

STAFF REPORT

DATE: May 25, 2022

TO: Board of Adjustment

FROM: Zoning Administration
Planning & Development
Services Department

ACTIVITY NO. T22SA00201

C10-22-05 DOWNTOWN DISPENSARY / 221 E 6TH ST LLC / 221 EAST 6TH STREET / C-3

The appellant, Jesse R. Callahan, May Potenza Baran & Gillespie, on behalf of Forever 46, LLC, is appealing the Zoning Administrator's Determination (T22SA00041), issued March 18, 2022 relating to the City's application of setbacks to the marijuana dispensary required by the Unified Development Code (UDC) in Section 4.9.9.E.1.j, which states that "the expansion of an existing marijuana dispensary shall be setback a minimum of 500 feet from a K-12 public, private, or charter school." The Zoning Administrator (ZA) determined that for the purposes of applying the required zoning setbacks of a marijuana dispensary, as indicated in UDC Sections 4.9.9.E.1.h & j, that the use of the property addressed 440 North 6th Avenue does meet the definition of "K-12 public, private, or charter school" as established through a Certificate of Occupancy (C of O) and as provided in the UDC, Arizona Revised Statutes (A.R.S.) and Arizona Administrative Code (A.A.C.). The appellant contends that the ZA "mischaracterizes UDC Sections 4.9.9.E.1.h & j as imposing a setback requirement from any property whereon a school may conduct "educational land use activities."

THE APPELLANT'S REQUEST TO THE BOARD

The appellant is requesting reversal of the March 18, 2022 Zoning Administrator's determination.

ZA DETERMINATION DATED MARCH 18, 2022

Refer to Exhibit 1.

APPELLANT'S ARGUMENTS TO REVERSE THE DETERMINATION

On April 15, 2022 the appellant filed the appeal to the Zoning Administrator's March 18, 2022 Determination. See appellant's submittal documents in the Board's application packet for Case C10-22-05.

The appellant identifies the following as the issues on Appeal:

1. "Although Planning and Development Services Department (PDSD) acknowledges Santa Theresa Tile Works is not a school, PSDS mischaracterizes UDC Sections 4.9.9.E.1.h and 4.9.9.E.1.j as imposing a setback requirement from any property whereon a school may conduct "educational land use activities."

2. Santa Theresa Tile Works' facility is not a school within the meaning of A.R.S. § 15-101(21).
3. PDSB's Zoning Determination is arbitrary, capricious, and an abuse of discretion.
4. PDSB is estopped from denying Forever 46 its Marijuana Use Authorization."

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 *Marijuana Facility* 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.

GENERAL DEVELOPMENT INFORMATION

Zoning and Land Use

SITE: ZONED C-3; (marijuana dispensary)

North: Zoned C-3; (single and multi-family residential)

South: Zoned C-3; (restaurant, bar, art studio)

East: Zoned C-3, R-3; (multi-family residential)

West: Zoned C-3; (automotive repair, retail, multi-family residential)

RETAIL TRADE USE GROUP - UDC SECTION 4.9.9

E. *Marijuana Facility*

1. *Marijuana Dispensary*

h. A marijuana dispensary shall be setback a minimum of 500 feet from a K-12 public, private, or charter school or a licensed childcare center, measured in a straight and direct horizontal line from the closest exterior or applicable interior suite wall of the marijuana dispensary to the closest property line of a school or childcare center. Exception: For the purposes of this section, the following uses are not considered schools and, therefore, are exempt from the setback requirement: 1) school administrative offices not located on or contiguous with a school site; and, 2) athletic fields or playgrounds used for school functions that are not contiguous with a school site, except as provided in Section 4.9.9.E.1.k.

j. The expansion of an existing marijuana dispensary shall be setback a minimum of 500 feet from a K-12 public, private, or charter school, measured in a straight and direct horizontal line from the closest exterior or applicable interior suite wall of the marijuana dispensary to the closest property line of a school.

ZONING ADMINISTRATION CONSIDERATIONS

On February 2, 2022, Forever 46, requested a Zoning Administrator Determination (ZAD) to confirm that Santa Theresa Tile Works is not a “K-12 public, private, or charter school” and therefore is not subject to a distance setback based on UDC Section 4.9.9.E.1.j. On March 18, 2022, the ZA determined that the use of the property addressed 440 North 6th Avenue does meet the definition of “K-12 public, private, or charter school” as established through a C of O and as provided in the UDC, A.R.S. and A.A.C. The determination is being appealed.

