



TOWN OF FAIRFAX

STAFF REPORT

March 2, 2022

TO: Mayor and Town Council

FROM: Linda Neal, Principal Planner
Janet Coleson, Town Attorney

SUBJECT: Adopt a Resolution Dismissing as Moot an Appeal of a Planning Commission denial of a Conditional Use Permit and Formula Business Conditional Use Permit for a medical cannabis storefront retail/adult use retail delivery-only business at 1930 Sir Francis Drake Boulevard

RECOMMENDATION

If the Council adopts Resolution 22-15 denying the Commercial Cannabis Business Permit application from Element 7/Fairfax Remedy, the Council should adopt Resolution 22-16 dismissing as moot the applicant's appeal of the Planning Commission's denial of the Conditional Use Permit and Formula Business Conditional Use Permit for a medical cannabis storefront retailer/adult use retail delivery only business at 1930 Sir Francis Drake Boulevard.

BACKGROUND

Element 7/Fairfax Remedy submitted an application to the Town on January 6, 2020 seeking to establish a medical cannabis storefront retailer/adult use retail delivery only business at 1930 Sir Francis Drake Boulevard. The Planning Commission held duly noticed public hearings on the application at the September 16, 2021 and October 21, 2021 Planning Commission meetings. The applicant was seeking a Commercial Cannabis Business Permit, Design Review Permit, Sign Exception Permit, Conditional Use Permit and Formula Business Conditional Use Permit. The Planning Commission made a recommendation to the Town Council regarding the Commercial Cannabis Business Permit, the Design Review Permit and the Sign Exception Permit and adopted Resolution Number 2021-22 denying the Conditional Use Permit and Formula Business Conditional Use Permit. The applicant timely appealed the Planning Commission's denial of the Conditional Use Permit and the Formula Business Conditional Use Permit to the Town Council. The September and October Planning Commission meeting staff reports and attachments can be viewed at the following links:

<https://www.townoffairfax.org/meetings/planning-commission-meeting-september-16-2021/#/tab-agenda-packet>

<https://www.townoffairfax.org/meetings/planning-commission-meeting-october-21-2021/#/tab-agenda-packet>

(Right click and click “open hyperlink” to get to the agenda and then scroll down to the 1930 Sir Francis Drake Boulevard item to access report and attachments – the first link if to the 9/16/21 Commission meeting and the second is to the 10/21/21 Commission meeting).

This item was on the Town Council agenda for a duly noticed public hearing on February 2, 2022 and the Council continued the item to the March 2, 2022 meeting.

DISCUSSION

The Council directed staff to return to the March 2, 2022 meeting with a resolution for denial of the Commercial Cannabis Business Permit for the Element 7/Fairfax Remedy application for a medical cannabis storefront retailer/adult use retail delivery only business at 1930 Sir Francis Drake Boulevard. If the Council adopts Resolution 22-15 denying the Commercial Cannabis Business Permit application from Element 7/Fairfax Remedy, the Council should also adopt Resolution 22-16 dismissing as moot the applicant’s appeal of the Planning Commission’s denial of the Conditional Use Permit and Formula Business Conditional Use Permit for the proposed cannabis business as the Commercial Cannabis Business Permit is necessary and required to operate a cannabis at the proposed location.

FISCAL IMPACT

n/a

ATTACHMENTS

Attachment A - Appeal form and supporting documents

Attachment B - Resolution No. 2021-22 A Resolution of the Fairfax Planning Commission Denying a Formula Business Conditional Use Permit, for a Medical Cannabis Storefront Retailer/Adult-Use Conditional Use Permit, for a Medical Cannabis Storefront Retailer/Adult-Use Retail Delivery-Only Business located at 1930 Sir Francis Drake Boulevard



TOWN OF FAIRFAX
 NOV 01 2021
 RECEIVED

TOWN OF FAIRFAX
 142 BOLINAS ROAD, FAIRFAX, CALIFORNIA 94930
 (415) 453-1584 / FAX (415) 453-1618

NOTICE OF APPEAL

FOR STAFF USE

Date: 11-01-21 Fee: \$625.00
 Appl.# _____
 Receipt# 1-62725
 Recvd. By: M. [Signature]
 Action: _____

The purpose of the appeal procedure is to provide recourse in case it is alleged that there is an error in any order, requirement, permit, decision or determination by any administrative official, advisory body or commission in the administration or enforcement of the City Ordinances. Any person aggrieved by the action of any administrative official, advisory board or commission in the administration or enforcement of any ordinance in the Town Code may make verified application to the Town Clerk in the manner prescribed by the Town Council within ten (10) days of action that is appealed.

FEE: Fees are set by resolution of the Town Council. See fee schedule for current application fees. *Effective FY2020-21: \$625.-*

PLEASE PRINT

Appellant's name MR. NICOLAS POMMIER (Attn: Josh Black) - Address Below.
 Mailing address 190 Market St., San Francisco, CA 94104 Day phone (628) 213 5657
 Property Address: 1930 SIR FRANCIS DRAKE BLVD. FAIRFAX, CA

I appeal the decision of: (list board, commission, or department and decision, for example: Planning Commission denial of variance) application # 20-02

The following are my reasons for appeal:

See Attached Letter.

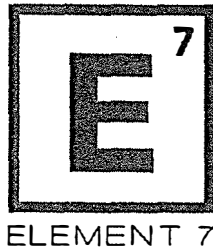
hereby declare that I have read the foregoing Notice of Appeal and know the contents thereof. I further declare under penalty of perjury that the information supplied by me is true and correct.

