

APPELLANT'S APPEAL ATTACHMENT

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May 31, 2019

VIA EMAIL AND FEDEX

City of Tucson Board of Adjustment
C/O Planning & Development Services
Department
201 N. Stone Avenue
Tucson, Arizona 85701
Russlyn.Wells@tucsonaz.gov

RE: Appeal of Zoning Certification Determination dated
May 16, 2019, for 1525 N. Park Avenue
Parcel ID No. 123-150-70A & 123-15-0720 (the "Property,"
Parcel ID No. 123-15-070B as of conjoining 08-NOV-2018)

CHAA: 111 Zoning: C-2 Activity #: T17SA00033,
T18SA00085, T19SA00137

Dear City of Tucson Board of Adjustment Members:

On May 16, 2019, the Zoning Administrator issued the Zoning Administrator Determination (the "Determination") related to Rashad J. Stocker's Zoning Determination Request dated April 1, 2019 (the "Request"). The Zoning Administrator determined that under the City of Tucson Ordinances 10850, 11199, 11346, and 11612 (collectively, the "Ordinances") the Drikung Dzogchen Center of Arizona (the "Buddhist Center") does not meet the definition of religious use, and that COPE Community Services, Inc. ("COPE") does not constitute a "residential abuse and treatment facility or other licensed drug or alcohol facility." Mr. Stocker hereby appeals the Determination to the Board of Adjustment.

This appeal is supported by the following arguments and correspondence and documents previously submitted in this matter. Contemporaneously submitted with this Legal Argument, Mr. Stocker includes the entire record of this matter for your consideration.

Brief Factual and Procedural Background of the Appeal¹

Total Accountability Patient Care, Inc. (“Total Accountability”) operates a medical marijuana dispensary located at 226 E. 4th Street, Benson, Arizona with offices at 1718 E. Speedway #146, Tucson, Arizona, 85719. On January 23, 2017, Total Accountability submitted its first Planning and Development Services Department Zoning Compliance Application, which application was approved by the Planning and Development Services Department (“PDS”) on February 8, 2017. Total Accountability planned to construct a medical marijuana dispensary at the Property.

On February 23, 2018, Total Accountability submitted its 2018 Planning and Development Services Department Zoning Compliance Application. That same day, my firm sent PDS a letter informing them that the application must be denied because the Buddhist Center constituted a “Church.” On March 8, 2018, PDS responded to the letter disagreeing that the Buddhist Center constituted a “Church.” And, the next day, PDS sent Total Accountability a Medical Marijuana Authorization Letter granting Total Accountability permission to obtain city permits to construct a medical marijuana dispensary location at the Property. *See* Request at Exhibit 1. Our offices sent PDS a letter dated March 12, 2018, responding to PDS’s last letter with further evidence that that Total Accountability had violated the setback provisions in the Ordinances because the Property was too close to the Buddhist Center and because it was too close to COPE. *Id.* On March 22, 2019, our offices sent another letter to PDS. *Id.* On March 26, 2019, PDS sent a response, ignoring the violations. *Id.*

On March 26, 2019, Total Accountability submitted its 2019 Planning and Development Services Department Zoning Compliance Application. *Id.* On April 1, 2019, Mr. Stocker submitted the Request, demonstrating therein that locating a medical marijuana dispensary at the Property violates the Ordinances.

On May 16, 2019, the Zoning Administrator issued its Determination and found, among other things, that the Buddhist Center does not meet the definition of religious use, and that COPE does not constitute a “residential abuse and diagnostic treatment facility or other licensed drug or alcohol

¹ The documents and correspondence referenced in the background are included in this Appeal. For a complete history of the correspondence in this matter, please see Exhibit B of the Determination.

rehabilitation facility.” Mr. Stocker timely submitted his intent to appeal the Determination. This appeal arises out of the Determination.

Legal Argument

Appellant formally requests that the Board of Adjustment reverse the Determination because the Buddhist Center constitutes a “Church” and because COPE constitutes a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility” (collectively, a “Residential Treatment Facility”) under the Ordinances. The Zoning Administrator’s failure to enforce the Ordinances is a reversible error and must be overturned.

