

Memorandum

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ATTORNEYS AT LAW

Date: July 13, 2017
To: Darryl Cotton
From: Finch, Thornton & Baird, LLP
Subject: Options for Marijuana Outlet CUP 100 Foot Separation Requirement
File No.: 2403.002

Issue: The subject property located at 6176 Federal Boulevard, San Diego, California 92114, is located within 100 feet of a residential zone that is directly south of and across the street (Federal Boulevard) from the subject property.

Brief Conclusion: It can be argued that Federal Boulevard serves as a constructed barrier that impedes direct access between the subject property and the residential zone thereby increasing the distance between the uses and meeting the separation requirement. It is not likely that a variance would be approved because the subject property can be utilized for other reasonable uses.

I. RELEVANT AUTHORITY

San Diego Municipal Code ("SDMC") §141.0504(a) provides:

Marijuana outlets shall maintain the following minimum separation between uses, as measured between *property lines*, in accordance with Section 113.0225:

...
(2) 100 feet from a residential zone

SDMC §113.0225(b) provides:

Except as provided in Section 113.0225(c), the distance between uses shall be measured horizontally in a straight line between the two closest points of the *property lines*, buildings, or use locations. The distance shall be measured horizontally without regard to topography or *structures* that would interfere with a straight-line measurement

II. SEPARATION BY CONSTRUCTED BARRIER

On April 5, 2016, the City Council approved Ordinance-20634. The Ordinance includes changes to distance measurement between uses.

SDMC §113.0225(c) provides:

When measuring distance for separation requirements for *marijuana outlets*, the measurement of distance between the uses shall take into account natural topographical barriers and constructed barriers such as *freeways or flood* control channels that would impede direct physical access between the uses. In such cases, the separation distance shall be measured as the most direct route around the barrier in a manner that establishes direct access.

This new provision has been interpreted in two marijuana CUP projects since its passage as described hereafter.

A. 3455 Camino Del Rio South (Project Number 368346)



In August 2016, the Planning Commission approved 3455 Camino Del Rio South (Project Number 368346) where the project was located within 1,000 feet of a public park because they were separated by a steep hillside with a grade differential of approximately 300 feet.

The city determined that “based on the new distance measurement the hillside is a natural topographical barrier that impedes direct access. The most direct route from the MMCC to Indian Hill Park is approximately three miles.”

The takeaway from this decision is that the city interpreted direct access around the barrier by the route a person would have to take.

B. Living Green Coop (Project Number 379530)



In August 2016, the Planning Commission denied Living Green Coop (Project Number 379530) because the project was within 1,000 feet of a park. Under SDMC § 113.0225(c) as enacted in 2016, the project would have been approved because the project was separated from the park by a “major roadway barrier” (Friars Road). However, the property was rezoned in 2016 from an IL-3-1 zone that allows MMCCs to a CC-3-6 zone that disallows MMCCs.

Because the applicant chose to continue under the 2014 regulations it had applied under in order to maintain its eligibility as an IL-3-1 zone, the city determined the project was within 1,000 feet of the park. The city would not process the application under two separate versions of the SDMC. In other words, the applicant could either apply under the 2014 regulations as an allowed IL-3-1 zone but be found within 1,000 feet of the park, or it could apply under the 2016 regulations to take into account the constructed barrier but as a disallowed CC-3-6 zone.

The takeaway from this decision is that the city was willing to consider Friars Road as a constructed barrier even though it is not a “freeway” although they referenced it as a “major roadway barrier.”

C. 6176 Federal Boulevard (Project Number 520606)



Here, it can be argued that Federal Boulevard should be considered a “constructed barrier” that impedes direct physical access between the subject property and the residential zone directly south of the subject property because a person would have to illegally cross Federal Boulevard in order to gain direct physical access to the subject property.

Instead, a person would have to walk over 600 feet northeast from the residential zone to the nearest crosswalk at the corner of Federal Boulevard and Oriole Street to cross Federal Boulevard and then walk over 600 feet southwest to the subject property.

Given the lack of suitable properties that meet the strict land use regulations for marijuana outlets in the City of San Diego, the Planning Commission may be receptive to this argument.

In particular, 3455 Camino Del Rio South (Project Number 368346) described above was the last marijuana outlet approved by the Planning Commission between August 2016 and June 2017. There was some public dissent against approving this project because it was within 1,000 feet of a relatively new, albeit unpermitted church.

Nevertheless, elaborating on his rationale for approving the project, Commissioner Wagner commented: “... I don’t find that any of the 14 marijuana dispensaries we have approved so far have been this idealist utopia of perfect parking, perfect space. We still have a mandate to somehow come up with 36 different dispensaries ... and we’re not going to be able to achieve that. ... We’re reaching the ceiling. ... We’re trying our best to fit square pegs into round holes.”¹

This could be interpreted that the Planning Commission is willing to exercise its discretion more liberally in approving future projects.

¹ See comments beginning at approximately 2:01:15
http://granicus.sandiego.gov/MediaPlayer.php?view_id=8&clip_id=6773.

III. VARIANCE

It is unlikely a variance would be approved because there is still a reasonable use for the subject property absent a variance.

Under SDMC §126.0805, a variance will be approved only if the following findings are made:

- (a) There are special circumstances or conditions applying to the land or *premises* for which the variance is sought that are peculiar to the land or *premises* and do not apply generally to the land or *premises* in the neighborhood, and these conditions have not resulted from any act of the *applicant* after the adoption of the applicable zone regulations;
- (b) The circumstances or conditions are such that the strict application of the regulations of the Land Development Code would deprive the *applicant* of reasonable use of the land or *premises* and the variance granted by the City is the minimum variance that will permit the reasonable use of the land or *premises*;
- (c) The granting of the variance will be in harmony with the general purpose and intent of the regulations and will not be detrimental to the public health, safety, or welfare; and
- (d) The granting of the variance will not adversely affect the applicable *land use plan*. If the variance is being sought in conjunction with any proposed *coastal development*, the required finding shall specify that granting of the variance conforms with, and is adequate to carry out, the provisions of the certified *land use plan*.

In applying for a marijuana CUP in 2015, 3515 Hancock Street MMCC (Project Number 368338) also applied for a variance because it was within 1,000 feet of Mission Bay Park.² The variance was denied because “there [were] no special circumstances or conditions applying to the land or premises for which the variance is sought that would deprive the applicant of reasonable use of the land or premises. ... This proposed tenant space does not qualify for a MMCC CUP however; there are a wide range of industrial and nonindustrial land uses allowed in this zone.”

Here, the findings for sections (b) and (c) would be particularly difficult to make because the subject property can be utilized for reasonable uses other than a marijuana outlet such as a retail store or office space.

² The project applicant argued unsuccessfully that the project was separated from Mission Bay Park by Interstate 8. Unfortunately for the project applicant, SDMC §113.0225(c) was not operative at that time, and actually this project may have been the catalyst for enacting such provision.