Executed this 1st day of November, 192021

SIGNATURE OF APPELLANT: _____

[Signature]

(4/94)



October 30, 2021

Ms. Michele Gardner
Town Clerk
Town of Fairfax
142 Bolinas Road
Fairfax, CA 94930

cc: Ben Berto, Town of Fairfax
Linda Neal, Town of Fairfax

**RE: FORMULA BUSINESS APPEAL (FAIRFAX REMEDY), DESIGN
REVIEW, AND SIGN PERMIT APPEAL**

Dear Ms. Gardner,

I am writing to you with regards to a medical cannabis dispensary (with adult-use delivery) application made by Element 7 Fairfax LLC (dba Fairfax Remedy) at 1930 Sir Francis Drake Blvd, Fairfax. Element 7 received a Notice of Planning Commission Action on October 22, 2021.

This letter appeals the decision made by the Fairfax Town Planning Commission to deny Element 7 Fairfax LLC a Formula Business Conditional Use Permit, Formula Business Review, Signage Permit, and Design Review.

On September 16, 2021, the Planning Commission met to discuss Application # 20-02 for consideration of Element 7's cannabis business permit application. The Planning Commission was directed by Town Staff (Linda Neal) at that meeting to review four (4) items for the Town Council at the meeting:

1. Design Review Permit recommendation for the Town Council
2. Sign Permit recommendation for the Town Council
3. Scoring of the Cannabis Business Permit in accordance with the Town Code
4. Formula Business Conditional Use Permit

We understand that the Planning Commission, under the Town Code, was assembled to present recommendations to the Town Council on the first three (3) items listed above, and that for the Formula Business Conditional Use Permit was set for action by the Planning Commission at the meeting on September 16, 2021. This hearing was continued until October 21, 2021 as time constraints did not allow the Planning Commission to complete the hearing on September 16, 2021.

Our Appeal Letter is focused at this stage on the Formula Business Conditional Use Permit, Design Review, and Signage Permit, and appeals the denials on several grounds (summarized for convenience):

- 1. The Planning Commission found that the proposal does not achieve or further preserve community and neighborhood character (including pedestrian scale). The Planning Commission believes that the business will attract too many consumers and patients from other cities and towns (due to a lack of legal and licensed businesses in those communities) which will erode the village character.**
- 2. The business will cause excessive detriment and adverse burden to surrounding businesses because it would be the 2nd licensed dispensary in the County. The Planning Commission also believes that the site will not create an equal or better use than a local business.**
- 3. The design of the building (specifically the horizontal railings and blue tinted decking) is typically found in more modern buildings and will not preserve the historic village-like character of the Town.**
- 4. The development is not consistent with the pedestrian orientation of the Town.**

The commentary in this letter addresses the facts relevant to each of these denials.

At the September 16 meeting, Town Staff presented a report on the project that discussed the Formula Business proposal in some depth for the Planning Commission. At the start of the meeting, staff noted the following with regards to how the Town of Fairfax ***“defined”*** a potential business under the Formula Business Town Code, “...any business that is required by a corporate headquarters or franchise or other arrangement to maintain any of the following: standardized services, decor, uniforms, architecture, signs or other similar features.

Town Staff noted that there was some confusion over this, largely because of how Element 7 “evolved” the application to continuously address these concerns through the application process and as the applicant (Element 7) better understood the application process. At 11:16 minutes, Staff (Neal) noted that, “...they changed a lot of things...you could kind of argue that they really no longer really fit the definition of a formula business...”

Town Staff went on to point out the following to the Commission:

- **Naming:** the business name had been changed from Element 7 Fairfax to Fairfax Remedy to address formula business concerns in the Town Code.
- **Uniforms:** uniforms were eliminated to address the Town Code.
- **Signs and Colors:** exterior colors were changed from green and white to shades of blue and white to address the Town Code.
- **Standardized Products:** Neal pointed out that State Licensing regulations and compliance are continuously changing and complicated – this means that products are standardized to some extent as they can only be purchased from heavily regulated licensed distributors.

Based purely on what constitutes a formula business under the Town Code, Element 7 would argue that its planned operations in the Town of Fairfax ***never met*** the definition of a Formula Business as Town Staff pointed out to the Commission:

- Corporate headquarters (loosely used because the founders and key executives do not even have a head office at the time of writing and work from their homes) are not mandating anything as being “standardized” in their current plans;
- Services are not standardized in any form;
- Décor and uniforms are not standardized or mandated;

- The planned architectural design and improvements were unique to this one location and would not have been replicated in any other part of California; and
- All signs and / or “similar features” were unique to the application.

One could argue that the Planning Commission could have looked closer at the ‘Formula Business’ definition and elected to allow Element 7 to proceed with this aspect of the application on the basis that it never met the definition for what the Town constitutes as a Formula Business, and this is certainly one aspect of the Appeal.

Moving on, Town Staff further pointed out that the following conditions had to be met to approve a Formula Business model by the Planning Commission (Section 17.040.220 of the Town Code):

- (a) The proposed formula business or restaurant will promote diversity and variety to assure a balanced mix of commercial uses available to serve both resident and visitor populations.
- (b) The proposed formula business or restaurant, together with its design and improvements, will be consistent with the unique and historic village-like character of the town, and preserve the unique visual appearance and shopping and dining experience of the town for its residents and visitors.
- (c) The proposed formula business or restaurant will provide services or products which complement existing businesses in the zoning district in which it is proposed to operate, considering the existence of and proximity to the same or similar businesses within that zone, and will not have significant adverse financial impacts to same or similar businesses within that zone.
- (d) If located within the Town Center Planning Area, the proposed formula business or restaurant will be consistent with the pedestrian orientation of the Town Center Planning Area.
- (e) The proposed formula business or restaurant will help residents avoid the need to drive out of town for their shopping needs.
- (f) The proposed formula business or restaurant will be consistent with all applicable general plan goals, objectives, policies, and programs.

