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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RANDOLPH W. DALE,

Plaintiff and Appellant,

v.

SONOMA COUNTY BOARD OF  
SUPERVISORS,

Defendant and Respondent.

A139057

(Sonoma County  
Super. Ct. No. SCV-252202)

Randolph W. Dale appeals from an order denying his petition for a writ of administrative mandate, which sought to overturn respondent's denial of his application for a discretionary use permit to operate a medical marijuana dispensary in an unincorporated area of Sonoma County. Dale contends there was a procedural irregularity in the administrative proceedings and respondent's decision was incorrect. We will affirm the order.

**I. FACTS AND PROCEDURAL HISTORY**

Dale, on behalf of Republic Health Center, Inc., filed an application with the County of Sonoma on August 15, 2011, seeking a use permit for a "Level II Medical Cannabis Dispensary" at a location on Santa Rosa Avenue, Santa Rosa, California, "APN 045-290-097." A revised proposal statement was submitted on September 26, 2011.

A staff report dated December 15, 2011, from the Sonoma County Board of Zoning Adjustments (BZA) of the Sonoma County Permit and Resource Management Department (PRMD), recommended that Dale's application be denied, because the subject parcel abutted a residential zone and the proposed use would be detrimental to the health, safety, peace, comfort, and general welfare of the neighborhood.

BZA held a public hearing on Dale's application on December 15, 2011, and January 26, 2012. On January 26, 2012, BZA approved the application, finding that the required setback from residential property could be waived due to the proposed dispensary's fencing, landscaping, and location on the property, and the intended use would not be detrimental to the neighborhood.

Respondent, the Sonoma County Board of Supervisors (Board), thereafter held a regularly scheduled public meeting on January 31, 2012. Among other things, the Board considered agenda item 25, referring to possible action items arising in connection with PRMD, including acts and determinations by BZA. At the request of Board Chair Shirlee Zane (Supervisor Zane), the Board agreed to undertake a direct review of BZA's approval of Dale's use permit, UPE 11-0062. (See Sonoma County Code, § 26-92-161, Ord. No. 5537, § 2(i) (2004).)

The direct review of UPE 11-0062 was scheduled for a public hearing on May 15, 2012. Notice of the hearing was duly given.

At the public hearing on May 15, 2012, Steve Padovan, PRMD Project Planner, advised that the county had already approved two dispensaries, and the cities of Cotati and Santa Rosa had approved three others, in the general area. He also noted that the location criteria for medical marijuana dispensaries required a 100-foot separation between the dispensary property and residential uses. The 100-foot measurement is made from the property line of the dispensary's parcel (not from the dispensary building itself), because "it's very difficult to separate out where the dispensary ends" on the parcel. Using this measurement, Padovan noted there were residences within 100 feet from the property line of Dale's proposed dispensary. Although BZA had found that additional landscaping and slats in an existing fence would provide a sufficient separation to waive

the 100-foot separation requirement, Padovan noted that BZA had “struggled with interpreting the ordinance” and applying it in a given situation, and had “asked that the Board provide clarification of their interpretations.”

Padovan also advised the Board that there was neighborhood opposition to the proposed dispensary. Neighbors expressed concern that people would smoke marijuana outside the dispensary. In addition, Padovan reported, “residents were very concerned” that a school bus would drop off children near the dispensary, and children would walk by the dispensary on their way home. Padovan recounted “there was a substantial number” of neighbors who came forward at the BZA hearing, which was “[m]uch more than we’ve had on any of the other dispensaries.” In fact, while proposals for other dispensaries had actually been supported by neighbors, the hearing on Dale’s proposal was different; in the words of PRMD Deputy Director Jennifer Barrett, “[T]his was the one hearing where we had quite a bit of opposition from the neighbors.” Supervisor Zane’s review of letters in the file confirmed there was “clear opposition from the neighbors.”

