

STAFF REPORT

DATE: July 24, 2019

TO: Board of Adjustment

FROM: Zoning Administration
Planning & Development
Services Department

ACTIVITY NO. T19SA00217

C10-19-13 THE PRIME LEAF MEDICAL MARIJUANA DISPENSARY / FRANTI III HOLDINGS LLC / 1525 NORTH PARK AVENUE, C-2

The appellant, Jesse R. Callahan on behalf of Rashad J. Stocker, is appealing the Zoning Administrator's Determination (ZAD) (T19SA00137), issued May 16, 2019 relating to the minimum setbacks (distance) required between the medical marijuana dispensary and a licensed residential substance abuse diagnostic and treatment facility or other residential drug or alcohol rehabilitation facility and a church. The Zoning Administrator (ZA) determined that the Drikung Dzogchen Center of Arizona does not meet the definition of religious use, and that COPE Community Services, Inc. does not constitute a residential abuse and treatment facility or other licensed drug or alcohol facility. The appellant contends that the ZAD fails to uphold the provisions of the City of Tucson Ordinances 10850, 11199, 11346, and 11612 as they are written.

THE APPELLANT'S REQUEST TO THE BOARD

The appellant is requesting reversal of the May 16, 2019 Zoning Administrator's determination.

ZA DETERMINATION DATED MAY 16, 2019

Refer to Exhibit 1.

APPELLANT'S ARGUMENTS TO REVERSE THE DETERMINATION

On May 31, 2019 the appellant filed the appeal to the Zoning Administrator's May 16, 2019 Determination. See appellant's submittal documents in the Board's application packet for Case C10-19-13.

The appellant identifies the following as the issues on Appeal:

1. The Buddhist Center, Drikung Dzogchen Center of Arizona, meets the definition of a church which requires the medical marijuana dispensary to be located more than 1,000 feet from the church.
2. The COPE facility is licensed to treat alcohol and drug abuse and offers residential care for these services which requires the medical marijuana dispensary to be located more than 2,000 feet from the residential treatment facility.

APPLICABLE TUCSON ZONING CODE SECTIONS

Tucson *Unified Development Code (UDC)* sections applicable to this appeal include, in part, the following:

Section 4.9.9.E *Medical Marijuana* which provides the use-specific standards for the dispensary;

Section 1.5.1 *Zoning Determinations and Zoning Certifications by the Zoning Administrator*, which provides for the ZA to interpret the provisions of the UDC; and

Section 3.10.2 *Appeals*, which provides for the Board of Adjustment to hear and decide on appeals made to the ZA's decision.

APPLICABLE CITY OF TUCSON ORDINANCES

The ordinances applicable to the appeal are 10850, 11199, 11346, and 11612.

GENERAL DEVELOPMENT INFORMATION

Zoning and Land Use

SITE: ZONED C-2; (medical marijuana dispensary)

North: Zoned R-2; (single and multi-family residential)

South: Zoned NR-2; (duplex)

East: Zoned R-2; (single-family and duplex)

West: Zoned NR-2; (multi-family residential)

RETAIL TRADE USE GROUP - UDC SECTION 4.9.9

E. Medical Marijuana

1. Medical Marijuana Dispensary

k. *A medical marijuana dispensary shall be setback a minimum of 1,000 feet from a public park listed in Section 6: Medical Marijuana Dispensary and Dispensary Off-Site Cultivation Uses - Required Setback from Certain Parks, of the Technical Standards Manual, a church, or library and a minimum of 2,000 feet from a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility, measured in a straight and direct horizontal line from the closest exterior or applicable interior suite wall of the medical marijuana dispensary to the closest property line of a church, library, public park, licensed residential substance abuse diagnostic and treatment facility, or other licensed drug or alcohol rehabilitation facility. A "church" means a building that is erected or converted for use as a church, temple, synagogue or mosque, where services are regularly convened that is used primarily for religious worship and schooling and that a reasonable person would conclude is a church by reason of design, signs, or other architectural features.*

ZONING ADMINISTRATION CONSIDERATIONS

On April 1, 2019, Rashad J. Stocker, requested a Zoning Administrator Determination (ZAD) that locating the medical marijuana dispensary at the subject location violates Tucson Ordinances 10850, 11199, 11346, and 11612. On May 16, 2019, the Zoning Administrator determined the Drikung Dzogchen Center of Arizona, does not meet the definition of religious use, and that the COPE Community Services facility does not constitute a residential abuse and treatment facility or other licensed drug or alcohol facility. The determination is being appealed.