I. The Zoning Administrator Erred By Not Determining that the Buddhist Center is a Church.

The Ordinances prohibit a medical marijuana dispensary from being located within 1000 feet of a “Church.” The Zoning Administrator agrees that the Buddhist Center is within 1000 feet of the proposed site of a medical marijuana dispensary. The Zoning Administrator, however, found that the Buddhist Center does not meet the definition of “religious use,” and denied the Request. This is clear error.

First and foremost, the Ordinances *do not* preclude a medical marijuana dispensary from being located within 1000 feet of a property used for religious purposes or a building holding a Certificate of Occupancy for religious use. *Rather*, the Ordinances preclude a dispensary from being within 1000 feet of a “Church,” as it is specifically defined in the Ordinances. The distinction is critical. As explained below, the Zoning Administrator neglects to determine if the Buddhist Center meets the definition of a “Church,” as it appears in the Ordinances, and its Determination of its compliance with “religious use” defined elsewhere in the Unified Development Code (“UDC”) is incorrect and misplaced.

The Ordinances define a “Church,” (the term appearing *in parenthesis* in the Ordinances and in the UDC) as “a building which is erected or converted for use as a church, 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.” *See, e.g.*, Ordinance 10850 at p. 11. That is, the requirements to constitute and identify a “Church” under the Ordinances, are that there is (1) a building, (2) erected or converted for use as a church, (3) with regularly convened religious services, (4) used primarily for religious worship and

schooling, and (5) a reasonable person would conclude it is a church because of the design, signs, and architectural features. *Id.*

The Appellant demonstrated that the Buddhist Center met each element of the definition of a “Church.” The Buddhist Center is a building. It has been converted for use as a church with regular religious services and is used primarily for religious worship and schooling. Also, a reasonable person would conclude it is a “Church” under the Ordinances because it has unique religious design and indicia on its outer wall.

The Zoning Administrator *made no findings* in the Determination that the Buddhist Center failed to meet the elements of a “Church” for purposes of the Ordinances, and only acknowledged that the Buddhist Center “lies within 1000 feet of the Property.” See Determination at p. 2.

Rather than focusing on the controlling definitions of “Church” in the Ordinances, however, the Zoning Administrator arbitrarily looked to other sections of the UDC to arrive at what appears to be a predetermined result. The Zoning Administrator cites a non-conforming status and the 1961 construction drawings to argue the structure was not erected as a church, but made no reference to the existing physical elements of conversion, activity or architectural features in the Determination. Instead, the Zoning Administrator found that the Buddhist Center is not a “religious use” because it is “certified for occupancy as a residential use only.” Determination at p. 2. Without the correct Certificate of Occupancy, as the flawed analysis goes, the Buddhist Center is not a “Church.”

To arrive at this conclusion, the Zoning Administrator asserts that “**Church**” (in parenthesis, as it appears in the Ordinances) and **religious use** “is the same,” with an argument that confuses “use” (activity) with “Certificate of Occupancy.” The former term “Church” (parenthesis) is a term given specific meaning and definition in the Ordinances, while the latter “religious use” references a civic land use code (*i.e.*, UDC 11.3.3 “Religious Use” – Assembly for religious worship), which appears outside the language of the Ordinances, and in which churches *are an example*. “Church” (parenthesis) and church (an *example of religious use* appearing in UDC 11.3.3, no parenthesis) are not the same thing, and do not have the same meaning. If they were the same and had the same meaning, the language of the Ordinances would not have included the explicit requirement that the building be “used primarily for religious worship.” The tautology thus created (*i.e.*, “...for religious worship that is used for religious worship...”) by the Zoning Administrator’s assertion in the premise of the argument illustrates the flaw of its conclusion.

