



**TYPE III – VARIANCE  
STAFF REPORT AND RECOMMENDATION**

*July 17, 2017*

**FILE NUMBER:** VR 17-05: Variance

**APPLICANT:** Travis Moffatt, 6100 SE 111th Ave, Portland, OR 97267

**OWNER:** Spray Building LLC  
1015 Molalla Ave, Oregon City, OR 97045

**REPRESENTATIVE:** Corinne Celko, Emerge Law Group,  
805 SW Broadway, Ste. 2400, Portland, Oregon 97205

**REQUEST:** Variance from OCMC 17.54.110.(C)(1), to locate a marijuana retail dispensary ("The Green Planet") within 250 feet of a public park (Mountainview Cemetery).

**LOCATION:** 1015 Molalla Avenue, Oregon City, Oregon 97045  
Clackamas County Map 3-2E-05BD, Tax Lot 00402

**REVIEWER:** Pete Walter, AICP, Planner, (503) 496-1568, Email: [pwalter@orccity.org](mailto:pwalter@orccity.org)

**RECOMMENDATION:** Denial

**PROCESS:** Type III Quasi-Judicial Public Hearing. Pursuant to OCMC 17.50. C. Type III decisions involve the greatest amount of discretion and evaluation of subjective approval standards, yet are not required to be heard by the city commission, except upon appeal. In the event that any decision is not classified, it shall be treated as a Type III decision. The process for these land use decisions is controlled by ORS 197.763. Notice of the application and the planning commission or the historic review board hearing is published and mailed to the applicant, recognized neighborhood association(s) and property owners within three hundred feet. Notice must be issued at least twenty days pre-hearing, and the staff report must be available at least seven days pre-hearing. At the evidentiary hearing held before the planning commission or the historic review board, all issues are addressed. The decision of the planning commission or historic review board is appealable to the city commission, on the record. The city commission decision on appeal from the historic review board or the planning commission is the city's final decision and is appealable to LUBA within twenty-one days of when it becomes final. A city-recognized neighborhood association requesting an appeal fee waiver pursuant to 17.50.290(C) must

officially approve the request through a vote of its general membership or board at a duly announced meeting prior to the filing of an appeal. IF YOU HAVE ANY QUESTIONS ABOUT THIS APPLICATION, PLEASE CONTACT THE PLANNING DIVISION OFFICE AT (503) 722-3789.

#### **I. BACKGROUND:**

Recreational marijuana retail stores are permitted in the Mixed Use Corridor MUC-1 zone (and certain other commercial zones) subject to the Marijuana Business regulations which were adopted by the City in 2016 (Ordinance No. 16-1008). These regulations were adopted following passage of Ballot Measure 3-508 which referred to the voters of Oregon City the question of whether or not to continue the City's local ban on Marijuana Businesses within the city. The ballot measure was not approved and marijuana businesses are now permitted within the City subject to applicable state and local laws.

Oregon City Municipal Code ("OCMC") section 17.54.110 provides a variety of local restrictions for the siting of marijuana businesses, such as separation requirements between retailers and 17.54.110(C)(1) requires that a marijuana retailer shall not locate within two hundred fifty feet (250') of any public park, licensed child care and day care facilities, and public transit centers. This distance is measured as a straight line from the closest points between property lines of the affected properties under OCMC section 17.54.110(C)(5).

The subject Property is approximately eighty-five (85) feet from the property line of Mountain View Cemetery ("the Cemetery"). The Cemetery is designated as the City's official cemetery and a public park under OCMC chapter 12.20, as authorized by Oregon City Ordinance No. 01-1011.

The City's marijuana business regulations, including buffers, went before the Planning Commission and City Commission on the dates listed below. Minutes, reports, and videos of these meetings are available at <https://oregon-city.legistar.com/Calendar.aspx>.

#### Planning Commission

July 11, 2016

July 25, 2016

August 8, 2016

#### City Commission

August 9, 2016

August 17, 2016

September 7, 2016

September 21, 2016

October 5, 2016

October 19, 2016

The minutes of the hearings are attached as Exhibits to this report.

#### **1. Existing Conditions**

Photographs of the property from Molalla Avenue, Harris Lane, and from the Cemetery are provided in the attached exhibits.

The zoning for the Property is Mixed-Use Corridor 1 (MUC1). Adjacent property to the north, south, east, and west is of the same zoning designation. Adjacent property to the north and west is developed with retail sales and service and office uses, including a salon, gas station, tax preparer,

and vehicle service station. Adjacent property to the south is used for professional offices. Adjacent property to the east is developed with multifamily row housing.

The Property is developed with existing retail, parking, and landscaping. Current tenants include a Mexican restaurant, drywall company, and a motorsports sales and service shop.

