

Location:	1901 Broadway (see map on reverse)
Assessor's Parcel Number:	008-0639-004-00
Appellant:	Dr. Michael Caplan, NorCal Health Services (707) 354-3535, (510) 839-0723
Owner:	Fruitvale Investments, Inc.
Proposal:	Appeal of the Zoning Manager's administrative determination letter, dated July 11, 2013, that denied appellant's application for a Minor Conditional Use Permit to establish a 4,700 square foot Health Care Commercial Activity on the ground floor of an existing building within the CBD-P zone.
General Plan:	Central Business District
Zoning:	CBD-P Central Business District Pedestrian Retail Commercial Zone
Environmental Determination:	Exempt, Section 15270 of the State CEQA Guidelines; disapproval of a project.
Historic Status:	PDHP, API contributor, major importance; Survey rating; Survey Rating: B*1+
Service Delivery District:	Metro
City Council District:	3
Date Filed:	Application filed: 11/28/12, Appeal filed: 7/22/13
Action to be Taken:	Uphold the Zoning Manager's administrative determination and deny the appeal
Finality of Decision:	Final (Not appealable pursuant to OMC Sec. 17.132.030)
For Further Information:	Contact case planner Neil Gray at 510-238-3878 or ngray@oaklandnet.com.

SUMMARY

The appellant requests that the Planning Commission grant an appeal of the Zoning Manager's administrative determination letter dated July 11, 2013, which denied appellant's application for a conditional use permit to legalize a 4,700 square-foot ground floor medical clinic (NorCal Health Care) that specializes in alternative and general treatments.

Staff recommends that the Planning Commission deny the appeal and uphold the Zoning Manager's determination, as described in this report.

CITY OF OAKLAND PLANNING COMMISSION



Case File: CUI2238, AI3214
Applicant: Dr Michael Caplan, NorCal Health Services
Address: 1901 Broadway
Zone: CBD-P

BACKGROUND

NorCal Health Care ("NorCal") provides medicinal cannabis evaluations as well as additional services such as general medical care, acupuncture, massage therapy, and nutritional consultations. NorCal moved into the building located at 1901 Broadway in March 2010. Because the building is located in the Central Business District Pedestrian Retail Commercial Zone ("CBD-P"), NorCal was required to obtain a Conditional Use Permit ("CUP") from the City prior to moving into the building; had it been granted, a CUP would have conditionally permitted Medical Services Commercial Activities on the ground floor of the building. NorCal did not obtain the required CUP, and there is no record that any Zoning Clearance for the clinic was issued for this location.

On August 16, 2012, the City received a complaint regarding the clinic and subsequently informed the appellant of the CUP requirement. On November 28, 2012, the appellant submitted a CUP application to the City to legalize the Medical Service Commercial Activity. The application included an "as built" floor plan showing a lobby/waiting room and receptionist for the clinic spanning the ground floor of the Broadway façade. The project includes a waiting area located adjacent to Broadway with patient treatment areas located in the back of the building.

Staff communicated concerns to the appellant that a waiting room and a medical clinic would not provide the pedestrian activity, customer attraction, or visual interest for pedestrians that the City desires for the burgeoning Uptown District and that the use is not consistent with the CBD-P zoning for the neighborhood. The appellant responded with a revised floor plan in an attempt to address the City's concerns (see Attachment A). The revised floor plan includes a "pharmacy window" that sells alternative health products, tables and chairs for 43 people, food vending machines, and art exhibits. In staff's opinion, the revised floor plan did not address staff's concerns, as the space would continue to operate as a waiting room.

On July 11, 2013, the Zoning Manager sent a letter to appellant denying NorCal's application for a CUP. The letter is attached hereto as Attachment B. The appellant submitted a timely appeal of the Zoning Manager's determination, which is the subject of this hearing. See Attachment C and the Staff Response to Appeal section, below, for the appeal and staff's response, respectively.

PROPERTY DESCRIPTION

The property is a 5,670 square foot, rectangular lot on the corner of Broadway and 19th Street in Downtown Oakland. According to the Office of Cultural Survey, the two-story building on the lot has historical significance due to its relatively high "B" rating and is a contributor to the Uptown Commercial Historic District, an "Area of Primary Importance". The building, the former location of the J. Malnick and Company clothing store, contains large windows and a traditional storefront façade.

NEIGHBORHOOD DESCRIPTION

The site is located within the Uptown Historic District, a thriving and still developing retail and entertainment area in Downtown Oakland that is anchored by the Fox and Paramount Theaters, several night clubs, retail stores, galleries, and the monthly Art Murmur event. Two popular restaurants, Duende and Flora, are adjacent to the subject building and the Fox Theater is approximately 200 feet from the site. According to the City's Neighborhood Investment Division, the Uptown Historic District has a low vacancy rate and is considered a healthy commercial market, particularly for restaurants.

GENERAL PLAN ANALYSIS

The property is located in the Central Business District area of the General Plan, Land Use and Transportation Element ("LUTE"). The proposal does not conform to the intent or policies contained the LUTE for Downtown. LUTE language is in italics and staff's response explaining why the project does not conform is in **bold type**.

The vision statement for Downtown contained in the LUTE of the General Plan states the following:

Broadway serves as the linkage from the neighborhoods to the waterfront, connecting housing areas to the Financial District, Uptown, City Center, Old Oakland, Chinatown, and the South of Nimitz area to the Jack London District. Subsequent planning and design studies may distinguish among Downtown subdistricts to heighten their identities and meet goals for Downtown. This may be achieved through differentiating uses, development standards, urban design elements or features of the transportation system. (LUTE, p. 66.)

The Uptown District is distinguished from other districts in Downtown by being a vibrant, 24-hour arts and entertainment district with restaurants, bars, theaters, shopping, and galleries. The proposal would weaken this distinct character because of its lack of nighttime hours, weekend activity (the application states that the clinic will only "on some occasions" be open on Saturdays and not be open on Sundays) customer attraction, and visual interest for pedestrians.

The proposal is also inconsistent with the following LUTE policies:

Policy D3.1 Promoting Pedestrians. *Pedestrian-friendly commercial areas should be promoted.*

The lack of activity at the Broadway frontage would reduce pedestrian interest along Broadway and 19th Street, thus reducing the pedestrian friendliness of the Uptown area (see Key Issues and Impacts section, below).

Policy D5.1 Encourage 24-hour activity. *Activities and amenities that encourage pedestrian traffic during the work week as well as evening and weekends should be promoted.*

The clinic is open from 9:00 am to 5:00 pm Monday through Friday, and only "on occasion" be open on Saturdays, and will, therefore, not attract evening or weekend foot traffic.

Policy D9.1 Concentrating Commercial Development. *Concentrate region-serving or "destination" commercial development in the corridor around Broadway between 12th and 21st streets, in Chinatown, and along the Jack London Waterfront. Ground floor locations for commercial uses that encourage a pedestrian-friendly environment should be encouraged throughout the downtown.*

A small medical clinic like the one proposed is not a region-serving or "destination" commercial business. In addition, the clinic reduces Uptown's concentration of commercial uses and is not consistent with the mix of businesses that creates an arts and entertainment district like Uptown that attracts visitors from throughout the region. Further, a medical clinic is not a use that encourages a pedestrian-friendly environment because it does not provide visual interest and deadens the commercial streetscape (see Key Issues and Impacts section, below).

ZONING ANALYSIS

The site is located in the CBD-P zone, a designation that encourages a clustering of pedestrian oriented activities on the ground floor. Section 17.58.010 of the Planning Code describes the intent of the CBD-P zone to “create, maintain, and enhance areas of the Central Business District for ground-level, pedestrian-oriented, active storefront uses. Upper story spaces are intended to be available for a wide range of office and residential activities.”

The CBD-P zone requires a Conditional Use Permit to locate a Medical Services Commercial Activity that is both on the ground floor and within 30 feet of a street abutting property line. A proposal must meet two sets of findings in order for the CUP to be approved. The first set is in Section 17.58.040 of the Planning Code. These findings, set forth below, are only required for ground floor activities that may have an impact on the functioning of a pedestrian-oriented commercial district.

1. The proposal will not impair a generally continuous wall of building facades;
2. The proposal will not weaken the concentration and continuity of retail facilities at ground-level, and will not impair the retention or creation of an important shopping frontage; and
3. The proposal will not interfere with the movement of people along an important pedestrian street.

The second set of findings, in Chapter 17.134 of the Planning Code, consists of general criteria that apply to all projects that require a CUP are described below:

1. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development;
2. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant;
3. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;
4. That the proposal conforms to all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050; and
5. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.

The Key Issues and Impacts section and the Revised Findings section, below, explain how the project cannot make the required findings and is inconsistent with the intent of the CBD-P zone and, therefore, cannot be approved.

ENVIRONMENTAL DETERMINATION

The California Environmental Quality Act (CEQA) Guidelines statutorily and categorically exempts specific types of project from environmental review. Section 15270 statutorily exempts projects that are disapproved. Staff's recommendation to deny the appeal falls under Section 15270, therefore this action is exempt from environmental review.

KEY ISSUES AND IMPACTS

Staff does not support the legalization of the clinic because: 1) it would slow the development and success of the burgeoning Uptown Commercial District for the reasons described below; and 2) the proposal cannot meet the findings required by the Planning Code to approve a CUP (see the Revised Findings section, below).

The success of entertainment and commercial districts such as Uptown depends on a successful mix of ground floor arts, entertainment, restaurant, and retail uses. This package of related businesses creates an attractive entertainment destination for the region by providing an interesting mix of activities. A ground floor Medical Services activity such as the one proposed weakens the District because it does not contribute to the existing mix of ground floor arts, retail, dining, and entertainment activities. The appropriate use of the subject site is particularly important to the success of the District because it is near the Fox and Paramount Theaters, two major activity centers, and adjacent to two popular restaurants, Duende and Flora.

A medical clinic also tends to create a "hole" in a vibrant commercial storefront area because it does not provide an active street front or browsing opportunities that create visual interest for pedestrians. The windows of medical clinics tend to be darkened or frosted to protect the privacy of patients. An attractive pedestrian experience also depends on creating a synergy between businesses where people walk to and from a mix of related businesses. People visit the District to be entertained by its package of art galleries, restaurants, bars, theaters, and retail stores and walk to and from the different businesses providing these goods and services. A medical clinic is not normally included in this chain of pedestrian destinations.

It is very feasible for the owner to find a restaurant, retail, entertainment or other more appropriate activity to occupy the subject ground floor space. The attractive historic building contains large windows and a traditional storefront façade at a corner location that is ideal for a restaurant, retail, or other active use. Further, according to the City's Neighborhood Investment Division, the District has a vacancy rate of only 9.76 percent and is considered a healthy commercial rental market and the spaces that are vacant are either in disrepair, have been part of a legal dispute, or are between listings. According to the Neighborhood Investment Division, a number of businesses have started taking over troubled properties and purchasing the leases of existing restaurants, further evidence of a strong commercial market. The Neighborhood Investment Division expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets.

It is also feasible that a medical services activity could locate in other areas of Downtown. The activity is permitted "by right" (i.e., without a planning permit) in many Downtown locations: in the CBD-X zone, CBD-C zone, above the ground floor of buildings in the CBD-P zone, and on the ground floor of buildings in the CBD-R zone.

