

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF ADAM MEYERS REPRESENTING
THE KENAI CHRISTIAN CHURCH
AND DAVID HALL OWNER OF
NORTHWOOD PLAZA:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
APPROVING A CONDITIONAL USE
PERMIT FOR A MARIJUANA
RETAIL STORE LOCATED AT
12516 KENAI SPUR HIGHWAY
KENAI, ALASKA**

Case No. BA-19-01

DECISION ON APPEAL

I. INTRODUCTION

Adam Meyers, representing the Kenai Christian Church and David Hall, owner of the Northwood Plaza, each separately appealed the DECISION of the City of Kenai Planning and Zoning Commission ("Commission") approving a Conditional Use Permit for ACG, LLC, ("ACG") to operate a Marijuana Retail Store, located at 12516 Kenai Spur Highway, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment REVERSES the DECISION of the Planning and Zoning Commission granting the Conditional Use Permit, thereby DENYING the Conditional Use Permit.

II. PROCEDURAL HISTORY

On May 19, 2017, ACG submitted an application to the Planning Department requesting a Conditional Use Permit to operate a marijuana manufacturing and cultivation facility.¹ [R.92-95]

¹ ACG, LLC, operates a commercial marijuana manufacturing operation on the site, but chose on its own accord, not to operate the cultivation business.

Pursuant to KMC 14.20.330-Standards for Commercial Marijuana Establishments, a conditional use permit is required for all commercial marijuana establishments in the City. Kenai Municipal Code 14.20.330 also specifically requires that all commercial marijuana establishments be located at least 500 feet from any churches.

On June 28, 2017, the Commission held a public hearing on Resolution No. PZ2017-20 approving the Conditional Use Permit. [R. 79-84] At the public hearing, the City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.72-78] One of the primary issues the Commission considered was whether the distance between the closest outer perimeter of the building proposed for the commercial operation to the main public entrance of the nearby Kenai Christian Church exceeded the distance required by KMC 14.20.330 of 500 feet. The Planner provided that he had spoken to the Kenai Christian Church and conducted site visits during the weekday and on multiple Sundays, and observed the public primarily using the covered entrance of the Church facing Second Avenue and identified this entrance as the main public entrance. [R.76] The City Planner at the time noted that the distance from the closest outer perimeter of the proposed Commercial Marijuana Establishment to the main public entrance of the Church measured, using the City's Geographic Information System, was approximately 504 feet and that a professional survey submitted by ACG provided a distance of 516 feet. [R.76] The Commission adopted the findings of the Planner in its Resolution approving the Conditional Use Permit. [R. 79-84] While there was opposition to approval of the Conditional Use Permit at the public hearing in 2017, including testimony from Mr. Hall and a letter written by Robert DeVold representing the Kenai Christian Church, no appeals of the decision by the Commission were filed. [R.89-90]

On July 19, 2019 the Planning Department received a new Conditional Use Permit application from ACG to operate a retail marijuana establishment in the same building it had previously been granted approval to operate its marijuana manufacturing operation. [R.35-38] On August 14, 2019, the Commission held a public hearing on ACG's application. [R.43-49] At this hearing Roger Boyd represented ACG, Mr. Hall spoke in opposition to the Conditional Use Permit, and Mr. Meyers submitted a letter of opposition.² [R. 45-46] At the hearing, the current City Planner provided a Staff Report noting that the location of the proposed retail marijuana store was

² Mr. Meyers' letter was provided as a laydown before the Commission and was inadvertently not included in the record before the Board of Adjustment.

in the same building that the Commission had concluded met the required buffer distance in 2017. [R.27] The Planner used mapping software to review for any new property uses that could be an issue for buffering requirements, and finding none, recommended the Commission approve the new Conditional Use Permit. [R.27-28] At the hearing, clarification based on the distances measured and determination of the main public entrance as determined by the Commission in 2017 was discussed. [R.46] The Commission ultimately approved the Conditional Use Permit for a retail marijuana establishment via Resolution PZ2019-27. [R.46]

Two timely appeals of the Commission's approval of the Conditional Use Permit to the City's Board of Adjustment were received by the City Clerk. [R.50-51] Mr. Meyers submitted an appeal providing: "Originally Kenai Christian Church was told the facility would not become a retail store. Also, the retail store is in violation of the 500 ft. buffer zone directly affecting minors who attend the Church." [R.50] Mr. Hall also submitted an appeal stating: "various religious groups meet in the Northwood Plaza on a regular basis and conduct religious activities of which Resolution PZ2019-27 would be infringing on the 500 [ft.] buffer zone.[R.51]