The Determination is misplaced and incorrect for other reasons. In the enforcement of setbacks from a “Church” the language of the Ordinances is complete and unambiguous as it was written – there is no need to rely on compliance or conformity with other sections of the UDC to determine if something is a “Church.” In establishing setbacks for dispensaries, there is no requirement in the Ordinances that a building possess any specific Certificate of Occupancy to qualify as a “Church” (parenthesis) or, as the Zoning Administrator implies, any requirement that the building be currently taxed at a rate applied for “religious use,” as defined by the Pima County Assessor. Please keep in mind that the language appearing in the Ordinances was developed with direct input and recommendations from PDSO. Had the Zoning Administrator and the PDSO intended the Ordinances require a “Church” (parenthesis) to have a specific Certificate of Occupancy or a particular tax designation, they would have specifically included such requirement in the definition language, or clearly referenced them. “Church” was defined for the purpose of the Ordinances because no definition of church existed in the Land Use Code (now UDC) that could be effectively applied to enforce setbacks, but the PDSO did *not have to place the term in parenthesis* and thus define (or re-define) a “Church” at all. The PDSO could have instead relied on the definition to follow from the term appearing elsewhere in the UDC (*e.g.*, as an example of a particular “Certified Use” - as the Zoning Administrator now appears to be doing). Instead, the manner in which the Ordinances define a “Church” include, along with specific architectural features and activities, reliance on the reasonable beliefs of a person that a building is a “Church.” This reliance and language allows the identification of a “Church” in simple terms that can be utilized by dispensary applicants in their requests for zoning approval, and by PDSO in enforcing setbacks.

Under the Determination just issued, however, even if a reasonable person believed a building is a church, *and* was a “Church” because it met the explicit requirements of the Ordinances, it still may not constitute a “Church” if it fails to possess a particular Certificate of Occupancy.

In the above situation, which summarizes the present circumstances of the Buddhist Center, the Zoning Administrator abandons the language developed by its own Department and attempts to rewrite the definition of “Church” without abiding by the public legislative process. This is in error for several additional reasons set forth below.

The first is that such revision now places an additional burden on dispensary zoning applicants to review the Certificates of Occupancy of any “potential Church” (those buildings meeting the features and activities criteria) that falls within a ½ mile radius of their proposed location and identify

whether it is an actual “Church.” Requiring such an action in the performance of due diligence is not reasonable – the certificates of all locations are not readily available. PDSO could not in good conscience make a specific Certificate of Occupancy or certified use a requirement for enforcing a setback without also meeting its obligation to have the Certificate of Occupancy for all properties available, updated, and posted in the online database, an obligation it has not met.

Additionally, this unwritten, undisclosed requirement could have allowed the zoning approvals of dispensaries in locations that past applicants reasonably believed were non-compliant because they were within 1000 feet of a “Church” (e.g., a building that otherwise met the criteria in the Ordinances). In other words, applicants possessed, but were not made aware of, a method to “de-qualify” a “Church” that ostensibly met all the Ordinances’ criteria of being a “Church.” This alleged option was not (and is not) published in the City of Tucson “Medical Marijuana Fact Sheet,” and all applicants relied (and rely) on the language as it is written in the Ordinances to submit locations for approval. There was and is no way for applicants to know that “Churches” appearing to constitute “Churches” under the Ordinances may not constitute “Churches” because they did not have specific Certificates of Occupancy.

The danger of adding unwritten requirements into a rule is that it leads to arbitrary and capricious decisions. Such actions approach violation of equal protection and due process rights under Arizona law.

In a Medical Marijuana Review Letter to Neal Starr, the Zoning Administrator denied the zoning approval of a proposed dispensary property located at 25 E. Blacklidge Drive. See T16SA00353 attached hereto as **Exhibit A**. This denial was based on the proposed dispensary location being within 1000 feet of The Church of the Pentecost, a “Church” (still) located at 3100 N. Stone Ave #108. At the time the letter of zoning denial was issued (August 2016), the Certificate of Occupancy for 3100 N. Stone Ave #108 was “OFFICE.” See T09OT02635 attached hereto as **Exhibit B**. The current Certificate of Occupancy available on the PDSO online database for 3100 N. Stone Ave #108 is “OFFICE.” See *id.* A manual search of the PDSO records, performed on May 23, 2019, was unable to locate or identify any Certificate of Occupancy for 3100 N. Stone Ave #108 that supersedes this “OFFICE” Certificate of Occupancy. Applicants for Zoning Compliance with Medical Marijuana Locations were directed by PDSO on June 27, 2016, to the Medical Marijuana Fact Sheet for information on the application process. See **Exhibit C**. The Medical Marijuana Fact Sheet (then, and now) repeats the simple language of the Ordinances in presenting the definition of a “Church.” It makes *no mention* of a requirement for a specific Certificate of Occupancy in identifying a “Church” for setback