Note that the applicant amended his original proposal to include: 1) a "pharmacy window" that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for

43 people; 3) three food vending machines; and 4) art exhibits (see Attachment A). These features would be located in an area that will function as the waiting area for patients of the clinic. Presumably, these changes were proposed to place more active uses in the area adjacent to Broadway to meet the intent of the CBD-P zone and to respond to City concerns. However, the addition of these features in the waiting area does not change the space. Staff believes that, despite the proposed revisions, the space will continue to function as a waiting room because the floor area adjacent to Broadway and the clinic is proposed to be fully integrated through four shared doors, a shared reception and "pharmaceutical display" area, and a shared entrance on Broadway (an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans propose seating for 43 people, many more seats than would be required for customers eating food from three vending machines.

STAFF'S RESPONSE TO APPEAL

The Planning Code's Administrative Appeal Procedure Chapter (OMC 17.132) describes the basis to appeal a determination of the Zoning Manager: *an error or abuse of discretion* was committed by the Zoning Manager, or the *decision is not supported by the evidence in the record*. The decision on the appeal is made by the Planning Commission which considers the appeal in light of the intent of the applicable Zoning Ordinance. The decision is final (non-appealable).

The following is staff's response to specific issues brought up by the applicant's appeal of the City's denial of CU12-238. A restatement of the issues raised in the appeal are in *italics*. Staff's response is in normal font. The full appeal is in Attachment C. Staff's responses show that there was neither an error nor abuse of discretion by the Zoning Manager and the decision was supported by the evidence in the record.

Appellant Argument #1:

THE ZONING MANAGER HAS BASED HIS DETERMINATION IN LARGE PART ON THE UNFOUNDED AND WHOLLY UNSUBSTANTIATED ASSERTION THAT THE AREA IN WHICH 1901 BROADWAY IS LOCATED IN A LOW VACANCY AREA.

The Zoning Manager has asserted at the top of page 4 of his decision that,

According to the City's Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site.

Such assertion is a conclusionary statement without any factual basis and is directly contradicted by evidence provided in Applicant's Conditional Use Application at page 5 -6. This section of the application sets forth a plethora of vacancies and closed businesses which to this date, continues to plague both sides of Broadway between 20th and 17th Streets. These facts are easily verified by a causal stroll in this vicinity. This factual error is so legally significant that it should render the Zoning Manager's denial improper. It is respectfully suggested that the proper remedy should be to send the Application back to the Zoning Manger with instruction to correct this error.

Staff Response:

According to the City's Neighborhood Investment Division, the District has a vacancy rate of only 9.76 percent and is considered a healthy commercial rental market and the spaces that are vacant are either in disrepair, have been part of a legal dispute, or are between listings. According to the Neighborhood

Investment Division, a number of businesses have started taking over troubled properties and purchasing the leases of existing restaurants, further evidence of a strong commercial market. The Neighborhood Investment Division expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets.

Also, the Zoning Manager has also based his decision on the proposal's inconsistency with the desired future character of the neighborhood, not only its existing character.

Appellant Argument #2:

THERE IS NO COMPETENT FACTUAL BASIS WHICH SUPPORTS THE FINDING THAT THE APPLICANT'S MEDICAL PRACTICE AND ATTENDED SERVICES WOULD HAVE AN ADVERSE IMPACT ON THE CHARACTERISTICS WHICH MAKES THE AT ISSUE NEIGHBORHOOD DESIRABLE.

This portion of the decision of the Zoning Managers' denial of Petitioners CUP is based in large part on the inaccurate generalized assumption that,

A Medical Services activity, in particular, tends to have a negative impact on the streetscape because (emphasis added) it creates relatively little foot traffic and the windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). Hence, the activity creates a "hole" in a vibrant urban streetscape.

It is insufficient to rely on general assumptions such as this when the facts specific to this property are so clearly not applicable. Petitioners has stated in his application that all the windows facing both the 19th Street side as well Broadway Street side will be opened for viewing by pedestrians. There is absolutely no basis for the Zoning Manager to wrongly assert that "the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside" It is patently false and cannot legally or factual be sufficient to sustain the denial of this application.

The Zoning Manager also utterly failed to provide any factual basis that the Applicant's current and purposed use would create relatively little foot traffic. He ignored the fact that Norcal currently employs approximately 25 persons and sees approximately 40-60 patients daily as well as approximately 8-10 members of the general public. He also, without any factual or legal basis simply dismissed the fact that the proposed and actual uses as set forth in Applicants CUP would significantly increase the already sizable pedestrian traffic Norcal Health Care creates.

Staff Response:

Staff's explanation as to why the project would have an adverse impact on desirable neighborhood characteristics is shown in the Revised Findings section of this report.

As set forth in the Revised Findings, although the floor plans indicate that the reflective coating will be removed from the windows along Broadway, and that the reflective coating and blinds will be removed from the window areas above 52" along 19th Street, Staff does not agree that opening the windows for viewing by pedestrians will eliminate adverse impacts on the characteristics that make the neighborhood desirable. In particular, medical services do not provide pedestrian browsing interest or contribute to the mix of activities that makes the Uptown Commercial District a regional attraction and successful commercial district.

The number of visitors and employees to the clinic are not the only relevant factors in creating pedestrian traffic in the district. Pedestrian traffic also depends on creating a synergy between businesses where people walk to and from a mix of related businesses. People visit the District to be entertained by its package of art galleries, restaurants, bars, theaters, and retail stores and walk to and from the different businesses providing these goods and services. A medical clinic is not normally included in this chain of pedestrian destinations.

Appellant Argument #3:

THE ZONING MANAGER COMPLETELY FAILED TO CONSIDER THE POSITIVE IMPACT THAT THE APPLICANT'S SECOND AMENDED/SUPPLEMENTAL FLOOR PLAN AND DESCRIPTION PROVIDE.

The Applicant submitted the Proposed Second Amended CUP to specially heighten the quality of the pedestrian browsing experience and to increase pedestrian interest and traffic. The proposal included the repurposing of the front portion of the premises which is approximately 24'-6 1/2" x 52'-2 1/2" and fronts Broadway and a portion of 19th Street. Such repurposing would result in the opening of the substantial view/window corridor for both the 19th and Broadway Street frontage areas of the property. The 19th Street window line will display various alternative pharmacy products as well as local art work by local artists for sale while the Broadway window line will provide inviting view corridors of the entire area.

The Applicant has proposed to refurnish this area to include seating capacity for 43 using bar height round tables with seating for 4 as well as a small easy chair conservation area. The purposed plan will increase the opportunity for the residents of the area as well as the general public to gain access to the interior as well as to provide needed services that are currently lacking in the immediate area.

Unfortunately the Zoning Manager utterly failed to address any of the significant benefits of Applicant's proposed changes even though it addresses his concerns of the lack of view corridors and an attraction of "retail customers". Instead, he focused on whether or not the, "...space will primarily remain a waiting room". The applicable codes do not address this distinction, nor do the codes attempt to distinguish pedestrian traffic into any other subgroups as the Zoning Manager has improperly suggested.

Simply put the Zoning Manager failed to supply any factual basis to support the assertion that the actual and proposed uses of this portion of the subject property will create, "...a 'hole' in a (otherwise) vibrant urban streetscape". This omission renders such objections legally and factual irrelevant.

Staff Response:

Staff has reviewed and considered the revised floor plan, and is unable to make the required findings for approval.

The layout of the space demonstrates that it will primarily function as a waiting room for medical customers, not an independently viable business. Although appellant has revised the floor plan to add a display of alternative medicines and food vending machines, these additions do not obviate the fact that the space remains a waiting room. The appellant does not dispute that the space will primarily be used as a waiting room. The seating capacity of 43 further substantiates the opinion that the space will be primarily used by patients waiting for medical treatment, not a retail space or pharmaceutical store. Staff experience with other projects has shown that when a display does not advertise the products of the primary business (in this case a medical services) it tends to become an insignificant and token element of the storefront and waiting area.

A medical clinic (including its waiting room) detracts from the mix of activities that makes the neighborhood desirable. Further, the pedestrian's interest will not be drawn into a space that is perceived to be a waiting room for a clinic and not a traditional retail store or gallery that has browsing interest and is open to the public. The characteristics of the waiting room, therefore, will create a hole in an otherwise vibrant urban streetscape.

Appellant Argument #4:

THE ZONING MANAGER PROVIDED NO LEGALLY COMPETENT BASIS TO CONCLUDED THAT THE APPLICANATS' PROPOSED AND ACTUAL USE WOULD NOT PROVIDE A CONVENTIENT AND FUNCTIONAL LIVING, WORKING, SHOPPING OR CIVIC ENVIRONMENT.

The only proffered basis to support this conclusion offered by the Zoning Manager was based, once again, solely on a flawed assumption that,

"The proposed Medical Services Commercial activity in the CBD-P zone will detract from the functional living, working, shopping and civic environment of the surrounding neighborhood because such an activity does not typically draw in pedestrian traffic looking for an active shopping or dining experience, which is desired along the ground floor."

Clearly, such conclusionary statements do not reflect what the Applicant's actual and proposed uses are and as such should not be accorded any legal or factual significance. Applicant does, however, agree that the "critical element" in determining the legal and factual merit of this application is whether or not the actual and proposed use will increase or reduce the overall pedestrian browsing experience. Such determination must not, as a matter of law, be based on speculation or without consideration of the specific facts related to the Applicant's proposed and actual use. The Zoning Manager failed to comply with this requirement in this instance.

Staff Response:

Staff has described in the Staff Response to Appellant Issues #2 - #3, above, how the proposed use will reduce the overall pedestrian browsing experience.

Appellant Argument #5:

THE ZONING MANAGER HAS IMPROPERLY IMPOSED A REQUIREMENT THAT THE APPLICANT MUST PROVE THAT ITS PROPOSAL WOULD ELIMINATE THE SPECTULATIVE OPPORTUNITY FOR MORE ACTIVE USES OF ITS LOCATION.

On page 6 under subheading a. the Zoning Manager without any legal authority has stated that:

Although the proposal does not involve extensive alterations, the current design and layout of the building is suitable for retail, restaurant, and other activities due to its high ceilings, large windows, high-quality storefront facade, and corner location on a major thoroughfare. The proposal would eliminate the opportunity for more active uses at this key ground floor location. (emphasis added)

This assertion is not referenced to any code or other law because no such legal requirement exists. There is no code or policy that mandates this Applicant or any other must demonstrate that the proposed or

actual use in the CUP will not eliminate the, "opportunity for more active uses" that any other hypothetical business may be able to general at the same location. Yet, this is exactly what the Zoning Manager has required of this applicant. Such requirement is without any legal authority and would result in the imposition of an unconstitutional vague requirement and must therefore be disregarded.

Staff Response:

In making this statement, staff is simply asserting that the Medical Clinic removes the opportunity for another business that is more consistent with the desirable characteristics of the District to be located at the proposed location. It is clear that a business occupying a space makes that space less available to other businesses and that these businesses could bring a use more consistent with the desired character for the area. As stated earlier, the space can be leased to a business more in keeping with the desired characteristics of the neighborhood due to the District's low vacancy rate, the site's corner location, and the high windows and traditional design of the storefront.

Appellant Argument #6:

THE APPLICANT HAS ESTABLISHED THAT ITS PROPOSAL WILL NOT INTERFERE WITH THE MOVEMENT OF PEOPLE ALONG AN IMPORTANT PEDESTRAIN STREET.

The Zoning Manager has stated at page 7 subheading c that,

The proposal will not necessarily interfere with the movement of people along an important pedestrian street. However, such a medical service use at ground level will not contribute to the necessary intensity of ground floor pedestrian activity and interest, as summarized in earlier findings.

