

SEPTEMBER 24, 2021 AMENDED NARRATIVE FOR ZONING VARIANCE SR21-0134

This amended narrative is submitted by Sean Amirian for Black Rock Venture, LLC through attorney David W. Dow.

This Request is for approval of use of the property as a marijuana grow and infusion facility at 5524 North 51st Avenue, Glendale, also known as Maricopa County Assessor's Parcel Numbers 144-76-024 and 5134 West Missouri Avenue, Glendale, also known as Maricopa County Assessor's Parcel Numbers 144-76-023.

Applicant will be using the property in compliance with Arizona law and in compliance with other rules and regulations of the City of Glendale. Applicant is converting the existing building, used as storage, warehousing, assembly, and manufacturing for medical equipment, to a grow and infusion facility by changing the interior as set forth in the site plan, any prior approvals or contracts as needed etc. have been obtained.

The Property is zoned M-2, Heavy Industrial and is located at 51<sup>st</sup> Avenue and Missouri. The Property is located in heavy industrial area that includes manufacturing and processing, warehousing, and outdoor storage.

**The Application requests the following Variance:**

A variance from distance from existing grow facility.

**Applicable Glendale zoning requires all Cultivation and Infusion Facilities to be:**

A proposed facility shall be located a minimum of 5,280 feet (1 mile) from all existing medical marijuana dispensaries, cultivation and infusion facilities.

The proposed facility is 855 feet away from 5246 West Luke Avenue, Glendale, Arizona.

**Required Variance Findings**

This request for a variance is for an Area Variance as opposed to a Use Variances. The law states that the distinction centers on the nature of the variance. Here, the operation of a Grow facility is within the allowed uses. The variance is really an Area Variance because the variance requested is only from the distance to another facility as the Arizona Supreme Court made clear in *Pawn 1st, LLC v. City of Phoenix*, 242 Ariz. 547, 551-52, ¶ 11 (2017). In that case, the applicant was a pawn shop and the operation as a pawn shop was a permitted use. The requested variance that the Court found as an Area Variance was that the building had to

be at least 500 feet from a residential district. Likewise here, we are seeking a Variance that is 855 feet away from 5246 West Luke Avenue, Glendale, Arizona.

Glendale has established a distance requirement, however, Applicant is unaware of any empirical studies to show that the distance between two grow facilities is needed so is unable to address those reasons specifically. Proposition 207 and A.R.S. §36-2857 state that a locality may not enact unduly burdensome requirements. Here, having the grow facilities near each other simply has no articulable basis for not permitting the Area Variance. In fact, the statute allows localities to limit the use of land to specified areas so having it near another facility does no harm given the lack of foot traffic for a grow facility.

A. Special Circumstances:

By statute, special circumstances applicable to the property include its size, shape topography, location, or surroundings and the strict application of the zoning ordinance will deprive the property of privileges enjoyed by other property of the same classification in the same zoning district. A.R.S. § 9-462.06(G)(2). In the zoning context, the term "special circumstances" is functionally equivalent to "hardship." *Burns v. SPA Automotive, Ltd.*, 156 Ariz. 503, 505 (App. 1988)

Here, Black Rock Venture submits that there are special circumstances that should permit the variance. These circumstances create a hardship requiring the variance.

Boards of adjustment may grant area variances only if, due to special circumstances, "the strict application of the zoning ordinance will deprive the property of privileges enjoyed by other property of the same classification in the same zoning district." A.R.S. § 9-462.06(G)(2). "The term `special circumstances' as used in the zoning ordinance is the functional equivalent of the word `hardship.'" *Burns v. SPA Auto., Ltd.*, 156 Ariz. 503, 505, 753 P.2d 193 (App. 1988). In *Pawn 1st, LLC v. City of Phoenix*, 242 Ariz. 547, 551-52, ¶ 11 (2017), the Court found that that "the lot size, the building's limited setback from the public sidewalk, and the parking restrictions constitute special circumstances justifying an area variance, because the Property's unique characteristics create exceptional practical difficulties." Here, Black Rock previously set forth that these circumstances create a hardship requiring the variance.

There is no self-imposed special circumstance either. A board of adjustment exceeds its statutory jurisdiction and authority, and its decision is "ultra vires and void," if it grants a variance in violation of the prohibition against self-imposition. *Arkules v. Bd. of Adjustment of Paradise Valley*, 151 Ariz. 438, 440, 728 P.2d 657 (App. 1986). In *Pawn 1st, LLC v. City of Phoenix*, 242 Ariz. 547, 551-52, ¶ 11 (2017), the court rejected the lower court holding that any special circumstances "were created by Jachimek and/or the Property owner by selecting

