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August 9, 2024

**VIA E-Mail Only**

City of Flagstaff Board of Adjustment  
c/o Tiffany Antol, Zoning Code Manager  
211 W. Aspen Avenue, 1<sup>st</sup> Floor  
Flagstaff, AZ 86001

**Re: Support for Zoning Code Interpretation Determination issued on April 17, 2024**

Dear Board Members:

Nirvana Center, through its undersigned counsel, provides the following statement of support for the Zoning Code Interpretation Determination issued on April 17, 2024 (the "Determination")

The Determination interpreted Section 10-40.60.220(F) of the Flagstaff Zoning Code requiring minimum separations from "sites containing any of the existing uses" to 1) refer to "land uses that have received Certificate of Occupancy and are currently in operation;" and 2) "[t]he timing of the determination of the minimum separations shall be consistent with State licensing for similar facilities which occurs at the time of the application . . . ."

Appellant, FLG Industries, LLC appealed this determination. As explained below, FLG's appeal must be denied where Appellant's grounds for appeal are not based on any findings or conclusions in the Determination.

**A. Brief Factual History**

1. In early 2024, Nirvana Center submitted a site concept plan attesting that the lot or parcel proposed to contain the marijuana establishment meets the separation requirements from existing uses listed in Section 10-40.60.220(F).

2. On April 1, 2024, Appellant, an affiliate entity of Noble Herb Dispensary, submitted a rushed building permit application to convert an existing dental office to a daycare to prevent its competitor from building at the property.

3. The Planning Director considered when Appellant's "daycare" would be considered an "existing use" within the meaning of Section 10-40.60.220(F).

4. The Planning Director also considered whether the determination of the distances would be made at the time of the concept application, which remains in effect for the term of the concept plan in accordance with Section 10-20.30.050.

5. On April 17, 2024, the Planning Director issued the Determination finding that 1) a use will be considered an "existing use" once the Certificate of Occupancy has been issued and the business is operating; and 2) the timing of the separation determination occurs at the time of the application.

6. On April 29, 2024, Appellant appealed the Determination.

#### **B. Authority**

The Zoning Code Administrator is empowered to "interpret, administer, and enforce the provisions of this Zoning Code." Section 10-20.20.090.

On a timely appeal, the Board "shall reverse or modify the order, decision, determination or interpretation under appeal only upon finding an error in the application of these regulations on the part of the administrative officer rendering the order, decision, determination or interpretation." Section 10-20.80.020(G).

#### **C. The Appeal must be denied as untimely.**

Section 10-20-80.20(C)(2) provides that a notice of appeal must be filed within 10 calendar days of the date of the decision. In this case, Appellant's notice of appeal was due April 27, 2024, but was not submitted until April 29, 2024. Section 10-20-80.20(C)(2) provides that the deadline cannot be extended except upon a determination that "the person filing the appeal received no actual or constructive form of notice of the order, requirement, decision or determination being appealed." Absent proof that an extension was granted on the basis that Appellant received no actual or constructive notice of the Determination, this appeal must be denied as untimely.

#### **D. The Appeal should be denied as groundless.**

Rather than attack the actual basis for the Determination, Appellant appeals findings that are not part of the Determination, and consequently are not proper grounds for appeal.

Appellant's challenges relate to 1) vested rights; 2) Appellant's true identity as a marijuana competitor; and 3) AZDHS standards when considering an application for approval to operate.

**1. The Appeal includes strawman arguments about vested rights that were not the basis for the Determination (*Grounds 1-3, 4, and 6*).**

Appellant argues that the Determination treats the “vesting of certain uses differently.” *See* Appeal, at 1 (emphasis added). This argument is patently defective in that it grossly misunderstands the concept of “vesting.” In short, a right vests; the use itself does not.

It is black-letter law that “a property right ‘vests’ when every event has occurred which needs to occur to make the implementation of the right a certainty. A vested property right is a right which is ‘actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.’” *Aranda v. Indus. Comm’n of Arizona*, 198 Ariz. 467, 471, ¶ 18, 11 P.3d 1006, 1010 (2000) (internal quotations omitted).

