



THE CITY OF SAN DIEGO

Report to the Planning Commission

DATE ISSUED: March 29, 2023 REPORT NO. PC-23-011

HEARING DATE: April 6, 2023

SUBJECT: Rancho Bernardo Cannabis Outlet, Process Three Appeal Decision

PROJECT NUMBER: 625766

REFERENCE: [Report to the Hearing Officer HO-22-040](#)

OWNER/APPLICANT: Bernardo Center Shops LLC/Will Senn

SUMMARY

Issue: Should the Planning Commission grant or deny an appeal of the Hearing Officer's January 25, 2023 decision to approve a Cannabis Outlet located at 16375 Bernardo Center Drive in the CC-2-3 zone within the Rancho Bernardo Community Plan?

Staff Recommendation: Deny the appeal and affirm the decision of the Hearing Officer to approve Conditional Use Permit No. 2243740.

Environmental Review: On February 10, 1992, the Planning Director adopted Negative Declaration 91-0695 for the Bernardo Center project. The City of San Diego, as lead agency, has completed a California Environmental Quality Act (CEQA) Section 15162 – Subsequent EIRs and Negative Declarations consistency evaluation for the proposed project. A consistency evaluation was performed to determine if conditions specified in CEQA Guidelines Sections 15162 would require preparation of additional CEQA review for the proposed amendments. The City has determined that the proposed project is consistent with the Bernardo Center Negative Declaration (Project No. 91-0695) and would not result in new impacts.

Fiscal Impact Statement: None. All staff costs associated with the processing of this project are recovered from a deposit account funded by the project applicant.

Code Enforcement Impact: None associated with this application.

Housing Impact Statement: The project does not propose housing and does not eliminate any existing housing units.

BACKGROUND

This item is an appeal of the Hearing Officer's January 25, 2023 decision to approve a Conditional Use Permit (CUP) to allow operation of a new Cannabis Outlet. The Report to the Hearing Officer HO-22-040 (Attachment 1) contains the project background, analysis, and necessary draft findings with a staff recommendation of approval.

Project Location:	16375 Bernardo Center Drive, Rancho Bernardo Community Plan
Project Scope:	Conditional Use Permit for a Cannabis Outlet to operate within a 6,453-square-foot tenant space in a 11,930-square-foot building in an existing commercial center.
Lot Size:	0.63 acres (27,443 square feet)
Zoning:	CC-2-3 (Community Commercial)
Community Plan Designation:	Specialized Commercial

Legal Standard for Appeal of Hearing Officer Decision

An appeal of a Hearing Officer decision may only be granted with evidence supporting one of the following findings:

- (1) Factual Error. The statements or evidence relied upon by the decision maker when approving, conditionally approving, or denying a permit, map, or other matter were inaccurate; or
- (2) New Information. New information is available to the applicant or the interested person that was not available through that person's reasonable efforts or due diligence at the time of the decision; or
- (3) Findings Not Supported. The decision maker's stated findings to approve, conditionally approve, or deny the permit, map, or other matter are not supported by the information provided to the decision maker; or
- (4) Conflicts. The decision to approve, conditionally approve, or deny the permit, map, or other matter is in conflict with a land use plan, a City Council policy, or the Municipal Code.

Pursuant to SDMC [section 112.0506\(c\)](#), the Planning Commission can only deny the appeal and affirm approval of the project if none of the above findings are supported by sufficient evidence or grant the appeal and reverse approval of the project if it finds one of the above findings is supported by sufficient evidence. The below analysis demonstrates how the appellants do not

provide facts to support one of the above findings.

PROJECT APPEAL DISCUSSION

On February 7, 2023, two appeals of the Hearing Officer's January 25, 2023 decision to approve the project were filed: one by the Rancho Bernardo Community Planning Board (RBCPB, Attachment 2), and one by Robert Brienza (Attachment 3).

RBCPB Appeal

The RBCPB's listed grounds for appeal were "Factual Error", "Conflict with other matters," and "Findings not supported". The appeal consists of a four-page letter, which begins by describing six appeal issues, which are then discussed in the remainder of the letter. For clarity, this staff report groups the grounds and their supporting text together. The un-grouped version of the RBCPB's appeal is Attachment 2 to this report.