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purposes, nor does it suggest that a presumed “Church” may not actually be a “Church” if it does not have a certified religious use. It follows that the denial letter issued to Neal Starr makes no mention of the Certificate of Occupancy employed by The Church of the Pentecost. If such were a requirement it would surely have been included in that document as part of the reason the application was denied.

Under the reasoning applied by the Zoning Administrator in the current Determination, the Zoning Administrator should have approved the application. The property at 3100 N. Stone #108 housed commercial businesses prior to The Church of the Pentecost locating there, so the building was certainly not “erected” as a church. The Church of the Pentecost has not engaged in any more visible, City permitted, or objective endeavor to “convert” the property at 3100 N. Stone for use as a church than the Buddhist Center has performed at its location. Both have religious services regularly convened, both locations are used primarily for religious worship and schooling, and a reasonable person would conclude that both are places of religious worship (a church, temple, synagogue or mosque) because of the design, signs, and architectural features present at the locations. Neither possesses a Certificate of Occupancy for religious use.

To be clear, under the Ordinances, The Church of the Pentecost is a “Church.” The 2016 Determination for The Church of the Pentecost is precedent and exemplifies the correct application of the Ordinances to enforce a setback. Under the rights of equal protection and due process, there is no justifiable reason why the Zoning Administrator found The Church of the Pentecost to be a “Church,” and the Buddhist Center not to be a “Church.” It is entirely inconsistent. Treating two religions differently violates the United States Constitution.

There are further disparities regarding the *explicit* mention of the requirement that a building possess a specific Certificate of Occupancy to qualify as a “Church.” In reviewing PDSO letters delivered to dispensary zoning applicants it should be noted the Ordinance language, and its specific criteria to identify a “Church,” is consistently cited and spelled out. When the Zoning Administrator determines a location *is* a “Church,” and a denial letter is delivered, research uncovered no instances of mentioning the alleged required Certificate of Occupancy to applicants as a reason for denial. *See, e.g.*, T16SA00251 attached hereto as **Exhibit D**; T16SA00336 attached hereto as **Exhibit E**; *see also* **Exhibit A**. If the Certificate of Occupancy is a factor considered by the Zoning Administrator in its routine process of evaluating applications, its mention in denials would be expected because it would be another objective reason to deny an application. That such mention is not

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present supports that it is not a regular criterion used by the Zoning Administrator. In those two instances when the Zoning Administrator has determined an entity *is not* a “Church,” it does not present evidence or argument directed at the specific qualifying criteria found in the Ordinances (*i.e.*, does not argue that the location in question *lacks* regularly convened services or *fails* to display specific architectural features, etc.) but instead steps outside the Ordinance language and relies on citation of other portions of the UDC to render these determinations. See T17SA00276 attached hereto as **Exhibit F**; see also the PDS Letter Dated March 08, 2018, at **Exhibit B-1 of Determination**.

By noting that any one or more specific qualifying criteria are not explicitly called out in determining an entity is a “Church” (*i.e.*, informing the applicant that the property *does* convene regular services and *does* possess specific architectural features, etc.) it may be argued by the Zoning Administrator that this inconsistency (meaning the omission of including mention of a specific Certificate of Occupancy in determining an entity is a “Church”) is simply a reflection of standard editorial practice. An objective assessment, however, would reveal the other defining criteria (*i.e.*, being a building purposed for use as a church, regularly convened services, used for religious worship and schooling, and reasonably concluded to be a church because of its design, signs, and architectural features) do not warrant explicit mention in letters of denial for good reason - *those* requirements are already *explicit* in the Ordinance language, referenced in the denial letter, and presumed by the Zoning Administrator to be understood by the applicant.