On October 7, 2019, Board Members Brian Gabriel, Henry Knackstedt, Tim Navarre, Glenese Pettey, and Jim Glendening were present for the hearing before the Board of Adjustment. At the hearing, public comment was allowed and Kurt Hallam and Al Weeks spoke against the approval of the Conditional Use Permit. The City Planner, Elizabeth Appleby presented a staff report to the Board. Mr. Meyers and Mr. Hall argued against the approval of the Conditional Use Permit, while Mark Theiler, representing ACG spoke in favor of the Board affirming the decision by the Planning and Zoning Commission.

III. STANDARD OF REVIEW

Kenai Municipal Code provides that "...the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken."³ The Board reviews the appeal *de novo*.⁴ Therefore, no deference is given to the decision by the

³ KMC 14.20.290(f)(2).

⁴ *Id.*

Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.⁵

The function of the Board is to determine whether the requirements for a conditional use permit have been met and grant or deny the conditional use permit on the conditions supported by the substantial evidence before it.⁶ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁷ The Board must make specific findings supporting its conclusions.⁸

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kenai Municipal Code 14.20.330-Standards for Commercial Marijuana Establishments, provides in part that commercial retail marijuana establishments are only allowed pursuant to a conditional use permit under KMC 14.20.150. Kenai Municipal Code 14.20.150(a) states in relevant part that: “[t]he conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings.” Conditional use permits must meet the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development,

⁵ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11 (Alaska 1993)

⁶ *Id.* At 931-932.

⁷ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).

⁸ *Fields*, at 932. And KMC 14.20.180(c).

building design, operation of the use and other similar aspects related to the proposed use.⁹

Both appeals are focused on the fifth criteria above. With respect to the fifth criteria, the proposed use will not be harmful to the public safety, health or welfare, in enacting Ordinance 2870-2016, which created the City's regulations on commercial marijuana establishments, the City Council found that "some uses are especially susceptible to the potential negative impacts of marijuana-related activities and land-uses, requiring buffering in addition to the standard Zoning Regulations."¹⁰ This concern expressed by the City Council was codified in KMC 14.20.330(f) which in part prohibits locating a commercial marijuana establishment within 500 feet of a church. If the proposed commercial marijuana establishment is not located outside the minimum distances as required by KMC 14.20.330(f) the City Council in enacting Ordinance 2870-2016 determined that the use would be harmful to the public safety, health or welfare. Mr. Hall's appeal and relevant testimony before the Board indicates that he believes the building he owns and operates; Northwood Plaza, should qualify as a church because religious groups meet in the Plaza on a regular basis and conduct religious activities. If Mr. Hall's Plaza meets the definition of a church, it is well within the 500 foot buffer distance and the retail marijuana establishment could not be located in the proposed location. Mr. Meyers' appeal makes two arguments. First, that the Church was told that the location operated by ACG would not become a marijuana retail store and second, that the Church is located within 500 feet of the proposed retail location.

A. The Northwood Plaza is Not a Church for Purposes of the City's Zoning Code.

Mr. Hall argued that the Northwood Plaza meets the definition of a church and because it is clearly closer than 500 feet to the proposed retail marijuana establishment, the retail marijuana establishment cannot be located where proposed. The Board finds that the Northwood Plaza does not qualify as a church.

A "church" is defined in KMC 14.20.320 as "a building or structure in which persons regularly assemble for worship, ceremonies, rituals, and education pertaining to a particular system of beliefs. The term "church" includes a synagogue, or temple." Mr. Hall did not provide any evidence other than his testimony before the Board, nor did he provide any witness testimony. Mr.

⁹ KMC 14.20.150(d)(1-6).

¹⁰ Ordinance 2870-2016, 8th WHEREAS Clause.