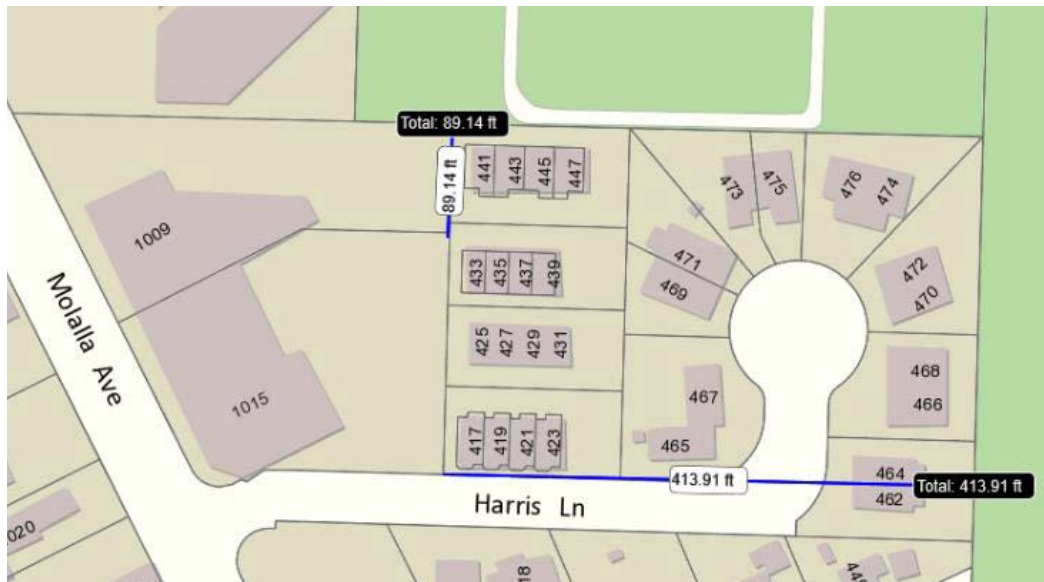


Figure 1. Vicinity Map



## 2. Project Description

The proposed application would allow Green Planet to occupy an existing restaurant tenant space on the Property for the use of a recreational marijuana retail business (the "Proposed Use," "Use"). The proposed use involves the retailing of usable marijuana, marijuana concentrates, marijuana-infused products, immature marijuana plants, accessory products, and administration. This application proposes a Major Variance from the requirement that such a marijuana retailer be located at least two hundred fifty (250) feet from the Cemetery. The Cemetery is considered a park and is approximately 89 feet from the Property. No exterior alterations are proposed to the exterior of the property with this application.

## 3. Municipal Code Standards and Requirements: The following sections of the Oregon City Municipal Code are applicable to this land use approval:

- 17.29 – Mixed Use Corridor District
- 17.50 - Administration and Procedures
- 17.54.110 – Marijuana Businesses
- 17.60 – Variances

The City Code Book is available on-line at [www.orecity.org](http://www.orecity.org).

## 4. Permits and Approvals: The applicant is responsible for obtaining approval and permits from each applicable governmental agency and department at Oregon City including but not limited to the Engineering and Building Divisions. In this case, the Oregon Liquor Control Commission (OLCC) has regulatory authority for final permitting of Marijuana Businesses under state law. The City's local land use regulations apply in addition to OLCC regulations, but do not supersede them.

The applicant submitted all of the following required items for business licensing within the 90-day business license period required by the City:

- Documentation from OLCC that a complete application has been submitted.
- A Signed Land Use Compatibility Statement (LUCS).
- Documentation that a complete permit application for an air filtration and ventilation system certified by an Oregon Licensed Mechanical Engineer and associated fees have been submitted to the Building Division.
- Documentation that complete building permits required to operate the business have been submitted (change of occupancy, etc.).

Subsequently, the applicant has been issued a conditional Business License pending the Planning Commission's determination for this variance application. If the variance is not approved, the business will not be permitted to open.

## 5. Notice and Public Comment

Notice of the proposal was sent to various City departments, affected agencies, property owners within 300 feet, and the Barclay Hills Neighborhood Association. Notice was provided in the Oregon City News / Clackamas Review. Additionally, the subject property was posted with signs identifying that a land use action was occurring on the property.

Written public comment was received from Larry Krause on August 25, 2017. Mr. Krause opposes approval of the variance for a variety of reasons (See Exhibit). Mr. Krause argues that the purpose of protecting grieving individuals from "severely prohibitive" nature of retail marijuana businesses is

not served by allowing this use. Further, Mr. Krause asserted that a practicable alternative has been identified by an alternate location, ostensibly for for a marijuana retail use further down Molalla Avenue. Mr. Krause notes concern over the precedent granting such a variance could set.

Mr. Krause's statement that "Our proposal, to build a new commercial Retail Store Building further down Molalla Ave, has already been approved by the Oregon City Planning Department..." is incorrect. A pre-application conference does not constitute land use approval.

No comments were received from the Public Works Department.

## **II. ANALYSIS AND FINDINGS:**

The applicant provided detailed code responses and a narrative. Staff's findings of compliance with the applicable code sections is detailed in the findings below.

### **CHAPTER 17.29 "MUC" MIXED USE CORRIDOR**

#### ***17.29.020 - Permitted uses.***

- A. Banquet, conference facilities and meeting rooms;*
- B. Bed and breakfast and other lodging facilities for up to ten guests per night;*
- C. Child care centers and/or nursery schools;*
- D. Indoor entertainment centers and arcades;*
- E. Health and fitness clubs;*
- F. Medical and dental clinics, outpatient; infirmity services;*
- G. Museums, libraries and cultural facilities;*
- H. Offices, including finance, insurance, real estate and government;*
- I. Outdoor markets, such as produce stands, craft markets and farmers markets that are operated on the weekends and after six p.m. during the weekday;*
- J. Postal services;*
- K. Parks, playgrounds, play fields and community or neighborhood centers;*
- L. Repair shops, for radio and television, office equipment, bicycles, electronic equipment, shoes and small appliances and equipment;*
- M. Residential units, multi-family;*
- N. Restaurants, eating and drinking establishments without a drive through;*
- O. Services, including personal, professional, educational and financial services; laundry and dry-cleaning;*
- P. Retail trade, including grocery, hardware and gift shops, bakeries, delicatessens, florists, pharmacies, specialty stores, marijuana pursuant to Section 17.54.110, and similar, provided the maximum footprint for a stand-alone building with a single store or multiple buildings with the same business does not exceed sixty thousand square feet;*
- Q. Seasonal sales, subject to OCMC Section 17.54.060;*
- R. Assisted living facilities; nursing homes and group homes for over fifteen patients;*
- S. Studios and galleries, including dance, art, photography, music and other arts;*
- T. Utilities: Basic and linear facilities, such as water, sewer, power, telephone, cable, electrical and natural gas lines, not including major facilities such as sewage and water treatment plants, pump stations, water tanks, telephone exchanges and cell towers;*
- U. Veterinary clinics or pet hospitals, pet day care;*
- V. Home occupations;*
- W. Research and development activities;*
- X. Temporary real estate offices in model dwellings located on and limited to sales of real estate on a single piece of platted property upon which new residential buildings are being constructed;*
- Y. Residential care facility;*
- Z. Transportation facilities;*

AA. Live/work units, pursuant to Section 17.54.105—Live/work units.

**Finding: Complies as proposed.** The proposed use involves the retailing of usable marijuana, marijuana concentrates, marijuana-infused products, immature marijuana plants, accessory products, and administration. The proposed use is retail trade, permitted under OCMC 17.29.020(P), with a footprint under 60,000 square feet. The use is permitted subject to the specific standards in Section 17.54.110., as adopted in Ordinance No 16-1008, which include a requirement to located at least 250 feet from any public park, as measured between the closest property lines. The applicant has requested a variance from the 250-foot separation requirement. See findings below regarding the variance.