The inconsistency in referencing a Certificate of Occupancy in Determinations regarding the identification of a “Church” questions its credibility as an authentic requirement and bolsters issues of equal protection and due process in Determinations. See **Exhibit A**. Additionally, the existence of the above correspondence employing the criterion of a specific Certificate of Occupancy to determine something *is not* a “Church” under the Ordinances ***does not create a precedent***: it was incorrect in those instances, and is incorrect in the current Determination.

To summarize, rather than examining whether the Buddhist Center constituted a “Church” under the language present in the governing Ordinances, the Zoning Administrator, at a whim, looked to other provisions of the UDC to instead determine a deficiency of use, and thus manufacture an unrecognized requirement (“certified religious use”) as justification for what appears to be a predetermined outcome – that the Buddhist Center does not constitute a “Church.” The Zoning Administrator’s decision was arbitrary,

capricious, inconsistent with recognized principals of statutory interpretation, and in error. It must be overturned.

II. The Zoning Administrator Erred By Determining that COPE Does Not Constitute a “Residential Substance Abuse Diagnostic and Treatment Facility or Other Licensed Residential Drug or Alcohol Rehabilitation Facility.”

The Ordinances prohibit a medical marijuana dispensary from being located within 2000 feet of a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility.” *See, e.g.*, Ordinance 11199 at p. 4. The Zoning Administrator agrees that the COPE facility located at 535 E. Drachman Street lies within 2000 feet of the Property. The Zoning Administrator disagrees that COPE qualifies as a Residential Treatment Facility.

COPE offers residential substance abuse treatment at this facility. COPE’s license states that it 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.” *See* Request at Exhibit 1 (emphasis supplied). It is therefore beyond dispute that COPE is licensed to treat alcohol and drug abuse, and that the facility offers residential care for these services. Indeed, the Zoning Administrator cannot and does not dispute this fact. Had the Zoning Administrator reviewed the Request under the governing Ordinances, the analysis would end here, and the result is that COPE is a “Residential Treatment Facility,” and the setback must be enforced.

The Zoning Administrator, however, ruled that COPE does not qualify as a Residential Treatment Facility requiring a setback under the Ordinances because it is not designed to “primarily” treat and diagnose substance abuse and drug and alcohol issues. Determination at p.4. Not only is the qualifier “primarily” absent in *any* relation to Residential Treatment Facilities in the Ordinances, whose provisions control the determination of whether an entity requires a setback for dispensary zoning, but the term is not even present in the Pima County Code of Ordinances where it defines such facilities, cited by the Zoning Administrator as the origin of the Ordinance language. A cursory review of the language of the Ordinances and the language of the Pima County Code of Ordinances demonstrates as much.

The Controlling Ordinances' Definition:

(A Residential Treatment Facility is a) licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility.

See, e.g., Ordinance 11199 at p. 4.

The Pima County Code of Ordinances Definition:

Residential substance abuse diagnostic and treatment facility: 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.

See Pima County Code of Ordinances 18.03.020 "R" 7.

The Zoning Administrator has attempted to insert a new term, and subsequently a new requirement, into the statute that *no* Ordinance, controlling, adopted, or otherwise, incorporates. The Zoning Administrator has arbitrarily interpreted the *meaning and definition* of a Pima County Code, and then claims it was adopted by the City of Tucson with *that* reinterpretation. Although the logic is flawed on its face, the Zoning Administrator nevertheless offers no correspondence with Pima County or any other evidence in its Determination to support, or even suggest, that its interpretation of what that Code "relates" to is correct. *See* Determination at p.3. The term "primarily" appears 48 times in the Pima County Code of Ordinances, and 12 times in its General Definitions (Chapter 18.03). "Primarily," as it appears in the Pima County Code, is never found in conjunction with, within a definition of, or in *relation* to "residential rehabilitation and treatment facilities" or "substance abuse." Inserting a term not included in any relevant rule anywhere in Pima County can only demonstrate an inexplicable bias being employed the Zoning Administrator.

