

GAMMAGE & BURNHAM, PLC

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August 14, 2024

Via email: Tantol@flagstaffaz.gov

Board of Adjustment

Attn: Tiffany Antol, Zoning Code Manager

City of Flagstaff

211 W. Aspen Avenue

Flagstaff, AZ 86001

RE: Appeal of 2024 Zoning Code Interpretation pertaining to Separation Requirements

Dear Members of the Board of Adjustment,

This firm represents RCH Wellness, the operator of a medical marijuana dispensary located within the City of Flagstaff (the "City"). On behalf of RCH Wellness, we are submitting this letter in support of the appeal of the City's 2024 Zoning Code Interpretation (the "Interpretation"), which was timely filed under Section 10-10.30.060 of the City's Zoning Code. Based on the materials presented below, the Interpretation contradicts the Zoning Code and departs from the City's established precedents.

The Interpretation states that the submittal of a Concept Plan is sufficient to vest an applicant's right to establish a marijuana use with regard to one specific development standard—separation from protected uses. However, this contradicts the City's previously stated policies regarding vesting. In fact, just one month prior to issuing the Interpretation, the City confirmed to us that a marijuana use does not vest until much later in the permitting process. The Interpretation is thus confusing, contradictory, and arbitrarily grants preferential treatment to the Nirvana facility.

1. The Interpretation contradicts the City's Zoning Code.

The Flagstaff Zoning Code (the "Code") is clear that Concept Plan Review is just a preliminary process: "Concept plan review is an informal review to ensure that the applicant is aware of the procedures and substantive requirements of the City and to identify any potential problems or concerns prior to submitting for site plan review and approval." Section 1020.30.050.A. Furthermore, "[n]o formal action is taken by the Director during concept plan review." Section 1020.30.050.C.3.

Concept Plan is the first mandatory step in the permitting process. For marijuana-related uses, the application must include an affidavit describing how the project complies with separation requirements. Upon receipt of the application, City Staff reviews the application and provides comments and conditions. This comment and condition letter is sometimes informally referred to as an "approval."

The receipt of this letter marks completion of the Concept Plan Review process, and allows an applicant to submit its full site plan or other construction documents.

The only purpose of Concept Plan Review, according to the Code, is to inform applicants of the requirements of their project. No formal action is taken nor formal approval granted. The Code does not even suggest that submitting a Concept Plan gives the applicant (who is not even an “applicant” at that point) legally vested rights.

To the contrary, the Code states that “[n]either concept plan review nor the provision of information by the [City] and the discussion of City policies shall be construed as either a recommendation for approval or denial of the development.” Section 1020.30.050.C.3. The Code clearly informs applicants that even the completion of Concept Plan Review does not create any rights. Because the Interpretation concludes that vested rights are acquired just by starting the Concept Plan process, it is contrary to the City Code.

The Interpretation raises a straightforward issue: when during the permitting process does an applicant obtain a vested right to establish a dispensary? Whether the mere filing of a Concept Plan has that effect is an entirely separate issue from the date on which a protected use (such as the daycare) becomes an “existing use” under the Code. At present, there is an existing daycare, but there is no existing dispensary. The Interpretation allows Nirvana to circumvent that fact.

2. The Interpretation contradicts the City’s previous treatment of dispensaries.

In addition to contradicting Section 1020.30.050 of the Code, the Interpretation is inconsistent with the City’s prior treatment of dispensaries. In 2020, RCH Wellness submitted a Concept Plan to relocate its dispensary. Upon receipt of Concept Plan approval, on February 8, 2021, RCH Wellness requested assurances from the City that the Concept Plan approval was sufficient to “secure the property as it relates to the setback requirements.” See Tab A – 2021 Emails. In other words, RCH asked the very same question that is at issue in this Interpretation. However, the City gave RCH Wellness the opposite answer.

First, on February 17, 2021, the Planning Development Manager, Genevieve Pearthree responded to RCH Wellness, after consulting with the City Attorney, and stated:

Per Section 10-20.30.050: Concept Plan Review of the City of Flagstaff Zoning Code, “Concept plan review is an informal review to ensure that the applicant is aware of the procedures and substantive requirements of the City and to identify any potential problems or concerns...”. Concept Plan is not a formal approval and thus it does not vest a project in the current City Code.