**17.29.030 - Conditional uses.**

*The following conditional uses are permitted when authorized and in accordance with the standards contained in Chapter 17.56:*

- A. Ancillary drive-in or drive-through facilities;*
- B. Emergency service facilities (police and fire), excluding correctional facilities;*
- C. Gas stations;*
- D. Outdoor markets that do not meet the criteria of Section 17.29.020H.;*
- E. Public utilities and services including sub-stations (such as buildings, plants and other structures);*
- F. Public and/or private educational or training facilities;*
- G. Religious institutions;*
- H. Retail trade, including gift shops, bakeries, delicatessens, florists, pharmacies, specialty stores and any other use permitted in the neighborhood, historic or limited commercial districts that have a footprint for a stand alone building with a single store in excess of sixty thousand square feet in the MUC-1 or MUC-2 zone;*
- I. Hotels and motels, commercial lodging;*
- J. Hospitals;*
- K. Parking structures and lots not in conjunction with a primary use;*
- L. Passenger terminals (water, auto, bus, train).*

**Finding: Not applicable.** The applicant has not proposed any of the above uses and the proposed retail use will not exceed 60,000 square feet. No conditional use permit is required.

**17.29.040 - Prohibited uses in the Mixed Use Corridor zoning district.**

*The following uses are prohibited in the MUC district:*

- A. Distributing, wholesaling and warehousing;*
- B. Outdoor storage;*
- C. Outdoor sales that are not ancillary to a permitted use on the same or abutting property under the same ownership;*
- D. Correctional facilities;*
- E. Heavy equipment service, repair, sales, storage or rentals (including but not limited to construction equipment and machinery and farming equipment);*
- F. Kennels;*
- G. Motor vehicle and recreational vehicle sales and incidental service;*
- H. Motor vehicle and recreational vehicle repair/service;*
- I. Self-service storage facilities.*

**Finding: Not applicable.** The applicant has not proposed any of the prohibited uses listed above.

**17.29.050 - Dimensional standards.**

*A. Minimum lot area: None.*

**Finding: Not applicable.** No new lots are proposed.

*B. Maximum building height: Maximum building height: Forty feet or three stories, whichever is less.*

**Finding: Not applicable.** The applicant has not proposed any changes to the height of the existing building.

*C. Minimum required setbacks if not abutting a residential zone: None.*

**Finding: Not applicable.** The site does not abut a residential zone. No changes are proposed to the existing building setbacks.

*D. Minimum required interior and rear yard setbacks if abutting a residential zone: Twenty feet, plus one foot additional yard setback for every one foot of building height over thirty-five feet.*

**Finding: Not applicable.** The site does not abut a residential zone. No changes are proposed to the existing building setbacks.

*E. Maximum Allowed Setbacks.*

*1. Front yard setback: Five feet (may be extended with Site Plan and Design Review (Section 17.62.055)).*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing building setbacks.

*2. Interior side yard setback: None.*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing building setbacks.

*3. Corner side yard setback abutting street: Thirty feet provided the Site Plan and Design Review requirements of Section 17.62.055 are met.*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing building setbacks.

*4. Rear yard setback: None.*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing building setbacks.

*F. Maximum site coverage of building and parking lot: Eighty percent*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing building lot coverage.

*G. Minimum landscaping requirement (including parking lot): twenty percent.*

**Finding: Not applicable.** The proposed use will take place wholly within an existing tenant space of the existing building on the subject property. No changes are proposed to the existing landscaping.

## **CHAPTER 17.60 – VARIANCE**

### **17.60.020 - Variances—Procedures.**

*A. A request for a variance shall be initiated by a property owner or authorized agent by filing an application with the city recorder. The application shall be accompanied by a site plan, drawn to scale, showing the dimensions and arrangement of the proposed development. When relevant to the request, building plans may also be required. The application shall note the zoning requirement and the extent of the variance requested. Procedures shall thereafter be held under Chapter 17.50. In addition, the procedures set forth in subsection D. of this section shall apply when applicable.*

*B. A nonrefundable filing fee, as listed in Section 17.50.[0]80, shall accompany the application for a variance to defray the costs.*

*C. Before the planning commission may act on a variance, it shall hold a public hearing thereon following procedures as established in Chapter 17.50. A Variance shall address the criteria identified in Section 17.60.030, Variances — Grounds.*

**Finding:** This application was initiated by an authorized agent of the property owner. It was accompanied by the required filing fee. The public hearing required under subsection C will be held before the planning commission acts on this Application. The criteria for review of the variance are addressed below.

*D. Minor variances, as defined in subsection E. of this section, shall be processed as a Type II decision, shall be reviewed pursuant to the requirements in Section 17.50.030B., and shall address the criteria identified in [Section 17.60.030, Variance — Grounds.](#)*

*E. For the purposes of this section, minor variances shall be defined as follows:*

- 1. Variances to setback and yard requirements to allow additions to existing buildings so that the additions follow existing building lines;*
- 2. Variances to width, depth and frontage requirements of up to twenty percent;*
- 3. Variances to residential yard/setback requirements of up to twenty-five percent;*
- 4. Variances to nonresidential yard/setback requirements of up to ten percent;*
- 5. Variances to lot area requirements of up to five;*
- 6. Variance to lot coverage requirements of up to twenty-five percent;*
- 7. Variances to the minimum required parking stalls of up to five percent; and*
- 8. Variances to the floor area requirements and minimum required building height in the mixed-use district.*

**Finding: Not applicable.** This request exceeds the given thresholds for a minor variance. The separation distances required for marijuana businesses under OCMC 17.54.110.(C)(1) are not applicable for a Type II Variance.

#### **17.60.030 – Variance - Grounds.**

*A variance may be granted only in the event that all of the following conditions exist:*

*A. That the variance from the requirements is not likely to cause substantial damage to adjacent properties by reducing light, air, safe access or other desirable or necessary qualities otherwise protected by this title;*

**Finding: Complies as proposed.** The requested variance is from a standard adopted specifically for the maintenance of a distance buffer between marijuana retailers and certain sensitive uses, in this case city parks.

The applicant maintains that, for the reasons below, reduction to the required distance buffer in this instance will not cause substantial damage to adjacent properties or create additional impacts to light, air, safe access, or other desirable qualities protected by the Oregon City Code.