Such statement is legally so vague and equivocal that it is legally insufficient to be considered anything other than speculation. As such it is submitted that this finding should be completely disregard as incompetent evidence.

Staff Response:

Staff does not believe that the proposal will interfere with the movement of people along Broadway or 19th Street. However, the applicant must demonstrate that the proposal meet all the required findings. As stated in the Revised Findings, there are several findings that the proposal does not meet.

Appellant Argument #7:

THE ZONING MANAGER FAILED TO ADDRESS THE EVIDENCE PROFFERED BY THE APPLICANT THAT ITS PURPOSED AND ACTUAL USE WIL INCREASE TRAFFIC- AND OFFER DIFFERENT AND NEEDED SERVICES AS SET FORTH IN THE PLANNING CODE AND THE GENERAL PLAN

The Oakland General Plan established that one of its objects as set forth in Objective D9 is to emphasize the, "... establishment, promotion and retention of commercial business that serve the needs of downtown workers and residents". Its associated Policy D9.2 states that Downtown residents should, "... have access to goods and services to meet their daily and long term needs with the downtown area."

Additionally, as set forth in Applicants' CUP, one of the primary medical services offered by Norcal Health Care is consultations with patients who suffer from a medical condition that may be benefited by

the use of Medicinal Marijuana. The City of Oakland, as has been set forth in all versions of the at issue CUP, has consistently stated its unequivocal support of its citizens rights to avail themselves of the protection of California's Compassionate Use Act.

One of the manifestation of such support has been the official policy of Oakland to welcome services related to the support of California's Medical Marijuana laws. The City has consistently encouraged legal businesses related to medical marijuana services to locate in the exact vicinity of Applicants leasehold. In fact the area of Broadway and 19th has been informally designated as "Oaksterdam" and there are several businesses in the area that specialized in providing various services related to medical marijuana.

The Applicant has also set forth the official policy of the City regarding Medical Marijuana as expressed in a recent filing the City Attorney made in the local Federal District Court. In such filing the City stated:

Oakland has a broad public interest in promoting the health, safety and welfare of its citizens, in protecting the regulatory framework it adopted in compliance with the laws of the State of California concerning medical cannabis and in receiving tax revenue from the well-regulated medical cannabis dispensaries located within its borders.

As a matter of law the Planning department is required to acknowledge that this has been established as the policy of the City in making its determination of various aspects of the within CUP. However, for reasons unstated the Zoning Manager simply ignored this important established fact.

Its failure to do so is a significant legal error as many of the legally imposed criterion necessary to determine issues related to this appeal require establishing whether Applicant's proposed and actual uses are, "...different and needed services as set forth in the planning code and the general plan"

The Departments failure to do so should be interpreted by the Planning Board as an admission by the Zoning Manger that Applicant's CUP does in fact provide needed services that are officially encouraged to locate their business in this area. To not do so would, in the opinion of the Applicant, render any denial legally and factual unsupported.

Staff Response:

Staff does not dispute that the proposed use may serve the long-term and short-term needs of Downtown workers and residents. If the applicant provides effective and legal medical care, including cannabis evaluations and prescriptions, then the City agrees that NorCal may provide an important and encouraged service. Further, a determination that the clinic is inappropriate for this particular ground floor location does not mean that the City generally discourages the activity. In fact, the activity is permitted "by right" in many Downtown locations: in the CBD-X zone, CBD-C zone, above the ground floor of buildings in the CBD-P zone, and on the ground floor of buildings in the CBD-R zone.

Restrictions on uses that may be generally encouraged by the City, such as medical clinics, may be applied at particular locations due to site characteristics, desired character for a neighborhood, noise or traffic impacts, and many other possible factors. For instance, even though industrial businesses are broadly encouraged by the City of Oakland, they are not permitted in low-density residential neighborhoods due to off-site impacts and neighborhood character preservation. Similarly, the Zoning Ordinance does not generally allow retail activities above the ground floor in the CBD-R zone to preserve the character of residential zones in Downtown; this restriction applies despite the City's many policies encouraging retail activities in Downtown.

The fact that there are existing medical marijuana services in the "Oaksterdam" neighborhood is not germane to this application. There are several activities related to marijuana such as education, dispensaries, and retail sales that could fit into different classifications under Chapter 17.10 of the zoning code. These activities may or may not be permitted by the Zoning Regulations or other City codes at a particular location. In reviewing the appellant's application, Staff evaluated the appropriateness of this medical clinic at the ground floor of 1901 Broadway, a location that is important to the continued success and neighborhood character of the Uptown Commercial District.

Appellant Argument #8:

OAKLAND WAIVED THE RIGHT TO DENY CUP BY ISSUING A BUSINESS PERMIT TO APPLICANT IN 2011 AND 2012

The issuance of business permit to petitioner is predicated on a review of the planning department in order to ensure that the use of the property in which the applicant conducts its business is in conformity with the applicable zoning requirements. This is verified on the City of Oakland's Website for the Finance and Management Agency located at http://www.oaklandnet.com/government/fwawebsite/revenue/revenue_biztaxreq.htm.

At this website the following information is highlighted:

If your business office is located in Oakland, you need to obtain a zoning clearance from the Zoning Division prior to commencing your business.

Petitioner has establish in his original filing of the at issue CUP the he became the owner of Norcal Health Care Inc. in March of 2010 and as such the first opportunity he had to file for a business permit under his name was in March of 2011, which he in fact did In order to receive his business license the Finance and Management Agency must first have the application checked by the city's Planning Department to ensure that such business is properly zoned for such use. Consequently, Norcal is legally entitled to rely on the issuance of such business license as an official acknowledgment by the City of Oakland's Planning Department that NorCal Health Care's occupancy at 1901 Broadway was in conformity with the applicable zoning requirements. As such it is Petitioner position that the Planning Department is now equitably estopped from asserting that, "The medical clinic has been operating at the location without the benefit of a permit since March of 2010."

Staff Response:

A business tax certificate is not a land use permit and does not confer planning or land use approval at a site. It is the business owner's responsibility to be granted the Zoning Clearance and all required land use permits prior to operation. Further, according to the City's business Tax License Office, the Business Tax License for NorCal has since lapsed.

The City has no record of issuing a Zoning Clearance to NorCal at 1901 Broadway.

Appellant Argument #9:

THE ONLY LETTER RECEIVED BY THE DEPARTMENT IN RESPONSE TO THE POSTED NOTICE OF APPLICATION WAS THE RESULT OF A SOLICATION BY AN EMPLOYEE OF THE DEPARMTNE AND NOT THE VIOLATION OF THE AUTHOR OF SUCH LETTER.

It is undisputed that the department only received a single letter from the public in response to the posted notice regarding the pendency of the within application for a CUP. That letter was dated January 25, 2013 and was written by Steve Snider, District Manager of the Lake Merritt-Uptown District Association and is part of the record. The letter was supportive of the Zoning Manager position; however, Applicant has learned that such letter was solicited by an employee of the Planning Department.

As proof of this assertion Applicant has attached a declaration of Warren Malnick the managing partner of the entity which owns the subject property. His declaration stated that he was informed by Andrew Jones, an associate of Mr. Snider and employed by the Lake Merritt-Uptown District that the letter that the Lake Merritt-Uptown District Association sent to the Planning Department dated January 25, 2013 was sent because their office received a request from an employee of the Planning Department to send in a letter opposing this CUP. Clearly, any letter that is solicited by the Planning Department to support their desire to deny the application for a CUP constitutes a serious breach of the integrity of the entire process and is legally impermissible.

Staff Response:

Although the appeal does not identify the name of the Planning Department employee who contacted the Lake Merritt-Uptown District Association, Staff followed up on this issue and could not find any employees from the Planning Department who solicited letters of support or opposition of the project (the January 25, 2013 letter is contained in Attachment D). Regardless, the Zoning Manager exercised his independent judgment in reviewing the project in its entirety, and his administrative determination was based on the Findings and analysis of the Planning Code requirements, not simply a letter of support or opposition from the Lake Merritt-Uptown District Association.

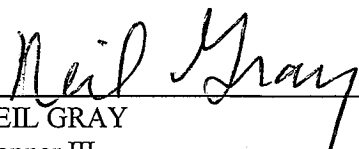
CONCLUSION

Staff finds that the appellant has neither found error nor abuse of discretion by the Zoning Manager, or that his decision is not supported by the evidence in the record. Staff, therefore, recommends that the Planning Commission deny the appeal and uphold the Zoning Manager's determination to deny the conditional use permit for the ground floor medical clinic at 1901 Broadway for the reasons stated above and in the Revised Findings section of this report. The applicant could use the front area of the building for a bona fide, independent business that conforms to the Planning Code, move to an upper story, or relocate to the many parts of Downtown where the activity is permitted. However, a medical clinic at this particular ground floor location is not consistent with the Planning Code.

RECOMMENDATIONS:

1. Affirm staff's environmental determination; and
2. Deny the appeal and uphold the Zoning Manager's determination based on the entire administrative record, including but not limited to the Findings, the attached Revised Findings, and the Staff Report.

Prepared by:



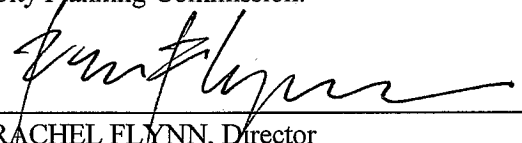
NEIL GRAY
Planner III

Approved by:



SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:



RACHEL FLYNN, Director
Department of Planning and Building

LEGAL NOTICE: The decision of the City Planning Commission is final and not administratively appealable. Any party seeking to challenge such decision in court must do so within ninety (90) days of the date the decision is announced (Code of Civil Procedure Section 1094.6).

ATTACHMENTS:

- A. Proposed Floor Plans and Internal Elevations
- B. July 11, 2013 Denial Letter
- C. Appeal
- D. January 25, 2013 Letter from the Lake Merritt-Uptown District Association
- E. Redlined revisions between original and revised Findings.

REVISED FINDINGS

This proposal does not meet the required findings under Sections 17.134.050 and 17.58.040 (L5) as set forth below. The basis to deny the project and related conditional use permit is not limited to the Findings, but also includes the information contained in the October 16, 2013 Staff Report to the Planning Commission, and the entire administrative record, hereby incorporated by reference. Required findings are shown in **bold type**; explanations as to why these findings cannot be made are in normal type. A proposal must meet all of the below findings in order to be approved.

These findings revise the initial findings (see Attachment A to the Zoning Manager's July 11, 2013 decision letter) to further support and clarify the Zoning Administrator's decision to deny the project. These Revised Findings clarify and refine the initial Findings, and are consistent with the initial Findings. Attachment E shows the differences between the revised and original findings.

Except as different criteria are prescribed elsewhere in the zoning regulations, a conditional use permit shall be granted only if the proposal conforms to all of the following general use permit criteria, as well as to any and all other applicable use permit criteria:

- A. **That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development;**

The proposal does not meet this finding because it negatively impacts the pedestrian experience and mix of activities in the District. This impact has an adverse effect on the desirable neighborhood character of Uptown and the success of abutting properties by reducing the quality of the district as a whole.

The proposal is located in an active commercial area with a character desired by the City and intended by the Planning Code. The site is located in the CBD-P zone, a designation that encourages a clustering of pedestrian oriented activities on the ground floor. Section 17.58.010 of the Planning Code describes the intent of the CBD-P zone to: "create, maintain, and enhance areas of the Central Business District for ground-level, pedestrian-oriented, active storefront uses. Upper story spaces are intended to be available for a wide range of office and residential activities".