Town Staff provided some commentary on these factors noting that the Town’s cannabis ordinance was formed after 22 public meetings in 2018 and 2019 when the Town came to the conclusion that a 2nd cannabis business (as proposed by Element 7) would be of benefit to the Town. Staff commentary included:

- (a) The proposed business **would** offer diversity to the existing cannabis business in the Town with a different experience and different products.
- (b) The applicant was making minimal design changes to the building and had completed both a Traffic Study and Historical Architecture Review, and that the building, as proposed was **consistent** with the Town architecture and it’s unique visual appearance.
- (c) The zoning and location of the business was set by prior Town Councils, not by the Applicant (see Figure 1 below). The applicant selected a location deemed **acceptable** by the Council.
- (d) Pedestrian orientation had been **maintained** by the applicant consistent with the Town Code.
- (e) The business would help local patients and customers stay in Fairfax and the County and continue to shop within the Village, thus **meeting the needs** of the Town Code. Staff further pointed out that many of the County’s other cannabis businesses were non-conformant and illegal.
- (f) The business was **in conformance** with the goals of the General Plan and Town Programs.

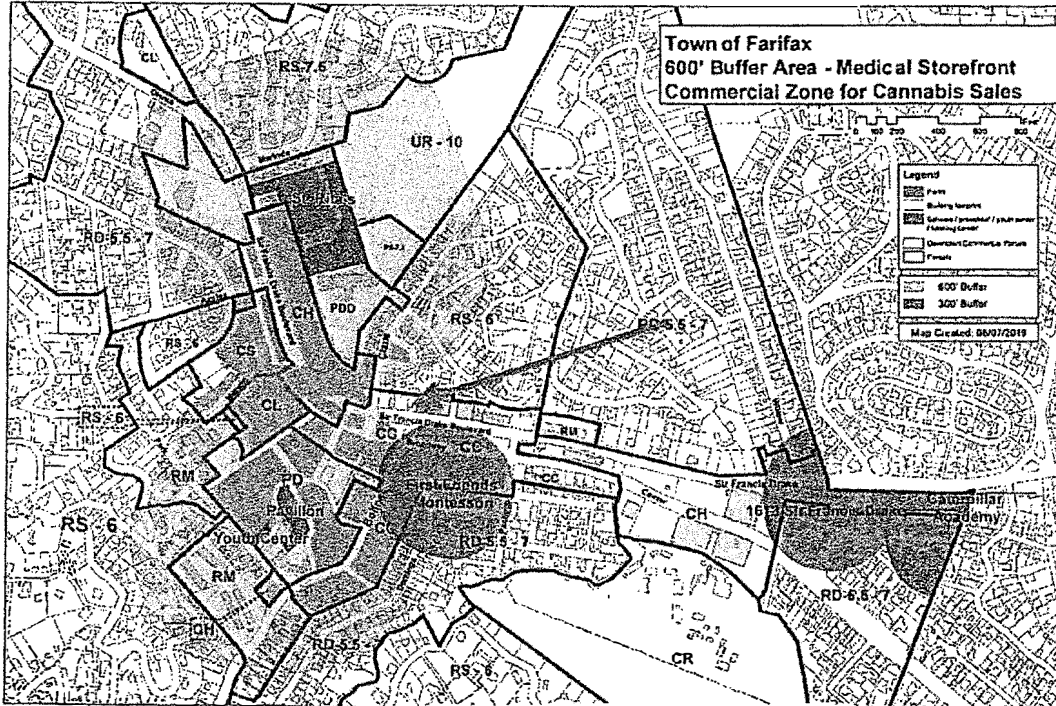


Figure 1: Town of Fairfax Cannabis Zoning Map

As stated previously, we earlier put forward the argument that Element 7 did not meet the definition of a Formula Business. If one does not agree with this, the above list should be applied and against each of these points, there are grounds, as evidenced by the Staff Report, that Element 7 should not have been denied as it clearly met the conditions on which a Formula Business could be approved in the Town. Rather, the Planning Commission decided to look at a host of other factors, mostly emotionally driven ones, that then guided the Planning Commission's discussion around the business being a formula one.

Many of these 'emotional' factors had been discussed continuously by the Town through 2018 and 2019 when 22 meetings were held to discuss cannabis and were once again raised by numerous members of the Town in opposition to the business in the weeks and months before the Planning Commission was held.

Commissioner Norma Fragochose chose to focus on emotional factors including the loss of a wooden dining table that had been erected in the car parking lot at 1930 Sir Francis Drake Blvd. She noted the proposal's value to the community is lowered with "...the loss of a community-loved shop that has a place for people to hang out...there is that sweet little seating area outside (in the carpark)" which was irrelevant to the formula business ruling required under Section 17.040.220 of the Town Code. She also questioned the use of the name 'Fairfax' in the name and who were the partners in the business which were irrelevant to her role as a commissioner. She further brought up the issue of whether Element 7 could sell the license (which we have no intent of doing) and if Mana Bowls had a valid lease, demonstrating she had been involved in some level of community discussion (and baseless rumor) which may have had some level of bias on her decision making. Her comment, "...they obviously have much deeper pockets than our local Mana Bowl business has..." was again irrelevant to her role as a commissioner, and again, demonstrates her potential decision bias against Element 7. One could argue that she should have potentially recused herself from any vote given her obvious level of bias against the applicant.

Commissioner Robert Jansen pointed out that, "...people talk about chains or multiple locations...as far as I know, there is nothing in our zoning code that talks about the size of a company or the number of locations, it is about the 'formula'..." On this basis, the Commissioners should have stuck to the definition and tests for formula business determination, but instead several, especially Commissioner Norma Fragoso, chose to focus on the emotional issues at hand that she'd clearly been influenced on by a small, but vocal, local community.

