



DEVELOPMENT SERVICES

BUILDING | HISTORIC PRESERVATION | PLANNING & ZONING

PLANNING AND ZONING BOARD STAFF REPORT

Similarity of Use Determination

Meeting	File No.	Application Type
January 23, 2022	2023-005-SIM-PZB	Similarity of Use
Applicant		Agent
Ziphealth		Neil Schiller, Esq.
Request		

Determination of a similarity of use to "pharmacy," which is a permitted retail use in the following zoning districts:

- General Commercial (GC), pursuant to Land Development Regulations (LDR) Section 4.4.9(B)(1)(a);
- Neighborhood Commercial (NC), pursuant to LDR Section 4.4.11(B)(1);
- Planned Commercial (PC), pursuant to LDR Section 4.4.12(B)(1);
- Central Business District (CBD), pursuant to LDR Section 4.4.13, Table 4.4.13(A);
- Planned Commerce Center (PCC), pursuant to LDR Section 4.4.18(B)(5)(a); and
- Mixed Residential, Office and Commercial District (MROC), pursuant to LDR Section 4.4.29(B)(3)

Background Information

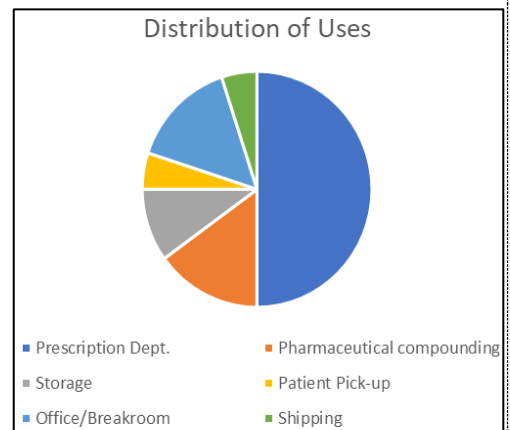
The applicant is requesting that the Board provide a determination for a similarity of use between a pharmacy that engages with most of its patients via telehealth with a large percentage receiving their medications through the mail and between a pharmacy as it is defined in **LDR Appendix – A, Definitions: Pharmacy**, *a retail establishment primarily offering goods for retail sale and on-site dispensing of prescription drugs, nonprescription drugs or both*. The GC, NC, PC, CBD, PCC, and MROC zoning districts allow pharmacies as an allowed, principal use.

Ziphealth, Inc. (the "Applicant") has leased a space at 1876 Doctor Andres Way, Suite 83 ("Property") in the MROC zoning district, and desires to obtain a Zoning Certificate of Use (ZCU) to establish the business at that location. Pursuant to LDR Section 4.4.29(B)(3), MROC: Principal Uses and Permitted Structures, general retail uses not to exceed 20 percent of the total building square footage of the development are allowed, and includes pharmacies. Ziphealth believes that the operation should be considered "pharmacy."

The Applicant seeks a similarity of use determination because an application for a Zoning Certificate of Use was denied as the operation's business model involves a heavy reliance on mail order distribution of its products. In correspondence with the department, the applicant has previously described itself as "a pharmacy with a very large internet presence in which more than 80% of their customers are serviced via package carriers and the US mail."

The applicant states that it has leased 4,000 square feet of space, of which 75% is dedicated to the prescription department, which is comprised of the prescription department (50%), pharmaceutical compounding (15%), and storage (10%). The prescription department prints labels, counts pills, fills orders, verifies orders, packages the medications, and scans them out of the system. The remaining 25% of the operation space is divided as patient pick-up area (5%), office/breakroom (15%), and shipping department (5%). The breakdown of uses is provided in the chart at right.

Ziphealth states that it engages with most of its patients via telehealth with a large percentage receiving their medications through the mail. Onsite staff is available to address customer questions or concerns. The Ziphealth pharmacy operates under the North American Industry Classification System (NAICS) code 446110, pharmacies, and drug stores.