First, the applicant states that Green Planet will utilize an existing retail space to meet the needs of its use and the requirements for premises licensure as imposed by the Oregon Liquor Control Commission (“OLCC”). No exterior alterations will be made that would lead to substantial damage or negative impacts to adjacent properties.

Second, the applicant states that the tenant space that Green Planet intends to occupy is located on the opposite side of the building from the Cemetery. Therefore, the entrance to the proposed tenant space and any signage for the use will not be visible from the Cemetery.

Furthermore, the applicant states that the presence of the proposed use will likely increase safety and security in the area. As required by the OLCC, the proposed recreational marijuana retail store will be equipped with commercial-grade locks, an alarm system, and surveillance cameras at every access point. The lighting and surveillance cameras at the property will be a deterrent to crime and will increase safety in the area.

With respect to the applicant’s first point, staff concurs that the proposed use will replace an existing restaurant use with minimal exterior alterations to the site or the existing building. No alterations to parking, landscaping, or exterior building materials are proposed. If the use is approved, the applicant may request sign permits for the new business, which are regulated by the

Sign code under OCMC 15.28 and are not part of any land use action. Aesthetic screening of new mechanical equipment, including exterior HVAC vents, if proposed, is processed through a Type I Minor Site Plan and Design Review process.

With respect to the applicant's second point, that the tenant space that Green Planet intends to occupy is located on the opposite side of the building from the Cemetery and though the building will be visible from the cemetery, the tenant space will not. The building is separated from the cemetery by two fences, vegetation and a parking lot. The portion of the cemetery closest to the proposed use is planned for future expansion of the cemetery and currently has no grave monuments.

With respect to the applicant's final point that that the presence of the proposed use will likely increase safety and security in the area, staff can neither confirm or deny this assertion.

*B. That the request is the minimum variance that would alleviate the hardship;*

**Finding: Complies as proposed.** This application seeks to reduce the required minimum separation distance from two hundred fifty (250) feet to eight-nine (89) feet. Staff notes that the applicant has chosen to be a tenant within an existing building and has not proposed any alternative building location. The proposed tenant space is geographically furthest from the cemetery than other tenant spaces on the subject site. The proposed variance represents the distance on the existing site that would alleviate the applicant's perceived hardship based on the measurement standard as provided by OCMC 17.54.110(C)(5).

*C. Granting the variance will equal or exceed the purpose of the regulation to be modified.*

**Finding: Does not Comply.** The purpose and specific intent of the buffer is not specifically stated in the city code, although it can be broadly inferred.

The applicant states that the general purpose of the required 250-park buffer is to prevent a marijuana retailer from being located near a location where children tend to congregate to avoid distribution of marijuana to minors. An additional purpose is to keep street crimes caused by all-cash transactions from occurring near minors.

The existing buffer was included in the City's code based partly upon the guidance of the League of Oregon Cities document "Local Government Regulation of Marijuana in Oregon – (Revised Third Edition May 2016) (See Exhibits), which clearly states on P. 76:

*Keeping in mind that state law allows for the licensing of marijuana retailers, wholesalers, processors, producers and laboratories, cities may want to impose restrictions on where marijuana businesses and facilities can locate in relation to other zones or specified locations and based upon the specific type of marijuana business. For example, a city could impose limits on the distance of marijuana businesses or facilities from:*

- *A residential zone or a multi-use zone which includes residences;*
- *Places where children congregate;*
- *A public elementary, private elementary, secondary, or career school attended primarily by individuals under the age of 21;*
- *A public library;*
- *A public park, public playground, recreation center, or facility;*
- *A licensed child care facility;*
- *A public transit center;*
- *Any game arcade where admission is not restricted to persons aged 21 or older;*
- *Another licensed medical marijuana facility licensed by the Oregon Health Authority or a*

*recreational marijuana facility licensed by the OREGON LIQUOR CONTROL COMMISSION;*

- *Any public property, not including the right of way; or*
- *Any combination of the above.*

The League of Oregon Cities also provided a complete model code with language as follows:

1. Restrictions on Location: Marijuana Dispensary or Retailer. A marijuana retailer shall not locate:
  1. Within a residence or mixed-use property that includes a residence.
  2. Within \_\_\_\_\_ zone(s).
  3. Within \_\_\_\_\_ [distance] of \_\_\_\_\_ [certain zones, types of properties, schools, parks, licensed day care facilities, parks, public transit centers, game arcades no restricted to persons age 21 and older, any public property, any other recreational or medical marijuana facilities, etc.]

Based on this guidance, staff modified the suggested code language that the League of Oregon Cities provided and the City ultimately adopted the 250' buffer from parks, licensed childcare facilities and transit centers, along with a 1000' separation requirement between licensed marijuana retailers.

The overall intent of the state law is much broader, in that the rules are those that the Oregon Liquor Control Commission "considers necessary to protect the public health and safety". The OLCC in turn is charged under the state's regulations (ORS 475B.025 General powers and duties; rules. See Exhibits) with the following powers:

- (f) To adopt rules regulating and prohibiting marijuana producers, marijuana processors, marijuana wholesalers and marijuana retailers from advertising marijuana items in a manner:*
- (A) That is appealing to minors;*
  - (B) That promotes excessive use;*
  - (C) That promotes illegal activity; or*
  - (D) That otherwise presents a significant risk to public health and safety.*

The applicant elaborated various reasons why granting this requested variance will equal or exceed the purpose of the buffer regulation.

First, the applicant states that it is reasonable to expect children to congregate at a typical city park, which contains a playground, ball fields, and other recreational activities. However, while the Cemetery is managed by the Department of Parks and Recreation and included in Oregon City's parks inventory, it is not a typical city park. The Cemetery has no playground, no ball fields, and no recreational activities of any kind. Notably, OCMC 12.20 (City Cemetery) is a separate and distinct municipal code section from OCMC 12.16 (Public Parks), and contains different rules and regulations for its use. Under the provisions of OCMC 12.20.010, the Cemetery "shall be used solely for the maintenance of burial plots, a mausoleum, general cemetery purposes and the administration thereof." Given the express uses of the Cemetery, and the lack of any recreational activities, children would not be expected to regularly congregate there.