At one point during the proceedings, Supervisor Zane asserted that Dale was operating a medical marijuana home delivery business—an assertion that Padovan confirmed. When Supervisor Efren Carrillo asked what that had to do with the use permit application at issue, however, Padovan said, “Nothing.” Supervisor Zane later explained that the existence of marijuana delivery services rebutted the proposition that there was inadequate access to cannabis for medical purposes; nonetheless, she added, “[T]he real issue is the proximity [of Dale’s proposed dispensary] to the two other dispensaries that already exist there[,] and the neighbors in terms of detrimental health and safety and the bus stops.”

Dale was initially allotted 10 minutes to speak in favor of his application; Supervisor Zane ultimately permitted him to speak for approximately 16 minutes. Dale asserted he did “not deliver to any cannabis patients in Sonoma County” and had not done so; he also denied any affiliation with “Sonoma County Collective.” Supervisor Zane thanked Dale for his clarification and concluded, “[O]bviously, it’s being operated

by someone else.” In regard to the 100-foot separation issue, Dale asserted there was more than 100 feet between the entrance of the proposed dispensary building and the residential areas. He added that the dispensary would open after the bus had picked the children up in the morning. In addition, Dale discussed the proposed landscaping, security, and other aspects of the proposed dispensary.

The Board also gave Dale’s attorney, Dan Beck, an opportunity to speak. Members of the public provided comments as well.

At the end of the public hearing, the Board considered a motion to deny Dale’s application. Supervisor Zane recommended the denial, based on a concern with the proliferation of dispensaries “concentrated in one area” and “the bus stop and the complaints and the concerns of the neighborhood in terms of the welfare of the neighborhood.” Supervisor Valerie Brown was also concerned about the proliferation of dispensaries. And Supervisor David Rabbitt concurred that the required 100-foot separation was to be measured from the property line, not the door of the dispensary, and in this case there were approximately six to nine homes within that 100-foot area. In addition, the landscaping between the dispensary and residential use was “actually very minimal” and “putting some slats in a Cyclone fence” was not a satisfactory solution. The motion to deny Dale’s use permit was passed on a 3-2 straw vote, with instructions to bring the matter back on June 12, 2012, for adoption of a resolution reflecting the decision of the Board.

On June 7, 2012, Dale filed additional documents with the Board: a “Revised Landscape Plan and Residential Setbacks,” a “Revised Hours of Operation and School Bus Stop,” a document entitled “Applicant is not the Operator of Sonoma County Collective,” and a request to disqualify Supervisor Zane.

On June 12, 2012, the Board adopted Resolution No. 12-0304, entitled “Resolution Of The Board Of Supervisors Of The County Of Sonoma, State Of California, Denying A Request For A Use Permit For A Level II Medical Cannabis Dispensary At 4170 Santa Rosa Avenue, Santa Rosa, APN 045-290-097.” The resolution set forth four findings in support of the denial: (1) the proposed project failed to meet the

requirement of Sonoma County Code section 26-88-126(i) for a 100-foot separation from a residential zoning district; (2) the proposed project was immediately adjacent to two school bus stops; (3) access to medical cannabis in the area was already provided by two approved dispensaries within 1.5 miles; and (4) the proposed use would be detrimental to the health, safety, peace, comfort and general welfare of persons residing or working in the neighborhood, and be detrimental or injurious to property and improvements in the neighborhood and to the general welfare of the area.

In September 2012, Dale and Republic Health Center, Inc. filed a petition for a writ of administrative mandate to set aside Resolution No. 12-0304. The petition contended that the request for direct review of the BZA decision did not comply with the law, because there was no public hearing on the request and no vote was taken. The petition further asserted that the Board's findings had "no foundation in fact or law." In addition, Dale complained of Supervisor Zane's statement that he operated Sonoma County Collective, which was alleged to be an illegal marijuana delivery service operating without a use permit. The Board opposed the petition.