The Determination includes no analysis, finding, or conclusion regarding vesting of rights. Instead, the Planning Director interpreted the term “existing uses” in Section 10-40.60.220(F) and found that a use is not an existing use until a certificate of occupancy is issued and operations have commenced for that use. The Determination follows well-established legal principles that a certificate of occupancy must be issued for the use and the use be in operation for it to be considered an “existing use.” *See, e.g. Kubby v. Hammond*, 68 Ariz. 17 (1948) (analyzed in context of non-conforming use).

The Determination makes no finding or conclusion about the vesting of rights, whether the Appellant's “daycare” or the “daycare's” competitor marijuana establishment. It confirms that the daycare is not an existing use for purposes of Section 10-40.60.220(F) until it receives a certification of occupancy and operates as such. Appellant's first three stated grounds for appeal are all based entirely on the vesting of rights and must be rejected. Appellant's fourth and sixth grounds for appeal are also erroneously tied to a “vesting” decision that was never part of the Determination, but those stated grounds for appeal are addressed further below.

**2. Public policy supports denial of the Appeal (*Grounds 4-5*).**

As an alternative ground for appeal, Appellant argues that it would be discriminatory and an abuse of discretion to issue an interpretation based on the identity of the user. There is no reasoning in the Determination relating to “concerns about the identity of the Day Care.”

The Board of Adjustment, however, should consider the identity of the Day Care when considering Appellants' public policy arguments about anti-competitive behavior. Contrary to Appellant's feigned concerns that the interpretation would allow a cannabis applicant to block off territory, it is Appellant who seeks to block off this territory from a cannabis competitor.

Appellant's manager is Ryan Hermansky, founder of Noble Herb dispensary in Flagstaff. Apparently, Nirvana Center's business presence in the community poses such a great threat to Noble Herb that it decided to manufacture a daycare to prevent the competition. Only after Nirvana Center submitted its concept plan, Appellant rushed to interfere with Nirvana Center's building plans by seeking to change the use of an existing dental office to a proposed daycare.

The Board should not condone the stifling of competition by permitting cannabis competitors to manufacture sham daycares after a competitor has already met the municipality's separation requirements. Appellant's fourth and fifth grounds for appeal should be denied where the sham "daycare's" true identity was not a basis for the Determination and where the real anti-competitive concern is the "sham" uses that will inevitably occur if competitors can simply take note of a concept plan and then manufacture a "daycare" to keep out competition.

**3. The Determination conflates State licensing requirements with zoning requirements. (*Ground 6*).**

Finally, Appellant raised arguments regarding State licensing requirements that are not the subject of the Determination. To be sure, the failure to comply with State licensing requirements would impact both the marijuana establishment's and Appellant's sham daycare's eventual operation, as both facilities would require licensure by the Arizona Department of Health Services (AZDHS) in order to operate. But neither Nirvana Center's ATO application to operate a marijuana establishment nor Appellant's application for licensure of a child care facility are before the Board.

Any arguments raised by Appellant regarding licensure are irrelevant to the Determination and premature where, as Appellant acknowledges, approval to operate will not occur until after the marijuana establishment obtains its certificate of occupancy and do those requirement do not relate to the "daycare." Appellant cannot predict the future of any eventual application, nor should the Board. Whether AZDHS will approve Nirvana Center's marijuana establishment (or Noble Herb's daycare, for that matter) is not an issue before the Board.

Appellant's sixth ground for appeal must be denied where it is entirely detached from the Determination that was made.

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There is no error in the Determination. Appellant's appeal is disconnected from the reality of what the Determination considered and concluded. The Determination must be upheld where Appellant offers no legitimate grounds for appeal. Nirvana Center intends to participate, through its undersigned counsel, at the Board of Adjustment hearing on August 21, 2024, and can address any questions the Board may have regarding these issues.

Sincerely,

MAY POTENZA BARAN &  
GILLESPIE, PC



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KAS/ll

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