

Board of Adjustment

Staff Report

CASE NUMBER: BA17-008 (PLN2016-00842)
LOCATION/ADDRESS: 254 South Mulberry
COUNCIL DISTRICT: District 3
STAFF PLANNER: Gordon Sheffield, AICP CNUa, Zoning Administrator
OWNER: MP Mulberry LLC, William P. Murphy
APPLICANT: William P. Murphy
REQUEST: *Requesting 1): an appeal of a denial of a medical marijuana cultivation facility registration; and 2) a variance to allow a medical marijuana cultivation facility to be less than the required distance from a school; in the GI District.*

SUMMARY OF APPLICANT'S REQUEST

Both requests filed by the applicant are related to the same proposal. The development located at 254 South Mulberry (Case Site) is classified as a group industrial development, and the owner, on behalf of a potential tenant, is requesting that a medical marijuana cultivation facility be allowed to operate from this location.

The application makes two requests. The first, appealing the Zoning Administrator's (ZA's) denial of an application to register the proposed location of a medical marijuana cultivation facility, has to do with the applicant disagreeing with the ZA's decision. The second, a variance to allow a medical marijuana cultivation facility to be closer than the required minimum distance of 1200-ft between a medical marijuana cultivation facility and a school. East Valley Institute of Technology (EVIT) is approximately 645-ft directly to the north of the 254 S Mulberry building.

STAFF RECOMMENDATION

It is recommended that the Board **consider each request separately, even to the extent of taking two separate votes; one on each request.**

The Board should consider the appeal of the decision to deny the initial registration request first. The reason for separate consideration of each request has to do with the decision the Board makes on this appeal. In the event the Board decides to overturn the ZA's decision regarding the school (which is the basis of the denied application), then a variance will no longer be necessary.

However, if the Board decides to uphold the ZA decision, then the Board may consider the variance as a separate matter, and has full discretion to decide that request in the manner that they determine is the best fit – which include approval of the variance request, denial, or continuance.

With regard to the Board's decision(s), it is recommended that the Board:

- 1) ***Uphold the decision of the Zoning Administrator*** to deny the medical marijuana cultivation facility application (upholding the denial of the initial application will then make the request for a variance relevant); and
- 2) ***Deny the variance*** request to allow a shorter separation distance from a school than 1200-ft.

SITE CONTEXT

CASE SITE: Group industrial development, zoned GI
NORTH: Group industrial development, zoned GI
EAST: (Across Mulberry) Industrial development, zoned GI
SOUTH: Outdoor storage, zoned GI
WEST: Existing mini-storage facility, zoned LI and GI

STAFF SUMMARY AND ANALYSIS

Request 1 – Zoning Administrator's Denial of the Medical Marijuana Cultivation Facility Registration Application:

Medical Marijuana Cultivation is considered a permitted land use in LI and GI zoning districts, provided the applicant demonstrates that the location complies with a series of separation requirements that, collectively, are often referred to as 'protected' land use classifications. The request involving 254 S. Mulberry is located in the GI-General Industrial district, so the minimum zoning district requirement is satisfied. What remains is confirmation that this location also complies with the

separation requirements from protected land uses. One of the protected land uses is a school, which requires a 1200-ft separation from the MMJ cultivation facility. Through mapping, the closest protected land use is a school, the East Valley Institute of Technology (EVIT), which is located directly north of the case site. All other protected land uses appear to be a sufficient distance away. Therefore, at issue is one question:
Is EVIT defined as a school for the purposes of zoning?