RBCPB Issue #1: *The applicant, Willie Frank Senn, had a stipulated judgement against him in which he was restrained by the courts from operating or maintaining a cannabis outlet at the time the application was deemed complete.*

The applicant, Willie Frank Senn, had a stipulated judgment with the City of San Diego that was ordered by the Superior Court of California, County of San Diego case # 37-2012-00087648-CU-MC-CTL that restrained him from engaging in the ownership or maintenance of a cannabis outlet. The City Project Manager deemed the application complete on February 4, 2019. At this time, Willie Frank Senn had a legal judgment against him that made him ineligible of operating or maintaining a cannabis outlet in the City of San Diego. The applicant may make the argument that he is currently eligible by an amendment to the stipulation, however, such an amendment was ordered on May 3, 2019, which is after the application was deemed complete on February 4, 2019. Based on the court judgment that Willie Frank Senn was ordered not to engage in the operation or maintenance of a cannabis outlet at the time the application was deemed complete, the application should have been denied (see Attachments 1 and 2). If the City determines that the judgement is no longer in force, despite the fact that it was in force at the time of the application, then the same consideration should be made with respect to changes in the Cannabis Ordinance, which at the time of application submittal allowed a cannabis operation at this location, but the currently approved ordinance does not permit a cannabis operation to be located adjacent to residential zoned property.

Staff Response to Issue #1: The project was deemed complete per the City's submittal requirements because it provided all of the information requested as part of an application.

The state requires an applicant to have all local approvals before obtaining a state license. An applicant would not be able to get a state license without local approval first – the state checks with the local jurisdiction as part of the process. (California Business and Professions Code [section 26055](#)). To that end, the cannabis outlet regulations ([SDMC section 141.0504](#)) do not require an applicant to have any sort of state license or background check to apply for a CUP to operate a

cannabis outlet in the future.

[Chapter 4, Article 2, Division 15 of the SDMC](#) does provides requirements for the operation of a cannabis outlet, but not requirements for applying for a CUP to operate one. Mr. Senn operates at least two other cannabis outlets (Urbn Leaf, which has two other locations). Mr. Senn is listed as a responsible person per Chapter 4 and continues to pass background checks for those locations.

The appellant acknowledges that the Stipulated Judgment they submitted is no longer in effect, however, they argue that the fact that the judgment was in effect at the time of the project application being deemed complete should be treated the same as the zoning regulations in effect at the time the project was deemed complete. Essentially, the appeal suggests that either the project can use the zoning ordinance in effect at the time of application, but Mr. Senn can't be the applicant, or that he can be the applicant, but the project must use the current ordinance. This is not the case.

Regarding the stipulated judgement and time of application, the following timeline illustrates that the applicant was free of judgement and was able to apply and operate cannabis outlets in the City of San Diego:

- December 2012: Stipulated Judgement which provided that the judgement could be modified to remove the prohibition on future operation of a cannabis outlet if cannabis became legal in the future
- November 2016: Cannabis became legal in the State of California
- February 2019: Current Project deemed complete
- May 2019: Amended Judgement to allow Mr. Senn to operate cannabis outlets in the City of San Diego

Government Code Section 65944:

(a) After a public agency accepts an application as complete, the agency shall not subsequently request of an applicant any new or additional information which was not specified in the list prepared pursuant to Section 65940.

California Government Code [section 65944\(a\)](#) and San Diego Municipal Code [section 112.0102\(b\)](#) both specifically require the City to use the regulations in effect at the time a project is deemed complete.

San Diego Municipal Code Section 112.0102(b):

and deposits required by this section and Section 112.0202. After the application has been *deemed complete*, the City Manager may not request any new or additional materials, information, fees, or deposits that were not specified at the time of application, except as provided by state law. The City

By contrast, if the Stipulated Judgement did not apply at the time of the Hearing Officer's decision to approve the project, there is no legal reason to act as if it was

still in effect - at the time Mr. Senn was granted permission to operate a Cannabis Outlet by the Hearing Officer, he was legally able to do so. The timing of the stipulated judgment is not sufficient evidence to support one of the findings necessary to approve the appeal.

