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Tuesday, July 23, 2019
Hand Delivered

Ms. Michele Beal Bagneris,
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100 North Garfield Avenue
Pasadena, California 91101

Mr. Nicholas G. Rodriguez
Assistant City Manager
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Mr. David Reyes, Director of Planning
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Pasadena Permit Center
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Guille Nuñez, Management Analyst IV,
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Pasadena Permit Center
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Re: Violations of Due Process in Cannabis C.U.P. Applications

Dear Ms. Bagneris, Mr. Reyes, Ms. Nunez, and Mr. Rodriguez:

We are in receipt of your two letters, both dated July 12, 2019, in which you advise The Atrium Group, LLC ("Atrium") that it has **no right to appeal** the numerous errors and omissions the City staff made in two letters dated June 27, 2019, determining that the *Conditional Use Permit: Cannabis Retailer* ("CUP Application") submitted for review on June 12, 2019 by Harvest of Pasadena, LLC ("Harvest") was "complete" and ready for filing. We sought to appeal the determinations in both of the two June 27th letters.

As you know, Atrium and my office previously sent letters to the City on June 19, 2019, June 28, 2019, July 8, 2019 and July 12, 2019. In those letters we detailed dozens of obvious errors that the City's Director of Planning & Development (and/or his designee) made in finding Harvest's CUP Application to be "complete and code compliant" as contained in the two letters of June 27, 2019.

In accordance with Rule No. VII of the City's Cannabis Rules and Regulations, the City was required to make a determination that ***both elements*** are satisfied ***before*** it could consider any CUP Application. The Harvest CUP Application was neither "**complete**" nor "**code compliant**." Despite the lengthy and detailed letters we provided to the City chronicling each of many errors that were made by City staff, we have not received a response ***addressing the merits*** any of the issues we raised save one — The sole

exception being a letter we received from Assistant City Manager Julie Gutierrez dated July 2, 2019, in which she creatively misconstrues (and improperly rewrites) Pasadena Municipal Code Section 17.050.066(D) to remove the word "**any**" that appears before and modifies the word "library." [1] "Any library" does not mean "public library," as that phrase is arbitrarily and capriciously re-defined in the July 2nd Julie Gutierrez letter.

While it is regrettable that any errors occur during the permitting process, there is no form of government that is infallible. Therefore, it would not be surprising to learn that the City made errors in this lengthy entitlement proceeding. But what happened were not errors, but willful distortions of the text in the Zoning Code. We have identified the instances of misconduct we experienced, and which are unacceptable. Yet the City staff has exhibited an inability to fairly apply the cannabis regulations and Zoning Code.

For this reason, we filed two appeals on July 3rd from the two June 27th determinations. We believed that an impartial tribunal (Board of Zoning Appeals) would provide a fair hearing, would agree with our concerns, and would rectify the mistakes that were made by the City's Director of Planning & Development (the "Director") and/or his designee.

Our hope for a hearing before this impartial tribunal was thwarted when we received the City Attorney's two letters dated July 12, 2019. In the first letter, City Attorney Bagneris denied Atrium the right to appeal the June 27th decision to place Atrium's CUP Application on hold and halt its further processing. The sole reason given was that the City had already determined that Harvest's application for a location within the same Council District was "complete" (a patently false determination under the Code).

In her second July 12th letter, City Attorney Bagneris told Atrium it did not have the right to appeal the City's determination that Harvest's CUP Application was "complete":

> "While Section 17.72.040.A(2) specifically provides a right to appeal a determination that a permit application or information submitted therewith is incomplete, that Section does not provide a right to appeal a determination that an application is complete."

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[1] We note that City Attorney Bagneris herself also "creatively reimagines" the City's position expressed by Assistant City Manager Julie Gutierrez in her July 12, 2019 letter. She attributes the definition of "library" to the City Manager's exercise of his rule-making authority under Chapter 5.78 of the Municipal Code, and not to the actual Code text. This reasoning contradicts the rationale in Ms. Gutierrez's letter dated July 2, 2019, when she ignored the word "any" and opined that the City defined "library" was based on Sections 17.80.010 and 4.109.120 of the Municipal Code. As Ms. Gutierrez was speaking for the City Manager, we remain unsure as to which irrational explanation the City now is asserting.

Notwithstanding the views of City Attorney Bagneris, we believe Atrium is nevertheless entitled to appeal both June 27th determinations to the City's Board of Zoning Appeals. In denying Atrium's appellate rights, the City Attorney overlooked PMC Section 17.72.040.A(1), which gives Atrium the right to appeal the Director's interpretation of "complete" and "code compliant." Director Reyes' re-definition of these terms in the June 27th letters is not consistent with the generally-accepted and plain definitions, especially in light of Rule No. VII of the City's Cannabis Rules and Regulations.

Furthermore, PMC Section 17.72.040.A(1) provides Atrium a separate basis to appeal a Directors' erroneous determinations in applying the Zoning Code — First, because the Director failed to review Harvest's application for completeness, accuracy, and compliance as required by PMC Section 17.60.040(D) and Rule No. VII; and Second, because the Director neglected to ensure that Harvest's application contained all of the required application materials, as mandated by PMC Section 17.60.060(A).