Commissioner Brett Kelly voiced concerns that the location and business type will create more traffic and be less of a gathering place for the local community. The applicant stands firm that commissioner Kelly had no basis for denying the formula business for the latter reason under Section 17.040.220 of the Town Code. With regards to traffic, the applicant believes that the Traffic Study it conducted demonstrated no negative impact on the Town, and that with 5 off-street parking spaces, the business was far better positioned than most retail outlets in Fairfax to deal with traffic and parking as very few have any parking on their site.

Commissioner Cindy Swift voiced concerns over the location of the business which was set by the Town Council (refer to Figure 1). As stated earlier, Element 7 believes that the use proposed was consistent with the zoning code and the Town's desire to establish a 2nd dispensary within the Town. Any vote from commissioner Swift should have focused on the facts of the formula business determination – we would argue this was not the case.

As commissioner Mimi Newton noted during the September 16, 2021 hearing, "...you guys (Planning Commission) want another bite at the apple that we took so long to chew on coming up with this ordinance that the Town Council ultimately chewed on... they (Town Council) came up with the locations... so to use the location as a disqualifying criteria seems to be putting it all upside down on its head..." She went on to say, "...due process must be followed before the town denies the application for reasons that will hold up to scrutiny." Element 7 does not believe that due process was followed and does not feel that the basis on which the application was denied holds up to legal scrutiny.

In addition to all of these comments, it is our view that the Planning Commission's adoption of a fair 'formula retail ordinance' in Fairfax is beyond arbitrary and capricious. Fairfax is a beautiful small-town with many exceptional businesses that would not meet the test of this ordinance if it were to apply to them. Many of the very best businesses in our community are thriving in Fairfax, and many of those have multiple outlets, some with corporate branding throughout the 'chain'. The intent of this letter is not to denigrate these businesses - they are all exceptional merchants. The intent of this letter is to illustrate that the ordinance is arbitrary, capricious and violates to equal protections of a new entrant seeking to set up shop in Fairfax.

- 7-Eleven at 150 Bolinas Road is one of 70,000 7-Elevens globally.
- Fairfax Lumber at 109 Broadway Blvd is an ACE hardware affiliate with consistent corporate branding in over 5000 locations around the world.
- Bank of America at 89 Broadway Blvd has over 4,300 retail branches throughout the country.
- Fairfax Theatre is owned by an operator with 16 locations around the region.
- Fairfax Market is a franchise member of the Independent Grocers Alliance which does business in over 30 countries globally.
- Henhouse Brewery of Sonoma is moving into Iron Springs and is also opening a tasting room in Novato. The business openly talks about how it is using its best practices ('formula') from Sonoma as it moves into the middle of Fairfax.
- The list of additional business with common ownership or chains in town goes on:
 - Good Earth Natural Foods
 - Perry's Deli
 - Mana Bowls has 2 locations in Marin County
 - Lotus Cuisine
 - The Roastery

- First Federal Savings and Loan
- M&G Burgers
-

Based upon the Planning Commission's interpretation of the formula business ordinance none of these exceptional enterprises would be allowed to open a new store in Fairfax. To apply the exclusion to Element 7 is arbitrary and capricious.

Our Appeals are based on these collective facts and specifically, with regards to the four (4) areas of the Town Code that the Planning Commission chose to deny us on:

1. **The Planning Commission found that the proposal does not achieve or further preserve community and neighborhood character (including pedestrian scale). The Planning Commission believes that the business will attract too many consumers and patients from other cities and towns (due to a lack of legal and licensed businesses in those communities) which will erode the village character.**
 - We disagree with this. The "intent" of the cannabis ordinance approved by the Town Council after 22 meetings and public forums was to open a 2nd business for the benefit of the Town. The Planning Commission is stretching itself to form this argument and the applicant believes that denying a business because it might successfully attract customers from small neighboring communities is ridiculous. There is a museum yards away from our proposed business location – is the Mountain Bike Hall of Fame not a business that potentially attracts tourists and customers from North America and other countries?
 - Should public policy makers really be interfering with the legal medical rights of individuals seeking LEGAL medical service based upon their personal beliefs?
 - Does the Town really agree that attracting cannabis customers from San Anselmo and San Rafael to Fairfax is a bad thing when these customers and patients might visit other local businesses – I would have thought that most businesses would gladly welcome an influx of new shoppers into their community after COVID almost wiped half of them out and put their life savings at risk of loss.

2. **The business will cause excessive detriment and adverse burden to surrounding businesses because it would be the 2nd licensed dispensary in the County. The Planning Commission also believes that the site will not create an equal or better use than a local business.**
 - Members of the Planning Commission arbitrarily used their personal views and beliefs to determine what was an equal or better use of the property. Surely, a medical patient that suffers from cancer or Alzheimer's and NEEDS medical cannabis has an equal or greater need for medicine than a member of the public that is hungry and wants an acai juice?
 - We would further argue that the business, a MEDICAL cannabis dispensary that requires each patient to have a valid medical recommendation for entry, isn't an excessive burden on anything in the Town of Fairfax. As we stated in our presentation, we expect to receive 10-15 customers an hour and at least 30-40% of these to be walk-ins (ie., they will walk into the facility and have a vehicle parked elsewhere). How is this an excessive burden when you have restaurants that seat 40-50 people in the Town that have no parking? Why are different rules being applied to this business.
 - In addition, Traffic Studies were conducted by the applicant that demonstrated no excessive impact versus the existing use for the property.

3. **The design of the building (specifically the horizontal railings and blue tinted decking) is typically found in more modern buildings and will not preserve the historic village-like character of the Town.**
 - Element 7 engaged a historical architect to ensure that it was retaining the features of the building and the Village.
 - I fail to understand how a blue tinted deck and railings (as cited by the Planning Commission) could evoke this response and be grounds for a denial?

