

**Board of Appeals Public Hearing
John & Winifred Murdock
56 Mussel Farm Road
February 1, 2018**

The meeting was called to order at 7:00 p.m. Members present were: Steve Miller, Chair Cox; Mark Bartholomew, Fred Carey, Richard Cohen, William Reinhardt and Crystal Tarjick. Also present were: Attorney William Kelly; Terry Brackett, CEO; Town Manager Timothy Polky; Elizabeth Curtis, Richard Bates, Randy Elwell, Tammy Willey, Rory Collin, John Murdock, Winifred Murdock and Kyle Murdock.

Quorum: A quorum was present.

Conflict of Interest: Richard Cohen stated his wife's family's rental property is managed by John Murdock. He said from time to time, his wife represented the Murdocks real estate sales, but she was not listing, anything currently. Cohen did not feel it was a conflict but felt this was important to disclose. Attorney Kelly asked Mr. Murdock if he had any objection to Mr. Cohen serving, and Mr. Murdock said he did not.

Chair Miller asked the members to respond individually and the responses be reflected in the minutes.

Chair Miller stated Mr. Cohen had served the Board well in the past and did not object.

Crystal Tarjick stated she had no problem.

Mark Bartholomew stated he did not have a problem.

William Reinhardt stated he did not have a problem.

Chair Miller stated he did not have a problem.

Fred Carey stated it was not an issue.

Chair Miller stated that Mr. Cohen said he did not feel it was an issue.

The Board of Appeals determined there was no conflict. Mr. Cohen will be a voting member at this meeting and, if necessary, the next one.

The appellants are John and Winifred Murdock. The administrative appeal is on the Code Enforcement Officer's decision of an ordinance regarding the usage of the building located on Mussel Farm Road. The Murdocks are also requesting a variance. The Murdocks own the building. They will speak on behalf of the business.

The Board agreed they have jurisdiction over the appeal. John and Winifred Murdock will be testifying concerning this appeal. The Murdocks will represent themselves. They did not bring legal representation because they did not think they would need it.

Chair Miller identified additional speakers to this appeal: Kyle Murdock, son of John and Winifred Murdock and Town Manager Tim Polky, if necessary for clarification of issues.

Chair Miller noted for the record, that Mr. Murdock had distributed his written material to each Board member before the start of the meeting. All parties were in agreement to reference the material as Exhibit A.

John Murdock began his testimony: To the St. George Board of Appeals. The property in question is located at 56 Mussel Farm Road in Tenants Harbor. The building is approximately 24,000 to 26,000 square feet on 7 ½ acres, with approximately 1,000 feet of waterfront. My wife Winnie and I bought the property last July from Sea Hag Holdings, of which we were shareholders in Sea Hag Holdings. We now own the property, so in the middle of this we became the owner; Sea Hag Holdings was the owner, and then we became the owners. When the property was purchased from the bank in 2012, it had been abandoned for three years. The former owners, Great Eastern Mussel Farm, had gone out of business after more than 30 years of operation.

The building was in terrible shape. Maybe some of you know that. All the windows have been broken. The roof leaked and had collapsed on one side. The building had been vandalized, over and over. It was apparent it was a popular hangout for young party goers. Sea Hag Holdings fixed the building. Put all new windows in it. New siding. New roof. We have renovated 80% of the inside. New plumbing. New electric wiring and new electric infrastructure. The power that goes to the building is second only to Dragon Cement Plant, in this area. It probably is the largest commercial building in St. George.

Sea Hag Holdings was the property management company. It leased the entire property to Sea Hag Seafood which closed its doors around two years ago. Since that time, Sea Hag Holdings, and then Winnie and I, tried to lease out the whole building or parts of it. I still personally use the dock for lobstering as do a few other boats. I also store lobster bait in one of the coolers of the building. The Tenants Harbor Co-op, last summer, leased freezer space. We currently lease half the downstairs to a lobster company who grades and ships live lobsters.