After a hearing on May 14, 2013, the court filed its written order on June 6, 2013, denying the petition. The order stated: "Petitioners have not met the burden of establishing grounds for issuance of a writ of administrative mandamus, having failed to establish that Respondent failed to act in a manner required by law or that Respondent's decision was not supported by substantial evidence. The Court finds that the Petitioners were given adequate notice of the direct review hearing and that the hearing process was procedurally correct. The Court also finds that reference to the other collective during the hearing did not so permeate the Board of Supervisors hearing that it tainted the deliberative process."

This appeal followed.

## II. DISCUSSION

On appeal from the denial of Dale's petition for administrative mandamus under Code of Civil Procedure section 1094.5, our role is identical to that of the trial court. (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921.) The trial

court may determine whether “(1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion.” (*Ibid.*) An agency abuses its discretion if it failed to proceed in the manner required by law, its decision is not supported by the findings, or the findings are not supported by substantial evidence. (*Ibid.*; see Code Civ. Proc. § 1094.5, subd. (b).)

Dale contends the Board denied his permit application after improperly taking direct review of BZA’s decision, and the Board’s denial of his application was not supported by “fact or law.” We address each contention.

A. The Board Properly Took Direct Review of BZA’s Decision

Dale contends that Supervisor Zane’s request for direct review of the BZA decision was “in violation of Sonoma County Zoning Code Article 92, Section 26-92-161(d),” because there was “no notice of a public hearing on the request for Direct Review,” “no public hearing on the request for Direct Review,” and “no vote taken on the request for Direct Review.”

1. Zoning Code Section 26-92-161

Sonoma County Code section 26-92-161 sets forth the procedures for the Board, on its own initiative, to review the decisions of lower-level decision makers (such as BZA) on discretionary use permit applications.

Under subdivision (a) of Sonoma County Code section 26-92-161, any Board member may request the Board to review the decision. Subdivision (d) specifies: “A request for direct review shall be *considered by the board of supervisors at a public meeting*. Notice of the meeting shall be given, and the meeting shall be conducted, in compliance with applicable law.” (Italics added.)

If the Board approves the request for direct review at the public meeting, the Board assumes jurisdiction over the matter and thereafter hears and decides the review at a properly noticed “public *hearing*.” (Sonoma County Code, § 26-92-161(d)(1) & (e); italics added.)

## 2. Compliance With Section 26-92-161

Dale complains there was “no notice of a public hearing on the request for Direct Review” and “no public hearing on the request for Direct Review.” However, a *request* for review need only be made and decided at a public *meeting*, not a public *hearing*. Here, Supervisor Zane’s request for review was plainly made and considered by the Board at the regularly scheduled public meeting on January 31, 2012.

Dale also contends there was “no vote” on the request for review, but there was. At the public meeting on January 31, 2012, Supervisor Carillo and Supervisor Rabbitt expressed their agreement with Supervisor Zane’s proposal for direct review. The vote was taken by Supervisor Zane as follows: “If I am not hearing any objections[,] [then] that will *move forward on a five, zero, zero* and a request for direct review on that item.” (Italics added.) And as Barrett would later recount, Supervisor Zane raised the matter for review, the Board concurred by not objecting, and that was sufficient.

The actual review (as opposed to the request for review) was subsequently heard by the Board at the duly noticed public hearing on May 15, 2012, pursuant to Sonoma County Code section 26-92-161(e). Dale fails to establish error.

### B. Substantial Evidence Supports the Board’s Findings

The Board denied Dale’s permit application based on four specific findings, any one of which would have been sufficient for the denial. As set forth below, the findings were supported by Sonoma County Code section 26-88-126(i), by the Board’s authority to protect the health, safety and welfare of residents, and by substantial evidence. (See *SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 469 (*SP Star*) [agency’s findings are presumed to be supported by the administrative record, and the appellant has the burden of showing they are not].)

#### 1. Board Finding No. 1

Sonoma County Code section 26-88-126(i) provides that a medical cannabis dispensary shall not be established within 100 feet of a residential zoning district. The

requirement may be waived if the applicant shows that an actual physical separation exists between land uses or parcels, such that no off-site impact could occur.<sup>1</sup>

The Board found that the proposed project did not have the required 100-foot separation from a residential zoning district, and there was no basis for waiving the requirement, because “the Project Site directly abuts four properties zoned RR (Rural Residential) along the north and east property lines and there is no adequate physical separation between the two land uses other than an existing chain link fence and proposed landscaping.” Accordingly, the “establishment of a medical cannabis dispensary on the Project Site is incompatible with the adjacent single-family neighborhood.”