The district has a character intended by this zoning designation and desired by the City. The site is within of the Uptown District, a thriving and still developing regional retail, arts, dining, and entertainment destination in Downtown Oakland that is anchored by the Fox and Paramount Theaters, several night clubs, retail stores, galleries, and the monthly Art Murmur event. According to the City's Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market.

The proposal would have an adverse effect on this desired neighborhood character. The success of commercial districts such as Uptown depends on successful a mix of ground floor arts, entertainment, restaurant, and retail uses. This package of related businesses creates an attractive entertainment destination for the region by providing an interesting mix of activities. A ground floor Medical Services activity such as that proposed weakens the district because it attracts

FINDINGS

relatively little foot traffic and does not contribute to its mix of ground floor arts, retail, dining, and entertainment activities. The appropriate use of the subject site is particularly important to the success of the District because it is near the Fox and Paramount Theaters, two major activity centers, and adjacent to two popular restaurants, Duende and Flora.

A medical clinic also tends to create a “hole” in a vibrant commercial storefront area because it does not provide an active street front or the browsing opportunities that create visual interest for pedestrians. The windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (darkened windows were on the front façade of the clinic as of an 8/21/13 site visit by staff). An attractive pedestrian experience also depends on creating a synergy between businesses where people walk to and from a mix of related businesses. People visit the district to be entertained by its package of art galleries, restaurants, theaters, and stores and walk to and from the different businesses providing these services. A medical clinic is not normally included in this chain of pedestrian destinations.

The applicant amended his original proposal to include: 1) a “pharmacy window” that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for 43 people; 3) three food vending machines; and 4) art exhibits. These features would be located in what is currently the waiting area for patients of the clinic. Presumably, these changes were proposed to place more active uses in the area adjacent to Broadway to meet the intent of the CBD-P zone. However, staff believes that the space will primarily remain a waiting room because the floor area adjacent to Broadway and the clinic are proposed to be fully integrated through four shared doors, a shared reception and “pharmaceutical display” area, and a shared entrance on Broadway (an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans proposed seating for 43 people, many more seats than are required for customers eating food from three vending machines.

- B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant;**

The proposal does not meet this finding. The proposed Medical Services Commercial activity in the CBD-P zone will detract from the functional living, working, shopping and civic environment of the surrounding neighborhood because the proposed clinic will reduce the attraction of the district as a whole. The success of commercial districts such as Uptown depends on a mix of ground floor arts, entertainment, restaurant, and retail uses that attract visitors from throughout a region. This package of related businesses creates a regional destination by providing an interesting mix of related activities. A medical clinic is not considered part of the mix of related activities that attracts visitors to an arts and entertainment district such as Uptown. The appropriate use of the subject site is particularly important to the success of the District because it is near the Fox and Paramount Theaters, two activity centers for the District, and adjacent to two popular restaurants, Duende and Flora.

Weakening the concentration of pedestrian oriented businesses on the ground floor will also weaken the function of the District as a whole by reducing the overall pedestrian browsing experience (see Finding A, above). This experience is a critical element to the function and success of any commercial district.

- C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;

The proposal may provide an essential service to the community by establishing a health clinic on the site. However, such use should be located above the ground floor at this location to avoid the adverse impacts identified in other findings. The Planning Code requires all of the Conditional Use Permit findings to be met in order to approve a CUP.

- D. That the proposal conforms to all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050;

No design review is required because the proposal does not involve any exterior alterations.

- E. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.

Part of the intent for the LUTE (Land Use and Transportation Element of the General Plan) Central Business District land use classification is to enhance Downtown as a high density mixed use urban center of regional importance with an emphasis on ground floor retail, restaurants, and entertainment uses. For instance:

- Policy D3.1 of the City of Oakland General Plan Land Use and Transportation Element Promoting Pedestrians, states that pedestrian-friendly commercial areas should be promoted; and
- Policy D5.1 of the LUTE, Encouraging Twenty-Four Hour Activity, states: activities and amenities that encourage pedestrian traffic during the work week, as well as evenings and weekends should be promoted.

The proposal for a ground floor Medical Services Commercial Activity at this location does not create, maintain, or enhance such ground-level, pedestrian-oriented, active storefront uses for the reasons described in other findings and, therefore, does not conform to the Central Business District General Plan designation and this finding cannot be made.

CBD-P Central Business District Pedestrian Retail Commercial Zone 17.58.40 (L5) Additional CUP findings:

If located both on the ground floor of a building and within thirty (30) feet from any street-abutting property line, these activities are only permitted upon the granting of a conditional use permit (see Chapter 17.134 for the CUP procedure). Incidental pedestrian entrances that lead to one of these activities elsewhere in the building are exempted from this conditional use permit requirement. In addition to the criteria contained in Section 17.134.050, these conditionally permitted ground floor proposals must also meet each of the following criteria:

- A. The proposal will not impair a generally continuous wall of building facades;

The proposal does not meet this finding.

FINDINGS

Although the proposal does not involve extensive alterations, the design of the building is suitable for retail, restaurant, and other active use due to its high ceilings, large windows, high-quality storefront façade, and corner location on a major thoroughfare. The proposal would eliminate the opportunity for more active uses at this key ground floor location.

Also, medical clinics tend to frost or darken windows to protect the privacy of patients (as of a site visit on 8/21/13, the windows of the current, unpermitted clinic are mostly darkened, making it difficult for pedestrians to look inside). This lack of transparency interrupts the pedestrian experience and impairs the continuous wall of building facades. Hence, the activity creates a "hole" in a vibrant urban streetscape.

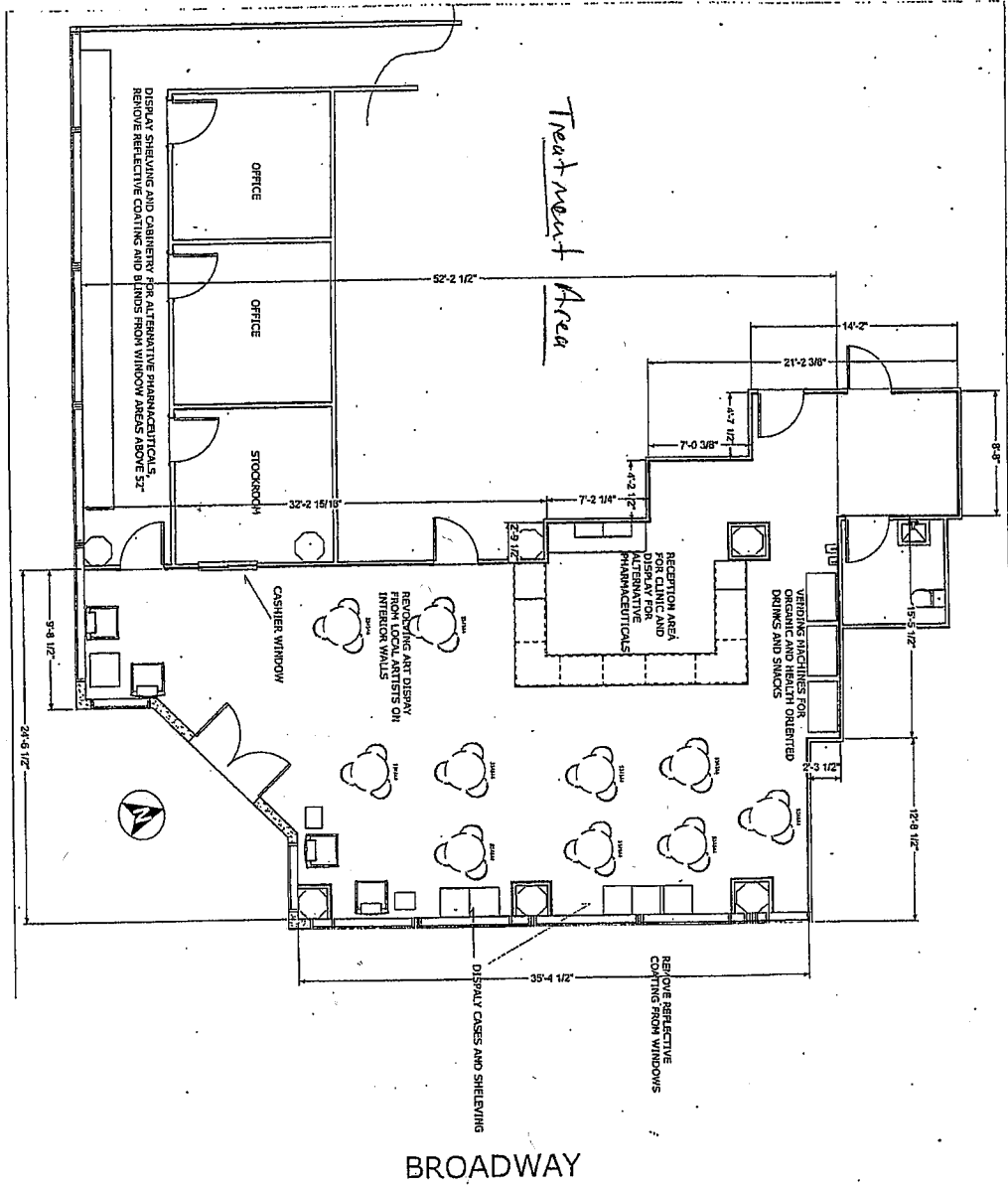
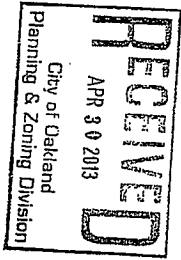
B. The proposal will not weaken the concentration and continuity of retail facilities at ground-level, and will not impair the retention or creation of an important shopping frontage;

This finding cannot be made. The proposal will weaken the concentration and continuity of retail facilities at ground-level and will impair the retention and creation of the Uptown shopping district. As described in other findings, the clinic weakens the concentration of the types of activities that make the district a regional attraction and creates a discontinuity in retail facilities due to its lack of browsing opportunities and visual interest.

C. The proposal will not interfere with the movement of people along an important pedestrian street.

The proposal will not necessarily interfere with the movement of people along an important pedestrian street. However, such a medical service use at ground level will not contribute to the necessary intensity of ground floor pedestrian activity and interest, as summarized in earlier findings.

DENIED BY: City Planning Commission: _____(date)_____ (vote)



BROADWAY

ATTACHMENT A

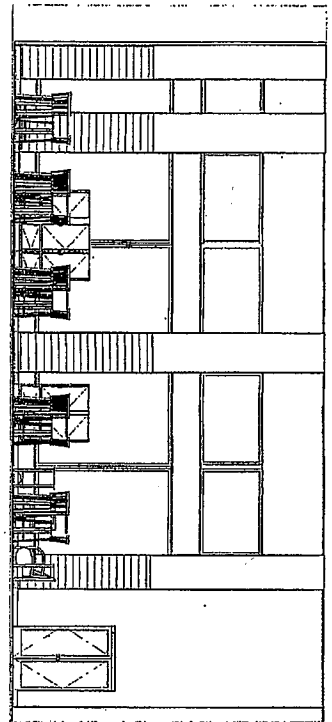
NO.	DESCRIPTION	BY	DATE

SHEET TITLE:
FLOOR PLAN

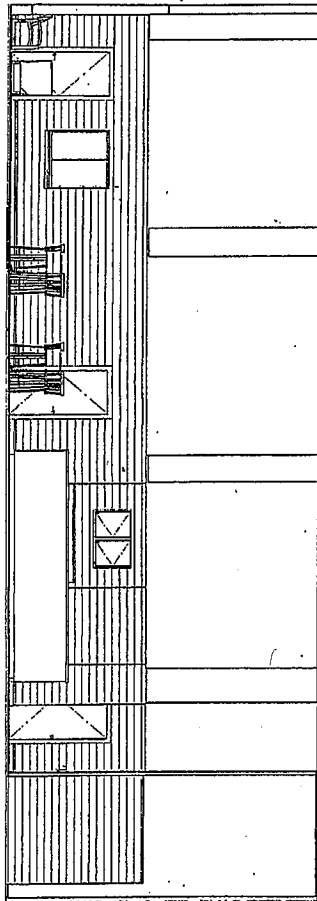
PROJECT DESCRIPTION:
1901 Broadway

DRAWINGS PROVIDED BY:
Chris Walters Design

DATE:
4/28/14
SCALE:
1/4"



INTERIOR VIEW LOOKING WEST TO BROADWAY AVE.



