



City of Flagstaff

Community Development Division

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Flagstaff, AZ 86001

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APPEAL

Date Received		Application for Appeal		File Number
Appellant FLG Industries, LLC dba Woodlands Village Day Care	Title	Phone 602.320.8866	Email hdukes@dukeslawaz.com	
Mailing Address 5527 N. 25th Street			City, State, Zip Phoenix, Arizona 85016	
Site Address N/A - Appeal of Zoning Code Interpretation dated 4/17/2024			City, State, Zip	
Parcel Number(s)		Zoning District		
Action Requested:	<input checked="" type="checkbox"/> Appeal to Board of Adjustment <input type="checkbox"/> Appeal to Planning and Zoning Commission <input type="checkbox"/> Appeal to City Council			
Date of previous appeal (if any)	<input type="checkbox"/> Appeal of dedications and exactions to Hearing Officer <input type="checkbox"/> Appeal to Heritage Preservation Commission			
Note:				
<ul style="list-style-type: none"> The Board of Adjustment hears and decides appeals when there is an alleged error in an order, requirement or decision made by an administrative official in the enforcement of the Zoning Code. The Planning and Zoning Commission hears and decides appeals of decisions by Staff concerning design review guidelines. The City Council hears and decides appeals of decisions by the Planning and Zoning Commission. A City Manager appointed hearing officer hears and decides appeals of dedications and exactions. <p>For information on the City of Flagstaff appeal process refer to Division 10-50.80 (Procedures for Appeals) of the Zoning Code.</p>				
Submittal Requirements				
<p>All applications for an appeal shall provide necessary background information to the appeal, and clearly state the grounds for the appeal. An appeal fee as established in Appendix 2 (Planning Fee Schedule) of the Zoning Code shall also be submitted, as well as any documentation, plans or other information in support of the appeal. Fees are non-refundable. Also refer to the Additional Submittal Requirements on the following page.</p>				
Appellant Signature		Date 4/29/24		
Property Owner Signature		Date		
Note: Incomplete applications and those not accompanied by the required information will not be accepted.				
For City Use				
Date Filed: _____		File #: _____		
Hearing Date: _____		Publication and Posting Date: _____		
Fee Receipt #: _____		Amount: _____ Date: _____		
Action by Board:		Cross Reference Numbers:		
<input type="checkbox"/> Hearing Date:		IDS: _____		
<input type="checkbox"/> Approved _____		P&Z: _____		
<input type="checkbox"/> Denied _____				
<input type="checkbox"/> Continued _____				
<i>See reverse side for additional information</i>				

April 29, 2024

VIA EMAIL: TAntol@flagstaffaz.gov

Board of Adjustment
CITY OF FLAGSTAFF
Flagstaff City Hall
211 W. Aspen Avenue
Flagstaff, AZ 86001

RE: Authorization Letter for Appeal of Zoning Code Interpretation to Board of Adjustment – Marijuana Establishment Minimum Separation Interpretation dated April 17, 2024 (the "Interpretation")

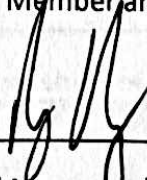
Dear Board of Adjustment Members:

Please accept this letter authorizing attorney Heather Duker to represent the Appellant of the above-referenced Interpretation, FLG Industries, LLC, an Arizona limited liability company dba Woodlands Village Day Care.

Sincerely,

FLG INDUSTRIES, LLC, an Arizona limited liability company

By: FLG INDUSTRIES REVOCABLE TRUST
Its: Member and Manager

By: 
Printed Name: RYAN HERMANSKY

Its: MANAGER

DUKES LAW, PLLC

5527 N. 25th Street
Phoenix, AZ 85016
602.320.8866

VIA EMAIL: TAntol@flagstaffaz.gov

Board of Adjustment
ATTN: Tiffany Antol, Zoning Code Manager
CITY OF FLAGSTAFF
211 W. Aspen Avenue, 1st Floor
Flagstaff, AZ 86001

April 29, 2024

RE: Appeal of Zoning Code Interpretation to Board of Adjustment – Marijuana Establishment Minimum Separations Interpretation dated April 17, 2024 (the “2024 Interpretation”)