The Board’s finding is supported by substantial evidence. Supervisor Rabbitt noted that the required 100-foot separation from residential zoning districts is measured from the property line of the parcel on which the dispensary would be located. He concluded “the 100-foot separation does hit six to nine, whatever, homes around the perimeter.” Padovan explained that the measurement is made from the property line of the dispensary’s parcel (as opposed to the dispensary building), because “it’s very difficult to separate out where the dispensary ends” on the parcel. Using this measurement, Padovan confirmed there were residences within 100 feet from the property line of Dale’s proposed dispensary. In addition, Rabbitt observed, the landscaping between the dispensary and residential use was “actually very minimal” and “putting some slats in a Cyclone fence” was unsatisfactory. And Barrett observed with regard to the setback waiver that “[t]his is the only ordinance where we have an

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<sup>1</sup> Sonoma County Code section 26-88-126(i) provides that a medical cannabis dispensary shall not be established (1) on any parcel containing a dwelling unit used as a residence, “nor *within one hundred feet (100') of a residential zoning district*” (italics added); (2) within 1,000 feet of any other medical cannabis dispensary, or within 500 feet from a smoke shop or similar facility selling drug paraphernalia; or (3) within 1,000 feet from any public school, park, or an establishment, public or private, that caters to or provides services primarily to persons under 18 years old. “Subsections . . . (1) and (2) may be waived . . . if the applicant can show that an actual physical separation exists between land uses or parcels such that no off-site impacts could occur.”

exception for where a physical separation exists that gives *a lot of discretion* to the decision makers on how to interpret it.” (Italics added.)

Dale’s arguments in this regard are unpersuasive. He contends, as he did at the hearing, that the 100-foot separation requirement should be measured from the entry of the dispensary building, not from the property line. But Dale does not provide authority or substantive argument as to why his measurement method should be used rather than the one adopted by the Board.

Dale also argues that five out of seven permitted dispensaries in unincorporated Sonoma County abut the parcel line of a residential zone. He provides no citation to the record for this proposition. Nor does he establish that a waiver of the 100-foot requirement in those instances compels the waiver of the requirement under the circumstances presented by his proposed dispensary.

Finally, Dale argues that he “will execute an addendum to the dispensary lease” to reduce the size of the dispensary site and construct a fence around the perimeter of the site. Again, he provides no citation to the record. In any event, what he might do in the future has nothing to do with whether the Board properly denied the permit based on the materials submitted by the time of the public hearing; and to the extent such proposals had been made or foreshadowed at the hearing, our role is not to reweigh the evidence before the Board, but to determine if substantial evidence supported the Board’s decision. As set forth *ante*, it did.

## 2. Board Finding No. 2

The Board found that the “Proposed Project is immediately adjacent to two school bus stops along the Project Site’s frontage that serve children from the adjacent residential neighborhood. Children residing in the surrounding neighborhood utilize the school buses, which stop at [certain intersections], placing children in direct view of the proposed medical cannabis dispensary.”

Substantial evidence supported the Board’s finding. Among other things, neighbors of the proposed dispensary expressed concerns regarding the proximity to the bus stops, particularly that the bus regularly stopped directly in front of the dispensary

and “that’s where the kids get on, that’s where the kids loiter, in the morning and in the afternoon.”

Dale argues that the nearest bus stop is not marked, there is no bus stop structure, and the dispensary is 114 feet from the stop, separated by a chain link fence. But he provides no citations to the record, and it is not our role to reweigh the evidence.

### 3. Board Finding No. 3

The Board found that “[a]ccess to medical cannabis in the area is already provided by two approved medical cannabis dispensaries within 1.5 miles of the Project Site.”