INTERIOR VIEW LOOKING EAST

Sent via U.S. Mail

July 11, 2013

Dr. Michael Caplan
Norcal Health Service, Inc.
1901 Broadway
Oakland, CA 94612

RE: Case File No. CU12-238; 1901 Broadway (APN: 008-0636-004)

Dear Ms. Caplan:

Your application, as described below, has been **DENIED** for the reasons stated in Attachment A, which contains the findings required to support this decision. This decision is effective ten (10) days after the date of this letter unless appealed as explained below.

The following table summarizes the proposed project:

Proposal:	Legalize a 4,700 square foot medical clinic on the ground floor of an existing commercial building.
Planning Permits Required:	Minor Conditional Use Permit to establish a Health Care Commercial Activity on the ground floor of an existing building within the CBD-P zone.
General Plan:	Central Business District
Zoning:	CBD-P Central Business District Pedestrian Retail Commercial Zone
Environmental Determination:	Exempt, Section 15270 of the State CEQA Guidelines; disapproval of a project.
Historic Status:	PDHP, API contributor, major importance; Survey rating; Survey Rating: B*1+
Service Delivery District:	Metro
City Council District:	3

If you, or any interested party, seeks to challenge this decision, an appeal **must** be filed by no later than ten calendar (10) days from the date of this letter, by **4:00 pm on July 22, 2013**. An appeal shall be on a form provided by the Planning and Zoning Division of the Community and Economic Development Agency, and submitted to the same at 250 Frank H. Ogawa Plaza, Suite 2114, to the attention of **Neil Gray, Planner III**. The appeal shall state specifically wherein it is claimed there was error or abuse of discretion by the Zoning Manager or wherein his/her decision is not supported by substantial evidence and must include payment of **\$1,352.91** in accordance with the City of Oakland Master Fee Schedule. Failure to timely appeal will preclude you, or any interested party, from challenging the City's decision in court. The appeal

ATTACHMENT B

itself must raise each and every issue that is contested, along with all the arguments and evidence in the record which supports the basis of the appeal; failure to do so may preclude you, or any interested party, from raising such issues during the appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the Zoning Manager prior to the close of the previously noticed public comment period on the matter.

If you have any questions, please contact the case planner, **Neil Gray, Planner III** at **(510) 238-3878** or **ngray@oaklandnet.com**, however, this does not substitute for filing of an appeal as described above.

Very truly yours,

Scott Miller
Zoning Manager

CC: Chris Candell, Inspection Services
Bill Quesada, Inspection Services
Keira Williams, Office of Neighborhood Investment
Brian Kendall, Office of Neighborhood Investment
Steven Schectman, 1212 Broadway, Suite 802, Oakland, CA, 94612
Steve Snider, District Manager, Lake Merritt-Uptown District Association

Attachments:

- A. Findings
- B. Attachment B – Proposed floor plan and project description submitted by applicant.

ATTACHMENT A

FINDINGS

The applicant proposes to establish a 4,700 square-foot, Medical Service Commercial Activity (Medical Clinic) on the ground floor of an existing building located at 1901 19th Street. The medical clinic has been operating at the location without the benefit of a permit since March of 2010. The proposed project is located within the CBD-P Central Business District Pedestrian Retail Commercial Zone (CBD-P zone).

Pursuant to OMC Section 17.58.040, Medical Service Commercial Activities are permitted in the CBD-P zone, subject to Limitation L5. Limitation L5 provides that, if the activity is located both on the ground floor of a building and within 30 feet from any street-abutting property line, such activity is only permitted upon the granting of a conditional use permit; in addition, the ground floor proposal must meet three additional criteria described in OMC Section 17.58.040.

As described below, the proposal cannot meet each of the required findings for approval and, therefore, is denied.

17.134.050 - General Use Permit Criteria. Except as different criteria are prescribed elsewhere in the zoning regulations, a conditional use permit shall be granted only if the proposal conforms to all of the following general use permit criteria, as well as to any and all other applicable use permit criteria:

- A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development;

The proposal does not meet this finding for the following reasons.

The site is located in the CBD-P zone, a designation that encourages a clustering of pedestrian oriented activities on the ground floor. Section 17.58.010 of the Planning Code describes the intent of the CBD-P zone to: “create, maintain, and enhance areas of the Central Business District for ground-level, pedestrian-oriented, active storefront uses. Upper story spaces are intended to be available for a wide range of office and residential activities”.

Approval of the Medical Services Commercial Activity would have an adverse effect on this desirable neighborhood character.

The proposal is located in an active storefront area intended by the Planning Code. The site is part of the Uptown District, a thriving and still developing retail and entertainment area in Downtown Oakland that is anchored by the Fox and Paramount

Theaters, several night clubs, retail stores, galleries, and the monthly Art Murrur event. Two popular restaurants, Duende and Flora, are adjacent to the site and the Fox Theater is approximately 200 feet from the site. According to the City's Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site. The building, the former location of the J. Malnick clothing store, contains large windows and a traditional storefront façade that is ideal for a restaurant, retail, or other active use. The Neighborhood Investment Division also expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets.

The Planning Code identifies Medical Service Commercial Activities to be a use that may not be appropriate in active storefront neighborhood such as the Uptown District. Section 17.58.040 of the Planning Code identifies active storefront activities that create pedestrian traffic and interest (e.g. General Retail Sales, General Food Sales, Full Service Restaurants, etc.) by allowing them to be located anywhere on the ground floor without requiring the granting of a conditional use permit. Other activities, such as Medical Service, that do not create high pedestrian activity or visual interest require the granting of a Conditional Use Permit (CUP) to be located within the front 30 feet of the ground floor. The criteria required to be met to be granted the CUP (see below) requires that the activity will not detract from an existing or potential clustering of ground floor active uses. A Medical Services activity, in particular, tends to have a negative impact on the streetscape because it creates relatively little foot traffic and the windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). Hence, the activity creates a "hole" in a vibrant urban streetscape.

Weakening the concentration of pedestrian oriented businesses also affects the appropriate development and success of abutting properties because the proposed clinic will attract fewer retail customers into the neighborhood than other types of businesses. The regional attraction of the entire district can also be affected by lowering the quality of the pedestrian browsing experience.

The applicant amended his original proposal to include: 1) a "pharmacy window" that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for 43 people; 3) three food vending machines; and 4) art exhibits. These features would be located in what is currently the waiting area for patients of the clinic. Presumably, these changes were proposed to place more active uses in the area adjacent to Broadway to meet the intent of the CBD-P zone. However, staff believes that the space will primarily remain a waiting room because the floor area adjacent to Broadway and the clinic are proposed to be fully integrated through four shared doors, a shared reception and "pharmaceutical display" area, and a shared entrance on Broadway (an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans proposed seating for 43 people, many more seats than are required for customers eating food from three vending machines.

- B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic**

environment, and will be as attractive as the nature of the use and its location and setting warrant;

The proposal does not meet this finding. The proposed Medical Services Commercial activity in the CBD-P zone will detract from the functional living, working, shopping and civic environment of the surrounding neighborhood because such an activity does not typically draw in pedestrian traffic looking for an active shopping or dining experience, which is desired along the ground floor.

Weakening the concentration of pedestrian oriented businesses on the ground floor will also weaken the function of the District as a whole by reducing the overall pedestrian browsing experience. This experience is a critical element to the function and success of any commercial district.

- C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;**

The proposal would provide an essential service to the community by establishing a health clinic on the site. However, such use should be located on a 2nd (or higher) floor to avoid the adverse impacts identified in other findings. The Planning Code requires all of the General Use Permit findings to be met in order to approve a CUP.

- D. That the proposal conforms to all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050;**

No design review is required because the proposal does not involve any exterior alterations.

- E. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.**

Part of the intent for the LUTE (Land Use and Transportation Element of the General Plan) Central Business District land use classification is to enhance Downtown as a high density mixed use urban center of regional importance with an emphasis on ground floor retail, restaurants, and entertainment uses. Policy D3.1 of the City of Oakland General Plan Land Use and Transportation Element Promoting Pedestrians, states that pedestrian-friendly commercial areas should be promoted. Policy D5.1 of the LUTE, Encouraging Twenty-Four Hour Activity, states: activities and amenities that encourage pedestrian traffic during the work week, as well as evenings and weekends should be promoted. The proposal for a ground floor Medical Services Commercial Activity at this location does not create, maintain, or enhance such ground-level, pedestrian-oriented, active storefront uses for the reasons described in other findings and, therefore, does not conform to the Central Business District General Plan designation and this finding cannot be made.

CBD-P Central Business District Pedestrian Retail Commercial Zone 17.58.40 (L5)

Additional CUP findings:

If located both on the ground floor of a building and within thirty (30) feet from any street-abutting property line, these activities are only permitted upon the granting of a conditional use permit (see Chapter 17.134 for the CUP procedure). Incidental pedestrian entrances that lead to one of these activities elsewhere in the building are exempted from this conditional use permit requirement. In addition to the criteria contained in Section 17.134.050, these conditionally permitted ground floor proposals must also meet each of the following criteria:

a. The proposal will not impair a generally continuous wall of building facades;

The proposal does not meet this finding.

Although the proposal does not involve extensive alterations, the current design and layout of the building are suitable for retail, restaurant, and other active due to its high ceilings, large windows, high-quality storefront façade, and corner location on a major thoroughfare. The proposal would eliminate the opportunity for more active uses at this key ground floor location.

Also, Medical Services tend to frost or darken windows to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). This lack of transparency interrupts the pedestrian experience and impairs the continuous wall of building facades. Hence, the activity creates a “hole” in a vibrant urban streetscape.

b. The proposal will not weaken the concentration and continuity of retail facilities at ground-level, and will not impair the retention or creation of an important shopping frontage;

This finding cannot be made. The proposal will weaken the concentration and continuity of retail facilities at ground-level and will impair the retention and creation of the Uptown shopping district.

The proposal is located in an active storefront area intended by the Planning Code. The site is part of the Uptown District, a thriving retail and entertainment area in Downtown Oakland that is anchored by the Fox and Paramount Theaters, several night clubs, retail stores, galleries, and the monthly Art Murmur event. Two popular restaurants, Duende and Flora, are adjacent to the site and the Fox Theater is approximately 200 feet from the site. According to the City’s Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site. The building, the former location of the J. Malnick clothing store, contains large windows and a traditional storefront façade that is ideal for a restaurant, retail, or other active use. The Neighborhood Investment Division also expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets.