The first floor of this building is well suited for marine related activities with lobster holding tanks, coolers, freezers, loading dock and plumbed for circulating sea water. The second floor, however, is not suited for any marine related activity. It has offices, lunch rooms, restrooms, large dry storage area which we refer to as the box room. There is a floor plan in your papers showing the first and the second floor. They were constructed to store all the shipping boxes for Great Eastern Mussel Farm is what Sea Hag Seafood used them for.

The space is currently empty but was more recently used for growing medical marijuana. It would appear that this is a desirable location for this activity. We have the electrical infrastructure which they need a lot. It is on the second floor which is dry and safe. It is in a remote area away from residential areas and it is at the end of a dead road. We probably have the best location in the town of St. George for something like this.

Sometime around the end of June, I received a letter from the CEO of St. George wanting to know information about who was leasing at the building at 56 Mussel Farm Road and what they were doing. I was informed I may need a Change of Use permit. I responded in an email on July 2, informing who was leasing. I assumed Sea Hag Holdings would not need a Change of

Use permit. We were a property holdings company that leased out property. I asked all my tenants to speak with the town and see what permits, if any, they may require.

On July 21, my lawyer called me and said the DEP had called them. They had been notified by the Town of St. George that there were illegal activities going on at our property. Large amounts of illegal discharge water were contaminating Long Cove and large amount of fresh water trucks were bringing water to the facility. This, of course, was not true. I called the DEP and told them what activities were going on at the property, creating the discharge of water and that we never imported fresh water. They were more than satisfied.

I sent an email to the CEO on July 21 and 24. On July 24, I was advised that the company, Onacraft, who grew medical marijuana, leasing part of the second floor, needed a Change of Use permit. I emailed back the CEO and told that agriculture is an allowed use in that zone, not needing a permit.

On August 3, I received an email asking where I got that information. I emailed back and said I got it from the Shoreland Zoning Ordinance. On August 28, I received an email stating that growing medical marijuana was not allowed use in the CMFA zone.

On September 3, I asked if it can be clarified that agriculture was allowed in the zone. On September 11, I received an email stating that agriculture is an allowed use, but there was a 75 foot buffer zone from the highwater mark. From the highwater mark to 75 feet, it needed to be marine water related. Outside a 75 foot, it did not. So, I measured the grow rows of the medical marijuana people (and they) were outside of the 75 feet. I emailed the CEO telling him this, figuring that at that point, we must be okay.

September 24, I was informed that the Onacraft operation was not a water dependent use and they had to get a permit or cease operation. Onacraft leased 50% of the second floor, growing medical marijuana but moved out in November when this issue with the town stopped being resolved. I have a broken lease for \$30,000. A \$900 a month extra insurance that I don't need which Onacraft was paying. I still believe the ordinance speaks for itself, and that the Code Enforcement Officer misinterpreted the ordinance. Agriculture is an allowed use without a permit in the CMFA zone.

In the information I gave you, the first page, is the Commercial Fisheries /Maritime Activities District, where it says the Commercial Fisheries/Maritime Activities District includes areas where the existing predominant pattern of development is consistent with the allowed uses for this district as indicated in the Table of Land Uses, Section 14. Flip the page, Table 14, Land Uses, Key to Table 1. It says yes. It is an allowed (no permit required but shall comply with all applicable land use standards). Go to Table 1, Land Uses in the Shoreland Zone. Look down, #13. Agriculture. It says, yes in the CFMA zone, which means it is allowed with no permit. That has an asterisk next to it which means subject to specific Land Uses, Section 15. You go to Section 15 in the Land Uses, and there is a whole part on Agriculture. It never says anything in that section that you can't grow inside a building or anything in that section that makes it illegal. On Section 17, Definitions for Agriculture, the production, keeping or maintenance for sale or lease of plants or animals, then it goes on to, but not limited to. Of course, the key word is

included but not limited to. If you look further past it, it says ornamental greenhouse products. This means if it is grown in a greenhouse, it is allowed. So, you can grow inside a building with no permit required. You can do agriculture. So, that is why I am pretty much appealing the decision. I think that the ordinance was misinterpreted.