Hall testified that youth groups and others use the foyer in the plaza as well as the coffee shop in the Plaza to discuss religion and hold bible studies. He indicated that these activities occur on a regular basis though he did not provide extensive details. When questioned, Mr. Hall acknowledged that one of the tenants in the Plaza is a Mexican restaurant that sells alcohol, but he clarified it was not like a typical bar. The Board finds that while the Plaza is used by groups to discuss religion and hold bible study, these activities do not transform what is essentially a commercial strip mall into a church. The building holds a Mexican restaurant, a coffee shop, and other retail businesses. All the available space other than common areas are occupied by these businesses. If Mr. Hall's argument was to be accepted, almost any coffee shop or other commercial business, or even private residence could be considered a church for the City's zoning purposes. Such an interpretation would render the City's zoning code, especially with regard to measuring buffers unworkable, as the City and other businesses would have no way to tell where churches were located within the City. Mr. Hall did not provide any testimony that there was any signage or other features of the Plaza that would indicate it was a church. There was no testimony that any member of the public entering the location would have any indication that the Plaza was anything other than a retail and restaurant location. The businesses within the Plaza clearly meet other definitions in the zoning code for restaurants and retail businesses.¹¹ The definition of church specifically includes synagogues and temples, indicating both an inclusive approach, but also one that contemplates a structure whose primary purpose is to be used for religious activity. The Board finds that based on the testimony presented the Plaza is not a "church" for purposes of the zoning code, and does not require a separation distance for the location of commercial marijuana establishments.

¹¹ KMC 14.20.320 provides "Restaurant" means an establishment where food and drink is prepared, served, and consumed primarily within the principal building and "Retail business" means establishments engaged in selling goods or merchandise to the general public for business or personal/household consumption and rendering services incidental to the sale of such goods.

B. Prior Statements by ACG that it was Not Going to Operate a Retail Store at the Location in Question Do Not Preclude it From Operating One Now.

Mr. Meyers and his witness, Robert DeVolld, both testified to the Board that in 2017 the Kenai Christian Church was told by ACG representatives that ACG was not going to operate a retail location in the building where ACG operated its manufacturing business. Testimony also provides that this information was provided to the Planning Commission in 2017 when approving the Conditional Use Permit for a manufacturing and cultivation establishment. When asked about this by the Board, Mr. Theiler stated that in 2017, ACG had no plans to operate a retail location at the site in question, but since then the commercial marijuana landscape had changed locally, and ACG's plans had changed as well. Mr. Theiler stated that ACG felt they needed to open a second retail location in order to stay competitive in the market.¹²

The Board finds that prior statements by ACG, that it did not intend to operate a retail location in the same building where it was approved by the Commission to operate a manufacturing business, do not preclude it from doing so at the present time or in the future. While statements by ACG to this affect may have made neighbors less opposed to the manufacturing operations, there is no evidence or record that the Commission in approving the manufacturing establishment put any weight on ACG's statements regarding its retail plans. If this issue was important to the Commission, the Commission could have conditioned the manufacturing permit to prohibit future retail operations. Further, both Mr. Hall and the Kenai Christian Church opposed the first permit in 2017 allowing the manufacturing establishment, so it cannot be reasonably argued that they relied on ACG's statements to their detriment. Mr. Meyers was questioned by the Board why the Church did not appeal in 2017, and Mr. Meyers never indicated that a decision not to appeal was based on ACG's statements that it did not intend to operate a retail establishment at the site.

C. The Main Public Entrance of the Church is Located within 500 Feet of the Proposed Retail Establishment.

The Board finds that the main public entrance of the Kenai Christian Church is the entrance facing McKinley Street, which is closer than 500 feet to the proposed commercial retail

¹² ACG currently operates a retail marijuana establishment at a separate location in the City.

establishment.¹³ Kenai Municipal Code 14.20.330(f)(2) provides in part that buffer distances shall be measured as the closest distance from the perimeter of a stand-alone commercial marijuana establishment structure to the main public entrance of a church. The main dispute in this appeal is that the Church has two entrances regularly used by the public, and which entrance should be considered the main public entrance is disputed by the parties. The Church has one entrance that is newer that faces Second Avenue, and one older entrance that faces McKinley Street.¹⁴ While Mr. Theiler provided no evidence to the Board, he testified that based on the architectural design of the Church and his personal observations of the use of the entrances, the Second Avenue entrance is the main public entrance. He also argued that the Board should follow the conclusion of the Planner in 2017, also adopted by the Planner in her 2019 staff report, that the Second Avenue entrance is the main public entrance. Mr. Meyer and his witness Mr. DeVold argued that while both entrances are main public entrances to the Church, the main public entrance that should be considered for this appeal is the McKinley Street entrance.

