



PUBLIC HEARING

PZ-24-00074

DATE: August 14, 2024

MEETING DATE: August 21, 2024

REPORT BY: Tiffany Antol

Appeal Process and Review:

Section 10-20.80.020 provides a process for appeals of interpretations by the Zoning Code Administrator or Planning Director. Appeals may be heard by the Board of Adjustment where it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of the Zoning Code.

The Board of Adjustment shall review the application and the recommendation of the Zoning Code Administrator and, following a public meeting, the Board of Adjustment shall reverse or modify the interpretation under appeal only upon finding an error in the application of the Zoning Code regulations on the part of the administrative officer rendering the interpretation. The Board of Adjustment shall grant the appeal, grant the appeal subject to specified conditions, or deny the appeal.

Purpose of the Interpretation:

The April 17, 2024, interpretation regarding Marijuana Establishment Minimum Separations was intended to address when the minimum separation requirements for Marijuana Establishments are addressed in the development review process.

Section 10-40.60.220 of the Flagstaff Zoning Code provides the following use standards for Marijuana Establishments:

A. Applicability. Prior to the submittal of a Building Permit or Business license application, or prior to the occupancy of a structure, for a Marijuana Establishment, the applicant shall complete a Concept Plan in accordance with Section 10-20.30.050, Concept Plan Review.

B. The Concept Plan application shall include the following:

- 1. A notarized authorization executed by the property owner acknowledging and consenting to the use of the property as a Marijuana Establishment;*
- 2. The name of the Marijuana Establishment and the name of the owner(s) of the Marijuana Establishment;*
- 3. The name, address, birth date, and valid registry identification card number of each nonprofit medical Marijuana Dispensary agent or registered Marijuana facility agent;*

4. A security plan describing details of alarm systems and exterior lighting in compliance with Division 10-50.70, Outdoor Lighting Standards, and including a floor plan showing the location, dimensions, and type of security measures demonstrating that the Marijuana Establishment will be secured, enclosed, and locked as required by law;

5. A scaled survey sealed by a land surveyor registered in the State of Arizona depicting the property lines of the lot or parcel that is proposed to contain the Marijuana Establishment and the separations from the nearest lot or parcel that contain any of the existing uses listed in subsection F of this section; and

6. 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 subsection F of this section.

C. A Marijuana Dispensary shall have operating hours not earlier than 8:00 a.m. and not later than 10:00 p.m.

D. A Marijuana Establishment shall:

1. Not be located in a temporary building or structure (e.g., shipping container, storage structure, tent, trailer, vehicle, etc., as determined by the Zoning Administrator);

2. Not emit dust, fumes, vapors, smoke, or odors into the environment;

3. Prohibit consumption of Marijuana on the premises, including the parking area associated with the Marijuana Establishment;

4. Display a current City of Flagstaff business license;

5. Include a secure storage area that can be enclosed and locked as required by law;

6. Have a single secure entrance or, if a dual licensee, demonstrate appropriate security measures to deter and prevent the theft of Marijuana and to reasonably regulate customer access to the premises, including equipping all entrances and exits with an alarm system;

7. Provide additional exits in accordance with the Building Code or Fire Code; and

8. Dispose of Marijuana remnants and by-products in accordance with State and local regulations.

E. A Marijuana Dispensary shall not have a drive-through service or an outdoor seating area for dispensary customers. An outdoor seating area for employees shall be designed in a manner that prohibits access and use by dispensary customers.

F. 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.*

With respect to the separation from existing uses identified in Section 10-40.60.220.F., the Zoning Code does not clearly state when the required separation requirements are required to be reviewed and determined to conform to code.

The attached April 17, 2024, interpretation from the Zoning Code Administrator identifies when the uses requiring separation are determined to be existing (i.e., at the time of Certificate of Occupancy) and when the City determines conformance with the separation requirements (i.e., at the time of concept plan submittal).

Applicant's Grounds for Appeal:

- Violates zoning uniformity requirements by treating the vesting of certain uses differently.
- Conflicts with Arizona law on rights vesting.
- Conflicts with previous interpretations.
- Contrary to state licensing requirements for marijuana establishments.
- The applicant also states that the interpretation is undesirable policy and that it is based on the identity of the user (business owner) rather than the use itself (daycare).

Grounds for Recommendation:

1. Determination of conformance with separation requirements.

Pursuant to Section 10-40.60.220.B. of the Zoning Code, the Concept Plan Application for a Marijuana Establishment must include an affidavit that verifies the proposed 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. Once submitted, planning staff reviews the affidavit and confirms the separation requirements are met. The review and acceptance of the affidavit allows the Marijuana Establishment to move through the development process in accordance with the Zoning Code, which can be multi-faceted and time consuming. Staff's acceptance of the affidavit submitted with the Concept Plan Application establishes conformance with the separation requirements and locks that determination in throughout the development process.