Review and Analysis

Pursuant to **LDR Section 4.3.2(C), Determining use: Uses not listed**

...in most instances it is clear that a specific use is allowable under a use category (i.e. the specific use "sale of clothing directly to a consumer" is allowed under the category "general retail sales"). Some specific uses (e.g. sale of automobiles) involve a special product which is identified as such within these regulations and hence are allowed only as listed. However, in some cases, it may be necessary to have an interpretation made to determine whether a use is allowable. In such cases, the following applies:

- (1) *Interpretation by Director. In situations where a specific use is not listed in examples provided under a type, the Director may determine that specific use is allowable on the basis that it is identical to uses listed in the examples. The Director shall maintain a list of such determinations.*
- (2) *Determination of similarity of use. In situations where the Director finds that the requested use is not identical but has similar characteristics to allowable uses or when the use is of a specific nature (e.g. automobile sales) and is listed as a specific use in another zone district, the use may be established within a specific zone district by action of the Planning and Zoning Board in authorizing it through a determination of similarity of use.*

The subject request has been submitted under Subsection (2) above.

Pursuant to **LDR Section 2.4.5(N)(5), Determination of Similarity of Use**, *prior to approving a determination of similarity of use request, the Planning and Zoning Board must find that the requested use is indeed similar to a use allowed in the referenced zoning districts and is in keeping with the stated purpose of the district.*

According to **LDR Section 4.4.29(A), Mixed Residential, Office and Commercial District (MROC): Purpose and Intent**, the MROC District regulations are *designed to provide for a transit-supportive, pedestrian-friendly mix of residential, office, and commercial uses in a master-planned environment.*

LDR Section 4.4.29(B), MROC: Principal Uses and Structures permitted:

1 Office center. The "Office Center" uses within an MROC development may comprise as much as one hundred percent (100%) of the total building square footage within the development. These uses can include:

- (a) Financial Institutions, e.g., banks, savings and loan establishments, brokerage firms.
- (b) Medical Offices, e.g., physicians, dentists, chiropractors, podiatrists, optometrists, etc.
- (c) Professional Offices, e.g., attorneys, engineering firms, architectural.
- (d) Governmental offices, e.g., including federal, state, county, and local offices, along with their related fleet and communications operations (which will be considered accessory uses to governmental offices and services), civic centers, courthouses, fire stations, public health facility, law enforcement offices and facilities, post office, public utility facilities, communication towers and community facilities such as civic centers, cultural facilities, libraries, auditoriums, museums, and public recreation facilities, and services such as day care centers, abuse, child care centers.
- (e) Business Support Services, primarily engaged in rendering services to other building establishments, e.g., such as mailing, building maintenance, personnel and employment services, management, and consulting services, protective services, copy and printing, travel, office supply, and similar services.

2 Research and development. Research and Development (R&D) uses involve either some degree of product creation, testing, evaluation, and development or the provision of testing and evaluation services for use by others. R&D uses may constitute 100 percent of the total building square footage within the development. Examples of such uses or resulting products include:

- (a) Product creation, testing, evaluation, and development.
 - 1. computer hardware.
 - 2. computer software.
 - 3. pharmaceuticals.
- (b) Research and development services.
 - 1. calibration laboratories or services.
 - 2. chemical laboratories.
 - 3. commercial testing laboratories.
 - 4. soil laboratories.
 - 5. Scientific research laboratories.

3 General retail uses. Retail uses and/or facilities not to exceed 20 percent of the total building square footage of the development, including, but not limited to:

- a) Restaurants, baked goods, books, cheeses, beer, wine, liquor, confectioneries, cosmetics, meats, pharmacies, flowers and plants, fruits and vegetables, food, gifts, glassware, ice cream, leather goods, luggage, medical and surgical equipment, music and musical instruments, nautical supplies, office furniture equipment and supplies, pets and pet supplies, photographic equipment and supplies, sewing supplies, sporting goods, toys, wearing apparel and accessories, appliances, bicycles, business machines, jewelry.
- b) Barber and beauty shops and salons, caterers, dry cleaning limited to on-site processing for customer pickup only, dry cleaning and laundry pickup stations, outdoor cafes, tailoring, tobacconist.
- c) Galleries, butcher shops, cocktail lounges, exercise facilities, museums, libraries, newsstands, commercial or public parking lots and parking garages.
- (d) Neighborhood Electric Vehicle (NEV) sales, lease or rental transactions only (no inventory on-site for any purpose), accessory to any Research and Development or Office Center complex.