A Medical Services activity would have a negative impact on the retention and growth of this entertainment and retail district because it creates relatively little foot traffic or customers and the windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). Hence, the activity creates a “hole” in a vibrant urban streetscape. The regional attraction of the entire district would also be affected by reducing the overall pedestrian browsing experience.

The applicant amended his original proposal to include: 1) a “pharmacy window” that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for 43 people; 3) food vending machines; and 4) art exhibits. These features would be located in what is currently the waiting area for patients of the clinic. Presumably, these changes were proposed to place active uses in the area adjacent to Broadway that meet the intent of the CBD-P zone. However, staff believes that the space will primarily remain a waiting room because the floor area adjacent to Broadway and the clinic are proposed to be fully integrated through four shared doors, a shared reception and “pharmaceutical display” area, and a shared entrance on Broadway (there is an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans proposed seating for 43 people, many more seats than are required for customers eating food from three vending machines.

c. The proposal will not interfere with the movement of people along an important pedestrian street.

The proposal will not necessarily interfere with the movement of people along an important pedestrian street. However, such a medical service use at ground level will not contribute to the necessary intensity of ground floor pedestrian activity and interest, as summarized in earlier findings.



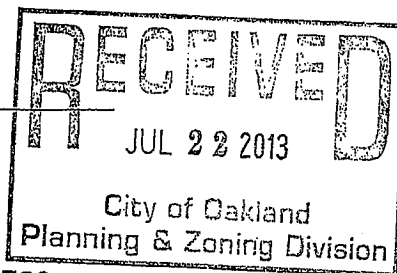
**CITY OF OAKLAND
APPEAL FORM
FOR DECISION TO PLANNING COMMISSION, CITY
COUNCIL OR HEARING OFFICER**

PROJECT INFORMATION

Case No. of Appealed Project: CU12-238

Project Address of Appealed Project: 1901 BROADWAY APN:008-0636-004

Assigned Case Planner/City Staff: Neil Gray, Planner II



APPELLANT INFORMATION:

Printed Name: DR. MICHAEL CAPLAN

Phone Number: 510-839-0723

Mailing Address: 1212 BROADWAY

Alternate Contact Number: 510-868-9980

City/Zip Code OAKLAND

Representing: _____

Email: steven@justlaw.org

An appeal is hereby submitted on:

- ☐ **AN ADMINISTRATIVE DECISION (APPEALABLE TO THE CITY PLANNING COMMISSION OR HEARING OFFICER)**

YOU MUST INDICATE ALL THAT APPLY:

- ☐ Approving an application on an Administrative Decision
- ☒ Denying an application for an Administrative Decision
- ☐ Administrative Determination or Interpretation by the Zoning Administrator
- ☐ Other (please specify) _____

Please identify the specific Administrative Decision/Determination Upon Which Your Appeal is
Based Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☐ Administrative Determination or Interpretation (OPC Sec. 17.132.020)
- ☐ Determination of General Plan Conformity (OPC Sec. 17.01.080)
- ☐ Design Review (OPC Sec. 17.136.080)
- ☐ Small Project Design Review (OPC Sec. 17.136.130)
- ☒ Minor Conditional Use Permit (OPC Sec. 17.134.060)
- ☐ Minor Variance (OPC Sec. 17.148.060)
- ☐ Tentative Parcel Map (OMC Section 16.304.100)
- ☐ Certain Environmental Determinations (OPC Sec. 17.158.220)
- ☐ Creek Protection Permit (OMC Sec. 13.16.450)
- ☐ Creek Determination (OMC Sec. 13.16.460)
- ☐ City Planner's determination regarding a revocation hearing (OPC Sec. 17.152.080)
- ☐ Hearing Officer's revocation/impose or amend conditions (OPC Secs. 17.152.150 &/or 17.156.160)
- ☐ Other (please specify) _____

(continued on reverse)

(Continued)

☒ **A DECISION OF THE CITY PLANNING COMMISSION (APPEALABLE TO THE CITY COUNCIL)** ☐ Granting an application to: OR ☐ Denying an application to:

YOU MUST INDICATE ALL THAT APPLY:

Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☐ Major Conditional Use Permit (OPC Sec. 17.134.070)
- ☐ Major Variance (OPC Sec. 17.148.070)
- ☐ Design Review (OPC Sec. 17.136.090)
- ☐ Tentative Map (OMC Sec. 16.32.090)
- ☐ Planned Unit Development (OPC Sec. 17.140.070)
- ☐ Environmental Impact Report Certification (OPC Sec. 17.158.220F)
- ☐ Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- ☐ Revocation/impose or amend conditions (OPC Sec. 17.152.160)
- ☐ Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- ☐ Other (please specify) _____

FOR ANY APPEAL: An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision.

You must raise each and every issue you wish to appeal on this Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Appeal Form (or attached additional sheets), and provide supporting documentation along with this Appeal Form, may preclude you from raising such issues during your appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

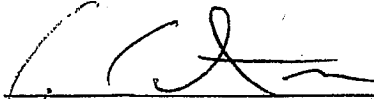
The appeal is based on the following: *(Attach additional sheets as needed.)*

PLEASE SEE ATTACHED DOCUMENT WHICH SETS FORTH ALL THE LEGAL AND FACTUAL
FOR THIS APPEAL

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form; however, the appeal will be limited evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.)*

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Signature of Appellant or Representative of
Appealing Organization

July 22, 2013

Date

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Below For Staff Use Only

Cashier's Receipt Stamp Below:

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ATTACHMENT A

TO THE CITY OF OAKLAND, CALIFORNIA
PLANNING COMMISSION

APPEAL OF THE ZONING MANAGERS' DENIAL
OF
CONDITIONAL USE PERMIT APPLICATION
CU12-238; 1901 BROADWAY (APN: 008-0636-004)

Submitted by Applicant Norcal Health Care Inc.

STATEMENT OF LEGAL AND FACTUAL BASIS OF APPEAL

1) THE ZONING MANAGER HAS BASED HIS DETERMINATION IN LARGE PART ON THE UNFOUNDED AND WHOLLY UNSUBSTANTIATED ASSERTION THAT THE AREA IN WHICH 1901 BROADWAY IS LOCATED IN A LOW VACANCY AREA.

The Zoning Manager has asserted at the top of page 4 of his decision that,

According to the City's Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site.

Such assertion is a conclusionary statement without any factual basis and is directly contradicted by evidence provided in Applicant's Conditional Use Application at page 5 -6. This section of the application sets forth a plethora of vacancies and closed businesses which to this date, continues to plague both sides of Broadway between 20th and 17th Streets. These facts are easily verified by a causal stroll in this vicinity. This factual error is so legally significant that it should render the Zoning Manager's denial improper. It is respectfully suggested that the proper remedy should be to send the Application back to the Zoning Manager with instruction to correct this error.

2. THERE IS NO COMPETENT FACTUAL BASIS WHICH SUPPORTS THE FINDING THAT THE APPLICANT'S MEDICAL PRACTICE AND ATTENDED SERVICES WOULD HAVE AN ADVERSE IMPACT ON THE ON THE CHARACTERISTICS WHICH MAKES THE AT ISSUE NEIGHBORHOOD DESIRABLE.

1 This portion of the decision of the Zoning Mangers' denial of Petitioners CUP is based in
2 large part on the inaccurate generalized assumption that,

3 A Medical Services activity, in particular, tends to have a negative impact on the streetscape
4 *because* (emphasis added) it creates relatively little foot traffic and the windows of medical
5 clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the
6 current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside).
7 Hence, the activity creates a "hole" in a vibrant urban streetscape.

8 It is insufficient to rely on general assumptions such as this when the facts specific to this
9 property are so clearly not applicable. Petitioners has stated in his application that **all** the windows
10 facing both the 19th Street side as well Broadway Street side will be opened for viewing by
11 pedestrians. There is absolutely no basis for the Zoning Manager to wrongly assert that "the windows
12 of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside" It is
13 patently false and cannot legally or factual be sufficient to sustain the denial of this application.

14 The Zoning Manager also utterly failed to provide any factual basis that the Applicant's
15 current and purposed use would create relatively little foot traffic. He ignored the fact that Norcal
16 currently employs approximately 25 persons and sees approximately 40-60 patients daily as well as
17 approximately 8-10 members of the general public. He also, without any factual or legal basis simply
18 dismissed the fact that the proposed and actual uses as set forth in Applicants CUP would
19 significantly increase the already sizable pedestrian traffic Norcal Health Care creates.

20 **3. THE ZONING MANGER COMPLETELY FAILED TO CONSIDER THE POSITIVE IMPACT**
21 **THAT THE APPLICANTS SECOND AMENDED/SUPPLEMENTAL FLOOR PLAN AND**
22 **DESCRIPTION PROVIDE.**

23 The Applicant submitted the Proposed Second Amended CUP to specially heighten the
24 quality of the pedestrian browsing experience and to increase pedestrian interest and traffic. The
25 proposal included the repurposing of the front portion of the premises which is approximately 24'-6
26 1/2" x 52'-2 1/2" and fronts Broadway and a portion of 19th Street. Such repurposing would result in the
27 opening of the substantial view/window corridor for both the 19th and Broadway Street frontage areas
28 of the property. The 19th Street window line will display various alternative pharmacy products as
well as local art work by local artists for sale while the Broadway window line will provide inviting
view corridors of the entire area.

The Applicant has proposed to refurbish this area to include seating capacity for 43 using bar
height round tables with seating for 4 as well as a small easy chair conservation area. The purposed
plan will increase the opportunity for the residents of the area as well as the general public to gain
access to the interior as well as to provide needed services that are currently lacking in the immediate
area.

Unfortunately the Zoning Manager utterly failed to address any of the significant benefits of
Applicant's proposed changes even though it addresses his concerns of the lack of view corridors and
an attraction of "retail customers". Instead, he focused on whether or not the, "...space will primarily
remain a waiting room". The applicable codes do not address this distinction, nor do the codes
attempt to distinguish pedestrian traffic into any other subgroups as the Zoning Manager has
improperly suggested.

1 Simply put the Zoning Manager failed to supply any factual basis to support the assertion that
2 the actual and proposed uses of this portion of the subject property will create, "...a 'hole' in a
3 (otherwise) vibrant urban streetscape". This omission renders such objections legally and factual
irrelevant.

4 4. THE ZONING MANAGER PROVIDED NO LEGALLY COMPETENT BASIS TO
5 CONCLUDED THAT THE APPLICANATS' PROPOSED AND ACTUAL USE WOULD NOT
6 PROVIDE A CONVENTIENT AND FUNCTIONAL LIVING, WORKING, SHOPPING OR CIVIC
ENVIRONMENT.

7 The only proffered basis to support this conclusion offered by the Zoning Manager was based,
8 once again, solely on a flawed assumption that,

9 "The proposed Medical Services Commercial activity in the CBD-P zone will detract from
10 the functional living, working, shopping and civic environment of the surrounding
neighborhood **because such an activity does not typically draw in pedestrian traffic looking
for an active shopping or dining experience, which is desired along the ground floor.**"

11 Clearly, such conclusionary statements do not reflect what the Applicant's actual and
12 proposed uses are and as such should not be accorded any legal or factual significance. Applicant
13 does, however, agree that the "critical element" in determining the legal and factual merit of this
14 application is whether or not the actual and proposed use will increase or reduce the overall
pedestrian browsing experience. Such determination must not, as a matter of law, be based on
15 speculation or without consideration of the specific facts related to the Applicant's proposed and
actual use. The Zoning Manager failed to comply with this requirement in this instance.