4. **The development is not consistent with the pedestrian orientation of the Town.**
 - As stated earlier, Traffic Studies were conducted by the applicant that demonstrated no excessive impact versus the existing use for the property.
 - Element 7 believes that of the 10-15 customers it will serve per hour, at least 30% of these would be walk-in customers. Over time, as people become familiar and comfortable with cannabis, we expect this number to increase with more walk-ins.
 - There was some question as to where Staff would park – as Element 7 discussed repeatedly, we plan to hire 100% of the staff locally and will be encouraging these staff, as we do at our Marina and Rio Dell locations, for staff to commute to work using public transport, to pay for parking (subsidized by company), or to ride a bike to work.
 - The Planning Commission also failed to step-back and really look at WHO these customers are – they are medical patients... many of which cannot drive, cannot use public transport, and are affected by severe medical conditions. These people need local cannabis solutions. They use cannabis as medicine. They don't have the means to travel to San Francisco or Santa Rosa for cannabis. Denying the application on this basis is akin to public policy makers interfering with the legal medical rights of individuals seeking LEGAL medical service based upon their personal beliefs.

Element 7 firmly believes that the Design Permit and Signage Permit aspects of the application are easily curable and do not form the basis of a denial of the application. The signage permit, for instance, was denied because it presents 7.5 square feet of signage when cannabis companies are limited to 6 square feet in the Town (all other businesses would be allowed to display up to 7.5 square feet based on the dimensions of the building).

As stated earlier, Element 7 does not believe that due process was followed and does not feel that the basis on which the application was denied holds up to legal scrutiny. We request that the Town Council immediately review this Appeal at its next meeting.

Kind regards,



Robert DiVito
Founder and CEO
Element 7
robert@e7ca.com

TOWN OF FAIRFAX
PUBLIC NOTICE REQUIREMENTS
FOR ALL LAND USE ENTITLEMENTS

Public notice is sent to property owners, residents and businesses for all land use entitlements including the following:

Zoning Change Amendments, Design Review, Variance, Use Permit, and Hill Area Development Permits. The area to be noticed is any parcel within 300 feet of the boundary line of the property that is the subject of the application.

When filing your application include a Notification Map and a Mailing List and Mailing Labels and stamps for property owners and residents to be notified as described below. The applicant is responsible for the accuracy of these materials. Erroneous information may require re-mailing or re-scheduling of the public hearing. When you file your application please sign and submit the attached affidavit stating that the required map, mailing list and labels have been prepared following these instructions.

The applicant prepares and provides the following:

1. A neighborhood notification map, mailing list and mailing labels
2. Postage stamps for each label
3. Completes the affidavit certifying the accuracy of the mailing list
4. Posts the site with an 11 inch x 17 inch Notice Form provided by the Planning Department.

If the approval of an application is delayed by unresponsiveness of an applicant, the address list and labels may have to be redone to ensure their accuracy.

Once Planning staff determines that an application is complete, they send a notice of completeness and provide the poster for the applicant. The poster is to be filled out by the applicant to describe the project. The poster is to be waterproofed and posted in a clearly visible location along the street frontage of the property at least 10 days prior to the public hearing.

The Planning Department provides the notices, reviews the mailing information provided by the applicant, and mails the notice.

Mailing List:

List the Assessor's Block and Lot Numbers for all lots within the Notification Map with the Names and Mailing Addresses of all the property owners and the Mailing Address for all residents and businesses. Include yourself and anyone else you wish notified. Please count the addresses and provide a stamp for each label.

Submit self-adhering **Mailing Labels** with this information, one name and address per label. For property owners, use the names. For residents and businesses, you may use either their name or "Occupant". Property Owners are those in the latest Assessors Tax Roll, available at the Marin County Assessor's Office

For Residents or Businesses you can get the number of dwellings or businesses on a lot from the property owner or building manager, or by counting the mail boxes, doorbells and any businesses. You may also use the reverse telephone directory at the library, use addresses shown on the mailbox, doorbell or reverse telephone directory, including any letter suffixes (134, 134A) or fractions (249, 249 1/2). If a doorbell or mailbox has a name but no separate street or apartment number, use that name for the mailing labels. There is usually a Resident anytime the Property Owner in the Townwide Tax Roll has a different mailing address.

In addition, a list of apartment/ multifamily renters is available on disk or in hard copy from the Planning Department. This list is an additional resource for creating the mailing list. Where the address of the owner differs from the location address of the property to be noticed, labels should be created for both owners and residents.

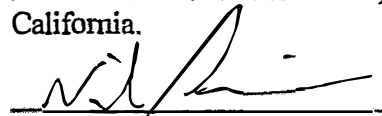
**Affidavit of Preparation of Notification Map,
Mailing List and Mailing Labels for Public
Notification for Land Use Public Hearing**

I, Nicolas Pommier, do hereby declare as follows:
(print name)

1. I have prepared the Notification Map, Mailing List and Mailing Labels for Public Notification for in accordance with Planning Department guidelines.
2. I understand that I am responsible for the accuracy of this information, and that erroneous information may require re-scheduling the public hearing.
3. I have prepared these materials in good faith and to the best of my ability.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED ON THIS DAY, 1st Day of Nov. 2021, ~~200~~ in the Town of Fairfax,
California.


Signature

Sheila Merchant Legal

ATTORNEY AT LAW

215 Culver Blvd #5313
Playa Del Rey, CA 90296

January 27, 2022

Via FedEx and Email To:

Michele Gardner
Town Clerk, Town of Fairfax
142 Bolinas Road
Fairfax, CA 94930

cc: Ben Berto, Town of Fairfax
Linda Neal, Town of Fairfax

**RE: LETTER SUPPORTING APPEAL OF PLANNING COMMISSION
ACTION DENYING FORMULA BUSINESS CONDITIONAL USE PERMIT**

Dear Ms. Gardner,

Please be advised that I represent the interest of Element 7 Fairfax LLC (d/b/a/ Remedy Fairfax) ("*Element 7*" or "*Remedy Fairfax*") with regard to the above-captioned matter. I am writing about a medical cannabis dispensary and adult-use delivery application made by Element 7 at 1930 Sir Francis Drake Blvd in the Town of Fairfax (the "*Town*"). Element 7 has spent over \$100,000 and two years of time and resources in applying for a Formula Business Conditional Use Permit and Cannabis Business permit in the Town, and my client believes that the process under which the Formula Business Conditional Use Permit was denied was unfair, unjust, and prejudicial.