Dear Ms. Antol and Board of Adjustment Members:

On behalf of my client, FLG Industries, LLC, an Arizona limited liability company, dba Woodlands Village Day Care (the “**Day Care**” or the “**Appellant**”), we submit to the Board of Adjustment this notice of appeal of the above-referenced 2024 Interpretation pursuant to Section 10-20.80.020 of the Flagstaff Zoning Code. We respectfully request a Board of Adjustment decision granting this appeal and reversing or modifying the Zoning Code Administrator’s 2024 Interpretation as erroneous. Specifically, the Appellant is requesting a Board of Adjustment Decision which uniformly applies and enforces the Marijuana Establishment separation standards as follows:

1. Uses are vested at the time an applicant obtains certificate of occupancy approval, pursuant to Section 10-20.40 of the Zoning Code and applicable caselaw.
2. Concept Plan review and approval is an informal review process and does not vest a project under the Zoning Code, pursuant to Section 10-20.30.050 of the Zoning Code.
3. Once a protected use (i.e. a day care) obtains a certificate of occupancy approval, the use must be identified by the City as an existing land use for purposes of applying Marijuana Establishment separation standards.
4. Because a use is not vested until certificate of occupancy approval is issued, the minimum separation requirements for a proposed Marijuana Establishment are not finally determined until the time a certificate of occupancy is issued for the Marijuana Establishment.

Background Information

Prior to issuing the 2024 Interpretation, the City consistently provided correspondence and direction to applicants in the following manner:

1. A specific version of the City Code is vested at the time of site plan or building permit approval – meaning the use may proceed with its development under the City Code in effect at the time of site plan or building permit approval.
2. A use is vested and established once a certificate of occupancy is issued.
3. A Concept Plan review and approval vests nothing. It is an informal approval.

Surprisingly, on April 17, 2024, the Planning Director issued the new 2024 Interpretation which contradicts the City’s previous direction and correspondence on several occasions. Based upon the “Context” provided within the 2024 Interpretation, the Interpretation appears to have been issued in response to the proposed Nirvana dispensary at 2725 S. Woodlands Village Boulevard and the Appellant’s Woodlands Village Day Care located less than 500 feet away at 2700 S. Woodlands Village Boulevard. To date, the proposed Nirvana dispensary has processed a Concept Plan review, but has not received site plan or building permit approval. On the other hand, the Woodlands Village Day Care has received building permit approval and is completing the necessary on-site improvements to obtain a certificate of occupancy in the near future.

In effect, the 2024 Interpretation applies two (2) different standards for vesting uses: (1) marijuana establishment uses are vested at the time of submitting for initial concept plan review (an informal process); and (2) all other uses are not vested until the time of certificate of occupancy approval. The following statements in the 2024 Interpretation demonstrate this inconsistency not only with the City’s prior correspondence but also an inconsistency in the vesting of certain uses.

2024 Interpretation

A. Reason for the Interpretation Determination:

To identify that existing land uses do not include those currently in review for either concept, site plan, or building permit. Land uses not yet established shall not impact the development of a Marijuana Establishment. Minimum separation requirements are determined at the time of concept plan application submittal for the Marijuana Establishment as required in Section 10-40.60.220(B)(6).

E. Analysis and Methodology:

- a. Since the proposed land use (daycare and family entertainment center) had not yet received a Certificate of Occupancy nor is in operation it is not considered an existing land use as referenced in Section 10-40.60.220(F). The proposed land use (daycare and family entertainment center) will be considered an existing land use once a Certificate of Occupancy has been issued by the City of Flagstaff and the business is in operation through visible inspection.
- b. The land uses that a marijuana establishment is required to meet minimum separations from shall be in operation before the date the marijuana establishment submitted the initial concept application and the submittal of the required affidavit. The affidavit of separation shall be in effect for the term of the concept plan per Section 10-20.30.050.