The Board finds the history of the Church provided in the record [R. 89-90] and testimony before the board to be helpful in determining which of these two entrances is the main public entrance. The Church is comprised of three connected structures. The first structure was built in 1971, but this structure no longer has an outside entrance as the second structure was added to it negating the need for the original entrance to the outside. This second structure built in 1983 contains the public entrance facing McKinley Street. This entrance is described as having the appearance of a main public entrance. The chapel of the Church is accessed through the McKinley Street entrance and contained within these first two structures, along with administrative offices and other rooms. The testimony and written evidence provides that these first two structures are where education, worship, group studies, baptisms, weddings, and funerals generally occur along with occasional recitals and community events. In 1998, a third, much larger structure was connected to the first two. The Church calls this third structure the Family Life Center. The Family Life Center is a large open space, used for larger events, youth sports activities, and Sunday morning and Wednesday evening services. For these services chairs are set up. The Second

¹³ The Board makes no decision whether the Second street entrance of the Church is more or less than 500 feet, though the record indicates it is likely greater. The Survey provided by ACG in 2017 did not correctly measure the distance because it appears to have measured from the door of the commercial marijuana establishment to the Second Street entrance of the Church, instead of the closest outside perimeter of the building to the Second Street entrance as required by relevant Kenai Municipal Code.

¹⁴ While there are other outside doors to the facility, they are not relevant to this inquiry.

Avenue entrance to the Family Life Center has a covered entrance, along with the majority of the parking directly out front. The covered entrance was added in 2004.

The Board finds that consistent with testimony of Mr. Meyers, the majority of the main or most important activities to the Church are accessed through the McKinley Street entrance. These activities include access to the Chapel, where worship, baptisms, weddings, and funerals are performed. The Board acknowledges that the largest, but less frequent events including Sunday morning and Wednesday evening services occur in the Family Life Center along with other larger activities. However, the Board finds that the activities representing the most core values of the Church such as baptisms and services held in its temple are accessed more frequently through the McKinley Street entrance.

The Board also finds that the McKinley Street entrance was the only frequently used entrance until the third additional entrance was completed. This entrance is denoted by the McKinley street address used by the Church, and this address has not changed throughout the additions to the Church. It is not unreasonable to conclude that this main public entrance has retained its character.

Architecturally, it may appear that the Second Avenue entrance is the main public entrance, given the covered entrance and number of parking spaces nearby. This position is supported by Mr. Theiler's testimony. However, the McKinley street entrance is closer to the highway and the first entrance a person coming from the highway would see. The record indicates that the McKinley street entrance is easily accessible by a walkway from the main parking area. [R. 90] Mr. DeVolld testified this entrance also has a commercially attractive door. The Second Avenue doors are locked throughout most of the week, while the McKinley Street doors are generally open except when one of the two administrative assistants are working alone and then they utilize a door bell and camera to let people in for safety reasons. The Second Avenue doors have no bell to gain access if locked.

Mr. Meyers and Mr. DeVolld explained that numerous church meetings, classes, and smaller worship services are accessed through the McKinley Street entrance. On Sundays, this includes 2 adult classes and 3 youth classes, likewise on Wednesday there are 2 adult classes and 3 youth classes. On Thursday morning there is one adult class and one youth class, at noon, one adult class, and every Thursday there is an elders class. Mr. DeVolld testified that the Second

Avenue entrance is used usually twice a week, while the McKinley Street entrance is used six days a week.

The testimony indicates the three full time staff use the McKinley Street entrance, which is where the mail comes to, and where all deliveries of goods and services are made. There was also testimony that the Fire Marshal comes to the McKinley Street door for inspections. The record and testimony indicates that the Church's McKinley Street entrance is where business and commerce is conducted. Testimony also indicates that this is where people enter for counseling. [R. 90]

Mr. Meyers and Mr. DeVold testified that the McKinley street door is the most frequently used door, and they identify it as the main public entrance.

Mr. Theiler testified that his observation from running his nearby manufacturing business is that most people use the Second Avenue entrance to the Church. No supporting evidence to this position was included however. The Board puts more weight on Mr. Meyers' and Mr. DeVold's testimony based on their more direct experience with the use of the church entrances.