While the applicant is seeking to establish the use in the MROC, it is important to note that the determination would be applicable to all zoning districts where pharmacies are an allowed use.

Rationale for Making a Determination of Similarity of Use

LDR Appendix A defines PHARMACY as a retail establishment primarily offering goods for retail sale and on-site dispensing of prescription drugs, nonprescription drugs or both. A retail pharmacy may also offer accessory services such as photo processing, eyeglass care, etc. No more than 15% of the total number of prescriptions sold within a thirty (30) day period can be derived from the sale of Schedule II controlled substances as listed in Florida Statute 893.03, as determined by an audit/information obtained from an entity that has jurisdiction to request and review such information. All pharmacies shall be staffed by a state licensed pharmacist.

Ziphealth's pharmacy and dispensing operations do operate similarly to a neighborhood pharmacy in that it accepts prescriptions and fulfills them for customers. And while the MROC Zoning District allows a pharmacy, the subject request is to apply the definition of "pharmacy" to an enterprise that receives prescription requests from any location via the internet, dispenses prescriptions, creates pharmaceutical compounds, and packages them primarily for delivery via package carriers and the US mail. The applicant states in its justification request that "this (Ziphealth) is not a drug store, wherein other products are offered to the public for retail sale. Ziphealth does offer medicated skin care products to its patients on site."

One of the differences between this request and a retail pharmacy is the that the stated business model is to primarily distribute prescriptions via mail and package services to patients and does not offer other retail products to the public, unlike a local neighborhood pharmacy that fills and dispenses prescriptions on site for local customers and offers several other retail goods and services to the walk-in public.

Consideration could be given to a similarity of use determination that a pharmacy with mail order distribution as an accessory use is similar to a retail pharmacy no matter that the majority of its work is devoted to mail orders with a minor walk-in customer presence. For example, the MROC District's permitted uses are aligned to providing personal services, retail uses, office uses, research and development and business support services and multi-family uses and provides for Accessory Uses LDR Section 4.4.29(C)(4) Accessory Uses and Structures permitted, which allows for the provision of services and repair of items incidental to the principal use. The distribution of packaged prescriptions via postal and package carriers could be classified as accessory use to the primary "pharmacy" use although there is a lack of retail activity comparable to a local drug store.

Consideration could also be given to recommend that a pharmacy that does not describe itself as a drug store that offers the public other items for retail sale, might be a better fit in the "Office Center" uses category as a specialized use.

If a determination is made that the use does not resemble a pharmacy, then the use shall be considered prohibited according to Section 4.3.2(C)(3), "Prohibited uses." When a use is not allowed, by application of Subsection 4.3.2(C)(1) or (2), it shall be considered as a prohibited use and not allowed within the Zoning District. If the Board determines that the use is not similar but should be allowed in the desired zoning district, another option would be for the applicant to request City Commission sponsorship of an LDR amendment. The LDR amendment process would allow the proposed use to be more thoroughly assessed by City Staff.

Review by Others:

A Similarity of Use determination is a final action by the Planning and Zoning Board, appealable by City Commission. Requests for Similarity of Use determination are not reviewed by other Boards.

Options for Board Action

- A. The Planning and Zoning Board finds that a pharmacy with accessory mail order distribution is similar to a pharmacy, which is a permitted retail use, in the MROC, GC, NC, PC, CBD and PCC zoning districts.
- B. The Planning and Zoning Board finds that that a pharmacy with an accessory mail order distribution operation is not similar to a pharmacy, which is a permitted retail use, in the MROC, GC, NC, PC, CBD and PCC zoning districts.
- C. Continue with direction for additional information to be provided.

Public and Courtesy Notices

X Courtesy Notices were sent to the following:

- Delray Beach Chamber of Commerce
- Downtown Development Authority

X Public Notices are not required for this request.