this particular property to use as a pawn shop, in violation of the prohibition against self-imposition." The Court instead stated that Arizona zoning statutes and local ordinances require boards of adjustment to consider special circumstances applicable to the property, not the property owner. *Id.* The Court then held that "Special circumstances are not 'self-imposed' when the owner wants to use the property in a way permitted to other similarly situated properties, but cannot do so because of externally imposed circumstances like those involved here. Although it is fair to say that Jachimek voluntarily acquired the Property subject to the special circumstances, he certainly did not create them." Thus, the Special Circumstances here are the same- Applicant is seeking to use the property in the same way as similarly situated property, specifically here, 5246 West Luke Avenue, Glendale, Arizona. The fact that it is a permitted use in the zoned area should result in approval of the Area Variance so that the property can be used as other similar properties are. Arizona has a longstanding legal tradition in favor of alienation thus the purchase of property with existing zoning restraints does not equate to self-imposed special circumstances. *See, e.g., Tovrea v. Umphress*, 27 Ariz.App. 513, 517, 556 P.2d 814 (1976) (noting that "[r]estraints on alienation are generally disfavored").

The existing distance separation has real reason for the separation requirement. The separation distances were developed years ago and well before the increased demand for the legal substance. This area is not one that has families driving around, children playing or significant traffic. It is a manufacturing and warehouse district. Imposing the separation requirement and not amending it or allowing this Area Variance is not consistent with the rights of property owners to use a property consistent with its current zoning area.

1. Black Rock needs to utilize this specific property, rather than another property of similar classification that would not require a variance. It has no other parcels in the area that can be used for the type of business. Requiring Black Rock to sell this parcel, find a similar parcel, put out funds in a tight economy to purchase a parcel, and then have to apply for another variance given the general congestion in Glendale that would likely require more than one variance would place a significant burden on Black Rock Venture.

In the current industrial real estate market, the inventory is so low that it is almost impossible to buy a building of this size in the current market. Inventory is unbelievably low and costly. Currently the replacement building is six time more expensive than when Black Rock Venture LLC purchased the property. There is no way they would qualify for a loan even if they were able to find a similar property given the increases and the existing property ownership.

2. Denying a variance in the strict zoning allowing only one cultivation facility in the area will restrict Applicant more severely than other properties in the same zoning district that are

allowed other uses. There has been another property has been approved for this type of business and thus denial would restrict Applicant's use more severely. Without a variance, medical marijuana dispensaries could be located on other M-2 zoned properties so it is a special circumstances that would preclude the Applicant's property from hosting a medical marijuana cultivation facility, a privilege enjoyed by other M-2 zoned parcels. *DREEM GREEN INC. v. City of Phoenix*, No. 1 CA-CV 18-0286 (Ariz. Ct. App. May 2, 2019).

3. This building has limited usage especially given the location and the size. The building has been in place for years. The location is not one that would lend itself to any other business Black Rock Venture conducts. The zoning in the area limits the type of business that can be operated. Black Rock Venture would have limited possibilities given the size of the building and the M-2 Heavy Industrial zoning. The Property is located in heavy industrial area that includes manufacturing and processing, warehousing, and outdoor storage.

Lot shape and size: These lots are corner lots and create exceptional practical difficulties with use as other businesses. The corner lot has a great deal of exposure to light and noise pollution, sidewalks to upkeep, loss of privacy especially due to unconventional configurations, higher fence costs, and double set back requirements. In all, the cost for upkeep at this size lot at this location makes it harder to sell in this type of zoning area.

Building size: In order to have a productive business and thus enjoy the property rights, Black Rock needs a sufficient size building to have the equipment and staffing. Finding a similar parcel that would fit within all of the various requirements places a significant burden on Black Rock. Not only is finding such a parcel a hardship, the cost particularly at this time is prohibitive, six times what Black Rock paid for the building in this economy.

Building location: The zoning in the area limits the type of business that can be operated and the operation of the Grow facility fits in the current zoning and its location limits its use to warehouse or manufacturing that is not something Black Rock can do. Lack of foot traffic to this building will cause no greater harm than any other manufacturing business in the same area.

4. The increased need for marijuana cultivation is an additional special circumstance that the community would benefit from having. The demand for legal marijuana has grown considerably since the legalization. The citizens of Glendale need a supply source and medical marijuana patients are seeing decreased availability.

B. Deprivation of privileges:

The Court in *Pawn 1<sup>st</sup> LLC* held that “to obtain an area variance, an applicant must show that strictly applying a zoning ordinance will cause "peculiar and exceptional practical difficulties" that deprive a property of privileges enjoyed by other similarly zoned properties.” The deprivation of privileges focuses on privileges enjoyed by other property of the same classification in the same zoning district. In this case, the other properties consist of manufacturing and warehousing, including at least one other grow and infusion facility. It is the same type of use as Black Rock is requesting. The manufacturing of marijuana, for legal and medical reasons and the infusion of the marijuana are no different than the other uses in the area. The government regulates the cultivation through strict guidelines which means that the requested Area Variance is actually more strictly controlled than the other also permitted manufacturing and warehousing in the same zoning district. In fact, the grow/cultivation is a permitted use. The only variance is the Area Variance. No other restrictions on buildings in the area doing the same type of work as each other are in place.