The City Planner identified the Second Avenue door as the main door in 2017 for purposes of the Conditional Use Permit for manufacturing and this position was adopted by the current City Planner in 2019.¹⁵ The City Planner indicated in 2017 that he visited the Church on multiple Sundays and during the week, and observed the public primarily using the Second Avenue entrance. [R.76] However, it is unclear from the record if this was Sunday mornings and Wednesday evenings when the two services are held in the Family Life Center or at other times. It is not disputed by the Church that the Second Avenue entrance is primarily used for these two weekly events, the only time these doors are typically open or used. The Planner also identified in 2017 that he spoke with the Kenai Christian Church, [R.17] but does not indicate whom at the Church he spoke to or what was specifically discussed. For these reasons, the Board does not rely on the determination of the Planner in 2017. The current City Planner indicated that she did not conduct an independent analysis of the Planner's determination in 2017 regarding which entrance was the main public entrance because she considered it to be a settled matter based on the conclusions of the Commission in 2017. Instead, she made sure there were no physical changes to

¹⁵ While the surveyor retained by ACG also measured to the Second Avenue door, there was no evidence or testimony to indicate whether the surveyor made any analysis that this was the main public door, or whether he was simply instructed to measure the distance to that entrance. Therefore, the Board gives it no weight in regards to a determination of which entrance is the main entrance.

the structures in question over the last two years and that there were no new uses of concern in the buffer area. For this reason, the determination in her staff report regarding which entrance is the main public entrance is also not relied upon.

Based on the testimony and evidence presented to the Board, the Board concludes that the for purposes of this current appeal, the 2019 application for a Conditional Use Permit to operate a retail marijuana establishment at 12516 Kenai Spur Highway, the main public entrance to the Kenai Christian Church is the McKinley Street entrance which is within 500 feet of the perimeter of the structure proposed to be used for the retail establishment.¹⁶ Therefore, the Board reverses the approval of the Conditional Use Permit approved by the Commission and denies the permit.


This Board decision has no effect on the 2017 decision of the Commission granting the Conditional Use Permit for the manufacturing establishment in 2017. That decision was not appealed to the Board, and the Board's decision is only based on the record and evidence presented to it on October 7, 2019 for the current appeal and Conditional Use Permit application. The Commission's decision with regard to the 2017 application is not overturned or otherwise affected by this decision.

¹⁶ The McKinley Street entrance is approximately 420 feet from the outer perimeter of the proposed retail marijuana establishment.

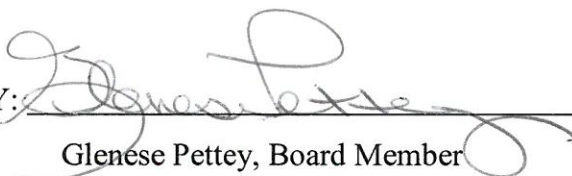
CONCLUSION

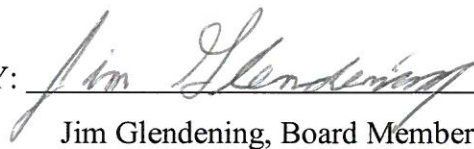
After reviewing the evidence and presentation of the parties, the Board of Adjustment REVERSES the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and denies ACG's application for a Conditional Use Permit to operate a retail marijuana establishment at 12516 Kenai Spur Highway.

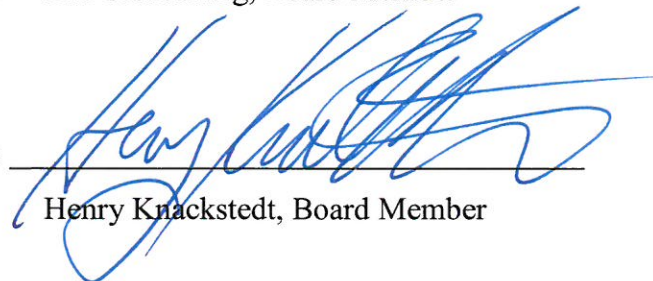
DATED this 6 day of November, 2019.

BY: 
Brian G. Gabriel, Board Chair

BY: 
Tim Navarre, Board Member

BY: 
Glenese Pettet, Board Member

BY: 
Jim Glendening, Board Member

BY: 
Henry Knackstedt, Board Member

Notice of Right to Appeal

This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

CERTIFICATE OF DISTRIBUTION

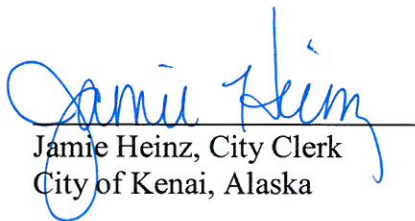
I certify that on 7th day of November, 2019, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

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