The Zoning Code was amended in 2021 to add the requirement that every Marijuana Establishment submit a concept plan application. The purpose of that amendment was to have a way to record and file information required to be submitted in conjunction with the initiation of a Marijuana Establishment,

including the affidavit establishing conformance with separation requirements. Requiring a Concept Plan, at a minimum, ensures that a planning review occurs as part of the initiation of a Marijuana Establishment and the required records are maintained in permanent planning files. It would be inefficient and potentially injurious to an applicant if the City were to require an affidavit establishing conformance with separation requirements at the time of Concept Plan application, but then wait to make a final determination of those separation requirements at time of certificate of occupancy, as suggested by the appellant.

A. Timing of conformance determination.

Appellant takes the position that conformance with the separation requirements should not be determined until the Marijuana Establishment receives certificate of occupancy. The purpose of the separation requirements is to ensure that Marijuana Establishments are not established near certain existing land uses. When a Marijuana Establishment applies for Concept Plan it becomes public record and allows other businesses or property owners the opportunity to determine their appropriate surroundings. For example, the proposed daycare was aware of the proposed Marijuana Establishment and had the opportunity to decide to locate or not locate in the vicinity of this use. Thus, establishing conformance with separation requirements at Concept Plan application supports the intended purpose of the regulations by providing notice to uses that seek to locate to the same general vicinity as the proposed Marijuana Establishment.

The affidavit can only represent a moment in time, and it is possible that new uses that require separation will be established during the time it takes to establish a Marijuana Establishment. The timeframe to establish a new Marijuana Establishment can vary based on many factors, such as whether it's new construction or alternation of an existing site. For example, an existing Marijuana Establishment recently relocated to a former restaurant and extensively renovated the structure to serve as a Marijuana Establishment. A timeline of their development review process is provided to show the length of time it can take to obtain Certificate of Occupancy.

- November 12, 2020 – Zoning Verification Letter
- December 12, 2020 – Concept Plan submitted to City
- February 4, 2021 – Concept Plan found complete
- April 19, 2021 – Building Permit submitted to City
- June 24, 2021 – Building Permit issued
- June 30, 2022 – Certificate of Occupancy

In that case, staff did not require an updated affidavit to establish conformance with separation requirements prior to issuance of certificate of occupancy. If the City had not established conformance at Concept Plan application, the Marijuana Establishment in this example could have expended significant time and resources to renovate their new location only to be denied a certificate of occupancy if a daycare had been established nearby on June 1, 2022.

B. Consistent with other separation requirement reviews.

The interpretation appears to be consistent with when the Arizona Department of Health Services establishes conformance with the State's single separation requirement. The following are sections from the rules in the Arizona Administrative Code governing the State's Medical Marijuana Program.

R9-17-321. Physical Plant

A. *A dispensary or a dispensary's cultivation site shall be located at least 500 feet from a private school or a public school that existed, as applicable:*

1. *Before the date the dispensary submitted the initial dispensary registration certificate application,*
2. *Before the date of an application to change the location of the dispensary, or*
3. *Before the date of an application to add a cultivation site.*

R9-17-322. Denial or Revocation of a Dispensary Registration Certificate

A. *The Department shall deny an application for a dispensary registration certificate or a renewal if:*

1. *For an application for a dispensary registration certificate, the physical address of the building or, if applicable, the physical address of the dispensary's cultivation site is within 500 feet of a private school or a public school that existed before the date the dispensary submitted the initial dispensary registration certificate application, before the date of an application to change the location of the dispensary, or before the date of an application to add a cultivation site;*

C. Conformance and vesting.

The appellant argues that the subject interpretation treats the vesting of uses differently or nonuniformly, which conflates conformance with vesting. Vesting is a legal term that refers to when a right or interest in property is secured, which is not at issue here. The subject interpretation merely determined when conformance with the City's adopted separation requirements will be established.

D. Other interpretations.

The appellant goes on to state that the subject interpretation conflicts with other staff interpretations. There are no official interpretations of the Zoning Code Administrator that reference the time frame for reviewing and accepting an affidavit confirming the minimum separation requirements for specific land uses.

E. Policy considerations.

Lastly, the appellant is concerned that the subject interpretation represents undesirable policy in addition to concerns that the interpretation was influenced by the owner of the daycare rather than the daycare itself. Neither of these issues speak to an error of the Zoning Code Administrator as is required to overturn such an interpretation.

2. When the uses requiring separation are determined to be existing.

The Zoning Code provides the following guidance on the requirement for separations: *"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:"*

This provision of the Zoning Code requires separation from **existing** land uses. The Zoning Code does not specifically define the term "existing," so staff relies on the dictionary definition. Existing is defined as in existence or operation at the time under consideration. A proposed land use, such as the appellant's

daycare, 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.

Appellant does not appear to be challenging this interpretation.

Recommendation:

The appellant has not identified a specific error of the Zoning Code Administrator in the subject interpretation. In accordance with the findings presented in this report, staff recommends that the Board of Adjustment uphold the subject interpretation and deny the appeal.

Attachments:

1. Zoning Verification Letter for Noble Herb relocation
2. Zoning Verification Letter for proposed custodial care facility