successful operational experience auspicious.

For the reasons stated in this document, in the attached Resolution, and in the Planning Department case file, the Planning Department recommends that the Board uphold the Planning Commission's decision in approving the Conditional Use authorization to establish an MCD in the existing vacant ground floor retail spaces at the subject property and deny the requests from Appellants Kimmerling and Alioto to overturn or modify the Commission's decision.

¹ State Proposition 215 ("The Compassionate Use Act of 1996"); California Senate Bill 420 ("The Medical Marijuana Program Act"); Board of Supervisors Resolution 955-01 ("Declaration of Sanctuary City for Medical Cannabis")