In addition to overstepping its authority, the Zoning Administrator's attempt to introduce a new qualifying criterion into the Ordinances setback requirements for Residential Treatment Facilities fails for many other reasons. First, it violates the rules of statutory interpretation because it introduces a new requirement into an easily understood rule. The law on interpreting statutes in this country is clear: the plain language of the statute controls. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well-established that when the statute's language is plain, the sole function of the courts – at least

where disposition required by the text is not absurd – is to enforce it according to its terms.”) (citations omitted). By this legal principle the legislative intent behind a statute is inherent in its language. The legislature only intends what is set forth in the statute – nothing more – because if it had wanted to include a further requirement, it would have done so explicitly.

Here, the Ordinances require only that a medical marijuana dispensary not be located within 2000 feet of a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility.” Ordinance 11199 at p. 4. The Ordinances never mention the term “primarily” in qualifying either the design or activities of the facility. The language in the Ordinances was developed with PDSO input and reviewed and adopted with PDSO recommendations. Significantly, the Ordinances do *not* state that a setback will be enforced from “a residential facility designed **primarily** to treat and diagnose substance abuse.” Determination at p.4. This optional terminology was clearly available to PDSO when it drafted the original Ordinance, adopted the Pima County language, and allegedly had the intent (articulated at length by the Zoning Administrator in the Determination) to so limit the licensed facilities that qualified for a setback. In short, if that was *actually* the intent, to “limit application of the setback to only those facilities designed to primarily treat and diagnose substance abuse and drug and alcohol issues” [Determination at p.4], then the final language of the Ordinances would have been written to reflect that intent. As it was actually recommended by PDSO and ratified by the Mayor and Council, the language of the Ordinances dictates that the Zoning Administrator must deny a medical marijuana dispensary zoning application if a proposed dispensary location falls within 2000 feet of *any* State-licensed residential facility treating substance abuse patients or providing residential alcohol rehabilitation. That this mandate holds true regardless of such considerations as the percentage of the facility’s patients suffering from substance abuse compared to the percentage of other patients, or the facility’s “design,” primary or otherwise, should be self-evident. Outside the formal process of legislative amendment there is no provision or legal precedent to enforce unwritten language, or to arbitrarily add new language that is suddenly deemed more accurate of intent in retrospect.

The Zoning Administrator’s reinterpreted definition of a Residential Treatment Facility is also logically flawed. A small licensed rehabilitation facility whose sole activity and service is *exclusively* residential substance abuse treatment may diagnose and treat only a few patients per month, whereas a large licensed residential behavioral health facility that offers services to a variety of patients, but not “primarily” substance abuse patients, may diagnose and treat significantly more substance-abuse patients than the

small facility. Under the Zoning Administrator's newly proposed definition, the former qualifies as a Residential Treatment Facility requiring a setback, and the latter would not, even though the larger facility would house and treat more individuals for substance abuse. This leads to the absurd result of now not only *allowing* a medical marijuana dispensary to locate within 2000 feet of a licensed facility where residential substance abuse treatment is being performed, but operating in proximity of *more* patients than would be allowed without "primarily" being inserted. The Zoning Administrator does not have the authority to rewrite the statute, let alone in a way that employs flawed logic, or that potentially reverses its own stated intent.

As the Zoning Administrator is aware, the availability of properties in the Tucson area meeting all the Ordinances' setback requirements is, and has been, the critical and limiting step in the application process to the Arizona Department of Health Services ("AZDHS"). In the past two rounds of dispensary registration allocations, applicants dismissed many properties as potential dispensary locations based on the reasonable understanding and belief that a "licensed residential substance abuse diagnostic and treatment facility" required a 2000-foot setback. Had these potential dispensary owners been aware that the enforcement of that setback was limited to "only those facilities designed to *primarily* treat and diagnose substance abuse and drug and alcohol issues" [Determination p.4] they would have screened them on an entirely different basis, as would have the owners of potential dispensary locations, many of whom were charging considerable sums to allow their approved properties to appear exclusively on a AZDHS application. Bear in mind that the allocation of dispensary registrations by AZDHS was performed randomly and by CHAA. An applicant's odds of receiving a dispensary allocation in the first round were determined *directly* by the number of qualifying properties submitted in that CHAA, and the financial stakes were believed (and have proven to be) significant.