Second, the applicant states that the State's rigorous regulatory system, as administered through the OLCC, requires retailers to verify that no minors are on the licensed premises and to verify age prior to completing the sale of a marijuana item to a customer. The State also requires that all marijuana items offered for sale by a retailer must be stored in such a manner that the items are only accessible to authorized representatives until final sale of the item to the customer is completed. In practice, this means that IDs are checked immediately upon entering the store and again at the point of sale, and that marijuana items are contained in areas that make shoplifting difficult.

Furthermore, as described above, the security measures that Green Planet will undertake to comply with OLCC regulations will increase safety in the area and help to reduce crime. Notably, Green Planet allows for credit card transactions, which reduces the amount of cash at the business and the temptation for cash-based street crimes.

Lastly, the applicant indicates that that fencing surrounding the Cemetery prevents direct access from the Cemetery to the Property. In order to walk or drive from the Cemetery to the Property, a person would need to travel from the Cemetery's entrance in Hillcrest Lane to the Property on Molalla Avenue, which is over 1,000 feet away.

Though a variety of valid points are provided above, the applicant has failed to address that the marijuana spacing requirements, as separated from parks and from each other, serve a critical function of limiting the number of marijuana related business within the city. This purpose for the regulation has not been addressed. During the process of developing the regulations, the Planning Commission and City Commission reviewed the totality of all requirements as a whole. In particular, a series of maps were created for all five marijuana uses based on the proposed zoning districts. Through this mapping process, the Planning Commission and City Commission discussed displaying the results of the availability for retailers to locate throughout Oregon City with varying distances from parks, daycares, other retailers. In each case, the City reviewed the overall effect and the likely number of retailers that would result. The City Commission rejected the idea of imposing larger spacing buffers as the result would leave too few options for retailers to locate. Throughout the process, the City balanced regulations to determine an optimal number of locations and spacing throughout the City in which marijuana retailers could operate. Too few locations would restrict the opportunity for retail locations, while too many locations may result in a greater number of marijuana retailers than desired. This optimal number of retail uses and spacing was struck in the adopted regulations.

The applicant has not identified how allowing the proposed Variance would maintain the overall number of retail locations which could be located in the City.

*D. Any impacts resulting from the adjustment are mitigated.*

**Finding: Does not comply.** The Cemetery borders the adjacent property to the north of the Property. This property line is both fenced and covered by vegetative screening. The only portion of the subject property that could potentially be seen from the Cemetery, over two fences, would be the parking lot used by the existing motorsports shop. Green Planet will face Molalla Avenue, and no portion of the business or signage will be visible from the Cemetery. The closest point of physical access from the Cemetery to the Property would be through the Cemetery entrance on Hillcrest Lane, approximately seven hundred twenty-five (725) feet from the Property when measured in a straight line and approximately one thousand (1,000) feet when measured along the public right-of-way.

Since potential visual or physical access impacts will be mitigated by site arrangement features and landscaping already existing on the Property and adjacent properties, any impacts to the quiet and respectful nature of the Cemetery are mitigated.

Staff took photos of the property from the Cemetery as well as from the abutting public streets, which are attached as exhibits.

Regardless of the distances and visual separations described above, the applicant did not identify how approval of the proposed Variance would maintain the overall number of retail locations which

could be located in the City, and how the resulting increase in marijuana retail locations is mitigated. Therefore staff finds that this standard is not met.

*E. No practical alternatives have been identified which would accomplish the same purpose and not require a variance.*

**Finding: Complies as proposed.** The applicant has not identified any practical alternatives beyond the proposed site. With the possible exception of wireless communication providers, which are required to prove that they cannot co-locate on an existing tower or support structure prior to proposing a new location pursuant to OCMC 17.80, the City does not have a precedent for requiring that an applicant consider other property to accommodate their proposal before getting a variance.

*F. The variance conforms to the comprehensive plan and the intent of the ordinance being varied.*

**Findings:** The following Goals and Policies of the Comprehensive Plan are pertinent to this variance request.

### **Goal 2.1 Efficient Use of Land**

Ensure that property planned for residential, commercial, office, and industrial uses is used efficiently and that land is developed following principles of sustainable development.

Policy 2.1.2 Encourage the vertical and horizontal mixing of different land-use types in selected areas of the city where compatible uses can be designed to reduce the overall need for parking, create vibrant urban areas, reduce reliance on private automobiles, create more business opportunities and achieve better places to live.

**Finding: Complies as proposed.** The application proposes to repurpose an existing tenant space within a commercial development for a business that will provide a product not previously available in the area. The property is conveniently located along a mixed use commercial corridor, near other general and specialty retail uses, and close to the residential areas that these businesses serve. The location is also convenient to pedestrian, bicycle, and bus routes along Molalla Avenue, which will help reduce the overall need for parking and reliance on private automobiles.

### **Goal 2.3 Corridors**

Focus transit-oriented, higher intensity, mixed-use development along selected transit corridors.

Policy 2.3.1 Ensure planning for transit corridors includes facilities and access management, aesthetics (including signage and building facade improvements), infill and redevelopment opportunities, high-density residential development, and business assistance to existing businesses.

**Finding: Complies as proposed.** The proposed use will redevelop an existing tenant space adjacent to Molalla Avenue in which multiple Tri-Met bus routes are located, such as 99 and 32. The development should not detrimentally impact or disproportionately use the available transit corridor or facilities, being of a similar impact as the previous restaurant use. The exterior of the tenant space will be maintained in the same clean, professional, and attractive manner.

### **Goal 2.4 Neighborhood Livability**

Provide a sense of place and identity for residents and visitors by protecting and maintaining neighborhoods as the basic unit of community life in Oregon City while implementing the goals and policies of the other sections of the Comprehensive Plan.

Policy 2.4.1 Develop local neighborhood plans to strengthen and protect residential neighborhoods and historic areas from infill development; such as development along linear commercial corridors.

Policy 2.4.2 Strive to establish facilities and land uses in every neighborhood that help give vibrancy, a sense of place, and a feeling of uniqueness; such as activity centers and points of interest.

**Finding: Complies as proposed.** The proposed use will utilize an existing developed site and add activity to an established retail area. Reuse of an existing space will prevent the need for further development within this area and will retain the character of the neighborhood while providing goods and services not previously offered in the neighborhood. The presence of a new marijuana retail facility in this location will increase the overall number of retail locations for marijuana sale in the city.