RBCPB Issue #2: *The proposed Cannabis Outlet is not in-line with the Rancho Bernardo Community Plan.*

The Planning Department's approval for Project 625766 should be overturned and the requested CUP

denied as its approval would be in direct conflict with the Rancho Bernardo Community Plan (RBCP). Page 22, Commercial Objectives, bullet point five states "To encourage commercial facilities to be designed so as to reduce the potential for criminal activity." The approval of the Cannabis Outlet would bring crime to the residents of Rancho Bernardo as suggested by SDMC section 141.0504 where if the Cannabis Outlet were to be approved then per the City's own code "Security shall include operable cameras, alarms, and a security guard. The security guard shall be licensed by the State of California and be present on the premises during business hours." This inclusion in the SDMC section 141.0504 of the need for added security suggests that the City assumes the potential for criminal activity which is contrary to the community plan's objective of encouraging commercial facilities designed to reduce the potential.

The Commercial Objectives in the RBCP also state "To ensure that any redevelopment of commercial retail or office use is sensitive to the needs and conditions of the community." The approval of the proposed Cannabis Outlet would be in direct conflict with the RBCP as the needs and conditions of the community have been stated by the residents and the RBCPB. Further, the fact that proposed Cannabis Outlet is located adjacent to residentially zoned and developed property, and is not permitted at this location under the current Cannabis Ordinance (141.0504(a) (2)) verifies that the proposal is not sensitive to the needs and conditions of the community. A Cannabis Outlet at this location has been strongly opposed by the residents, local businesses, and the RBCPB and all have voiced their continued opposition to this proposal since was introduced in February of 2019, four years ago.

The City of San Diego adopted the RBCP on March 28, 1978. Within the RBCP is the structuring for the Community Planning Board.

"Community Planning Board

The Community Planning Board should be involved and active in the implementation of the Plan. Its work should include initiating action based upon Plan proposals, monitoring development activity in Rancho Bernardo and periodically conducting general meetings within the community so as to raise the consciousness of the people relative to planning and implementation efforts. It should also function to obtain public opinion, to act as liaison between the residents, developer and City government, and to maintain the Plan on a contemporary basis by periodic review and updating. Conversely, all governmental should solicit Planning Board and community input before making decisions that affect the Plan."

The RBCPB has followed the guidelines set forth above by getting the public opinion, acted as a liaison with the City, and communicated its and the community's opposition to the proposed Cannabis Outlet. If the City should move forward and allow the proposed Cannabis Outlet then the City itself could be seen as going against the RBCP that it adopted in March 1978 and has continued to recognize to date.

Staff Response to Issue #2: The RBCPB appeal suggests that a new, legal cannabis outlet will increase crime, however, it does not demonstrate how this is the case. Staff is not aware of such an issue at any of San Diego's permitted and licensed dispensaries.

The appeal suggests that the project's implementation of the San Diego Municipal Code's Cannabis Outlet ordinance's requirements for a security guard and security system mean that the City expects crime to occur at a Cannabis Outlet. This is not the case. The requirements of SDMC section 141.0504(b)-(m) have been included in the permit simply because they are a part of the current

ordinance requirements for Cannabis Outlets.

The Cannabis Outlet ordinance was originally enacted to apply to Medical Marijuana Consumer Cooperatives (MMCCs) at a time where recreational use of cannabis was not legal, and security at MMCCs was of paramount concern. Despite the fact that these businesses would likely have taken their own security measures to protect their legally operating business, requirements for security guards and security systems were included in the MMCC ordinance to address public safety concerns about the new type of business. To claim that this feature of the ordinance (originally included to address the very crime concerns that are now being raised) is not based on facts or evidence provided by the appellant. The intent of these measures was to enhance the safety and security of the proposed use. They are included in the ordinance as measures that, taken together with other operational requirements, will address the perceived public safety concerns associated with Cannabis Outlets, and serve to discourage any potential crime from occurring. This does not imply that the City assumes that Cannabis Outlets will have high crime rates.

The Municipal Code currently allows Cannabis Outlets with a Conditional Use Permit. The purpose and intent of a Conditional Use Permit are as follows (SDMC [section 126.0301](#)):

The purpose of these procedures is to establish a review process for the development of uses that may be desirable under appropriate circumstances, but are not permitted by right in the applicable zone. The intent of these procedures is to review these uses on a case-by-case basis to determine whether and under what conditions the use may be approved at a given site. Further, the intent is that each use be developed so as to fully protect the public health, safety, and welfare of the community. To provide this protection, conditions may be applied to address potential adverse effects associated with the proposed use.