Unified Development Code (UDC) § 4.9.9.E provides the use-specific standards relating to medical marijuana dispensaries. The language specifically defines what constitutes a church and the type of residential treatment facility applicable to the medical marijuana dispensary setback requirement. The primary issue of this appeal is the setback to a church and a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility that the medical marijuana dispensary must adhere to.

This staff report seeks to clarify the ZAD as follows: 1) the Drikung Dzogchen Center does not meet the definition of a church as described in the UDC; and 2) the COPE facility, in question, provides short term general mental health residential services for severely mentally ill individuals who may or may not have substance abuse issues. However, the facility does not operate as a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol facility as set forth in the UDC.

DISCUSSION

1: Church

UDC § 4.9.9.E states that a medical marijuana dispensary cannot be located within 1,000 feet of a church. The appellant argues that the Drikung Dzogchen Center is a building that has been converted for use as a church and used primarily for religious worship and schooling with regular religious services and that any reasonable person would conclude the building is a church because of the unique religious design and indicia on its outer wall.

As it relates to a medical marijuana dispensary, UDC § 4.9.9.E specifically defines the criteria that identifies a building as a church as “[1] A church means a building that is erected or converted for use as a church, temple, synagogue or mosque, [2] where services are regularly convened that is used primarily for religious worship and schooling and [3] that a reasonable person would conclude is a church by

reason of design, signs, or other architectural features.” It is important to note that in order for the separation requirement to be applied between the church and dispensary, the church must meet all of the criteria in this section.

The Zoning Administrator’s Determination (ZAD) argues the following as reasons why the Drikung Dzogchen Center does not constitute a church:

Conversion: The property addressed as 1038 East Lester Street is within the interior of a residential neighborhood and was developed with a single-family residence in 1961. It has continuously been classified and taxed as a primary residential dwelling. Per Unified Development Code (UDC) § 1.4.1, a change of use from a residence to a church requires approval. To date, no plans have been submitted, reviewed or approved for conversion from a residence to a church. A Certificate of Occupancy has not been issued to occupy the structure for an assembly (religious) use.

Primary regular use: There are websites associated with the Drikung Dzogchen Center. Based on the information on these websites, the center is a meditation center that provides opportunity for teachings and practice of the Drikung Dzogchen tradition of Tibetan Buddhism. In addition, the property is advertised as a 2 bedroom 1 bath house for rent through AirBnB. The AirBnB site indicates there is a shrine room within the house. Based on the information on the websites, it is not clear that the primary use of the property is a church.

Appearance: The appellant has not indicated any specific religious architectural features of the building. The building is designed as a single-family residence and is consistent in style and appearance with other residences in the vicinity. The front yard is enclosed by a 4’ high wall with access via a metal gate. Mature shade trees and other vegetation are visible above the wall as are a patio table with an umbrella and a hammock. There are decorative tiles embedded in the front wall on each side of the gate, and the gate contains a drawing with Tibetan calligraphy. The appellant asserts the building is a church by the unique religious design and indicia on the wall and that a reasonable person would conclude from this art that the building is a church. The drawing and lettering might appear to some to be religious art, but it is not signage that a reasonable person would view and conclude that the use of the property is for a church.

The appellant points to inconsistencies in PDSO response letters to proposed medical marijuana dispensary locations regarding the requirement that a building possess a Certificate of Occupancy for a specific use. UDC § 1.4.1 states that *“Land shall not be divided into two or more parcels, except as allowed in accordance with Section 8.2, Land Division and Subdivision Standards, or be used or occupied, no site modification or construction started, and no existing use*

or structure expanded, reconstructed, changed, or otherwise altered until compliance with the provisions of the UDC have been certified.” Based on this, a change of use from a residence to a church requires the development to be brought into compliance with the provisions of the UDC. Additionally, a Certificate of Occupancy is of significant importance because it certifies that building is in compliance with provisions of the UDC and building code requirements.

The letters the appellant refers to as Exhibits A, D, and E are Medical Marijuana Review letters prepared by staff involved in the application review process. The purpose of these letters is to confirm application completeness and verify location requirements. It is common practice as part of the review to verify the last Certificate of Occupancy for a building. The decision that a building is a church, means that staff has reviewed the application for conformance with all of the criteria as identified in UDC § 4.9.9.E. Staff is aware that an error was made in one of the letters that resulted in the denial of the dispensary based on being located within 1000 feet a church. In this case, a Certificate of Occupancy was issued for the building as an “office” use which does not meet the criteria of a church as defined under this section.