UDC Section 4.9.9.E provides the use-specific standards relating to marijuana dispensaries. The primary issue of this appeal is the setback to a K-12 public, private, or charter school that the marijuana dispensary must adhere to.

This staff report seeks to clarify the ZAD as follows: 1) Santa Theresa Tile Works is the “arts campus” of Imago Dei Middle School, a licensed private school; 2) the use of Santa Theresa Tile Works by Imago Dei Middle School as its arts campus is, therefore, a private school as defined by the A.R.S. and A.A.C.; 3) in applying the provisions of UDC Section 4.9.9.E.1.h. & j., staff references A.R.S. and A.A.C. to determine the definition of “K-12 public, private, or charter school”, which does not preclude a private school from having multiple campuses or locations; and 4) the “vested rights doctrine” does not apply as a building permit related to the proposed expansion has not been issued by PDS. The zoning compliance review is necessary to determine conformance with UDC Section 4.9.9.E.1.h. & j. prior to issuance of building permits, and in this case resulted in a denial.

DISCUSSION

1: Arts Campus

Imago Dei Middle School, located at 55 North 6th Avenue, is a licensed private school providing education for grades 5 – 8. Santa Theresa Tile Works is a non-profit subsidiary of Imago Dei Middle School. Santa Theresa Tile Works holds a C of O that was issued in 1998 for a use identified as “Art Studio”. The appellant argues that the C of O issued is dispositive and does not identify the use of Santa Theresa Tile Works as a “K-12 public, private, or charter school.”

An “Art Studio”, as explained in the ZAD (Exhibit 1), does not align with a defined use in the UDC. The UDC does provide flexibility to clarify the use as noted on the C of O. The ZAD acknowledges that Santa Theresa Tile Works activities include

selling ceramic tiles on-site and online, providing workshops, and creating art pieces for the general public to view. In addition to these activities and as an additional land use, art class is also taught at Santa Theresa Tile Works by Imago Dei Middle School staff and Santa Theresa Tile Works employees, several days a week on a weekly basis. As an example, 5th graders attend art class at Santa Theresa Tile Works every Friday as noted on Imago Dei Middle School's website. The arts class provided at Santa Theresa Tile Works is considered primary education as art is an academic standard of the Arizona Department of Education. Imago Dei Middle School considers Santa Theresa Tile Works as its "arts campus" and is mentioned as part of its curriculum.

2: Private School

A private school as defined in A.R.S. 15-802(G)(3), is a "nonpublic institution, other than the child's home, where academic instruction is provided for at least the same number of days and hours each year as a public school." The definition as provided in the A.R.S. does not preclude a private school from having multiple campuses or locations.

An "Educational Use" as defined by the UDC, "Provides a student with instruction through a course or group of courses." Furthermore, the UDC defines Elementary and Secondary Schools, as providing "primary and secondary education for grades kindergarten through 12, as required by the Arizona State Board of Education." Art, as previously mentioned, is considered primary education, and the continuous, scheduled use of Santa Theresa Tile Works for art class establishes this location as a "private school" for the purposes of applying UDC Section 4.9.9.E.1.h. & j.

3: Reliance on facts and code references when issuing a determination.

The appellant contends that the ZAD's "art campus" theory is "arbitrary, capricious, and an abuse of discretion." The ZAD is based on facts and references the UDC A.R.S. and A.A.C. In order to determine whether or not the 500' setback was applicable to Forever 46 marijuana dispensary expansion, the ZA referenced the applicable sections of the A.R.S. and A.A.C. related to the definition of a "K-12 public, private, or charter school."

The appellant argues that sending students to Santa Theresa Tile Works is no different than sending them to "The Screening Room for theatre, the Sonoran Glass School for glass blowing, or the Tucson Museum of Art for art appreciation." The difference is the latter are field trips and are not regularly scheduled art classes as provided at Santa Theresa Tile Works. For example, The Tucson Museum of Art and its employees along with Imago Dei Middle School staff do not teach art classes to 5th graders on a weekly basis. As previously stated, art classes are taught at Santa Theresa Tile Works on a scheduled basis which does establish this location as a private school.