The City Attorney's haste to justify the City staff's actions and thwarting Atrium's first two appeals did not consider whether the City's arbitrary and capricious twisting of the meaning of words had inflicted economic injuries on Atrium in violation of due process protected by federal and state constitutions. By contorting the meaning of common words, the City staff has deprived Atrium of the procedural right to appeal the two status letters of June 27th. Atrium was effectively being denied the safeguards of procedural due process — The right to a hearing and the right to have its case decided by a neutral party. The July 2nd letter and two July 12th letters each denied due process to Atrium.

In rejecting Atrium's right to appeal the June 27th Harvest status letter, the City Attorney relied on PMC Section 17.72.040.A(2), which was written years before the cannabis permit program was adopted. Section 17.72.040.A(1) and (2) have general applicability to all Zoning Code issues. The appeal rights therein reflect the City's duties under California Government Code Sections 65943(b) and 65943(c), and Pasadena Code Sections 17.72.040.A(1) and (2) are intended to provide applicants broadly applicable rights of appeal in all land use proceedings where the City decides that an application is incomplete. Normally, when the City finds that a land use application does not meet the standards necessary to be "deemed complete" there are no aggrieved third parties except for the applicant. Because of this, it is not hard to understand why Section 17.72.040.A(2) was written only to provide appellate relief for the applicant and not third parties, but Section 17,72.040(A)(1) provides third party appeal rights in all instances.

When Pasadena established its current cannabis permit program, it decided to impose a competitive process upon the final six eligible permit candidates. On June 12, 2019, the six final applicants were informed they would be participating in an elaborate "race to file" a "complete" and "compliant" CUP Application where each minute of time could

cost an applicant hundreds of thousands of dollars in lease payments and other required pre-commitments. Or worse yet, losing the "race" could result in the loss of any opportunity to obtain a permit under the City's competitive rules. But to file a timely CUP Application it was required to be both "complete" and "compliant."

To accommodate this highly competitive process, it appears that the Planning Director Reyes (or his designee) in effect applied the Zoning Code provisions to result in a "zero-sum" outcome: Each time the City staff determined a permit application to be "complete" there could be both a winner and loser based on relative timing of each CUP Application. The City staff transformed what was usually a routine "deemed complete" determination into an all-or-nothing decision that would admit one applicant and reject another applicant. This occurred due to the limited number of geographic locations were a cannabis retailed could be allowed, placing each competitor for a Council District within 1,000 feet of one another, with any "winner" in effect excluding any "loser" in the race to be "deemed complete."

With both Harvest and Atrium vying for a single permit within Council District No 3, it was clear that the City's determination that Harvest's application was "complete" would inflict CUP Application termination upon Atrium and subject Atrium to substantial economic harm. If such a determination were correct, then Atrium's loss would simply be the price that must be paid for engaging in a competitive process. However, if the City staff decided wrongly, and the City staff enabled Harvest to prevail in Council District No. 3, the City staff severely prejudicial Atrium. By then denying Atrium the right to appeal was improper because Atrium can show that Harvest CUP Application was neither "complete" and "compliant" under the Zoning Code. The City staff's erroneous determination of "complete" and "compliant" would kill off the hopes of any competitor such as Atrium, which is what the right to appeal was designed to address.

The City's usual zoning procedures only anticipate the need to provide an appellate remedy for a stand-alone applicant on a single parcel of land, and there was no prior need to consider the harm that a wrongful staff decision might inflict on third parties. The procedural modifications to the process that were implemented by Director Reyes (or his designee), made clear that the City's refusal to hear Atrium's appeals would constitute a ***de facto*** unequivocal denial of all of Atrium's right to due process, an impartial hearing, and would violate its civil rights by excluding from any consideration.

When a local government acts in an arbitrary and capricious manner to interfere in a competitive business environment, favoring one competitor over the other, it can be held liable for a violation of civil rights in federal court. See, *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985). It seems doubly irrational for the City staff to reject Atrium's request for a fair and impartial appeal hearing knowing that such an

impartial appeal hearing at the Board of Zoning Appeals would establish the City's even-handedness, but denying such an appeal could force any company to seek redress of its civil rights in federal court. See, *Knick v. Township of Scott, Pennsylvania*, No. 17-647, ___ U.S. ___, (June 21, 2019) (overturing *Williamson County Regional Planning Commission v. Hamilton* Bank (1985) 473 U.S. 172 --- As of June 2019 there is no longer a requirement for an aggrieved business first to file suit in state court, and today direct filing in federal court is allowed. Also see, *Yamagiwa v. City of Half Moon Bay* (2007) 523 F.Supp 1036 ($36.8 million awarded for City's arbitrary interference).

The City staff's determinations in the letters dated June 27, 2019, were facially erroneous and the City's Attorney's denials of the two appeals in her letters of July 12, 2019, were an arbitrary and capricious denial of due process. The City staff's letter of July 2, 2019, was likewise an arbitrary and capricious denial of due process. We request that the City of Pasadena reinstate Atrium's appeals of the two decision letters dated June 27th and allow its pending appeal of the July 2nd letter to proceed. All three appeals filed by Atrium should be heard by the City's Board of Zoning Appeals as provided in the Zoning Code.

Sincerely,

Christopher Sutton
Legal Counsel, The Atrium Group, LLC

cc: Mr. Dean Bornstein, Chief Executive Officer, The Atrium Group, LLC
Ms. Julie A. Gutierrez, Assistant City Manager
Mr. Steven Mermell, City Manager