

ZONING ADMINISTRATOR'S (ZA) DETERMINATION



CITY OF
TUCSON

PLANNING AND
DEVELOPMENT
SERVICES
DEPARTMENT

ZONING
ADMINISTRATION
DIVISION

May 16, 2019

Jesse R. Callahan, Esq.
May, Potenza, Baran & Gillespie
Attorneys at Law
201 North Central Avenue
Phoenix, Arizona 85004-0608

Sent via email to: jcallahan@maypotenza.com & gcartwright@maypotenza.com

SUBJECT: Zoning Administrator Determination
Medical Marijuana Dispensary
1525 North Park Avenue, Tucson, Arizona
Pima County Tax Parcel Number: 123-15-070B
Development Plan/ Permit Numbers: DP18-0043/ T18CM05428
Activity # T19SA00137

Dear Mr. Callahan,

I am in receipt of your letter and its attachments, dated April 1, 2019, requesting a Zoning Administrator Determination (“ZAD”) (*See, Exhibit A*)ⁱ. In your letter of request you state that the City is in violation of ordinance Nos. 10850, 11199, 11346 and 11612 for certifying zoning compliance of a proposed medical marijuana dispensary located at 1525 N. Park Ave, Tucson, AZ (T19SA00122) (the “Property”). You specifically request a ZAD relating to the City’s application of setbacks to the Property required by the Unified Development Code (“UDC”) at section 4.9.9.E.1.k, for a medical marijuana dispensary, which states that a medical marijuana dispensary shall be setback “a minimum of 1,000 feet from...a church...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...” You also state that, per the City’s Fact Sheet regarding medical marijuana dispensaries, it is the burden of the applicant proposing to use a location for a medical marijuana dispensary to demonstrate that the proposed location complies with controlling ordinances and that this is not the burden of the Planning and Development Services Department or your client and, that the proposed location violates these ordinances.

Setback From “Church, Temple, Synagogue or Mosque”:

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Planning and Development Services Department (PDSD) - 201 North Stone Avenue
P.O. Box 27210 - Tucson, AZ 85726-7210
Telephone: (520) 791-5550 - Fax: (520) 791-4340
Website: www.tucsonaz.gov/pdsd
Email: DSD_Zoning_Administration@tucsonaz.gov

The residence at 1038 East Lester Street is an established residential use, therefore, the 1000 foot setback from a “church, temple, synagogue or mosque” required by UDC 4.9.9.E.1.k does not apply to the Property. The City does not dispute that a residence at 1038 East Lester Street (which identifies online as The Drikung Dzogchen Center) lies within 1,000 feet of the Property. The City disagrees with your assertion that the Drikung Dzogchen Center meets the UDC definition of a “church, temple, synagogue or mosque “for purposes of applying the zoning setback required by UDC 4.9.9.E.1.k.

UDC section 11.3.3.I defines various civic land uses and defines Religious Use as “Assembly for religious worship. Typical uses include churches, synagogues, and temples.” Relating to setbacks for a medical marijuana dispensary, UDC section 4.9.9.E.k.1 states that “A “church” means a building that is erected or converted for use as a church, temple, synagogue or mosque”...” In this instance, “church” and “religious use” is the same.

For the purposes of applying zoning regulations, a Use is established when it has been certified through the compliance review process and a Certificate of Occupancy or Letter of Completion has been issued for the proposed use of the structure. I reviewed Planning and Development Services (PDS) records and Pima County Assessor’s records for the property addressed 1038 East Lester Street and identified with Assessor’s Parcel Number 123-11-0280. PDS records contain construction drawings, and a permit issued January 9, 1961, to construct a new house on this property (Exhibit C). Additionally, per Pima County Assessor’s records this property is developed with a Single Family Residence and is currently taxed accordingly as a primary residence (Exhibit D).

Pursuant to UDC section 1.4.1.B “Land shall not...be used or occupied, ...and no existing use or structure expanded, reconstructed, changed, or otherwise altered until compliance with the provisions of the UDC have been certified.” The facts are that plans have not been submitted for review and approval nor has a Certificate of Occupancy been issued to allow a change of use from a residential use to a religious use. Further, the owner continues to pay property taxes for a residential use of the property. The property addressed 1038 East Lester Street is certified for occupancy as a residential use only. Therefore, it cannot be considered a religious use such as a church, synagogue, temple, or mosque for the purposes of applying zoning setbacks from a medical marijuana dispensary.

Setback From Licensed Residential Substance Abuse Diagnostic and Treatment Facility Or Other Licensed Residential Drug Or Alcohol Rehabilitation Facility:

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The COPE facility at 535 East Drachman is primarily structured to provide short term general mental health residential services for the severely mentally ill and general mental health adult clients. The City does not dispute that the COPE facility lies within 2,000 feet of the Property. The City disagrees with your assertion that the COPE facility meets the UDC definition of a “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility” for purposes of applying the zoning setback required by UDC 4.9.9.E.1.k.