According to SDMC [section 126.0305](#), an application for a Conditional Use Permit may be approved or conditionally approved only if the decision maker makes the following findings:

- a) The proposed development will not adversely affect the applicable land use plan;
- b) The proposed development will not be detrimental to the public health, safety, and welfare;
- c) The proposed development will comply with the regulations of the Land Development Code including any allowable deviations pursuant to the Land Development Code; and
- d) The proposed use is appropriate at the proposed location.

The decision maker may deny a CUP if they do not believe permit findings can be met. However, the appeal suggests that no Cannabis Outlet could ever be able to make CUP finding 2 (that the proposed development will not be detrimental to the public health, safety, and welfare). This is not the case.

Over two dozen Conditional Use Permits for Cannabis Outlets have been approved by the Hearing

Officer and the Planning Commission with the same requirements currently proposed as a part of the permit for this project.

Staff has provided draft findings in the affirmative to allow approval of the project.

RBCPB Issue #3: *The City Project Manager has incorrectly inserted measurements to allow for the approval of the Cannabis outlet.*

With respect to the distance of separation between the proposed outlet and the adjacent church, a third-party engineering study, which was requested by several parties, was submitted by the applicant. However, the study provided no supporting documentation or narrative for how the measurement was obtained (see Attachment 5). Without a narrative, the results cannot be verified by interested parties. When asked if there was supporting narrative or documentation for the study, the response from the Project Manager was that no support was provided, but when looking at the document, it appears to be the shortest route to the proposed Cannabis Outlet. The measurement from the engineering firm that was hired and paid by the applicant provided a study that indicated the separation between uses was 1,033 feet, just 33 feet over the needed separation or a margin of 3.3%. The Project Manager failed the community by simply accepting the submitted document without validating the information, particularly when this project is so close to a sensitive use. Further due diligence should have been done by the City's project manager to firmly assure that the applicants' submittal docs were thoroughly vetted. The applicant has a strong financial gain while the community has nothing to gain and a lot to lose.

The interpretation of SDMC section 113.0225 by the City's Project Manager has been a strong point of contention. The Project Manager relied on the City's italicized words that directly reference the City's definitions (SDMC section 11.0103) when it came to removing the Kumon Learning Center, which appears to meet the definition of a minor-oriented facility, as a sensitive use. However, in SDMC section 113.0225 with regards to measuring separation between uses, the word separation is not italicized. Therefore, one must go outside of the City's definitions to find its true meaning. Merriam Webster Dictionary defines separation as: 1: the act or process of separating : the state of being separated 2 a: a point, line, or means of division b: an intervening space : GAP "the separation between wheel spokes" 3 a: cessation of cohabitation between a married couple by mutual agreement or judicial decree b: termination of a contractual relationship (such as employment or military service). One can see above the applicable definition references "an intervening space or GAP (see Attachments 3 and 4). It is clear that there is zero separation between the proposed Cannabis Outlet's parcel and the residential zone as they have an abutting ("Abutting property means a lot or parcel of land that shares all or part of a common lot line with another lot or parcel of land.") property line. Clearly zero separation exists and therefore a measurement does not apply and directly contradicts the Project Manager's interpretation by inserting a measurement where there is none.

City Response to Issue #3: In regards to the distance measurement to the church, the applicant supplied a distance measurement demonstrating that the proposed Cannabis Outlet is 1,033 feet away from the church when measured in accordance with SDMC [section 141.0504\(a\)\(1\)](#) as it applies to the project. This measurement was stamped and signed by a licensed civil engineer, which is a commonly accepted method for determining separation distance, and which has been previously accepted by the Hearing Officer and the Planning Commission. This measurement was discussed at

the January 25, 2023 Hearing Officer meeting.

The separation distance of 1,033 feet meets the 1,000-foot separation requirement as allowed by SDMC [section 141.0504\(a\)\(1\)](#), using the provisions of SDMC [section 113.0225\(c\)](#). Neither at that hearing nor in their appeal does the appellant describe in detail why this measurement should not be used. The Planning Commission has previously approved a separation distance of as little as [1,014 feet](#) also based on this code section.

In regard to the distance from the Kumon Learning Center, the appellant does not contest the City's distance measurement.