EVIT is a School

Mesa Zoning Ordinance (MZO), §11-86-3, defines the term 'school' as follows:

***Schools, Public or Private.** Facilities for primary or secondary education, including public schools, charter schools, and private institutions having curricula of general academic education consistent with the academic requirements of the State of Arizona, including kindergarten, elementary, junior high school, and high school, including accessory facilities traditionally associated with schools, such as athletic stadia, cafeterias and libraries.*

As regards to EVIT, the following table description excerpt was copied directly from the Arizona Department of Education (ADE) website on January 17, 2017: <http://www.ade.az.gov/edd/NewDetails.asp?EntityID=7282&RefTypeID=1033>

EVIT - East Valley Institute of Technology

ENTITY INFORMATION			
CTDS:	07-08-01-001	Entity ID:	7282
Entity Type:	Vocational Technical Facility	Entity Nature:	School
County:	Maricopa	Grades Served:	9-12
Mailing Address:	1601 West Main Street, Mesa, AZ 85201		
Physical Location:	1601 West Main Street, Mesa, AZ 85201		
Phone:	(480) 461-4000	Fax:	(480) 461-4169

Note: The description of the Entity Nature and Grades Served are highlighted for the purposes of this report.

Given the classification of this facility by ADE, and the listing of grades served (9-12) to be descriptive of the junior high and high schools grades used to define school in the zoning ordinance definition, and EVIT's practice of assigning academic credit to a student's transcript that counts towards minimum high school diploma graduation requirements, the ZA concluded that EVIT met the zoning ordinance requirements of the definition of a school, and therefore would be accorded a minimum separation from any medical marijuana facility.

Based on MZO §11-2-3.D, the measurement of a separation distance (also described as a radius because the minimum distance is from all defined boundaries of the two uses required to be separated) is a closest straight line distance, and is not intended to be measured as a 'shortest travel distance' requirement. Although in most circumstances, there are methods of connecting one use to another (roads, sidewalks, drive aisles), the specific language of the zoning ordinance makes clear that separation distances are measured using an 'as the crow flies' method of measuring distances, taken without regard to the locations or paths of streets, boundaries of intervening properties, fences, railroad tracks, sidewalks or bike paths.

Request 1 - Conclusion

The application was denied because it did not comply with the minimum separation required between a medical marijuana cultivation facility and a defined school. The separation distance was measured based on the method specifically described by the Mesa Zoning Ordinance for measuring such separation requirements. EVIT is classified as a school, both by the Arizona Department of Education, and as defined by the Mesa Zoning Ordinance. Therefore, the denial of the application was based correctly on the lack of compliance with minimum requirements.

Request 2: A variance to allow a Medical Marijuana Cultivation Facility to Locate Closer than 1200-ft to a School

Again, the request for a variance is only necessary if the Board determines the original request was correctly denied by the Zoning Administrator. If the Board overturns the ZA's previous decision, and approves the initial request, then this consideration of a variance request is not needed.

Until recently, the City of Mesa considered a separation requirement between land uses to be a condition of the land use, and did not permit variance applications to shorten any of the required separation distances. Instead, an applicant would need to file a rezoning application, or petition for a text amendment to the zoning code. A recent Arizona Court of Appeals case changed that

logic. The decision in 1st Pawn v. City of Phoenix determined that separation requirements are eligible for a variance, but notes also that these variance requests remain subject to the standard criteria for a variance. The decision also mentions it would be difficult to comply with the requirement that the identified hardship condition was not self-imposed.

Summary of Applicant's Justification

The applicant's justification is based principally on the lack of connectivity between the EVIT campus and the proposed location of the MMJ cultivation facility on South Mulberry. They note that there is a minimum of 8 physical barriers that would prevent, or at the least certainly make it very difficult, a person from walking, biking, or driving from the EVIT campus to 254 S. Mulberry (the Case Site). The most principal obstacle is the presence of the Southern Pacific Railroad tracks, and the lack of a railroad crossing at Mulberry, with the nearest railroad crossing being to the east on Alma School Road. All 8 of these obstacles are present now, and the applicant states that each is not present because of any choice made by the applicant, or by the prospective tenant.

The applicant further states that this is a cultivation facility that will not be open to the general public, and similar 'grow-only' facilities tend to go unnoticed. He also brings to attention that there are a limited number of properties adjacent to a railroad track in Mesa, so the effect of limited access because of the railroad tracks on the calculation of the separation requirements is not a common condition. Therefore, they believe that if the Board decides to grant the variance request, it would be unusual to find a set of similar circumstances that could justify a similar request. They conclude that special favor would not be granted because the location is somewhat isolated, and that the land uses and circumstances that provide context of this area are also unique.