...

There are two options to vest the current project in the current City Code. The first, which again is not required for the proposed project, is to obtain Site Plan completeness and then approval. The second option is to apply for a building permit at the site for the interior and exterior changes needed to update the building to meet the proposed dispensary use.

See Tab A.

In 2021, the City clearly stated that Concept Plan Review is an informal process, and that approval does not vest compliance with any development standards. Consistent with Arizona case law on “vested rights,” the City determined that further, more substantial steps are required to vest the project in the Code.

Second, on March 4, 2024, this firm contacted the City Attorney’s Office about its previous position regarding vesting for marijuana uses. See Tab B – 2024 Emails. We referred back to the 2021 email from Ms. Pearthree and asked whether building permits or site plan approval were still considered sufficient for vesting. The City’s Planning Director reaffirmed the 2021 email (that Concept Plan Review does not vest a project with respect to the Code’s requirements), and added that that the right to the marijuana *use* is not vested until the City issues a Certificate of Occupancy:

[The 2021] email is regarding vesting in the current code, your email below indicates vesting the new use.

If you just want to vest the project in current code, then yes, as explained in [the] 2021 email would still be the position of Planning. However, ***if you are asking when the use is vested, then that would be with the issuance of a CO.***

See Tab B (emphasis added).

This March 4, 2024, email confirmed again that a project is not vested in the Code upon Concept Plan approval. The 2024 email also established that the *use* itself is not vested until Certificate of Occupancy.

Given this explicit guidance, we were stunned when, just over one month later, the City issued the Interpretation that is being appealed here. That Interpretation concluded that the mere *submission* of a Concept Plan application was sufficient to vest under the Code’s development standards.

The Planning Department was aware of the inconsistency between prior communications and the Interpretation. Before issuing the Interpretation, the Planning Director forwarded our 2024 email exchange to other Planning Staff, once more affirming the City’s prior position and questioning why the Nirvana Interpretation was different:

Let’s chat. My understanding is use is vested ***when CO issued not completeness completed.*** Do either of you know ***the distinction between this response and Nirvana*** or do we need to revisit.

See Tab C – Planning Department Email (emphasis added).

To answer the Planning Director’s question, there is no distinction. The City’s consistent, logical policy on vesting cannot be reconciled with the Interpretation. According to the City, a project is not even vested in the current version of the Code until building permit applications or Site Plan Approval. How can a project vest compliance with specific provisions of the Code, before it is vested in the Code at all? The City’s Interpretation is illogical and erroneous.

The Interpretation contradicts City precedent and grants preferential treatment to the Nirvana facility. Prior to issuance of the Interpretation, the City has held all applicants to a different, higher standard. RCH Wellness, as well as other dispensaries within the City, have not been entitled to vest compliance with development standards simply by submitting Concept Plan applications. All other dispensaries have been required to proceed at risk and were not vested until issuance of a Certificate of Occupancy.

3. The Interpretation has potential to create widespread negative impacts on development in the City.

At present, the Code does not allow applicants to acquire vested legal rights through the Concept Plan Review process. The Interpretation opens the door for applicants to gain vested rights at an early stage in the development process that is inconsistent with state-wide and former City practices. The Board of Adjustment should appreciate the consequences of opening that door.

The Interpretation, if upheld, is precedent for all future development within the City. The Interpretation effectively allows an applicant to “freeze” the existing conditions surrounding the development at the time of Concept Plan submittal. From the time of submittal, the applicant need not consider changes to the surrounding area or any new developments. This policy could have negative ramifications for the City.

For example, the City often requires applicants to complete a Traffic Impact Analysis (TIA) as part of Site Plan Review (after Concept Plan Review). The TIA considers the effect the development will have on traffic and factors in nearby future developments. Under the Interpretation, applicants would only need to base the TIA on the conditions existing at the date of Concept Plan submittal. This policy would allow applicants to disregard any new developments or changes to the community, even if they would greatly impact the traffic study.