4: Vested Rights Doctrine

Appellant asserts that they have a “vested right” in the expansion of the Property because “[t]he City subsequently permitted Forever 46’s expansion over the course of months, beginning in July 2021.” However, Appellant is incorrect in both the facts and the law. The vested rights doctrine has been stated by Arizona courts as follows:

[W]here a special use or building **permit has been legitimately issued** and the **permittee has substantially relied thereupon** and **incurred considerable expenses**, the right to continue construction under such permit becomes a vested right.

Town of Paradise Valley v. Gulf Leisure Corp., 608, 557 P.2d 532, 540 (1976), (emphasis added)

Thus, where a permit has been issued and an applicant has materially relied upon that permit and its contents, a municipality cannot arbitrarily revoke said permit. *Id.* at 607-08; *see also Phoenix City Council v. Canyon Ford, Inc.*, 473 P.2d 797 (1970); 1 Yokley, *Zoning Law and Practice*, s 9—5 (3d ed. 1965). Conversely, vested rights do *not* attach where the acts of reliance were performed before the issuance of a duly authorized permit. *Id.* 608.

Here, Appellant applied for two permits in July of 2021. On July 12, 2021, Appellant applied for a building permit (Permit Activity No. T21CM05739) for a stair door enclosure and lighting. The building plans are attached as Exhibit 2 with the area of work highlighted. Permit T21CM05739 was issued on August 10, 2021. Appellant’s architect was specifically advised that Permit T21CM05739 was issued only for the stair door enclosure and lighting, not for expansion of the premises (see attached email Exhibit 3). The stamped and approved plans clearly state the approval is for stair work only, as does the issued permit (attached as Exhibit 4). The stairs in question are in a different area of the building than the proposed dispensary expansion, as described further below. Furthermore, the approved plans and permit for T21CM05739 do not make any reference to an expansion of a marijuana facility.

On July 9, 2021, Appellant applied for a building permit (Permit Activity No. T21CM05662) to make certain building improvements, including an expansion of the dispensary within the existing building envelope. The building plans are attached as Exhibit 5 with the area of work highlighted on excerpted sheets 1 and 4. Appellant was notified on or about August 5, 2021 that the submitted permit application failed to include a Marijuana Use Authorization Application (“Marijuana Application”) as required by UDC Use Specific Standard 4.9.9.E.1, among other deficiencies. Appellant resubmitted the permit application on or about August 11, 2021, again without the Marijuana Application. On August 24, 2021, Appellant was again notified of the deficiency. On October 12, 2021, Appellant again resubmitted the permit application, this time having filed the Marijuana Application, however the Marijuana Application had been submitted incorrectly. Appellant was notified on October 13, 2021 of this error and informed that the submitted plans could not be approved without approval of the Marijuana Application. The Marijuana Application was submitted correctly on October 12, 2021 and denied on December 6, 2021. No

permit has been issued for Permit Activity No. T21CM05662; therefore, Appellant has no vested rights to expand the building under the law.

Conclusion

Santa Theresa Tile Works, a non-profit subsidiary of Imago Dei Middle School, has a C of O for “Art Studio”. The activities associated with the use include selling ceramic tiles on-site and online, providing workshops, creating art pieces for the general public to view, and providing art classes for students at Imago Dei Middle School. Art classes are held regularly for the private school which meets the criteria for “Educational Land Use” as stated in the UDC. A “private school” as defined by the A.R.S. does not restrict multiple campuses or locations. Therefore, for the purposes of applying the 500’ setback requirement to a “K-12 public, private, or charter school”, Santa Theresa Tile Works is a “private school” and Forever 46 must adhere to UDC Section 4.9.9.E.1.h. & j.

Recommendation

Staff recommends upholding the Zoning Administrator’s Determination that for the purposes of applying the code required setbacks of a marijuana dispensary as indicated in UDC Section 4.9.9.E.1.h. & j., Santa Theresa Tile Works does meet the definition of a private school; and that the expansion of the marijuana dispensary does not comply with the provisions of UDC Section 4.9.9.E.1.h. & j.

PLANNING & DEVELOPMENT SERVICES RECOMMENDATION

Staff recommends upholding the Zoning Administrator’s Determination

Mark Castro, Principal Planner
For
Elisa Hamblin, AICP
Zoning Administrator

Attachments:

- Exhibit 1 Zoning Administrator’s Determination
- Exhibit 2 Plan Set T21CM05739
- Exhibit 3 Certificate of Occupancy Email
- Exhibit 4 Permit T21CM05739
- Exhibit 5 Excerpted Plan Set T21CM05662