### **Goal 2.5 Retail and Neighborhood Commercial**

Encourage the provision of appropriately scaled services to neighborhoods.

Policy 2.5.1 Encourage the redevelopment of linear commercial corridors in ways that encourage expansion of existing businesses and infill development, and at the same time reduces conflicting traffic movements, improves the aesthetic character of these commercial areas, and encourages trips by transit, bicycling and walking.

Policy 2.5.2 Allow and encourage the development of small retail centers in residential neighborhoods that provide goods and services for local residents and workers. Generally, these centers should be located at the intersections of two or more streets that are classified as neighborhood collectors or higher.

Policy 2.5.4 Encourage the development of successful commercial areas organized as centers surrounded by higher density housing and office uses, rather than as commercial strips adjacent to low-density housing.

**Finding: Complies as proposed.** The proposed use will re-purpose existing development for a new retail use along the commercial corridor of Molalla Avenue. The commercial corridor provides non-automobile transportation options to individuals travelling by foot, bicycle, or bus. The proposed use will offer a product not previously available in the neighborhood, and through this will encourage residents to visit the area more frequently, visiting other local retailers while there. This may help encourage further infill development along the commercial corridor, which serves higher density housing types located nearby.

### **Goal 5.3 Historic Resources**

Encourage the preservation and rehabilitation of homes and other buildings of historic or architectural significance in Oregon City.

Policy 5.3.4 Support the preservation of Oregon City's historic resources through public information, advocacy and leadership within the community, and the use of regulatory tools and incentive programs

Policy 5.3.7 Encourage property owners to preserve historic structures in a state as close to their original construction as possible while allowing the structure to be used in an economically viable manner.

Policy 5.3.8 Preserve and accentuate historic resources as part of an urban environment that is being reshaped by new development projects.

**Finding: Not Applicable.** The subject site or Mountain View Cemetery are not a designated historic landmark. The proposed use will not directly impact Mountain View Cemetery, and as stated above, any potential visual impact will be mitigated.

### **Goal 6.1 Air Quality**

Promote the conservation, protection and improvement of the quality of the air in Oregon City.

Policy 6.1.2 Ensure that development practices comply with or exceed regional, state, and federal standards for air quality.

**Finding: Complies as proposed.** The applicant is proposing to utilize an existing site and building. The existing air handler and ductwork at the Property will be sufficient to provide air circulation throughout the proposed use. This system will be upgraded with additional filtration equipment to ensure that no potentially objectionable odors from the Use will be allowed to emanate to nearby public spaces, properties, businesses, or residences. The upgraded ventilation system will be fully compliant with OCMC 17.54.110(D)(5), which provides higher standards than those imposed by the state.

### **Goal 8.1 Developing Oregon City's Park and Recreation System**

Maintain and enhance the existing park and recreation system while planning for future expansion to meet residential growth.

Policy 8.1.1 Provide an active neighborhood park-type facility and community park-type facility within a reasonable distance from residences, as defined by the Oregon City Park and Recreation Master Plan, to residents of Oregon City.

Policy 8.1.10 Identify revenue-producing opportunities for inclusion in existing and future parks to offset operational costs.

Policy 8.1.12 Identify and protect land for parks and recreation within the Urban Growth Boundary.

**Finding: Complies as proposed.** The proposed use will not have no impact on the development of the Park System except through the possible payment of new System Development Charges with a building permit, and sales and property taxes.

### **Goal 9.1 Improve Oregon City's Economic Health**

Provide a vital, diversified, innovative economy including an adequate supply of goods and services and employment opportunities to work toward an economically reasonable, ecologically sound and socially equitable economy.

Policy 9.1.1 Attract high-quality commercial and industrial development that provides stable, high-paying jobs in safe and healthy work environments, that contributes to a broad and sufficient tax base, and that does not compromise the quality of the environment.

**Finding: Complies as proposed.** The proposed use will serve to advance Goal 9.1, although it will replace the current restaurant space, by generating additional business within Oregon City in a new and rapidly growing industry, and by increasing revenue distributions from Oregon City's local marijuana tax and Oregon's marijuana tax that are partially based on the number of licensed retailers in proportion to the total number statewide. The applicant states that the proposed use will also provide additional jobs in a growing industry that typically pays workers above the state minimum wage, and that these jobs provide a safe and healthy work environment where employees receive additional regulatory compliance training over and above what would be typical of most other retail employees serving other markets.

### **Goal 9.5 Retail Service**

Allow a variety of retail outlets and shopping areas to meet the needs of the community and nearby rural areas.

Policy 9.5.1 Develop local neighborhood or specific plans, when appropriate, to blend infill development along linear commercial areas into existing neighborhoods.

**Finding: Complies as proposed.** The proposed use will offer goods and services not previously offered in the neighborhood. This will help prevent local residents from having to travel to other areas to purchase the goods offered, and will encourage rural residents from outside the area to travel to the neighborhood to make purchases from the proposed use as well as other nearby businesses. Policy 9.5.1 is directed towards actions of the city and is not an approval criterion.

## **Chapter 17.54 - SUPPLEMENTAL ZONING REGULATIONS AND EXCEPTIONS**

### *17.54.110 –Marijuana Businesses*

*For the purpose of zoning regulation pursuant to this section, recreational and medical marijuana facilities are considered the same by Oregon City.*

#### *A. Applicability*

**Finding: Applicable.** This application proposes a retail marijuana business serving both recreational and medical customers. The ordinance applies to the current Application.

*B. These standards apply to all marijuana businesses in Oregon City. Restrictions on Location - Zoning*

*1. Please refer to individual zone districts elsewhere in this title to determine whether marijuana businesses including production, laboratories, processing, wholesale, and retail use are permitted, prohibited or otherwise regulated.*

*2. Marijuana businesses are prohibited abutting any "R" residentially zoned area, except that this provision shall not apply where the subject property abuts a road that has a freeway, expressway, major arterial, minor arterial, or collector functional classification as shown on Figure 8, Multi-Modal Street System, of the Oregon City Transportation System Plan and;*

*3. Home Occupation. A marijuana business may not be operated as a home occupation and;*

*4. The sale or distribution of marijuana is prohibited for mobile vendors and at all special events and outdoor markets.*

**Finding: Complies as proposed.** The subject property is within the mixed use corridor MUC-1 zone, which permits the proposed use subject to the operational standards of the code. The site does not abut any "R" residentially zoned area. No home occupation is proposed as part of this Application. No marijuana sale or distribution will be carried out via mobile vendor or at special events or outdoor markets. These standards are met.