16 5. THE ZONING MANAGER HAS IMPROPERLY IMPOSED A REQUIREMENT THAT THE
17 APPLICANT MUST PROVE THAT ITS PROPOSAL WOULD ELIMINATE THE
SPECTULATIVE OPPORTUNITY FOR MORE ACTIVE USES OF ITS LOCATION.

18 On page 6 under subheading a. the Zoning Manager without any legal authority has stated that

19 Although the proposal does not involve extensive alterations, the current design and layout of
20 the building is suitable for retail, restaurant, and other activities due to its high ceilings, large
21 windows, high-quality storefront facade, and corner location on a major thoroughfare. **The
proposal would eliminate the opportunity for more active uses at this key ground floor
location.** (emphasis added)

22 This assertion is not referenced to any code or other law because no such legal requirement
23 exists. There is no code or policy that mandates this Applicant or any other must demonstrate that the
24 proposed or actual use in the CUP will not eliminate the, "opportunity for more active uses" that any
25 other hypothetical business may be able to general at the same location. Yet, this is exactly what the
Zoning Manager has required of this applicant. Such requirement is without any legal authority and
26 would result in the imposition of an unconstitutional vague requirement and must therefore be
disregarded.

27 //

28 //

1 6. THE APPLICANT HAS ESTABLISHED THAT ITS PROPOSAL WILL NOT INTERFERE
2 WITH THE MOVEMENT OF PEOPLE ALONG AN IMPORTANT PEDESTRAIN STREET

3 The Zoning Manager has stated at page 7 subheading c that,

4 The proposal will not necessarily interfere with the movement of people along an important
5 pedestrian street. However, such a medical service use at ground level will not contribute to
6 the necessary intensity of ground floor pedestrian activity and interest, as summarized in
earlier findings.

7 Such statement is legally so vague and equivocal that it is legally insufficient to be considered
8 anything other than speculation. As such it is submitted that this finding should be completely
disregard as incompetent evidence.

9 7. THE ZONING MANAGER FAILED TO ADDRESS THE EVIDENCE PROFFERED BY THE
10 APPLICANT THAT ITS PURPOSED AND ACTUAL USE WIL INCREASE TRAFFIC- AND
11 OFFER DIFFERENT AND NEEDED SERVICES AS SET FORTH IN THE PLANNING CODE
AND THE GENERAL PLAN

12 The Oakland General Plan established that one of its objects as set forth in
13 Objective D9 is to emphasize the, "... establishment, promotion and retention of commercial
14 business that serve the needs of downtown workers and residents". Its associated Policy D9.2 states
that Downtown residents should, "... have access to goods and services to meet their daily and long
term needs with the downtown area."

15 Additionally, as set forth in Applicants' CUP, one of the primary medical services offered by
16 Norcal Health Care is consultations with patients who suffer from a medical condition that may be
benefited by the use of Medicinal Marijuana. The city of Oakland, as has been set forth in all
17 versions of the at issue CUP, has consistently stated its unequivocal support of its citizens rights to
avail themselves of the protection of California's Compassionate Use Act.

18 One of the manifestation of such support has been the official policy of Oakland to welcome
19 services related to the support of California's Medical Marijuana laws. The City has consistently
encouraged legal businesses related to medical marijuana services to locate in the exact vicinity of
20 Applicants leasehold. In fact the area of Broadway and 19th has been informally designated as
"Oaksterdam" and there are several businesses in the area that specialized in providing various
21 services related to medical marijuana.

22 The Applicant has also set forth the official policy of the City regarding Medical Marijuana as
expressed in a recent filing the City Attorney made in the local Federal District Court. In such filing
the City stated:

23 Oakland has a broad public interest in promoting the health, safety and welfare of its citizens,
24 in protecting the regulatory framework it adopted in compliance with the laws of the State of
California concerning medical cannabis and in receiving tax revenue from the well-regulated
25 medical cannabis dispensaries located within its borders.

26 As a matter of law the Planning department is required to acknowledge that this has been
27 established as the policy of the City in making its determination of various aspects of the within CUP.
However, for reasons unstated the Zoning Manager simply ignored this important established fact.

1 Its failure to do so is a significant legal error as many of the legally imposed criterion necessary to
2 determine issues related to this appeal require establishing whether Applicant's proposed and actual
uses are, "...different and needed services as set forth in the planning code and the general plan"

3 The Departments failure to do so should be interpreted by the Planning Board as an admission
4 by the Zoning Manger that Applicant's CUP does in fact provide needed services that are officially
5 encouraged to locate their business in this area. To not do so would, in the opinion of the Applicant,
render any denial legally and factual unsupported.

6 **8. OAKLAND WAIVED THE RIGHT TO DENY CUP BY ISSUING A BUSINESS PERMIT TO**
7 **APPLICANT IN 2011 AND 2012**

8 The issuance of business permit to petitioner is predicated on a review of the planning
9 department in order to ensure that the use of the property in which the applicant conducts its business
10 is in conformity with the applicable zoning requirements. This is verified on the City of Oakland's'
Website for the Finance and Management Agency located at
http://www.oaklandnet.com/government/fwawebbsite/revenue/revenue_biztaxreq.htm.
11 At this website the following information is highlighted:

12 If your business office is located in Oakland, you need to obtain a zoning clearance from the
13 Zoning Division prior to commencing your business.

14 Petitioner has establish in his original filing of the at issue CUP the he became the owner of
15 Norcal Health Care Inc. in March of 2010 and as such the first opportunity he had to file for a
16 business permit under his name was in March of 2011, which he in fact did In order to receive his
17 business license the Finance and Management Agency must first have the application checked by the
18 city's Planning Department to ensure that such business is properly zoned for such use.
19 Consequently, Norcal is legally entitled to rely on the issuance of such business license as an official
acknowledgment by the City of Oakland's Planning Department that Norcal Health Care's occupancy
at 1901 Broadway was in conformity with the applicable zoning requirements. As such it is
Petitioner position that the Planning Department is now equitably estopped from asserting that, "The
medical clinic has been operating at the location without the benefit of a permit since March of
2010."

20 **9. THE ONLY LETTER RECEIVED BY THE DEPARTMENT IN RESPONSE TO THE POSTED**
21 **NOTICE OF APPLICATION WAS THE RESULT OF A SOLICATION BY AN EMPLOYEE OF**
22 **THE DEPARMTNE AND NOT THE VIOLATION OF THE AUTHOR OF SUCH LETTER.**

23 It is undisputed that the department only received a single letter from the public in response to
24 the posted notice regarding the pendency of the within application for a CUP. That letter was dated
25 January 25, 2013 and was written by Steve Snider, District Manager of the Lake Merritt-Uptown
26 District Association and is part of the record. The letter was supportive of the Zoning Manager
position; however, Applicant has learned that such letter was solicited by an employee of the
Planning Department.

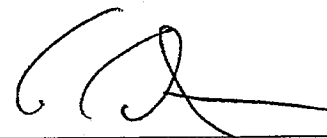
27 1. As proof of this assertion Applicant has attached a declaration of Warren Malnick the
28 managing partner of the entity which owns the subject property. His declaration stated that he was

1 informed by Andrew Jones, an associate of Mr. Snider and employed by the Lake Merritt-Uptown
2 District that the letter that the Lake Merritt-Uptown District Association sent to the Planning
3 Department dated January 25, 2013 was sent because their office received a request from an
4 employee of the Planning Department to send in a letter opposing this CUP. Clearly, any letter that is
5 solicited by the Planning Department to support their desire to deny the application for a CUP
6 constitutes a serious breach of the integrity of the entire process and is legally impermissible.

7
8
9 CONCLUSION

10 It is respectfully submitted that Applicant has identified many legal and factual error and or
11 omission made by the Zoning Manager in his determination to deny the at issue CUP. The sum total
12 of these identified legal and factual error are more than sufficient to either overturn the denial or at a
13 minimum, require that the Zoning Manager correct these errors and omission and issue a decision
14 that incorporates these corrections.

15
16
17 Dated: July 22, 2013


By, Steven Schectman
Attorney for Applicant

DECLARATION OF WARREN MALNICK
RE:CU12-238

WARREN MALNICK hereby declares as follows:

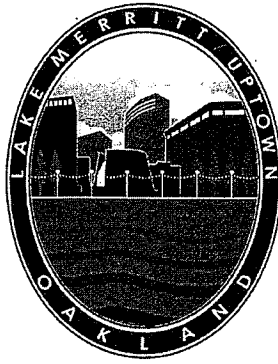
1. I am a resident of the State of California and above the age of majority. I am managing partner of Fruitvale Investments, LLC which is owner of the property located at 1901 Broadway, Oakland CA and in such capacity I am responsibility for the operation and care of this property. If called as a witness in this matter I could testify to the matters stated herein of my own knowledge, except for such matters as are stated to be based upon my information or belief.

2. 1901 Broadway has been owned by my family for approximately 10 years. During that time we have come to know the neighborhood and the merchants and pedestrian that frequents the area. One of the many business people I have meet as a result of my ownership interest in the subject property are Steve Snider and Andrew Jones. Mr. Snider and Mr. Jones are involved in various community enterprises including the Lake Merritt-Uptown District Association of which I am a member.

3. I spoke with Mr. Jones in later January or early February of 2013 regarding a letter that the Lake Merritt-Uptown District Association had send the Mr. Gray who works for Oakland's planning department regarding the CUP that my tenants, Norcal Health Care Inc. have pending in the planning department. During this conversation Mr. Jones told me that the letter that the Lake Merritt-Uptown District Association sent to the Planning Department dated January 25, 2013 was sent because their office received a request from an employee of the Planning Department to send in a letter opposing this CUP.

4. I declare under penalty of perjury that the above is true and correct. Executed in Oakland California, on July 22, 2013.


Warren Malnick



Steve Snider
District Manager
Lake Merritt-Uptown District Association
388 19th Street
Oakland, CA 94612
510-238-1122

January 25, 2013

Mr. Neil Gray
Case Planner
City of Oakland

RE: Case File Number CU12-238

Dear Mr. Gray,

It is the opinion of the Lake Merritt-Uptown District Association (LMUDA) that the current use of the prominent, street level storefront at 1901 Broadway, NorCal Health Care, is not conducive to our vision for the district and not complementary to other ground floor uses. It is also of concern that we have been informed by the City that this business has been operating without a CUP in place and was not subject to the design review process, setting an undesirable precedent.

LMUDA is supportive of businesses that activate ground floor, street level properties along the Broadway corridor. Well lit and inviting windows for retail, restaurant, bar, café and entertainment venues are the best usage for street level properties in the Uptown District. Our organization is actively working to fill all vacant properties and enhance the pedestrian experience in the district. We would like to discourage usages that provide no opportunities for pedestrian engagement by using window treatments that block the view of the business and its patrons. Our aim is to support businesses that draw pedestrians into the business or generally engage and create interest from the general public.

Thank you for your consideration. If you have any questions or would like further clarification please feel free to contact me.

Thank you.

Sincerely,

Steve Snider
District Manager
Lake Merritt-Uptown District Association

Attachment D

LAKE MERRITT UPTOWN ASSOCIATION

388 19th Street • Oakland, California 94612
Phone 510.452.4529 • Fax 510.452.4530 • info@lakemerritt-uptown.org • www.lakemerritt-uptown.org

ATTACHMENT E: CHANGES TO ORIGINAL FINDINGS

The Revised Findings in the September 11, 2013 staff report revise the initial findings in the July 11, 2013 decision letter (see Attachment A to the July 11, 2013 letter). The Revised Findings clarify and refine the initial Findings, and are consistent with the initial Findings.