Neither the Board nor Attorney Kelly had questions for Mr. Murdock.

Testimony of Terry Brackett, Code Enforcement Officer: I did have a number of contacts with the Murdocks regarding this issue. As you get into it, deeper and deeper, and look at different definitions and that sort of thing, you come up with different things that can or cannot be done in that Commercial Fisheries/Marine Activities District. One of them is that you look at the functionally water dependent, and it doesn't say anything about agriculture and that sort of thing that can be done in that zone. You look at the Industrial Definition and that definition does not allow things to be done in the Commercial Fishing or Natural Resources. I think that the correct decision was made. The other thing he is talking about is a greenhouse. They are not raising anything in a greenhouse. That is a factory operation. They are using artificial light and that sort of thing. I think that the right decision is to say that they could not grow medical marijuana in a Commercial Fisheries/Maritime Activities (Commercial Fishing/Marine Activity zone).

Richard Cohen asked how the buffer zone was measured. Brackett said it was measured from the mean-high tide; the normal high-tide. Cohen asked how far it went into the building. Brackett said that did not really affect this ruling, because it was the whole Commercial Fisheries/Maritime Activities zone which was 250 feet.

Reinhardt asked Brackett, "When did that 75 foot buffer zone come into effect? I don't see anything in our Ordinance which says that 75 foot buffer had more restrictions as far as use-wise, because it is a Commercial Fisheries/Maritime Activities District which goes 250 feet back." Brackett told Reinhardt he was correct. Reinhardt said he wondered whether that came from somebody at DEP or someone had mentioned it. Brackett said no, it had not.

Kyle Murdock said there were a couple of references to setbacks in the Agriculture Land Use Modification, Section 15. N., few of which were 75 foot setbacks. They mostly had to do with soil erosion and manure spreading to avoid contamination of bodies of water. Reinhardt said yes, that all had to do with outside tilling, manure, fertilizing, and so forth. Kyle Murdock stated, "And, agriculture is allowed within the 75 foot setback. There are just limits on how much soil area you can till and how many tons of manure you can spread in a year."

Chairperson Miller asked, "So, it is not directly related to buildings? My question is this. Is the Shoreland Zone a designated area? I remember, it is 250 feet. The reason is to protect the resource and to limit the amount of activities, other than grandfathered ones, that are allowed in this area. Is that the object of this?" Brackett said yes.

Chairperson Miller said, "It is quite highly restrictive. I thought it was just for marine related items. But, am I misinterpreting part of that as well?" Bartholomew and Reinhardt said no.

Winifred Murdock, "It is right here in your chart that we got off the town's website."

Kyle Murdock cited Section 14. Table #13. "It says the CFMA allows agriculture without a permit. It is allowed with permits by the Planning Board in the Resource Protection District, the Stream Protection District and the Recreation District, but in the CFMA, e. Maritime Residential and in the Limited Commercial Districts of the Shoreland Zone, it is allowed without a permit from the Planning Board."

Bartholomew asked, "Is there was anything that would tell us where agriculture ends up and industry begins?" He said the ordinance mentioned greenhouses which are basically solar powered. They use the outdoors in order to provide the impetus for growing. He asked if that was different from using the lights and everything required for an industrial strength, agricultural or plant production facility.

Attorney Kelly stated, "Well, you have hit on the core issue. Fair enough because words matter and you folks are here to interpret the two terms that are referenced in the Code Enforcement Officer's Notice of Violation in which he said it was neither Commercial use nor Industrial use; because in your ordinance, both of those uses in this CFMA District require that they be water dependent, if it is going to be industrial or if it is going to be commercial. How that ties into your question is, is this Industrial or is it Agriculture use?"