As a variance request, the applicant must demonstrate to the Board that four criteria exist:

- 1) Special circumstances must be present;
- 2) The special circumstances are pre-existing and not self-imposed
- 3) The lack of a variance would deprive the property owner of privileges enjoyed by owners of similar properties in the same zoning district; and
- 4) The variance would not constitute a special privilege not available to other properties in this same zoning district.

There is a special condition that applies to the land or building and the special condition was pre-existing and not created by the property owner:

The applicant notes the presence of the railroad tracks, and 7 other impediments to any physical access or connection between EVIT and the Case Site. It is agreed that the presence of the railroad tracks and the lack of frequent crossings limits the connectivity of the EVIT campus to this Case Site.

However, the method of measurement between a proposed use and a protected use does not take into account any relationship of the degree of connectivity or direct access between the two sites in question. If it did, there would likely be an alternative consideration that would address how to account for the alternative factor on the separation distance calculation. For example, when calculating separations between group homes for the handicapped, the MZO allows the ZA to take into account physical separations between neighborhoods, such as arterial streets and canals. In the case of medical marijuana facilities, no alternative consideration or factor was provided.

In addition, the separation requirements related to any medical marijuana facility, including cultivation 'grow only' facilities are also well known, and provided on a separate summary sheet available at this link:

<http://www.mesaaz.gov/business/development-sustainability/planning/registering-medical-marijuana-dispensaries-facilities>

The tenant made a choice to apply for the cultivation facility at this location despite having knowledge of these requirements, as well as access to the following summary map showing available locations for cultivation-only facilities in Mesa:

<http://www.mesaaz.gov/home/showdocument?id=15950>

By choosing to locate at this site, despite the knowledge of the separation requirement, when other choices are available that do comply with these standards, the applicant created a self-imposed condition.

Strict compliance with the Code would deprive the property of privileges enjoyed by other properties in the same zoning district and the variance would not constitute a special privilege unavailable to other properties in the vicinity and the zoning district of the subject property:

The applicant notes that the presence of the railroad tracks, and other 7 obstacles or impediments forces any individual that wishes to travel from EVIT to this Case Site to use Main Street, Alma School and Broadway before accessing Mulberry to this proposed MMJ cultivation location, a distance of 1.14-miles. However, the design of the medical marijuana facility ordinance (Ord. 5025, codified as MZO §11-34-31) intentionally limits where MMJ facilities may be placed, and does not offer universal

eligibility to all locations in LI or GI districts simply by locating in the correct zoning district. Rather, the locational criteria intentionally place additional restrictions that purposefully limit where MMJ facilities may be placed, even to the point of allowing eligible locations on only a few LI or GI sites, and not allowing eligible locations on others. The ordinance design creating these additional restrictions is intentional, as the Council wished to take into account additional concerns and other factors with MMJ facilities that are not always taken into account when operating customary industrial and commercial uses. Such concerns include needs for additional security, and the attraction of the product grown at these facilities to generate potential crimes.

Therefore, although some industrially-zoned sites are eligible, it is a designed outcome that not all industrial properties are automatically eligible to be a MMJ facility location. The tenant's choice in this matter is the origination of the self-imposed condition.

FINDINGS

Zoning Administrator's Denial of Medical Marijuana Cultivation Facility Registration Application

- 1.1 East Valley Institute of Technology (EVIT) is an operating school training high school students in vocational skills and arts. Classes taken at EVIT are credited to a student's high school transcript, and included when calculating eligibility for graduation with a high school diploma. It is therefore classified as a school, in conformance with the definition of the Mesa Zoning Ordinance, §11-86-3.
- 1.2 MZO §11-31-34 requires a minimum separation between a medical marijuana cultivation facility and a school to be 1200-ft. The proposed location of the medical marijuana cultivation facility, based on a closest straight line distance between the EVIT campus and the building located at 254 South Mulberry is less than 1200-ft. The ZA legitimately denied the initial registration application for failure to comply with the minimum separation requirement.