This attachment shows the differences between the initial findings in the July 11, 2013 decision letter and the Revised Findings contained in this report.

Language that has been added to the initial Findings is shown in underline type, and language that has been deleted from the initial Findings is shown in ~~strikethrough~~.

17.134.050 - General Use Permit Criteria. Except as different criteria are prescribed elsewhere in the zoning regulations, a conditional use permit shall be granted only if the proposal conforms to all of the following general use permit criteria, as well as to any and all other applicable use permit criteria:

- A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development;

The proposal does not meet this finding because it negatively impacts the pedestrian experience and mix of activities in the District. This impact has an adverse effect on the desirable neighborhood character of Uptown and the success of abutting properties by reducing the quality of the district as a whole.

The proposal is located in an active ~~The proposal does not meet this finding for the following reasons:~~

commercial area with a character desired by the City and intended by the Planning Code. The site is located in the CBD-P zone, a designation that encourages a clustering of pedestrian oriented activities on the ground floor. Section 17.58.010 of the Planning Code describes the intent of the CBD-P zone to: "create, maintain, and enhance areas of the Central Business District for ground-level, pedestrian-oriented, active storefront uses. Upper story spaces are intended to be available for a wide range of office and residential activities".

~~Approval of the Medical Services Commercial Activity would have an adverse effect on this desirable neighborhood~~

The district has a character:

~~The proposal is located in an active storefront area intended by the Planning Code.~~ this zoning designation and desired by the City. The site is part within of the Uptown District, a thriving and still developing regional retail, arts, dining, and entertainment area ~~destination~~ in Downtown Oakland that is anchored by the Fox and Paramount Theaters, several night clubs, retail stores, galleries, and the monthly Art Murmur event. Two popular restaurants, Duende and Flora, are adjacent to the site and the Fox Theater is approximately 200 feet from the site. According to the City's

Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. ~~There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site. The building, the former location of the J. Malnick clothing store, contains large windows and a traditional storefront façade that is ideal for a restaurant, retail, or other active use. The Neighborhood Investment Division also expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets.~~

The proposal would have an adverse effect on this desired neighborhood character. The success of commercial districts such as Uptown depends on successful a mix of ground floor arts, entertainment, restaurant, and retail uses. This package of related businesses creates an attractive entertainment destination for the region by providing an interesting mix of activities. A ground floor Medical Services activity such as that proposed weakens the district because it attracts relatively little foot traffic and does not contribute to its mix of ground floor arts, retail, dining, and entertainment activities. The appropriate use of the subject site is particularly important to the success of the District because it is near the Fox and Paramount Theaters, two major activity centers, and adjacent to two popular restaurants, Duende and Flora.

A medical ~~The Planning Code identifies Medical Service Commercial Activities to be a use that may not be appropriate in active storefront neighborhood such as the Uptown District. Section 17.58.040 of the Planning Code identifies active storefront activities that create pedestrian traffic and interest (e.g. General Retail Sales, General Food Sales, Full Service Restaurants, etc.) by allowing them to be located anywhere on the ground floor without requiring the granting of a conditional use permit. Other activities, such as Medical Service, that do not create high pedestrian activity or visual interest require the granting of a Conditional Use Permit (CUP) to be located within the front 30 feet of the ground floor. The criteria required to be met to be granted the CUP (see below) requires that the activity will not detract from an existing or potential clustering of ground floor active uses. A Medical Services activity, in particular, tends to have a negative impact on the streetscape because it creates relatively little foot traffic and the windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). Hence, the activity creates a “hole” in a vibrant urban streetscape.~~

~~Weakening the concentration of pedestrian oriented businesses also affects the appropriate development and success of abutting properties because the proposed clinic will attract fewer retail customers into the neighborhood than other types of businesses. The regional attraction of the entire district can also be affected by lowering the quality of the pedestrian browsing experience.~~ clinic also tends to create a “hole” in a vibrant commercial storefront area because it does not provide an active street front or the browsing opportunities that create visual interest for pedestrians. The windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (darkened windows were on the front façade of the clinic as of an 8/21/13 site visit by staff). An attractive pedestrian experience also depends on creating a synergy between businesses where people walk to and from a mix of related businesses. People visit the district to be entertained by its package of art galleries, restaurants, theaters, and stores and walk to and from the

different businesses providing these services. A medical clinic is not normally included in this chain of pedestrian destinations.

The applicant amended his original proposal to include: 1) a "pharmacy window" that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for 43 people; 3) three food vending machines; and 4) art exhibits. These features would be located in what is currently the waiting area for patients of the clinic. Presumably, these changes were proposed to place more active uses in the area adjacent to Broadway to meet the intent of the CBD-P zone. However, staff believes that the space will primarily remain a waiting room because the floor area adjacent to Broadway and the clinic are proposed to be fully integrated through four shared doors, a shared reception and "pharmaceutical display" area, and a shared entrance on Broadway (an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans proposed seating for 43 people, many more seats than are required for customers eating food from three vending machines.

- B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant;**

The proposal does not meet this finding. The proposed Medical Services Commercial activity in the CBD-P zone will detract from the functional living, working, shopping and civic environment of the surrounding neighborhood because such an activity does not typically draw in pedestrian traffic looking for an active shopping or dining experience, which is desired along the ground floor. the proposed clinic will reduce the attraction of the district as a whole. The success of commercial districts such as Uptown depends on a mix of ground floor arts, entertainment, restaurant, and retail uses that attract visitors from throughout a region. This package of related businesses creates a regional destination by providing an interesting mix of related activities. A medical clinic is not considered part of the mix of related activities that attracts visitors to an arts and entertainment district such as Uptown. The appropriate use of the subject site is particularly important to the success of the District because it is near the Fox and Paramount Theaters, two activity centers for the District, and adjacent to two popular restaurants, Duende and Flora.

Weakening the concentration of pedestrian oriented businesses on the ground floor will also weaken the function of the District as a whole by reducing the overall pedestrian browsing experience. (see Finding A, above). This experience is a critical element to the function and success of any commercial district.

- C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;**

The proposal ~~would~~may provide an essential service to the community by establishing a health clinic on the site. However, such use should be located ~~on a 2nd (or higher) above the ground floor at this location~~ to avoid the adverse impacts identified in other findings. The Planning Code requires all of the ~~General~~Conditional Use Permit findings to be met in order to approve a CUP.

- D. ~~D.~~ That the proposal conforms to all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050;**

No design review is required because the proposal does not involve any exterior alterations.

- E. ~~E.~~—That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.**

Part of the intent for the LUTE (Land Use and Transportation Element of the General Plan) Central Business District land use classification is to enhance Downtown as a high density mixed use urban center of regional importance with an emphasis on ground floor retail, restaurants, and entertainment uses. For instance:

- Policy D3.1 of the City of Oakland General Plan Land Use and Transportation Element Promoting Pedestrians, states that pedestrian-friendly commercial areas should be promoted; and
- Policy D5.1 of the LUTE, Encouraging Twenty-Four Hour Activity, states: activities and amenities that encourage pedestrian traffic during the work week, as well as evenings and weekends should be promoted.

The proposal for a ground floor Medical Services Commercial Activity at this location does not create, maintain, or enhance such ground-level, pedestrian-oriented, active storefront uses for the reasons described in other findings and, therefore, does not conform to the Central Business District General Plan designation and this finding cannot be made.

CBD-P Central Business District Pedestrian Retail Commercial Zone 17.58.40 (L5) Additional CUP findings:

If located both on the ground floor of a building and within thirty (30) feet from any street-abutting property line, these activities are only permitted upon the granting of a conditional use permit (see Chapter 17.134 for the CUP procedure). Incidental pedestrian entrances that lead to one of these activities elsewhere in the building are exempted from this conditional use permit requirement. In addition to the criteria contained in Section 17.134.050, these conditionally permitted ground floor proposals must also meet each of the following criteria:

- A. The proposal will not impair a generally continuous wall of building facades;**

The proposal does not meet this finding.

Although the proposal does not involve extensive alterations, the ~~current design and layout of the building are~~ is suitable for retail, restaurant, and other active due to its high ceilings, large windows, high-quality storefront façade, and corner location on a major thoroughfare. The proposal would eliminate the opportunity for more active uses at this key ground floor location.

Also, medical ~~Services~~ clinics tend to frost or darken windows to protect the privacy of patients (as of a site visit on 8/21/13, the windows of the current, unpermitted clinic are mostly darkened ~~so that~~ making it difficult for pedestrians ~~cannot~~ to look inside). This lack of transparency interrupts the pedestrian experience and impairs the continuous wall of building facades. Hence, the activity creates a “hole” in a vibrant urban streetscape.

B. The proposal will not weaken the concentration and continuity of retail facilities at ground-level, and will not impair the retention or creation of an important shopping frontage;

This finding cannot be made. The proposal will weaken the concentration and continuity of retail facilities at ground-level and will impair the retention and creation of the Uptown shopping district. As described in other findings, the clinic weakens the concentration of the types of activities that make the district a regional attraction and creates a discontinuity in retail facilities due to its lack of browsing opportunities and visual interest.

~~The proposal is located in an active storefront area intended by the Planning Code. The site is part of the Uptown District, a thriving retail and entertainment area in Downtown Oakland that is anchored by the Fox and Paramount Theaters, several night clubs, retail stores, galleries, and the monthly Art Murmur event. Two popular restaurants, Duende and Flora, are adjacent to the site and the Fox Theater is approximately 200 feet from the site. According to the City's Neighborhood Investment Division, the District has a low vacancy rate and is considered a healthy commercial market. There is a high demand for restaurant space, particularly for corner locations on a major thoroughfare that have large windows, such as the subject site. The building, the former location of the J. Malnick clothing store, contains large windows and a traditional storefront façade that is ideal for a restaurant, retail, or other active use. The Neighborhood Investment Division also expects the success of Uptown to continue to spread along Broadway, particularly between 18th and 20th Streets. A medical Services activity would have a negative impact on the retention and growth of this entertainment and retail district because it creates relatively little foot traffic or customers and the windows of medical clinics tend to be darkened or frosted to protect the privacy of patients (the windows of the current, unpermitted clinic are mostly darkened so that pedestrians cannot look inside). Hence, the activity creates a "hole" in a vibrant urban streetscape. The regional attraction of the entire district would also be affected by reducing the overall pedestrian browsing experience.~~

~~The applicant amended his original proposal to include: 1) a "pharmacy window" that sells alternative health products that will be in the window and interior display cases; 2) tables and chairs for 43 people; 3) food vending machines; and 4) art exhibits. These features would be located in what is currently the waiting area for patients of the clinic. Presumably, these changes were proposed to place active uses in the area adjacent to Broadway that meet the intent of the CBD-P zone. However, staff believes that the space will primarily remain a waiting room because the floor area adjacent to Broadway and the clinic are proposed to be fully integrated through four shared doors, a shared reception and "pharmaceutical display" area, and a shared entrance on Broadway (there is an existing door on 19th Street could be used as a separate entrance into the clinic). Also, the floor plans proposed seating for 43 people, many more seats than are required for customers eating food from three vending machines.~~

C. The proposal will not interfere with the movement of people along an important pedestrian street.

The proposal will not necessarily interfere with the movement of people along an important pedestrian street. However, such a medical service use at ground level will not contribute to the necessary intensity of ground floor pedestrian activity and interest, as summarized in earlier findings.