Furthermore, because Concept Plan is a relatively inexpensive process (\$420 application fee), and the completion is valid for at least one year, applicants are likely to purchase all the vested rights that are marked for sale by the Interpretation. With the knowledge that one can lock in existing conditions simply by submitting a Concept Plan, we would expect applicants to submit such plans all over the City.

4. The identity of the user is an improper consideration in a land use matter.

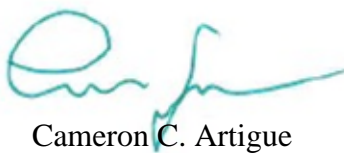
The Interpretation raises issues concerning development standards and vested rights. Answers to such questions never depend on the identity of the user—land use law does not ask “who.” Nonetheless, interested parties may try to avoid the legal issues by tying their argument to the identity of RCH Wellness. Consideration of such matters is totally improper. While the daycare and RCH Wellness (two distinct legal entities) share common interests, land use law is neutral as to ownership. Neither the Planning Department nor the Board of Adjustment is allowed to apply different rules depending on the identity of an applicant, its friends and neighbors, or its business associations.

August 14, 2024
Page 5

We urge the Board of Adjustment to ensure that the same rules apply to similarly-situated persons and to consider the long-term ramifications of the Interpretation. The City does not have authority to contradict its own Code or to treat applicants differently. We look forward to the opportunity to speak on this item at Board of Adjustment meeting on August 21st.

Sincerely,

GAMMAGE & BURNHAM

By 
Cameron C. Artigue

CCA/cap

TAB A

2021 Emails

----- Forwarded message -----

From: **Genevieve Pearthree** <Genevieve.Pearthree@flagstaffaz.gov>

Date: Wed, Feb 17, 2021 at 11:55 AM

Subject: Re: RCH Wellness Center Relocation - Concept Plan PZ-20-00232

To: Douglas Daly <daly@dalylawfirmaz.com>

Cc: Christina Rubalcava <CRubalcava@flagstaffaz.gov>

Good morning Doug,

Thank you for your patience while I consulted with the City Attorney's Office regarding your request for a Concept Plan approval letter.

City Staff cannot write an approval letter for a Concept Plan Review. Per Section [10-20.30.050](#): Concept Plan Review of the City of Flagstaff Zoning Code, "Concept plan review is an informal review to ensure that the applicant is aware of the procedures and substantive requirements of the City and to identify any potential problems or concerns...". Concept Plan is not a formal approval and thus it does not vest a project in the current City Code.

In contrast, a letter of approval was issued in 2012 for the RCH Wellness Center Site Plan Review (PSPR2012026) because the project went through Site Plan Review, and Site Plan Review is a formal approval (it is located in Section [10-20.40](#): Permits and Approvals). Please note that Site Plan Review is not required for the current project (PZ-20-00232).

There are two options to vest the current project in the current City Code. The first, which again is not required for the proposed project, is to obtain Site Plan completeness and then approval. The second option is to apply for a building permit at the site for the interior and exterior changes needed to update the building to meet the proposed dispensary use.

Please let me know if you have any questions.

Best,

Genevieve Pearthree

Planning Development Manager | Current Planning Section

City of Flagstaff | 211 W. Aspen Ave. | Flagstaff, AZ 86001

gpearthree@flagstaffaz.gov | 928-213-2603

From: Douglas Daly <daly@dalylawfirmaz.com>

Sent: Wednesday, February 10, 2021 4:47 PM

To: Genevieve Pearthree <Genevieve.Pearthree@flagstaffaz.gov>

Subject: Re: RCH Wellness Center Relocation - Concept Plan PZ-20-00232

Thank you for the update.

Regards,

Douglas A. Daly
DALY LAW FIRM, PLLC

PO Box 14483
Scottsdale, Arizona 85267
T: 602.703.5320

On Wed, Feb 10, 2021 at 4:31 PM Genevieve Pearthree <Genevieve.Pearthree@flagstaffaz.gov> wrote:

Good afternoon Doug,

I am in the process of discussing your question with staff, including the City Attorney's Office. I will be in touch next week when I have more information for you.