I. Statement of Facts

In 2016, California voters approved Proposition 64 which legalized the non-medical adult use of cannabis, including large majorities of voters in Marin County and the Town. Thereafter, the Fairfax Town Council ("*Council*") conducted over 20 meetings with residents, Councilmembers, Town staff, and other stakeholders from 2018 to 2019 to discuss changes to the Town's cannabis ordinance to potentially allow new cannabis businesses to operate in the Town. Exercising its power to determine what was appropriate to protect the public health, safety, and welfare of its residents, the Council passed two new ordinances, Ordinances 834 and 835, which came into force in October 2019 to allow a second cannabis retail operation to be permitted in the Town, to set parameters for the permit process, and to establish zoning standards and restrictions for such new commercial cannabis business.

In January 2020, in response to a request for proposal from the Council (the "*RFP*"), my client submitted an application seeking to establish a cannabis business in the zone outlined by the Council in the RFP. From January 2020 until August 23, 2021, when the application was deemed complete, my client continued to submit documents, traffic studies, full architectural and construction drawings, and a historical assessment to the Town, all at a considerable cost of both time and money to respond to various concerns raised by Town staff regarding the application.

On September 16, 2021, the Town of Fairfax Planning Commission ("*Commission*") met to discuss Application # 20-02 to consider Element 7's proposed cannabis business. The Commission was charged with preparing 4 items for the Council:

1. Recommendation to the Council on a Design Review permit
2. Recommendation to the Council on a Sign permit
3. Scoring criteria for a Cannabis Business permit in accordance with Town Code Chapter 5.56, Cannabis Businesses, § 5.56.070(B)(1)
4. Decision on a Formula Business Conditional Use Permit per Town Code § 17.040.220

I understand that Planning Director Berto, Principal Planner Neal, and staff were able to present their report, the Commission heard public comment, and was able to take straw polls of commissioners on the findings they could and could not make on these items. It was then determined that the item would be continued until the October 21, 2021 meeting so that the staff could prepare a resolution to deny the Formula Business CUP application, the Design Review permit, the Sign permit, and to score the application for a Cannabis Business permit for that second meeting. After the second Commission meeting, on October 22, 2021, Element 7 received a Notice of Planning Commission Action denying its Formula Business Permit application.

I have significant legal concerns regarding how this matter has been arbitrarily handled by the Commission. Specifically, my concerns lie in the findings of the Commission and whether there was substantial evidence to support these findings based on the facts in the record.

II. Specific Grounds of the Appeal

1. **The Commission classified the proposed business as a “Formula Business” without a presenting a finding of the factual basis.**

§ 17.040.210 of the Town code defines a Formula Business as “[a]ny business that is required by a corporate headquarters or franchise or other arrangement to maintain any of the following: standardized services, decor, uniforms, architecture, signs or other similar features. This shall include but not be limited to any retail sales, service, visitor accommodation, wholesale or industrial operations that was not in business within the Town of Fairfax prior to April 1, 2000.” As stated in my client’s final application, we do not believe that Remedy Fairfax should be classified as a Formula Business. Centralized operations only include regulatory compliance, but do not infringe into the realm of standardized services for the proposed location. Remedy Fairfax will tailor its services and products to the unique population of the Town and surrounding areas. Décor and uniforms are not standardized or mandated. The planned architectural design and improvements are unique to this one location, preserve the few distinctive features of the original building highlighted by the historical analyst’s report, and are not replicated anywhere else in California. The signage and similar features are also unique to this location.

The Commission did not include in their order any findings regarding the classification of the proposed business as a Formula Business which makes it difficult to ascertain the basis for their classification. However, Commissioner Jansen did note that “...people talk about chains or multiple locations...as far as I know, there is nothing in our zoning code that talks about the size of a company or the number of locations, it is about the ‘formula’...” We ask that the facts be reviewed de novo to make this determination in the first instance.

2. **The Commission found that the proposal does not comply with the Town General Plan Policies in that it would not preserve community and neighborhood character or preserve or enhance the village (small town) character and pedestrian scale of the downtown area.** To support this finding, the Commission found that Remedy Fairfax “would attract medicinal cannabis users from adjacent and outlying areas due to the lack of other licensed legal medical retail/adult recreation retail cannabis delivery businesses in other Marin areas” and that the majority “will be driving and leaving which will not preserve the village character and pedestrian scale of the downtown area.” First, in response to staff concerns, Remedy Fairfax agreed to create a bicycle parking area at the rear of the parking lot to ensure the location will be consistent with the pedestrian orientation of the downtown area.

Second, after 22 meetings and two years of fact finding and community input, the Council considered both the types of customers and patients that would patronize a new cannabis business, where they may hail from, and the availability of other licensed retail locations in Marin County, and still chose to pass the new ordinances to permit a new location to open in Town. As stated in the staff report for the September 16, 2021 Commission meeting, “[t]he question of whether a second cannabis business per se should be allowed has already been settled...having a second viable cannabis business will promote diversity and variety of commercial cannabis experiences to serve both resident and visitor populations.” Indeed, if out-of-Town customers always destroy the village character and pedestrian scale of the downtown area, how are businesses like the Mountain Bike Hall of Fame, a museum that is yards away from Element 7’s proposed location, and which potentially attracts tourists and customers from across the state and North America, permitted to operate in Town?