In regards to the residential separation distance, the Hearing Officer report for this project and staff's presentation at the January 25, 2023 hearing address this issue in detail. The project site is directly adjacent to residentially zoned properties to the east and south, which are zoned RS-1-14. As previously stated, the City is required to use the land use regulations in effect at the time a project is deemed complete. This project was submitted before SDMC [section 141.0504\(A\)\(2\)](#) was changed to disallow consideration of barriers (link is to current code which does not apply). Therefore, the City must observe the ordinance that was in effect at the time of submittal, [Ordinance O-20793](#) (Attachment 4 to this Planning Commission Report). At the time the project was deemed complete on February 4, 2019, the SDMC allowed topography and barriers to be taken into account per SDMC section 113.0225(c) when measuring distance between Cannabis Outlets and residential uses.

The intent of the separation regulations is to prevent access between uses. When using the provisions of SDMC section 113.0225(c), distance is measured as the most direct route around the barrier in a manner that establishes direct access. Steep topography, dense landscaping, and constructed barriers (a continuous wall separating the property from the adjacent subdivision to the east, and an open space easement across the sloped landscaped area to the south, adjacent to Interstate 15) result in a path to residentially-zoned properties that is much greater than 100 feet. To access the proposed cannabis outlet from the adjacent residential area, a person would either have to:

1. Walk at least 3,000 feet via City sidewalks, going north on Bernardo Heights Parkway, then turning left on Bernardo Center Drive, and continuing south to the proposed outlet, or
2. Travel at least 1,400 feet through an open space easement area to the rear of the shopping center, through steep terrain and dense vegetation.

In this context, it is possible that even properties that abut each other can have a separation distance over 100 feet if a person cannot reasonably be expected to go between them. That is the case here due to topography, walls, and landscaping. The record will reflect that staff's and the Hearing Officer's interpretation is consistent with past practice for previously approved cannabis outlets in the City of San Diego; in many cases, properties directly abutted each other but the separation distance was adequate based on existing barriers – no reasonable person would be able to move directly between the uses at the point at which they abut each other.

RBCPB Issue #4: *A factual timeline has not been established on when the separation between the Hope*

Methodist Church and the proposed Cannabis Outlet was altered by the insertion of a fence. This area was utilized publicly for decades prior to the application process for the proposed Cannabis Outlet.

The residents of Rancho Bernardo, the RBCPB, local businesses and Hope United Methodist Church have been attempting to get a factual timeline of when the fence was inserted that altered the separation measurement to the applicant's favor, between Hope United Methodist Church and the proposed Cannabis Outlet. The applicant admitted they paid for the fence.

The applicant has not provided any solid proof that the fence was erected prior to what the City's sees as the "Deemed Application Date". The residents, RBCPB, local businesses and Hope United Methodist Church ask the Planning Commission to see the insertion of the fence for what it really is and that it's simply a tool to close off a direct route to Hope United Methodist Church. The Planning Commission should note that before the path was closed by the insertion of the fence, it was a "good neighbor" pathway for the members of Hope United Methodist Church, residents of Bernardo Heights, and the visitors to the shopping center. The insertion of the fence was not a "neighborly" act.

City Response to Issue #4: There is a six-foot wall on the northern end of the shopping center along the walking path between the proposed cannabis outlet and the existing church. This wall is justification for a longer walking distance from the Cannabis Outlet to the church property (only with this wall is the walking distance to the church greater than 1,000 feet).

The SDMC allows for barriers to be considered when measuring distance, and it does not prohibit applicants from deliberately constructing their own barriers. The six-foot wall is allowed at this location per SDMC [section 142.0330\(a\)\(1\)](#) and did not require a Building Permit per SDMC [section 129.0203\(a\)\(2\)](#).

An analysis of the permits for the church and the shopping center determined that there are no permit conditions requiring this area to remain open. The property owner chose to allow this path to be closed and was under no obligation to have it remain open.

RBCPB Issue #5: *The City Project Manager failed due diligence in verifying the measurements when they are under scrutiny from all interested parties.*

City Response to Issue #5: See response to Issue #3 above. The appellant does not demonstrate how this is the case.

RBCPB Issue #6: *The required finding presented in Section 126.0305 (d) for CUPs, "the proposed use is appropriate at the proposed location," cannot be met.*

City Response to Issue #6: The appeal makes this statement but does not address the issue further. The statement is not supported by the evidence provided. Staff has provided draft findings in the affirmative and recommends denial of the appeal and approval of the project.