F. Interpretation Determination

- a. Section 10-40.60.220(F) of the Flagstaff Zoning Code shall be interpreted to require minimum separations from sites containing existing uses to mean land uses that have received Certificate of Occupancy and are currently in operation. The timing of determination of minimum separations shall be consistent with State licensing for similar facilities which occurs at the time of application as described above.**

In addition, the City erroneously claims that they have issued this interpretation to “be consistent with State licensing for similar facilities.” The Arizona licensing process requires that a dispensary submit a certificate of occupancy as part of the initial licensing application to the State. Likewise, the state DHS regulations specify that marijuana establishments must be separated from schools that are in existence as of the date that a licensee files an application to move an establishment. A.A.C. R9-22-321. Therefore, even the State applies its licensing criteria (including the 500’ separation requirement applicable to schools) after the dispensary has received a certificate of occupancy.

Grounds For Appeal

For the following reasons, the 2024 Interpretation is erroneous, arbitrary and capricious, an abuse of discretion, or contrary to law and should be set aside:

1. The 2024 Interpretation violates zoning uniformity requirements and treats the vesting of certain uses differently. It determines that a daycare and other protected uses are not vested until a certificate of occupancy has been issued, whereas the dispensary need only submit a concept plan application. The interpretation is contrary to the intent of the Zoning Code by granting the dispensary special treatment when the daycare is the use that is intended to be protected.

2. The 2024 Interpretation directly conflicts with the City’s prior direction and communications to applicants. For the last 3 years, the City has interpreted concept plan review to be an informal process, consistent with the Zoning Code. Now, the 2024 Interpretation considers a marijuana establishment use to be vested at the time of concept plan review for purposes of applying the separation standards. Instead, the separation standards should be applied and enforced from concept plan review through certificate of occupancy approval.

3. The 2024 Interpretation is contrary to Arizona law, which recognizes that rights vest only when substantial expenditures are made in reliance upon a development permit. In this case, no formal permit or approval has been issued.

4. The 2024 Interpretation is an undesirable City policy because it enables a cannabis applicant to block out huge territory for an extended period of time for a cheap price. A concept plan application fee is \$420 and is valid for a year, with an option to extend for up to 90 days. The dispensary applicant could block off huge areas and then let the applications sit for months and months. The \$420 concept plan review fee to vest a dispensary use is *de minimis*. For approximately \$5,000, a dispensary could submit concept plans for properties located near a dozen key intersections in Flagstaff, and block off nearly the entire city for 15 months. Is it the City’s intention to allow marijuana establishments to vest their rights

BOARD OF ADJUSTMENT

City of Flagstaff

April 29, 2024

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in this manner? Furthermore, are daycares and other protected uses expected to search up to 15 months' worth of concept plan approvals to determine whether their use will or will not be afforded protection from dispensaries?

5. To the extent the City expresses concern about the identity of the Day Care, the City is violating the basic rule that zoning is concerned with the use and not the user. To issue an interpretation based upon the identity of the user would be discriminatory and an abuse of discretion.

6. The 2024 Interpretation is contrary to the State licensing requirements for marijuana establishments and the vesting rule that is implied in AAC R9-17-321 and 322.

At this point in time, we have several outstanding public records requests related to this appeal of the 2024 Interpretation and the proposed dispensary at 2725 S. Woodlands Village Blvd. These records were not produced by the City prior to the appeal deadline. The Appellant reserves the right to supplement or modify the grounds for this appeal and to submit any additional documentation in support of this appeal up until 10 calendar days prior to the Board of Adjustment hearing, in accordance with Rule 405 of the Board of Adjustment Rules of Procedure updated March 30, 2016.

Very truly yours,

/s/ Heather N. Dukes

Heather N. Dukes, Esq.

602.320.8866 | hdukes@dukeslawaz.com

Enclosures

EXHIBIT 1



City of Flagstaff

Flagstaff Zoning Code Interpretation Determination

Issued By: Michelle McNulty
Planning Director

Subject: Marijuana Establishment minimum separations

Date Issued: April 17, 2024

Summary of Zoning Code Interpretation Determination:

This interpretation is intended to address when the following minimum separations are addressed in the development review process.