3. The Commission found that the proposed business did not meet the General Use Permit Requirement B, that it will cause excessive detriment and adverse burden to surrounding businesses.

The Commission found that the proposed business would “cause excessive detriment and adverse burdens to adjoining properties due to the regional draw of one of only two medical dispensaries/adult recreational delivery cannabis businesses in Marin.” The concerns being raised here were foreseeable as far back as 2017 as wherever a second cannabis dispensary is located in Town, it would be a regional draw. Considering the Council has already both passed the cannabis ordinances permitting a second location and indicated the zones in which a second cannabis business may be located, it is unclear exactly what proposal the Commission *would* approve if this were the criterion it is using. It appears the Commission merely wants another bite at the apple to stop another cannabis business from opening in the Town.

As stated in my client’s presentation, they expect to receive 10-15 customers an hour and at least 30-40% of these to be walk-ins (i.e., they will walk into the facility and have a vehicle parked elsewhere). How is this an excessive burden when restaurants that seat 40-50 people in the Town have no parking? Why are different rules being applied to this business? In addition, traffic studies were conducted by my client that demonstrated no excessive impact versus the existing use for the property. In fact, the proposed location would include 5 on-site parking spaces, more than many of the adjoining businesses.

4. The Commission found that the proposed business did not meet the General Use Permit Requirement D, that the site will not create an equal or better development of the premises than would otherwise be the case.

The Commission found that approval would “not result in equal or better development of the premises than would be the case, for example, if a locally-owned restaurant were located on the premises. There is more community interaction and activity consistent with the downtown character with such a restaurant business.” This finding echoes Commissioner Frago’s statements that approving Element 7’s proposal would mean, “the loss of a community-loved shop that has a place for people to hang out...there is that sweet little seating area outside (in the carpark).” However, to a patient that suffers from cancer or Alzheimer’s and needs medical cannabis, that patient has an equal or greater need for medicine than a member of the public that would like to eat at a restaurant. If the Commission finds that a restaurant business will always be a better development use of any given premises than a medical and delivery cannabis business one wonders where a second licensed cannabis business would be permitted in Town, considering the restrictions imposed by the Council on possible locations. Furthermore, does the Town really agree that attracting cannabis customers from San Anselmo and San Rafael to Fairfax is a bad thing when these customers and patients might visit other local businesses? I would have thought that most businesses would gladly welcome an influx of new shoppers into their community after COVID almost wiped half of them out and put their life savings at risk of loss.

- 5. The Commission found that the proposed business did not meet the Formula Business Use Permit Requirement B, that the business be consistent with the unique and historic village-like character of the town and preserve the unique visual appearance of the Town for its residents and visitors.**

The Commission found that the design of the exterior improvements are like those “typically found in a more modern building” and will not preserve the unique visual appearance of the Town. My client plans to make minimal design changes to the building and has completed both a traffic study and historical architecture review which concluded that the building as proposed was consistent with the Town architecture and its unique visual appearance.

The Commission goes on to say, “an influx of cannabis purchasers and associated two-way traffic will also be inconsistent with the Town’s unique and historic village-like character.” This finding betrays a bias against cannabis patients as being almost by their nature incompatible with the village-like character of the Town. If the Council has determined that a second cannabis business and its associated customers are welcome in the Town, the Commission does not have the authority to overrule this conclusion.

- 6. The Commission found that the proposed business did not meet the Formula Business Use Permit Requirement D, that the business be consistent with the pedestrian orientation of the Town Center Planning Area.**

The Commission hardly makes any findings related to this requirement, conclusory stating that the pedestrian orientation of the Town Center Planning Area “will be adversely affected by the influx of one-purpose visitors, mostly by automobile, and their resultant traffic and activity patterns.” As stated above, my client expects to receive 10-15 customers an hour and at least 30-40% of these to be walk-ins. Further, my client has conducted traffic studies that demonstrated no excessive impact versus the existing use of the property. What is the factual basis for the Commission’s finding?

- 7. The Commission found that the proposed business did not meet the Formula Business Use Permit Requirement F, that the business be consistent with all applicable general plan goals, policies, and programs.**

See discussion in Section 1 above.

III. Conclusion

When in late 2019, the Council passed the new cannabis ordinances allowing an additional cannabis business to operate legally in the Town, the foreseeable result was that an applicant, in this case my client, would assume it had a fair chance to establish a legal medical cannabis business in the Town. In that effort, my client has paid out over \$100,000 in costs, fees, leases, and other expenses over the almost 2 years it has been working with Town staff to complete its application. I urge the Council to reverse the decision of the Commission at its next meeting and correct these prejudicial, unjust, and unfair findings.

Element 7 reserves all rights in this matter and will be considering litigation against the Town of Fairfax if decisions regarding its application continue to be handled in such an arbitrary manner by the Town of Fairfax.

Sincerely,



Sheila Merchant Esq.

RESOLUTION NO. 2021-22

A Resolution of the Fairfax Planning Commission Denying a Formula Business Conditional Use Permit, for a Medical Cannabis Storefront Retailer/Adult-Use Retail Delivery-Only Business located at 1930 Sir Francis Drake Boulevard

WHEREAS, the Town of Fairfax received an application to convert the structure at 1930 Sir Francis Drake Boulevard into a combination medical retail storefront and adult use delivery cannabis business at 1930 Sir Francis Drake Boulevard from Fairfax Remedy on January 6, 2020 which was deemed complete on August 23, 2021; and

WHEREAS, the submitted application included a request for a Formula Business Conditional Use Permit; and

WHEREAS, pursuant to CEQA Guidelines Section the project is exempt per California Code of Regulations, Chapter 3, Article 19, categorical exemption numbers 15301(a), 15303(c), 15304(b).