*C. Restrictions on Location: Marijuana Dispensary or Retailer. A marijuana retailer shall not locate:*

*1. Within 250 feet of any public parks, licensed child care and day care facilities, and public transit centers.*

*2. Within 1000 feet of a public elementary or secondary school for which attendance is compulsory under ORS 339.020, or a private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), or the property located at Clackamas County Map 3-2E-09C, Tax Lot 800.*

**Finding: See variance.** The subject property is approximately 89 feet from Mountain View Cemetery, a public park. The variance sought through this application seeks to reduce the minimum required distance.

*3. Within 1000 feet of another marijuana retailer.*

**Finding: Complies.** At this time, there is no other licensed marijuana retailer operating within 1000 feet of the subject property. Should this variance be approved and a business license issued for the proposed use, no other marijuana retailer will be permitted within 1000 feet of the subject property.

*4. If a new protected property or use described in this section should be established within the aforementioned separation distance of an existing legally established marijuana dispensary or retailer, the existing marijuana dispensary or retailer may remain in place and the separation requirement shall not be applied.*

**Finding: Not applicable.** This standard provides protection for an existing marijuana retailer and accordingly provides no review standard for the current application.

*5. The spacing distance specified in this section is a straight line measurement from the closest points between property lines of the affected properties.*

**Finding: Complies as proposed.** This standard provides the basis of calculation for the measurement in responses 1-3, above. As measured, the subject site is 89 feet from the closest property line for the cemetery. The applicant correctly measured the spacing distance.

#### **D. Standards of Operation**

*1. Compliance with Other Laws. All marijuana businesses shall comply with all applicable laws and regulations, including, but not limited to, the development, land use, zoning, building and fire codes.*

**Finding: Complies as proposed.** An application has been submitted to OLCC to legally operate the proposed use. The applicant has been working with the Oregon City Business Licensing, Planning, and Building Departments to ensure that all business licensing, zoning, building, and specialty code standards are met. To the extent that it is required, the applicant may be required to obtain a food establishment license from the Oregon Department of Agriculture. Any other permits or licenses required for the proposed use will be obtained as necessary. This standard will be met.

*2. Registration and Compliance with State Law. The marijuana business's state license or authority shall be in good standing with the Oregon Health Authority or Oregon Liquor Control Commission and the marijuana business shall comply with all applicable laws and regulations administered by the respective state agency, including, without limitation those rules that relate to labeling, packaging, testing, security, waste management, food handling, and training.*

**Finding: Complies as proposed.** As referenced above, the applicant has applied for an OLCC license for the proposed use. The license will be obtained prior to operation and will be maintained in good standing throughout the life of the business. The applicant has demonstrated through obtaining OLCC licenses at other locations that it can obtain such license. Compliance with all OLCC marijuana retailer license requirements is required prior to the proposed use opening for business.

*3. No portion of any marijuana business shall be conducted outside, including but not limited to outdoor storage, production, processing, wholesaling, laboratories and retail sale, except for temporary ingress and egress of vehicles, persons and materials associated with the permitted use.*

**Finding: Complies.** The applicant has indicated that the proposed use will take place wholly within the existing building and tenant space. Doors will be open only as long as necessary for ingress and egress of persons and materials associated with the permitted use. This standard will be met.

*4. Hours of Operation. Operating hours for a marijuana business shall be in accordance with the applicable license issued by the OLCC or OHA.*

**Finding: Complies.** The business will not be open before 7:00 a.m. or after 10:00 p.m., the hours of operation currently allowed under OLCC rules. This standard will be met.

*5. Odors. A marijuana business shall use an air filtration and ventilation system that is certified by an Oregon Licensed mechanical engineer to ensure that all odors associated with the marijuana is confined to the licensed premises to the extent practicable. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.*

**Finding: Complies as proposed.** A mechanical permit application for upgrade to the existing ventilation system for purposes of odor control has been submitted (Permit # BM-17-0310). The required odor control system will be installed and operational prior to commencement of the proposed use. This standard will be met.

*6. Doors and windows shall remain closed, except for the minimum length of time needed to allow people to ingress or egress the building.*

**Finding: Complies as proposed.** Windows will not be opened in conjunction with the proposed use. Doors will be equipped with self-closing hardware to ensure that they are open only for the minimum length of time needed to allow people to ingress or egress the building. This standard will be met.

*7. Secure Disposal. The facility must provide for secure disposal of marijuana remnants or by-products; marijuana remnants or by-products shall not be placed within the marijuana business's exterior refuse containers.*

**Finding: Complies as proposed.** The applicant's permit requires that marijuana remnants or by-products will be stored in a secured waste disposal area until removed by a waste hauler. This standard will be met.

*8. Drive-Through, Walk-Up. A marijuana business may not have a walk-up window or a drive-through.*

**Finding: Not applicable.** The applicant has not proposed to utilize a walk-up window or drive-through. Compliance with this standard is also a condition of obtaining and maintaining an OLCC marijuana retailer license.

*9. The facility shall maintain compliance with all applicable security requirements of the OLCC including alarm*

systems, video surveillance, and a restriction on public access to certain facilities or areas within facilities.

**Finding: Complies as proposed.** Security and surveillance equipment will be installed to comply with OLCC requirements. Compliance with such requirements will be confirmed by an OLCC inspector prior to their issuing a license for the proposed use. This standard will be met.