Robert Brienza Appeal

Mr. Brienza's listed grounds for appeal were "Factual Error", "Conflict with other matters," "Findings not supported", and "New information". The appeal consists of a 5-page letter. What follows is analysis of Mr. Brienza's appeal, the entirety of which is Attachment 3 to this report.

Brienza Appeal Issue #1: *The community of Rancho Bernardo has been vehemently opposed to the outlet opening at the 16375 Bernardo Center Dr location since March of 2019. There were over 100 people who attended the very first meeting about this project back in March of 2019.*

City Response to Issue #1: The voluntary consumption of cannabis by adults 21 years of age or older is allowed by state law. Cannabis is legal per Proposition 64 that was passed by California voters in 2016.

Brienza Appeal Issue #2: *...the outlet is not in compliance with the San Diego Municipal Codes and Ordinances pointed out in numerous planning meetings and hearings....*

City Response to Issue #2: The appeal makes this statement but does not support it in the text that directly follows.

Brienza Appeal Issue #3: *The Rancho Bernardo Community Plan states the following for Commercial Objectives:*

- *To encourage commercial facilities to be designed so as to reduce the potential for criminal activity.*
- *To ensure that any redevelopment of commercial retail or office use is sensitive to the needs and conditions of the community.*

The Rancho Bernardo Community Plan also states the following of the nearby Bernardo Town Center:

- *The development should be characterized by shops and establishments which meet the diverse needs and tastes of community residents rather than the demands of large regional markets.*

The marijuana outlet would not increase safety in Rancho Bernardo. It is not sensitive to the needs and conditions of the community. Since the community of Rancho Bernardo has made their opposition clear, the marijuana outlet does not meet the requirement of being sensitive to the needs of the community, not does it meet the needs and tastes of the community.

City Response to Issue #3: The appeal states the appellant's opinion but does not support it with facts demonstrating how a cannabis outlet would be unsafe or encourage criminal activity. Staff has provided draft findings and draft conditions of approval to support the proposed development which demonstrate that the project would not adversely affect the applicable land use plan and would not be detrimental to the public health, safety, and welfare. The project is not a part of Bernardo Town Center and therefore that language is not applicable.

Brienza Appeal Issue #4: *The applicant claimed that the church was more than 1,000 feet and more than 100 feet from residences or residential zones. The applicant claimed due to zoning errors that the residence and zone sharing property lines was zoned for industrial.*

City Response to Issue #4: See City response to RBCPB Issue #3 for analysis of separation issues. The proposed Cannabis Outlet is 1,033 feet away from the church when measured in accordance with SDMC section 141.0504(a)(1) as it applies to the project. The issue of the adjacent residential area possibly being zoned industrial was addressed during review and was not discussed at Hearing Officer. The area is not zoned industrial.

Brienza Appeal Issue #5: *After the neighboring residential zoning was proven based on previous zoning maps and surveys detailed this as residentially zoned, the argument then shifted to demonstrating the distance was based on path of travel being over 100 feet to residences and over 1,000 feet based on path of travel rather than the requirements of a straight line per the San Diego Municipal Code.*

The measurement should be taken based on San Diego Municipal Code and Ordinances in effect at the time of the application submittal in February of 2019. I will reference from the San Diego Municipal Code that was enforced when the application was submitted. City staff during the Hearing and some previous instances by other committees have stated the codes and ordinances have been updated some now need to be considered, but this is being done in error. See Hearing Board Meeting from January 24, 2023 where city staff explain incorrectly starting at 1:06:00 at link below.

https://www.youtube.com/live/6Vqc_uSP4Y4?feature=share&t=3933

The application date by the applicant is February 4, 2019, so ordinances and codes prior to that date should only be considered. The 2017 version of O-20793 was in effect when CUP permit was submitted. 2018 version of San Diego Municipal Code was in effect when CUP was submitted. These will be referenced in this argument. It should be noted that the current San Diego Municipal Code and Ordinances also restrict the location of the marijuana outlet at 16375 Bernardo Center Drive.