The ZA letter dated June 30, 2017 (Appellant’s Exhibit F) is a response to a request for a determination that a dispensary is in violation of the setback requirement to a church. The ZA reviewed the qualifiers for a church and found that not all of the criteria of the church definition were met. More importantly, it was verified that the primary use of the building was “office”. The Certificate of Occupancy is brought up again because it identifies the use of a building.

The appellant further argues that the determination made that the Drikung Dzogchen Center is not a church, made no findings on how the center did not meet the definition. On page 2, paragraphs 3 and 4, of the ZAD, the ZA discusses the definition and how the building does not meet the first requirement “[1] A church means a building that is erected or converted for use as a church, temple, synagogue or mosque.” In order to be recognized as a church, the building must comply with all of the criteria of the definition. The ZA also states that a church and religious use in this instance are the same. The point was to make it clear that the term “church” as it’s used in the definition is inclusive of all religious buildings, i.e. temple, synagogue, or mosque.

2: Licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility

The ordinance states that a medical marijuana dispensary cannot be located within 2,000 feet of a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility”. This text

was derived from the Pima County Ordinance relating to medical marijuana dispensaries as noted in the October 26, 2010 Tucson Planning Commission's recommendation. The Pima County Code of Ordinances defines residential substance abuse diagnostic and treatment facility as "*A facility designed to diagnose and treat persons suffering from the abuse of chemical substances and alcohol subject to the licensure procedures of the Arizona Department of Health Services.*"

At issue is whether the subject COPE facility is a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility that triggers the need for this dispensary to be setback 2,000 feet.

The appellant asserts that the COPE facility located at 535 East Drachman, offers behavioral health services, including providing "services for persons who are at risk of having psychiatric disorders, harmful involvement with alcohol or other drugs, or other addictions or who have behavioral health needs" and argues that this triggers the setback requirement. However, as described in a letter dated November 6, 2006 from the facility's director (ZAD Exhibit F), the purpose of the subject COPE facility is to provide short term general mental health residential services for severely mentally ill individuals.

Staff researched the services provided by COPE Community Services and learned they offer Behavioral Health Services, Medical Services, Therapy Services, Youth Services and Community Health Services. These services are provided in either residential facilities or outpatient clinics.

COPE Community Services Behavioral Health Services: Residential Services webpage states "COPE provides residential services to adults with serious mental illness and those who have other behavioral and/or substance abuse issues. Services are provided in community facilities that provide individualized care and may include the following:

- Supervision 24 hours a day, 7 days a week
- Counseling for behavioral health issues
- Medication supervision (providing storage, reminders, and observation of clients taking medications)
- Instructions in daily living skills (hygiene, budgeting, cooking, shopping, resources, etc.
- Social and recreational activities
- Establishing positive daily routines
- Transportation to appointments for medical, financial and legal needs."

COPE's Therapy Services are offered at outpatient clinics during regular business hours with some clinics offering extended hours. The Therapy Service webpage states "COPE's Substance Abuse Treatment Program is designed to meet the needs of individuals and families that have been affected by substance abuse. COPE's therapists meet with clients to assess the level of care that is most appropriate and to identify specific issues that need to be addressed while in treatment. Additional assessments may be conducted throughout the recovery process in order to ensure clients are making progress. Co-occurring disorders will also be addressed as a component of treatment. COPE offers several levels of substance abuse treatment designed to meet the specific needs of each client including:

- Intensive outpatient services
- Substance abuse recovery
- Relapse prevention
- Seeking Safety
- SMART Recovery"

During the dispensary application review process staff visited the subject COPE facility and spoke with facility staff and were informed that the facility is a residential facility and does not provide substance abuse services. The additional information derived from COPE's website confirms that though a residential facility may offer behavioral health counseling, substance abuse diagnosis and treatment and recovery services are provided in outpatient facilities not in residential facilities.

The appellant asserts that there is no licensure procedure or licensure type that specifically distinguishes a residential care facility as a primarily substance abuse treatment facility. The UDC governs the use of the land within the limits of the city and UDC § 4.9.9.E clearly states what type of facilities apply to the separation requirement. As stated in the ZAD, the City intended to only include facilities with the purpose to diagnose and treat substance abuse and drug and alcohol issues, rather than include all facilities contained within the Physical and Behavioral Health Service land use class.