## **CHAPTER 17.50 - ADMINISTRATION AND PROCEDURES**

### **17.50.050 Preapplication Conference**

*A. Preapplication Conference. Prior to submitting an application for any form of permit, the applicant shall schedule and attend a preapplication conference with City staff to discuss the proposal. To schedule a preapplication conference, the applicant shall contact the Planning Division, submit the required materials, and pay the appropriate conference fee. At a minimum, an applicant should submit a short narrative describing the proposal and a proposed site plan, drawn to a scale acceptable to the City, which identifies the proposed land uses, traffic circulation, and public rights-of-way and all other required plans. The purpose of the preapplication conference is to provide an opportunity for staff to provide the applicant with information on the likely impacts, limitations, requirements, approval standards, fees and other information that may affect the proposal. The Planning Division shall provide the applicant(s) with the identity and contact persons for all affected neighborhood associations as well as a written summary of the preapplication conference. Notwithstanding any representations by City staff at a preapplication conference, staff is not authorized to waive any requirements of this code, and any omission or failure by staff to recite to an applicant all relevant applicable land use requirements shall not constitute a waiver by the City of any standard or requirement.*

*B. A preapplication conference shall be valid for a period of six months from the date it is held. If no application is filed within six months of the conference or meeting, the applicant must schedule and attend another conference before the city will accept a permit application. The community development director may waive the preapplication requirement if, in the Director's opinion, the development does not warrant this step. In no case shall a preapplication conference be valid for more than one year.*

**Finding: Complies as proposed.** The applicant scheduled and attended the required pre-application conference on Friday, July 14, 2017 and included the notes of the conference (PA 17-37) in their formal land use application.

### **17.50.055 Neighborhood Association Meeting**

*The purpose of the meeting with the recognized neighborhood association is to inform the affected neighborhood association about the proposed development and to receive the preliminary responses and suggestions from the neighborhood association and the member residents.*

*1. Applicants applying for annexations, zone change, comprehensive plan amendments, conditional use, planning commission variances, subdivision, or site plan and design review (excluding minor site plan and design review), general development master plans or detailed development plans applications shall schedule and attend a meeting with the city-recognized neighborhood association in whose territory the application is proposed. Although not required for other projects than those identified above, a meeting with the neighborhood association is highly recommended.*

*2. The applicant shall send, by certified mail, return receipt requested letter to the chairperson of the neighborhood association and the citizen involvement committee describing the proposed project. Other communication methods may be used if approved by the neighborhood association.*

*3. A meeting shall be scheduled within thirty days of the notice. A meeting may be scheduled later than thirty days if by mutual agreement of the applicant and the neighborhood association. If the neighborhood association does not want to, or cannot meet within thirty days, the applicant shall hold their own meeting after six p.m. or on the weekend, with notice to the neighborhood association, citizen involvement committee, and all property owners within three hundred feet. If the applicant holds their own meeting, a copy of the certified letter requesting a neighborhood association meeting shall be required for a complete application. The meeting held by the applicant shall be held within the boundaries of the neighborhood association or in a city facility.*

*4. If the neighborhood association is not currently recognized by the city, is inactive, or does not exist, the applicant shall request a meeting with the citizen involvement committee.*

5. To show compliance with this section, the applicant shall submit a sign-in sheet of meeting attendees, a summary of issues discussed, and letter from the neighborhood association or citizen involvement committee indicating that a neighborhood meeting was held. If the applicant held a separately noticed meeting, the applicant shall submit a copy of the meeting flyer, a sign in sheet of attendees and a summary of issues discussed.

**Finding: Complies as proposed.** A meeting of the Barclay Hills Neighborhood Association (BHNA) was held by the applicant on Monday, July 24, 2017, 7:00 p.m., at 515 Molalla Avenue. Notice was sent to the Neighborhood Association chair and Community Involvement Coordinator, as well as all property owners within 300 feet of the subject property. Notes are included with the application. The applicant also attended a second regular meeting of the BHNA on August 8, 2017 at 445 Warner Rd.

**17.50.090 - Public notices.**

*All public notices issued by the city with regard to a land use matter, announcing applications or public hearings of quasi-judicial or legislative actions, shall comply with the requirements of this section.*

*B. Notice of Public Hearing on a Type III or IV Quasi-Judicial Application. Notice for all public hearings concerning a quasi-judicial application shall conform to the requirements of this subsection. At least twenty days prior to the hearing, the city shall prepare and send, by first class mail, notice of the hearing to all record owners of property within three hundred feet of the subject property and to any city-recognized neighborhood association whose territory includes the subject property. The city shall also publish the notice in a newspaper of general circulation within the city at least twenty days prior to the hearing. Pursuant to Section 17.50.080H., the applicant is responsible for providing an accurate and complete set of mailing labels for these property owners and for posting the subject property with the city-prepared notice in accordance with Section 17.50.100. Notice of the application hearing shall include the following information:*

- 1. The time, date and location of the public hearing;*
- 2. Street address or other easily understood location of the subject property and city-assigned planning file number;*
- 3. A description of the applicant's proposal, along with a list of citations of the approval criteria that the city will use to evaluate the proposal;*
- 4. A statement that any interested party may testify at the hearing or submit written comments on the proposal at or prior to the hearing and that a staff report will be prepared and made available to the public at least seven days prior to the hearing;*
- 5. A statement that any issue which is intended to provide a basis for an appeal to the city commission must be raised before the close of the public record. Issues must be raised and accompanied by statements or evidence sufficient to afford the city and all parties to respond to the issue;*
- 6. The notice shall state that a city-recognized neighborhood association requesting an appeal fee waiver pursuant to Section 17.50.290C. must officially approve the request through a vote of its general membership or board at a duly announced meeting prior to the filing of an appeal.*
- 7. A statement that the application and all supporting materials and evidence submitted in support of the application may be inspected at no charge and that copies may be obtained at reasonable cost at city hall during normal business hours; and*
- 8. The name and telephone number of the planning staff person responsible for the application or is otherwise available to answer questions about the application.*

**Finding: Complies as proposed.** Public notice was provided in accordance with this section. A copy of all the required public notices is attached to the Staff Report.

### CONCLUSION AND RECOMMENDATION:

Based on the analysis and findings as described above, Staff concludes that the proposed variance for a site located at 1015 Molalla Avenue, Oregon City, Oregon 97045, Oregon City, Oregon 97045 and identified as Clackamas County Map 3-2E-05BD, Tax Lot 00402, cannot meet the requirements as described in the Oregon City Municipal Code in this report and should be denied.

Therefore, the Community Development Director recommends the Planning Commission **deny** file VR 17-05, based upon the findings and exhibits contained in this staff report.

### EXHIBITS:

1. Vicinity Map
2. Application, Narrative and Plans
3. Public Notices
4. Larry Krause Comments
5. Site Photos
6. *Local Government Regulation of Marijuana in Oregon* – (Revised Third Edition May 2016), League of Oregon Cities.
7. ORS Chapter 475B — Cannabis Regulation (2015 Edition).
8. Planning Commission and City Commission Minutes