Arizona law has changed and the existing ordinance that is requiring this Area Variance is not only depriving property owners such as Black Rock of the ability to use the property for lawful purposes, it is depriving the citizens of Glendale of the ability to obtain needed medical marijuana as well as recreational legal marijuana. The demand well exceeds what Black Rock will be able to produce. Doing so in an area that is not near residences or schools and is a permitted use in the zoning area will have no detrimental impact on the community except for the lack of marijuana supply. It will have a significant detrimental impact on Black Rock if it cannot use its land for a purpose that fits in the existing zoning area.

The demand for recreational marijuana has impacted medical marijuana patients because the demand is higher than production and it will not be solved until lawful, licensed and heavily regulated businesses are permitted to produce marijuana.

Here, there are special circumstances that apply to the Property, the variance required was an area variance, Black Rock did not create the special circumstances, the variance is necessary for the preservation and enjoyment of substantial property rights, and the variance would not be materially detrimental to the surrounding area. *See Pawn 1st, LLC v. City of Phoenix*, 242 Ariz. 547, 551-52, ¶ 11 (2017)

C. Minimum necessary to alleviate hardship:

The requested variance is the minimum necessary to alleviate the hardship. The proposed property complies with all of the other zoning requirements. Applicant is requesting the one variance only.

D. Lack of detrimental effect on surrounding properties:

The Application here is for a grow and infusion facility which is needed for the demand of the citizens. A grow and infusion facility is needed to address the legal marijuana production and there is only one other grow or infusion facilities in this area. The increase in the need for production based on the new marijuana laws justifies an additional facility. No adverse effects will be felt by the community or other businesses around the facility due to the existing building being used for grow and infusion and there has been no showing of adverse effects from the nearby facility.

Black Rock Venture's operations will be conducted in compliance with Arizona law and ADHS regulations. There will be no negative impact on surrounding properties. The area is zoned heavy industrial. There is not the foot or vehicular traffic associated with a dispensary. Prior approvals of similar facilities in the areas have not contributed in a measurable way to the deterioration of the surrounding area nor contributed to the lowering of property values.

The grow and infusion of the marijuana will be heavily supervised in compliance with all laws. Security procedures will be in place as set forth in the proposed plan to make the area safe and not a crime magnet. Appropriate signage will be placed warning of the security measures. No dangerous waste products will be disposed of that would be accessible to anyone in the community. Strict tracking will be in place to show the transfer of the marijuana. There will no noise that would disturb other residences or businesses in the area.

Approval will not be detrimentally impact persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general. The existing facility has not contributed to any measurable deterioration of the area or to the lowering of property values. Additionally, it has proven to be compatible with the other heavy industrial and commercial uses in the surrounding area. The operation as a cultivation an infusion facility in an already existing warehouse type building will not be apparent to anyone that anything different is occurring. There will be no odors, increased traffic or offensive signage.

It is believed there are no other "protected uses" that are within the restricted distances of the Property thus there are no concerns about separation requirements from residentially zoned districts, preschools, kindergartens, elementary, secondary or high schools, public parks, community centers, dependent care facilities, homeless shelters, dormitories, youth community centers, and places of worship.

Signage will be minimal as this is not a dispensary and there is no customer foot or vehicle traffic. The building is an existing one and operations will all be internal. Only part of the building will be used for the grow and part for the infusion and it will have no impact on

the public as it is an existing building currently being used for storage, warehousing, assembly, and manufacturing for medical equipment. No additional traffic, parking or outside activity will occur beyond the previous use. The property is near and west of Grand Avenue and thus away from downtown Glendale. Security will be in place for the facility once it is converted.

**Additional Information:**

In this case, there is a grow facility at 5246 West Luke Avenue, Glendale, Arizona based on the State of Arizona CHAA system. The facility is zoned M-2 with only heavy industrial uses permitted in the area. There are no residences in the area and the nearest has school is 2000 feet away and has Grand Avenue as a divider. The nearest residence is 2330 feet away. The nearest marijuana facility is 855 feet away and is a grow facility.

In 2020, Arizona voters approved the legal use of marijuana.

In 2010, Arizona voters approved the Arizona Medical Marijuana Act and the Department of Health Services regulates the sale and use of Medical Marijuana. There are strict regulations which included dividing the State into 126 different Community Health Analysis Areas, known as "CHAAs." In 2016, DHS issued an additional 31 Medical Marijuana Dispensary licenses to better serve patients. In addition, the voters approved the marijuana for recreational use which is a change of circumstances since the medicinal use was previously approved and therefore now the new law has created significant additional demand.

**CONCLUSION**

The approval of this Application will allow Black Rock Venture LLC to operate the facility pursuant to the strict rules and regulations required and will provide a needed service to the people of City of Glendale.

Dated this 24th day of September, 2021.

By: \_\_\_\_\_  
Sean Amirian