A Marijuana Establishment shall meet the following minimum separations, measured in a straight line from the boundary of the lot or parcel containing the use to the property boundary of the lot or parcel containing any of the existing uses listed below:

1. Two thousand feet from another Marijuana Establishment;
 2. Five hundred feet from a residential substance abuse treatment facility or other residential drug or alcohol rehabilitation facility licensed by the State of Arizona;
 3. Five hundred feet from a community college, university, or from any public, private, parochial, charter, dramatic, dancing, music learning center, or other similar school or educational facility that caters to children;
 4. Five hundred feet from a daycare home or daycare center;
 5. Five hundred feet from a public library or public park; and
 6. Five hundred feet from a facility devoted to family recreation or entertainment.
-

A. Reason for the Interpretation Determination:

To identify that existing land uses do not include those currently in review for either concept, site plan, or building permit. Land uses not yet established shall not impact the development of a Marijuana Establishment. Minimum separation requirements are determined at the time of concept plan application submittal for the Marijuana Establishment as required in Section 10-40.60.220(B)(6).

B. Authority to the Administrator Zoning Code.

The Planning Director is the Zoning Code Administrator/Zoning Administrator for the City of Flagstaff in accordance with the authority granted by Section 10-20.20.090. of the Flagstaff Zoning Code (the "Zoning Code"), and Arizona Revised Statutes §9-462, et al, is authorized to interpret, administer, and enforce Title 10, Flagstaff Zoning Code, of the Flagstaff City Code.

C. Context for the Request for Interpretation Determination:

A concept plan for a marijuana establishment has been submitted and reviewed. An affidavit signed and notarized by the applicant attesting that the lot or parcel proposed to contain the marijuana establishment meets the separation requirements from the nearest lot or parcel containing any of the existing uses listed in Section 10-40.60.220(F). After the submittal of the concept plan, a building permit was submitted for a new daycare and family entertainment center within five hundred feet.

D. Relevant Definitions, and Reference Material:

1. Section 10-10.30.030(A) states that no building, structure, or land shall be used or occupied, and no building, structure, or land shall be constructed, replaced, occupied, enlarged, or altered, nor shall any applicable permit be issued unless in conformity with all the provisions of this Zoning Code for the zone in which it is located and other applicable regulations.

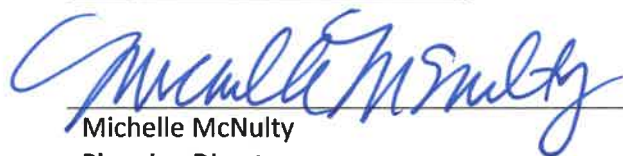
E. Analysis and Methodology:

- a. Since the proposed land use (daycare and family entertainment center) had not yet received a Certificate of Occupancy nor is in operation it is not considered an existing land use as referenced in Section 10-40.60.220(F). The proposed land use (daycare and family entertainment center) will be considered an existing land use once a Certificate of Occupancy has been issued by the City of Flagstaff and the business is in operation through visible inspection.
- b. The land uses that a marijuana establishment is required to meet minimum separations from shall be in operation before the date the marijuana establishment submitted the initial concept application and the submittal of the required affidavit. The affidavit of separation shall be in effect for the term of the concept plan per Section 10-20.30.050.

F. Interpretation Determination

- a. Section 10-40.60.220(F) of the Flagstaff Zoning Code shall be interpreted to require minimum separations from sites containing existing uses to mean land uses that have received Certificate of Occupancy and are currently in operation. The timing of determination of minimum separations shall be consistent with State licensing for similar facilities which occurs at the time of application as described above.

Interpretation Determination By:


Michelle McNulty
Planning Director


Date:

Appeal of Interpretation Determination

Pursuant to Section 10-20.80.020 of the Zoning Code, an appeal of a decision, determination or interpretation of the Zoning Code Administrator/Zoning Administrator shall be filed within 10 calendar days of the date of the decision, determination or interpretation. Appeals shall be filed in accordance with Section 10-20.80.020 of the Zoning Code.

**The deadline to File Appeal of this interpretation determination is:
5:00 p.m. on April 29, 2024**