The process of drafting an ordinance to establish a new land use class and the associated development standards includes reviews of ordinances of other jurisdictions and seeking input from various stakeholders. It is not uncommon to use existing language from other ordinances as the basis for a proposed ordinance.

When the Medical Marijuana ordinance was being drafted, the Land Use Code contained the Residential Care Services land use group: Physical and Behavioral Health Service (PBHS) land use class. This land use group and land use class was carried over into the UDC and is codified at UDC section 11.3.D.2. The PBHS land use class is defined to include facilities that “provide[s] lodging, meals, treatment, counseling, and supervision to persons with behavioral disorders or developmental disabilities or to physically disabled individuals not related to the owner/manager of the facility. Typical uses include group homes for the developmentally disabled, group homes for the seriously mentally ill, specialized treatment homes, group foster homes, and recovery homes for substance abusers.”

Staff intentionally chose not to include all the uses within the PBHS land use class in the ordinance, and instead chose to limit application of the separation requirement to the specific use referenced and defined in the Pima County ordinance, which relates to facilities designed to *primarily* treat substance abuse and drug and alcohol problems, versus those facilities designed to *primarily* treat the seriously mentally ill and general mental health.

On October 26, 2010, the Tucson Planning Commission issued its recommendation to the Mayor and Council on the proposed Land Use Code amendment to address medical marijuana dispensaries and cultivation locations. The Planning Commission’s recommendation (Exhibit E) acknowledges that City staff coordinated with Pima County and used its ordinance as the basis for the City’s proposed amendment. The text “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility” was derived from the Pima County Ordinance relating to medical marijuana dispensaries as noted in the Planning Commission’s recommendation. The General Definitions section contained in Pima County Code of Ordinances Zoning Chapter 18.03 defines residential substance abuse diagnostic and treatment facility as “A

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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.”

UDC section 11.2.4.B states that the word “or” may be read to indicate the connected items are being referred to individually or as a combination. Because the two uses (licensed residential substance abuse diagnostic and treatment facility and license residential drug or alcohol rehabilitation facility) are in the same land use group, I read the ‘or’ to mean that the two uses are read as a combination of similar uses.

The UDC language “licensed residential substance abuse diagnostic and treatment facility or other licensed residential drug or alcohol rehabilitation facility” was derived from the Pima County Ordinance and in combination can be 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 at issue is designed to provide residential treatment for severely mentally ill individuals. The City of Tucson was aware of the specific use of this facility through correspondence with the COPE facilities manager (Exhibit F) in 2006-2007. Further, in 2017 and 2018 Planning and Development Services (PDSD) staff verified the use via an onsite inquiry of COPE staff. Though substance abuse counseling may be offered, the primary use of the facility, as described in the letter from COPE, is to provide short term general mental health residential services for the severely mentally ill and general mental adult clients. Had the City intended on applying the setback requirement to ANY or ALL facilities contained within the PBHS land use class, it would have done so, but instead the decision was made to use the Pima County language and thereby limit application of the setback to only those facilities designed to primarily treat and diagnose substance abuse and drug and alcohol issues.

It is my 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, that the property addressed 1038 East Lester does not meet the definition of a religious use; and, that the COPE 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.

Your concern is noted regarding an application requirement that places the burden on the applicant to demonstrate the proposed location complies with controlling ordinances. This is an application requirement and not policy. In its review of the application for completeness and continued processing, PDSD staff investigates and

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confirms conformance with location requirements. Based on the definition and application of provisions, staff did not find the location to be in violation.

Please feel free to contact me if you have questions. You may reach me via e-mail at Russlyn.Wells@tucsonaz.gov or by telephone at 520-837-4948.

This determination may be appealed to the Board of Adjustment per UDC Section 1.5.1.E. Please contact Mark Castro at 837-4979 or at Mark.Castro@tucsonaz.gov for questions about the Board of Adjustment appeal process.

Sincerely,



Russlyn Wells
Zoning Administrator

C: Scott Clark, Director Planning and Development Services
Mike Rankin, City Attorney
Piroshka Glinsky, Principal Assistant City Attorney
Steve Shields, Section Manager Site Review

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ⁱ See, Exhibit B for a complete history of correspondence between your firm and the City relating to this issue and the proposed medical marijuana facility located at 1525 N. Park Ave including:

- (a) Letter dated February 23, 2019
- (b) PDSB Letter dated March 8, 2018
- (c) Letter dated March, 12, 2018
- (d) Letter dated March 22, 2019
- (e) PDSB Letter dated March 26, 2019

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