O-20793 section 141.0504 (a) (1) and (2) states 1,000 feet from churches and 100 feet from residential zones as measured between property lines per section 113.0225 of the San Diego Municipal Code. San Diego Municipal Code Section 113.0225 defines property line to property line, including as noted diagram 113-02E. San Diego Municipal Code Section 113.0225 (a) and (b) defines measurement to be horizontally in a straight line without regard to topography or structures that would interfere with a straight-line measurement. Section (c) references separation distances NOT property lines. Section (c) also states account for natural topographical barriers and constructed barriers such as freeways or flood control channels but does NOT mention structures. Therefore, Section (c) does not apply since it is not referencing property lines, nor structures.

The property line between 16375 Bernardo Center Dr and 11716 Corte Templanza falls on the residence side of the wall, so there is no barrier separating the two properties. Measurements have been pulled and confirmed on both SanGIS (<https://sdgis.sandag.org/>) and County Survey Records System ([https://srs.sandiegocounty.gov/#/s?v=G&a=a&q=&aoi=CIRCLE\(33.010,-](https://srs.sandiegocounty.gov/#/s?v=G&a=a&q=*&aoi=CIRCLE(33.010,-)*

117.078%20d%3D0.0008944095351394622). Photo of measuring tape is 6 feet at closest point and 16 feet, 4 inches at farthest point. Property lines for similar points are less than those numbers, meaning there is no wall between the property lines.

Staff Response to Issue #5: The appeal appears to suggest that staff is using the wrong effective ordinance and is interpreting separation provisions incorrectly. This is not the case. Although the ordinance number was not specifically called out in the Hearing Officer report, that report correctly references the requirements of Ordinance O-20793, which is the version of SDMC section 141.0504 that applies to the project. As stated in the Hearing Officer report, this version of the ordinance allows barriers to be considered when determining residential separation distance, even for properties that abut each other. This is because the intent was to regulate access, which is not possible (even between abutting properties) where topography and barriers exist to prevent access. Access to/from Mr. Brienza's property is not feasible from the proposed outlet due to the existence of a solid six-foot wall, regardless of where the wall is exactly located, be it on the property line or several feet inside it.

This is consistent with how the regulations were interpreted by decision makers for multiple outlets subject to those same regulations at the time, most notably in the Mission Valley area, where commercial parcels abutted residential parcels but access was prevented due to topography and/or barriers.

Brienza Appeal Issue #6: *There was a prior judgement in 2012 again Will Senn stating that even though he does not admit guilt, the court stated that he shall not operate any outlets in San Diego. Case 37-2012-00087648-CU-MC-CTL is The City of San Diego v. The Holistic Cafe and Willie Senn. The Stipulated Judgement states that even though no guilt shall be admitted, the case was settled as follows: "Defendants and all persons mentioned above are hereby enjoined and restrained pursuant to SDMC sections 12.0202 and 121.0311 and California Code of Civil Procedure section 526, and under the Court's inherent equity powers from engaging in or performing, directly or indirectly, any of the following acts: b. Operating or maintaining at any property, premises, or location anywhere in the City of San Diego any commercial, retail, nonprofit, collective, cooperative, or group establishment for the growth, storage, sale, or distribution of marijuana, including but not limited to any marijuana dispensary, collective, or cooperative organized pursuant to the California Health and Safety Code."*

Staff Response to Issue #6: See response to RBCPB Issue #1 above.

Brienza Appeal issue #7: *The median age for Rancho Bernardo is 45 per the latest census in 2020, much older than the median age of 35 across the City of San Diego. See link below: <http://www.city-data.com/neighborhood/Rancho-Bernardo-San-Diego-CA.html> According to a study conducted by the University of California San Diego School of Medicine, just 366 Californians over the age of 65 visited ERs in 2005 for cannabis-related concerns. By 2019, that figure had skyrocketed nearly 3200%, when 12,167 seniors made trips to emergency rooms for that reason. Safety should be considered in allowing the marijuana outlet to be permitted in a community of older individuals that could be susceptible to health and safety concerns based on this data.*

<https://health.ucsd.edu/news/releases/Pages/2023-01-09-cannabis-related-emergency-departmentvisitis->

[among-older-adults-on-the-rise.aspx](#)

<https://www.nbcsandiego.com/news/local/stoned-california-seniors-headed-to-ers-by-the-thousandsucsd-study/3139189/>

Staff Response to Issue #7: The voluntary consumption of cannabis by adults 21 years of age or older is allowed by state law. Cannabis is legal per Proposition 64 that was passed by California voters in 2016.