Best,

Genevieve Pearthree

Planning Development Manager | Current Planning Section
City of Flagstaff | 211 W. Aspen Ave. | Flagstaff, AZ 86001
gpearthree@flagstaffaz.gov | 928-213-2603

From: Douglas Daly <daly@dalylawfirmaz.com>
Sent: Monday, February 8, 2021 9:47 AM
To: Genevieve Pearthree <Genevieve.Pearthree@flagstaffaz.gov>
Subject: Re: RCH Wellness Center Relocation - Concept Plan PZ-20-00232

Thank you Genevieve. I will mail hard copies of everything out today. In addition, I have attached a copy of the newly issued facility license from AZDHS approving RCH as a dual license Marijuana Establishment (Adult Use 21+ Sales License & Medical).

As you know, RCH is currently in the process of acquiring the 522 E. Route 66 property. They have applied for and been issued a business license for the property to operate the Marijuana Establishment. They are seeking some assurance from the city that the concept plan process and approval to submit for building permits will secure the property as it relates to the set back requirements. For example, should another dispensary submit for building plans within 500 feet, RCH would still be permitted to move forward with their project subject to the conditions in the concept plan comments. When RCH previously applied for approval of their current location Mr. Gullickson issued a letter in that regard stating the property was approved by the city for use as a dispensary.

Could you provide a letter stating the same that the property is approved for RCH as a marijuana establishment and medical dispensary?

Regards,

Douglas A. Daly
DALY LAW FIRM, PLLC
PO Box 14483
Scottsdale, Arizona 85267
T: 602.703.5320

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On Thu, Feb 4, 2021 at 4:51 PM Genevieve Pearthree <Genevieve.Pearthree@flagstaffaz.gov> wrote:

Good afternoon Doug,

I'm writing to let you know that the City of Flagstaff Inter-Division Staff (IDS) has reviewed and accepted with the conditions and comments listed below the Concept Plan for the RCH Wellness Center Relocation (PZ-20-00232). You can now allowed to submit for Building Permit review. Include a copy of this Concept Plan Review Comments letter along with your responses as part of Building Permit submittal.

Please feel free to contact me if you have any questions. Otherwise, I'll look for your building permit submittal soon.

Best,

Genevieve Pearthree

Planning Development Manager | Current Planning

City of Flagstaff | 211 W. Aspen Ave | Flagstaff, AZ 86001

gpearthree@flagstaffaz.gov

Office: 928-213-2603



TAB B

2024 Emails

Chloe A. Plaisance

From: Michelle J. McNulty <Michelle.McNulty@flagstaffaz.gov>
Sent: Monday, March 4, 2024 9:43 AM
To: Kevin Fincel; Chloe A. Plaisance
Cc: Lindsay C. Schube; Alaxandra Pucciarelli; Christina Rubalcava
Subject: RE: Vesting for Marijuana Dispensaries

Hi, Chloe.

Genevieve's email is regarding vesting in the current code, your email below indicates vesting the new use.

If you just want to vest the project in current code, then yes, as explained in Genevieve's 2021 email would still be the position of Planning. However, if you are asking when the use is vested, then that would be with the issuance of a CO.

Best,
Michelle

Michelle McNulty, AICP, CPM
Planning Director
City of Flagstaff
211 W. Aspen Avenue
Flagstaff, AZ 86001
michelle.mcnulty@flagstaffaz.gov
Office (928) 213-2607
Cell (928) 707-2789

From: Kevin Fincel <KFincel@flagstaffaz.gov>
Sent: Monday, March 4, 2024 6:52 AM
To: Chloe A. Plaisance <cplaisance@gblaw.com>
Cc: Ischube@gblaw.com; Alaxandra Pucciarelli <APucciarelli@flagstaffaz.gov>; Michelle J. McNulty <Michelle.McNulty@flagstaffaz.gov>; Christina Rubalcava <CRubalcava@flagstaffaz.gov>
Subject: RE: Vesting for Marijuana Dispensaries

Good morning Chloe,

The question below is a question for Alax or Michelle in Planning. I am copying both on this email, along with their legal counsel, Christina Rubalcava.

Please include Christina on any emails to Planning staff.