Legal Analysis

Pursuant to A.R.S. § 9-462.06 and UDC § 3.10.2(A)(1), the City of Tucson has authorized the Board of Adjustment to hear appeals of the Zoning Administrator's interpretation of the UDC. The Board may hold a study session and shall hold a public hearing where the appellant and all parties in interest may present in support and/or in protest of the determination. During the public hearing, the Board may hear all relevant facts, circumstances and conditions affecting the appeal, and may call for questions from members of staff. Upon closing of the public hearing, the

Board may reverse, affirm or modify the decision being appealed and may impose conditions necessary and appropriate to implement the UDC (UDC § 3.10.2.D). The Board may also take the matter under advisement for later consideration, or may defer action if additional evidence is needed or further study is required.

Appellant requested that the Zoning Administrator determine that UDC section 4.9.9 prohibits the planned medical marijuana facility because its location is within the minimum setbacks of 1,000 feet from a church and 2,000 feet from a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility.

A church is defined by UDC section 4.9.9.E.1.k as “a building that is erected or converted for use as a church, temple, synagogue or mosque, where services are regularly convened that is used primarily for religious worship and schooling and that a reasonable person would conclude is a church by reason of design, signs, or other architectural features.” Therefore, in order to be considered a church for the purposes of this section, a building must: 1) be erected for or converted to a church, temple, synagogue or mosque use; 2) have regular services consisting of religious worship or schooling, and 3) have a design, signs or other architectural features that would lead a reasonable person to conclude it is a church. As written, the UDC requires all three elements to be present. As noted above, there are no indications of a religious use other than a religious symbol on the gate, no indication that its primary use is religious worship or schooling and no indication that the building has been converted to such a use. Appellant incorrectly and without evidence argues that the church use is reasonably apparent to one of Buddhist practice, and then argues that non-Buddhists would conclude the building is a church based on Google Maps. The first argument is akin to concluding a single family home is a Catholic church because the front gate has a cross on it or that the same home is a Jewish temple because of a mezuzah on the doorpost. Neither are reasonable conclusions. The second argument introduces an element that is not present in the UDC definition, reference to a website. Thus, a reasonable person would not conclude, by reason of the *building's* design, signs or architectural features that 1038 East Lester Street is a church and the setbacks of UDC section 4.9.9.E.1.k do not apply as to a church.

Licensed residential substance abuse diagnostic and treatment facility and licensed residential drug or alcohol rehabilitation facility are not defined in the UDC. As noted above, the language was taken from the Pima County medical marijuana dispensary regulation and is defined as “[a] facility designed to diagnose and treat persons suffering from the abuse of chemical substances and alcohol subject to the licensure procedures of the Arizona Department of Health Services.” The COPE facility in question is licensed as a Behavioral Health Facility by the Arizona Department of Health Services. Additionally, the facility is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF) as a Behavioral Health Residential Facility. While substance abuse may be a component of this licensure and accreditation, whether a facility is designed to diagnose and treat persons suffering from substance abuse is a factual determination, as a licensed residential substance abuse diagnostic and treatment facility must be both licensed and operating as such a facility. Based on the averments of COPE themselves,

their advertising, and their website, the facility at 535 East Drachman is not designed to diagnose and treat persons suffering from substance abuse, nor is it operating as such, but it is providing short term treatment for seriously mentally ill individuals. Therefore, the UDC section 4.9.9.E.1.k setbacks as to a licensed residential substance abuse diagnostic and treatment facility do not apply.

Conclusion

The building at 1038 East Lester Street has not been converted for use as a church (religious use); services consisting of worship or schooling are not held in the building regularly; and the building does not by reason of design, signs, or architectural features appear to be a church to a reasonable person. Therefore, it does not meet the criteria in Unified Development Code (UDC) section 4.9.9.E.1.k to qualify as a church in that section that triggers the setback requirement for the dispensary. Given that the facility at 535 East Drachman Street is not designed to diagnose, treat or rehabilitate persons suffering from substance abuse, nor is it operating as such, but is providing short term residential use for seriously mentally ill individuals, it is staff's conclusion that it does not trigger the setback requirement for the dispensary as indicated in Unified Development Code (UDC) section 4.9.9.E.1.k.

Recommendation

Staff recommends upholding the Zoning Administrator's Determination that for the purposes of applying the code required setbacks of a Medical Marijuana Dispensary, as indicated in Unified Development Code (UDC) section 4.9.9.E.1.k, the property addressed 1038 East Lester does not meet the definition of a church (religious use); and that the facility at 535 East Drachman does not meet the definition of a licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility.

PLANNING & DEVELOPMENT SERVICES RECOMMENDATION

Staff recommends upholding the Zoning Administrator's Determination

Russlyn Wells, Zoning Administrator

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Attachment: Exhibit 1 Zoning Administrator's Determination