Brienza Appeal Issue #8: The next two pages of the appeal list several demographic and statistical facts and concerns related to cannabis and cannabis legalization in California and Colorado.

Staff Response to Issue #8: As with Issue #7 above, the voluntary consumption of cannabis by adults 21 years of age or older is allowed by state law. Cannabis is legal, and these are not concerns regarding this specific project.

Brienza Appeal Issue #9: This appeal issue takes the form of a bulleted list. The list is italicized below, with staff responses following each bullet point.

The arguments against a marijuana outlet at 16375 Bernardo Center Drive are summarized as follows:

- *The distance to sensitive use locations such as the church and residential zones as properly measured makes the proposed marijuana outlet location out of compliance with the San Diego Municipal Code and Ordinances.*

This is not the case, as has been demonstrated herein. Staff has interpreted the ordinance properly and in accordance with established Hearing Officer and Planning Commission precedent.

- *The applicant acknowledged the outlet was within 100 feet of residences when they argued it was incorrectly noted on the zoning map as industrial.*

Staff and the applicant acknowledge that the project abuts residentially zoned property, but the effective walking distance from the outlet to adjacent residences is greater than 100 feet as discussed herein. The issue of the adjacent residential area possibly being zoned industrial was addressed during review and was not discussed at Hearing Officer. The area is not zoned industrial.

- *The distances between the proposed outlet and the church and residential zones have been measured in error, and when measured correctly, the outlet location is not in compliance with the San Diego Municipal Code and Ordinances.*

This is not the case, as has been demonstrated herein. Staff has interpreted the ordinance properly and in accordance with established Hearing Officer and Planning Commission precedent.

- *The Rancho Bernardo Community Plan does not allow for businesses that do not serve the community safely. The people have opposed the marijuana outlet and have proven it does not safely serve the community.*

Staff acknowledges that people in the community oppose a Cannabis Outlet at this location. However, the above is not supported by evidence in the record, as discussed herein.

- *A judgement against the applicant states that they shall not be allowed to operate a marijuana establishment in the City of San Diego.*

This is not the case, as discussed herein.

- *There are safety concerns based on statistics that suggest an increase in crime, hospitalizations, and other adverse affects that would affect Rancho Bernardo.*

The appellant does not link these concerns to this specific project. These are general cannabis-related concerns. Cannabis is legal with or without the proposed project.

- *Rancho Bernardo does not want this marijuana outlet in their community.*

Staff acknowledges that some people in the community oppose a Cannabis Outlet at this location. Opposition to a project alone is not sufficient evidence to support the findings to uphold an appeal.

Conclusion:

The two appeals provide no evidence of new information that was not available through reasonable efforts or due diligence at the time of the decision.

City staff has reviewed the proposed project, analyzed the appeal issues raised, and determined that the project is in conformance with adopted City Council policies, regulations of the Land Development Code, and the Rancho Bernardo Community Plan. The appellants do not have sufficient evidence to support any of the four findings that are grounds for appeal. The proposed project is consistent with the recommended land use and development standards in effect for this site, and no deviations are required to approve the project. Therefore, City staff recommends the Planning Commission deny the appeal and uphold the Hearing Officer's decision to approve Conditional Use Permit No. 2243740.

Staff has prepared updated draft findings (Attachment 5) to support the proposed development and draft conditions of approval (Attachment 6).

ALTERNATIVES

1. Deny the appeal and affirm the Hearing Officer's decision to approve Conditional Use Permit

No. 2243740, with modifications.

2. Approve the appeal, reverse the Hearing Officer's decision, and deny Conditional Use Permit No. 2243740, if the findings to approve the project cannot be affirmed.

Respectfully submitted,

(For Lara Gates)
Renee Mayo

Lara Gates
Deputy Director
Development Services Department

Travis Cleveland

Travis Cleveland
Development Project Manager
Development Services Department

Attachments:

1. Report to the Hearing Officer HO-22-040
2. Rancho Bernardo Community Planning Board Appeal
3. Robert Brienza Appeal
4. Ordinance O-20793
5. Draft Resolution with Findings
6. Draft Permit with Conditions