WHEREAS, the Planning Commission held a duly noticed Public Hearing on September 16, 2021, at which time all interested parties were given a full opportunity to be heard and to present evidence, and then closed the public hearing and provided direction to staff to return at the October meeting with a resolution denying the application; and

WHEREAS, based on the plans and supplemental information provided by the applicant as well as testimony at the public hearing, the Planning Commission has determined that the applicant has not met the burden of proof required to support all of the findings necessary for approval of the Project's Formula Business Conditional Use Permit, as described below; and

WHEREAS, in accordance with Sections 17.032.060 and 17.040.220 of the Fairfax Municipal Code, the Commission hereby makes the following findings to support denial of the application for a Formula Business Conditional Use Permit:

The proposal does not comply with Fairfax General Plan Policies as follows:

Land Use Element

Goal LU-7: Preserve Community and Neighborhood Character

Town Center Element:

Policy TC-1.1.1: New and/or renewed development in the Town Center Planning Area shall preserve and enhance the village (small town) character and pedestrian scale of the downtown area.

The proposed business does not achieve or further either of the above General Plan Goal contained in the Land Use Element or the above policy contained in the Town Center Element.

The proposed formula business will be attracting medicinal cannabis users from adjacent and outlying areas due to the lack of other licensed legal medical retail/adult recreation retail cannabis delivery businesses in the other Marin areas and many or most of those customers will be driving and leaving, which will not preserve the village character and pedestrian scale of the downtown area and the immediately adjacent Taylor and Claus Drive neighborhoods.

General Use Permit Required Findings, Finding (B) (required by Town Code, Chapter 17.032.060(B) and (D) and Section 17.040.220):

(B) The development and use of property, as approved under the use permit, shall not create a public nuisance, cause excessive or unreasonable detriment to adjoining properties or premises, or cause adverse physical or economic effects thereto, and create undue or excessive burdens in the use and enjoyment thereof, which effects will be substantially beyond that which might occur without approval or issuance of the use permit.

The potential of a substantial increase in the number of persons visiting the dispensary site by vehicle and other means. Specifically the business will cause excessive detriment and adverse burdens to adjoining properties due to the regional draw of one of only two medical dispensaries/adult recreational delivery cannabis businesses in Marin.

(D) Approval of the use permit will result in equal or better development of the premises than would otherwise be the case, and that the approval is in the public interest and for the protection or enhancement of the community.

Approval of the use permit will not result in equal or better development of the premises than would be the case, for example, if a locally-owned restaurant were located on the premises. There is more community interaction and activity consistent with the downtown character with such a restaurant business.

Formula Business Use Permit Required Findings (Town Code § 17.040.020, required findings (B), (D), and (F))

(B) The proposed formula business or restaurant, together with its design and improvements, will be consistent with the unique and historic village-like character of the town, and preserve the unique visual appearance and shopping and dining experience of the Town for its residents and visitors.

The design of the exterior improvements to the building with horizontal railings and blue tinted decking surfaces typically found in a more modern building will not preserve the

historic village-like character of the Town, or preserve the unique visual appearance and shopping and dining experience of the Town for its residents and visitors. An influx of cannabis purchasers and associated two-way traffic will also be inconsistent with the Town's unique and historic village-like character.

(D) If located within the Town Center Planning Area, the proposed business or restaurants will be consistent with the pedestrian orientation of the Town Center Planning Area.

The exterior design is modern with horizontal deck and access ramp railings, blue tinted decking and stair material and does not comply with General Plan Town Center policy TC-2.1.1: New or renewed development in the Town Center Planning Area should be compatible with the architectural character of the downtown in terms of height, design treatment, colors, textures and materials (other buildings in the Town Center range in construction date from the 1920's through 1970's). Further, the Town Center's pedestrian orientation will be adversely affected by the influx of one-purpose visitors, mostly by automobile, and their resultant traffic and activity patterns, including the impacts on neighborhoods adjacent to the Town Center.

(F) The proposed formula business or restaurant will be consistent with all applicable general plan goals, policies, and programs.

The proposed business will not be consistent with General Plan Goal LU-7: Preserve Community and Neighborhood Character, and Town Center Element Policy TC-1.1.1: New and/or renewed development in the Town Center Planning Area shall preserve and enhance the village (small town) character and pedestrian scale of the downtown area (see discussion above).

WHEREAS, the Commission has reviewed the project based on the information provided in the applicant's supplemental information containing table of contents sections 1 through 15, including 1) Remedy Fairfax Introduction, 2) Cannabis Business Application, 3) Planning Application, 4) Live Scans (reviewed and approved by the Fairfax Police Chief and Town Manager in February of 2020), 5) Business Formation Documents, 6) State License Application, 7) Business Plan, 8) Operating Plan, 9) Public Benefits Plan, 10) Sensitive Use Plans, 11) Site and Floor Plans, 12) Signage and Lighting Plan 13) Traffic Study, 14) Security Plan, and 15) Letters of support, the Architectural Plans by SKS architects dated 5/22/20, pages ESP, EC1, A0, A1 and A2 and the landscaping and irrigation plans by Roth/Lamotte Landscape Architecture, pages L0.0, L1.0 and L1.1 dated 5/18/20 and presented to the Commission at the public hearing on 9/16/21.

NOW, THEREFORE BE IT RESOLVED, the Planning Commission of the Town of Fairfax hereby finds and determines as follows:

1. Based on the findings set forth above, the Planning Commission hereby denies the requested Formula Business Conditional Use Permit.

The foregoing resolution was adopted at a regular meeting of the Planning Commission held in said Town, on the 21st day of October 2021, by the following vote:

AYES: Fragoso, Green, Jansen, Kelly, Swift

NOES: Chair Newton

ABSENT: Gonzalez-Parber



Chair Mimi Newton

Attest:



Ben Berto, Director of Planning and Building Services