Thanks,

Kevin

Kevin R. Fincel
Deputy City Attorney

City of Flagstaff
211 West Aspen Avenue
Flagstaff, AZ 86001
(928) 213-2045
kfincel@flagstaffaz.gov

From: Chloe A. Plaisance <cplaisance@gblaw.com>
Sent: Friday, March 1, 2024 12:56 PM
To: Kevin Fincel <KFincel@flagstaffaz.gov>
Cc: lschube@gblaw.com
Subject: Vesting for Marijuana Dispensaries

You don't often get email from cplaisance@gblaw.com. [Learn why this is important](#)

Hi Kevin,

Per my email yesterday, we received the guidance below from Genevieve Pearthree in 2021 for a previous client. With regard to a potential new dispensary for a new client, we'd like to confirm whether the City still takes the position that either site plan approval or building permits would be sufficient for vesting. Typically, we advise that the most conservative approach is to assume the use doesn't vest until a Certificate of Occupancy is issued. Site plan approval and building permits are earlier in the process, so we just want to confirm that we are providing advice consistent with the City's current approach.

Thank you,
Chloe

Chloe A. Plaisance
Gammage & Burnham | [Profile](#)
602.256.4427 Direct

From: Genevieve Pearthree <Genevieve.Pearthree@flagstaffaz.gov>
Date: Wed, Feb 17, 2021 at 11:55 AM
Subject: Re: RCH Wellness Center Relocation - Concept Plan PZ-20-00232
To: Douglas Daly <daly@dalylawfirmaz.com>
Cc: Christina Rubalcava <CRubalcava@flagstaffaz.gov>

Good morning Doug,

Thank you for your patience while I consulted with the City Attorney's Office regarding your request for a Concept Plan approval letter.

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In contrast, a letter of approval was issued in 2012 for the RCH Wellness Center Site Plan Review (PSPR2012026) because the project went through Site Plan Review, and Site Plan Review is a formal approval (it is located in Section [10-20.40](#): Permits and Approvals). Please note that Site Plan Review is not required for the current project (PZ-20-00232).

There are two options to vest the current project in the current City Code. The first, which again is not required for the proposed project, is to obtain Site Plan completeness and then approval. The second option is to apply for a building permit at the site for the interior and exterior changes needed to update the building to meet the proposed dispensary use.

Please let me know if you have any questions.

Best,

Genevieve Pearthree

Planning Development Manager | Current Planning Section

City of Flagstaff | 211 W. Aspen Ave. | Flagstaff, AZ 86001

gpearthree@flagstaffaz.gov | 928-213-2603

TAB C

Planning Department Emails

FW: Vesting for Marijuana Dispensaries

Michelle J. McNulty <Michelle.McNulty@flagstaffaz.gov>

Mon 4/15/2024 9:01 AM

To: Alexandra Pucciarelli <APucciarelli@flagstaffaz.gov>; Wesley Welch <wesley.welch@flagstaffaz.gov>

Let's chat. My understanding is use is vested when CO issued not completeness completed. Do either of you know the distinction between this response and Nirvana or do we need to revisit.

From: Kevin Fincel <KFincel@flagstaffaz.gov>
Sent: Monday, April 15, 2024 8:46 AM
To: Chloe A. Plaisance <cplaisance@gblaw.com>; Michelle J. McNulty <Michelle.McNulty@flagstaffaz.gov>
Cc: Ischube@gblaw.com; Alexandra Pucciarelli <APucciarelli@flagstaffaz.gov>; Christina Rubalcava <CRubalcava@flagstaffaz.gov>
Subject: RE: Vesting for Marijuana Dispensaries

Good morning Chloe,

Do you represent Noble Herb?

Kevin R. Fincel
Deputy City Attorney
City of Flagstaff
211 West Aspen Avenue
Flagstaff, AZ 86001
(928) 213-2045
kfincel@flagstaffaz.gov

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Cc: [Ischube@gblaw.com](mailto:ischube@gblaw.com); Alexandra Pucciarelli <APucciarelli@flagstaffaz.gov>; Christina Rubalcava <CRubalcava@flagstaffaz.gov>
Subject: RE: Vesting for Marijuana Dispensaries

Michelle –

Thank you for the quick response and clarification.

Have a great week,
Chloe

Chloe A. Plaisance
Gammage & Burnham | [Profile](#)
602.256.4427 Direct

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