The 2000-foot setback was so effective in disqualifying properties in Tucson in the first round of allocation that it was cited and utilized by businesses as a way to prohibit dispensary zoning from being approved near them. In fact, pursuant to one of these initiatives, the Zoning Administrator previously made a Determination regarding the qualifications of a Residential Treatment Facility to require a setback. See Letter of Determination Dated April 4, 2012, attached hereto as Exhibit G. That 2012 Determination references the same Land Use Codes (*i.e.*, Residential Use Group and Residential Care Services) that are carried over in the UDC underlying the current Determination. The Zoning Administrator states that: "The term, rehabilitation facility refers to a convalescence, in-patient facility where meals lodging and services are rendered to ill persons." While the Zoning

Administrator determines that both phrases of the Ordinance language – “Residential substance abuse and treatment facility” and “...or other drug or alcohol rehabilitation facility” – are covered by 6.3.8.5 (Residential Care Services, carried over to UDC 11.3.D), the Zoning Administrator did not feel compelled to place the Use within the Physical and Behavioral Health Services (“PBHS”) subclass, choosing instead to reference “rehabilitation center,” a Use appearing in 6.3.8.5, which was apparently not carried over to the UDC. The 2012 Determination of what the Ordinance language refers to thus established a Use precedent, and one that does not manufacture or necessitate the need to separate it from entries in the PBHS subclass of use. Which, perhaps, calls into the question the professed need to do so when developing the Ordinance language. Most notably, this Determination, which provides an actionable definition of Residential Treatment Facility, did not need to step outside of the Ordinance language to do so. Of particular significance, it did not reference anything about facility design or mention *anything* about this alleged “primarily” requirement. To now proclaim that the “primarily designed” requirement existed *all along*, and was *intended* from the draft stages of the Ordinances, would mean the PDSO has employed practices and policies of public education over the past seven or more years that incompletely informed applicants of the actual meaning of the Ordinance language, as well as misrepresenting the zoning practices it would actually employ in approving or denying locations.

Setting aside the Determination that a facility must be designed to be “primarily” engaged in treating substance abuse to qualify as a Residential Treatment Facility is flawed, the Zoning Administrator has not presented evidence to satisfy its own conditions. The formula employed by the Zoning Administrator in determining that COPE is “not primarily” engaged in treating substance abuse patients is conspicuously absent in the Determination. The Zoning Administrator cites correspondence from 2006-2007 (Exhibit F of the Determination, with its’ 2006 program description referenced, but not included in the Exhibit), and an onsite inquiry of the COPE facility in 2017-2018, but no field notes on calculating the percentages of substance abuse patients treated or any other measure of patient care breakdown, by type or otherwise, is presented. The letter from COPE summarizes its activities at the Location between 1997 and 2006 – *thirteen years ago*. The letter from COPE does not refer to any “primary” facility design, nor does its content somehow establish an irrevocable, non-revisable treatment program. The Zoning Administrator entirely projects from pre-Ordinance correspondence to determine the current magnitude and degree of COPE’s residential substance abuse treatment. *Nothing* presented by the Zoning Administrator in the Determination references recent evidence or the *present* design and patient population of the COPE facility. To put a finer point

on it, the Zoning Administrator ginned up the requirement that a Treatment Facility be “primarily” engaged in treating substance abuse patients, and then never provided any evidence that COPE currently does not “primarily” engage in treating substance abuse patients. Accordingly, even under the incorrect definition of Residential Treatment Facility espoused by the Zoning Administrator, there is no current evidence that COPE does not qualify.