Variance Request to Allow Less than the Minimum Required Separation Distance Between a Medical Marijuana Cultivation Facility and a School

- 2.1 The prescribed method of measuring a separation distance between a protected land use and a medical marijuana cultivation facility is the closest straight line between the two areas. Specifically, the distance is measured between the edge of the protected use's 'campus' and the outside wall of the building used to house the proposed use.
- 2.2 The method prescribed for measuring distance is not based on travel distance, and does not take into account any degrees of connectivity between the two affected land uses. It is a straight proximity measurement, and not a measure of accessibility.
- 2.3 The applicant's request for a variance is based on the idea that connectivity should be taken into account, and that the presence of the railroad tracks and seven other obstacles in a straight line travel path between the EVIT campus and the Case Site should be considered. While this may be understandable and effective if the measurement distance took into account ease of accessibility and degree of connectivity, that is not the case in this method of measurement. Because the separation standard is a straight line proximity 'as the bird flies' requirement, no hardships or other physical obstructions interfere with how the proximity is measured.
- 2.4 The Planning Division staff maintains maps that indicate in a general manner the locations of eligible medical marijuana facility sites, one for dispensaries and another for cultivation facilities. It makes both maps readily available on-line. Also available on-line is a summary table which lists the specific requirements for locating any type of medical marijuana facility, including cultivation facilities. The available map shows this site as an ineligible location. The summary table clearly states that a 1200-ft separation is required between a school and a medical marijuana cultivation facility.
- 2.5 The prospective tenants have options available elsewhere in Mesa for locating a cultivation facility, and are not limited to just this location.

Mesa Zoning Ordinance

11-2-3 Rules of Measurement

- D. **Measuring Radius.** When a specified land use is required to be located a minimum distance from another land use, the minimum distance is measured in a straight line from all points along the lot line of the subject project. In the event the lot line is curved, the separation radius shall also curve in a similar manner to maintain the specified minimum radius distance. The starting point for the measurement shall be the closest point on the outermost property line for the lot or development site of the protected use, including multiple parcel development sites acting as a campus, or sharing parking, access aisles and other appurtenant shared facilities, such as group development sites. The distance shall be measured to the outside nearest wall of the building intended to house the proposed use.

11-31-34 Medical Marijuana Facilities

B. Medical Marijuana Cultivation Facilities ("Cultivation Facilities") and medical marijuana infusion facilities (Infusion Facility), as these terms are defined by this Ordinance, are **permitted only in the LI and GI districts**, subject to compliance with **all of the following**:

1. The Location of the Cultivation Facilities and/or the infusion facility shall be a minimum distance of 2,400 feet from the next nearest Medical Marijuana Dispensary, Off-site Cultivation Facilities or infusion facility. This separation distance does not apply to the distance between the cultivation or infusion facility, and the specific dispensary served by the Cultivation or Infusion Facility.
2. **The Location of the Cultivation and/or Infusion Facility shall be a minimum distance of 1,200 feet from any of the following:**
 - a. Churches;
 - b. Libraries;
 - c. **Schools**
 - d. Public parks in the LI or GI districts
3. The location of the Cultivation and/or Infusion Facility shall be a minimum distance of 500-feet from:
 - a. Day Care Centers and Pre-schools.
 - b. Public parks in all zoning districts except LI or GI.
 - c. Privately owned designated open spaces and recreations areas maintained by Homeowner's Associations as designated on the applicable plan of development approved by the City.
4. The maximum floor area of an Off-site Cultivation Facilities shall be limited to 25,000 square feet.
5. On and Off-site Cultivation Facilities shall be housed in Permanent Buildings.
6. The maximum floor area of an Infusion Facility shall be limited to 10,000 square feet, of which no more than 2,500 square feet shall be used for storage of marijuana related finished product or marijuana related materials used in the production of product.
7. The Cultivation and/or Infusion Facility shall remain in compliance with requirements of the Arizona Department of Health Services and A.R.S § 36-2804.