Substantial evidence supported the Board’s finding. Padovan advised that the county had already approved two dispensaries, and the cities of Cotati and Santa Rosa had approved three others, in the general area. Dale’s own slideshow indicated two dispensaries were operating within 1.26 miles of his proposed dispensary site. Supervisor Zane recommended denial based on concern with the proliferation of dispensaries “concentrated in one area,” and Supervisor Brown shared her concern regarding the proliferation of dispensaries.

Dale does not dispute that other dispensaries are operating within 1.5 miles, or that the concentration of similar dispensaries in the area can be a factor in the Board’s discretionary decision to grant or deny a use permit. Instead, he urges that “[t]he dispensary is not within 1,000 feet of another dispensary” and contends that the addition of his proposed dispensary would not exceed the total number of dispensaries allowed. He provides no citation to the record. In any event, he fails to establish a lack of substantial evidence supporting the Board’s finding.

### 4. Board Finding No. 4

The Board found that the “establishment, maintenance, or operation of the use for which [the] application is made would, under the circumstances of this particular case, be detrimental to the health, safety, peace, comfort and general welfare of persons residing

or working in the neighborhood of such use, and be detrimental or injurious to property and improvements in the neighborhood and to the general welfare of the area.”

The concern of neighbors is sufficient to constitute substantial evidence that a contemplated use is detrimental to the welfare of the community. (*SP Star, supra*, 173 Cal.App.4th at p. 476; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 337.) Here, neighbors expressed concern that people would smoke marijuana outside of the dispensary, the school bus would drop off children near the dispensary, and children would walk by the dispensary on their way home. Padovan recounted “there was a substantial number” of neighbors who came forward at the BZA hearing, which was “[m]uch more than we’ve had on any of the other dispensaries.” Zane confirmed that there was neighborhood opposition.

Dale argues that the safety and security of patients and the neighborhood would be a top priority of the dispensary, noting its highly visible location, on-site parking, fencing, security guard, security system, and other matters. To the extent he presented evidence supporting this argument, he has not negated the existence of neighborhood concern or established that substantial evidence did not support the Board’s finding.

Dale fails to show that the reasons for the Board’s decision were not supported by substantial evidence.

### C. Appellant’s Other Arguments

Dale points to Supervisor Zane’s claim that he operated a medical marijuana delivery service without a use permit, contending that the statement attacked his character and persuaded the Board to deny the use permit.

The administrative record does not support Dale’s contentions. Although Supervisor Zane (and Padovan) initially asserted that Dale operated a medical marijuana home delivery business, Padovan stated it had nothing to do with the matter at hand. Supervisor Zane opined that the existence of home delivery services rebutted the notion that there was inadequate access to medical cannabis, but she did *not* recommend that the permit be denied because it was *Dale* who operated the service; to the contrary, she asserted, “[T]he real issue is the proximity to the two other

dispensaries that already exist there[,] and the neighbors in terms of detrimental health and safety and the bus stops.” Moreover, when Dale denied any affiliation with Sonoma County Collective and asserted he did not deliver to county cannabis patients, Supervisor Zane thanked him for his clarification and accepted his representation, stating that “obviously, it’s being operated by someone else.”

Dale further argues that Supervisor Zane has a conflict of interest, based on a campaign contribution. He also argues that Supervisor Zane is prejudiced against him and cannot give him a fair and impartial hearing.<sup>2</sup> He provides no citations to the record to support these claims. He points to no facts in the administrative record indicating a disqualifying pecuniary interest or other matter that would require disqualification. And our own review of the administrative record indicates no evidence that would compel disqualification.

Dale fails to establish error.

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<sup>2</sup> Subdivision (f) of Sonoma County Code section 26-92-161 reads: “Any member of the board of supervisors who initiates a request for direct review shall have full participation rights in determining whether to approve the request and, if the request is approved, in hearing and deciding upon the matter, including the right to vote, unless actual bias or prejudice is otherwise shown.”

III. DISPOSITION

The order is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.