Inserting the requirement that a Residential Treatment Facility “primarily” engage in substance abuse treatment also fails because it places an additional burden on an applicant seeking to locate a medical marijuana dispensary where a Residential Treatment Facility may exist because the applicant has no way of knowing how the Zoning Administrator interprets “primarily.” After internet searches for services offered and confirmation of appropriate licensure by the Arizona Department of Health Services to identify the locations of all entities licensed to provide residential substance abuse treatment in a half-mile radius, and then surveying 2000 feet to determine a setback, the applicant must now determine whether any licensed facility within that 2000-foot perimeter is “designed to *primarily* treat substance abuse and drug and alcohol problems.” Determination p. 4. The Department of Health Services licensure, license type, and licensure process makes no such distinction, and *no published formula* for this determination exists. What if the facility offers “some” other behavioral health services? What if most of its *income* comes from substance abuse treatment, but it provides many other behavioral health services? What if the majority of its patients have physician diagnosed substance abuse issues, but their insurance only allows reimbursement for residential services if the billing is coded for mental illness? Without guiding criteria, a published formula, (or apparently, absent a thirteen-year-old letter describing services offered at the location in a previous decade) it would be unreasonable, if not impossible, for a medical marijuana dispensary applicant to fulfill its obligation of due diligence. An applicant could not demonstrate objective compliance with the Ordinance setbacks with such a subjective term inserted. In addition, inserting the requirement of “primarily” engaging in the treatment of substance abuse puts an unreasonable burden on PDS staff. The zoning department would be compelled to calculate, document and defend the process or formula by which the determination of “primarily” was made. They would further have to receive and respond to petitions by dispensary applicants who contend and argue that licensed facilities located within 2000 feet of their proposed location are *not* so “primarily” engaged (and, conceivably, hear the arguments of facilities that contend they *are* so engaged). If the Zoning Administrator’s assertion that the “primarily” criteria has been the “intended meaning” all along, there should *presently* be considerable documentation *and a defined formula* for each medical marijuana zoning review demonstrating that a setback was only

enforced when the entity in question had been confirmed by PDSO as a facility “designed to primarily treat substance abuse or and drug and alcohol problems.” Determination at p.4.

The Determination has another inconsistency meriting brief mention. It states that COPE cannot meet the definition of Residential Treatment Facility because it was not “designed to diagnose and treat persons suffering from the abuse of chemical substances and alcohol,” and that the “COPE facility at issue is designed to provide residential treatment for severely mentally ill individuals.” Determination at p. 4. The Zoning Administrator ignores that a facility designed to treat mentally ill patients *is also necessarily designed to treat substance abuse patients*. The two treatment modalities are not mutually exclusive and the significant overlap between mental illness and substance abuse is universally recognized in health care.

To be clear, the Zoning Administrator determined that COPE did not meet the definition of a Residential Treatment Facility *solely because* it was not a “facility designed to *primarily* treat and diagnose substance abuse and drug and alcohol issues.” Determination at p.4. In the absence of the “primarily” qualification introduced by the Zoning Administrator, COPE clearly constitutes a Residential Treatment Facility, and thus requires the enforcement of a setback in approving dispensary zoning. The alleged intent of the adopted language and what it “refers” to, its violation of legislative process, logical flaws, unacceptable consequences, and the failure of the Zoning Administrator to even satisfy its own “intended” requirement of “primarily,” have been outlined in the arguments above. Individually, the arguments question the legal soundness, historical plausibility, and authenticity of the Zoning Administrator’s Determination regarding the COPE facility. If the merits of any of the individual arguments hold validity the Determination must be reversed. Collectively they entirely erode the platform on which the Determination was made and presented.

III. Conclusion

The Zoning Administrator’s Determination must be reversed because its premises and conclusions fail to follow or uphold the provisions of the Ordinances as they are written. The Zoning Administrator *should have* applied the definition of “Church” appearing in the Ordinances to determine whether the Buddhist Center qualifies as a “Church,” as opposed to using requirements from other provisions of the UDC to disqualify it on grounds of religious use. The Zoning Administrator *should have* determined whether COPE is a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility,” not whether COPE

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is a “facility designed to *primarily* treat and diagnose substance abuse and drug and alcohol issues.” The Zoning Administrator’s decision to arbitrarily apply ancillary rules, ignore clear language, and introduce completely new requirements into the existing Ordinances is blatant error. For the reasons set forth above, the Appellant respectfully requests the Board of Adjustment reverse the Determination.

Sincerely,

MAY, POTENZA, BARAN & GILLESPIE, P.C.

Jesse R. Callahan, Esq.

JRC/gc

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