Attorney Kelly said, "I do have a couple of thoughts about that. Just to inform the Board, you all are going to have to decide what the terms means. That is your job tonight, by statute. You are the interpreters, and Mr. Murdock has given you, I think, a very clear explanation of what he thinks is Agriculture. But, if you would let me ask a couple of questions, Mr. Chairman, to flush out the record a little bit here, that might be helpful for where you are going."

Attorney Kelly said, "In your exhibit, Mr. Murdock, from what you handed out tonight, it seems to be the same floor plan that was in your appeal. Can you orient the Board? I am looking at the one that has the second floor in tonight's materials. The ones that were just handed out. We have a first floor and a second floor from the Murdocks. The second floor has things like Former Box Storage, Former Box Storage Locker Room, Office, and Lab. If I am holding the page up so I can read it, is the water side on the top of the bottom of this?"

John Murdock responded that it was on the top.

Attorney Kelly asked how far up from the bulkhead or the wharf line is the building? Mr. Murdock responded, ten feet. Kyle Murdock said it varies slightly as you go down the length of the building.

Attorney Kelly asked, "In the spaces that you have identified here, however you want to describe it, which spaces were occupied by the medical marijuana grower?" Mr. Murdock indicated it was the Box storage; the furthest ones away from the water.

Attorney Kelly asked, "What else did they use for space for their activities?"

Mr. Murdock said, "They used the lunch room just to store some things and get a break. They were using the bathrooms. They wanted to start moving into other areas. They wanted to eventually grow into the locker room area and they wanted to eventually occupy the offices."

Attorney Kelly asked, "But they did not have that as part of their lease?" Mr. Murdock responded, no.

Attorney Kelly, "They had the box storage, lunch room, the bathroom?" Mr. Murdock said yes.

Attorney Kelly, "For the record, when did they commence occupying and using the space, and when did they leave?"

Mr. Murdock, "I think it was in June 2017."

Attorney Kelly, "That is when they left?"

J. Murdock, "That is when they started occupying the building."

Attorney Kelly, "You said they left in November?" Mr. Murdock said yes.

Attorney Kelly, "I think the Board needs to know a little more detail. What was in there? What did they bring in?"

Mr. Murdock, "They had a lot of stuff in there. They put a lot of work in there. A lot of rewiring for the electrical boxes, fuse boxes, things like that. They need a lot of power. They had all the lights in there. Air conditioners, heat pump units. All the venting. They had put a lot of infrastructure in there."

Attorney Kelly, "How did they water their (unintelligible)?"

Mr. Murdock, "We have a well."

Attorney Kelly asked how it (the water) was distributed. Mrs. Murdock said with a hose.

Kyle Murdock, "Their system. I mean you can only really gain access to a medical marijuana facility if you are the purveyor of that facility or they're a fully, there is very restricted access to them. I did a little bit of consulting this spring with the purveyor of that company, just helping to transition the facility because I had so much experience with it from the plant. I believe that they were watering by filling 55 gallon drums with filtered water because they need it filtered to a certain degree, greater than typical tap water is. Then using a submersible pump to pump it into the pods that the plants were being grown."

Attorney Kelly, "Do you have a sense how many pots did they have in there?"

Kyle Murdock, "I think that they were growing at one time about 36 plants."

Mr. Murdock, "We cleaned it up afterwards, but there were 100's of pots."

Kyle Murdock, "They are (unintelligible) stuff to set up to grow many generations of plants."

Attorney Kelly, "They would have had grow lights, hanging or fixed somehow?" Kyle Murdock responded yes.

Attorney Kelly, "What was the plan, as you understood it? They never got to harvesting? Correct?"

Kyle Murdock, "I think they achieved one harvest in there."

Mr. Murdock, "I think they brought in plants that were already growing from another location. So, they did not grow them from seed, but they brought plants from another location. I believe they harvested in October."

Mrs. Murdock, "We do know that DHS went down and checked on them because people said they were doing illegal things. We do know that DHS went down there, and they were not doing anything illegal."

Mr. Murdock, "We did quite a background check on them, before."

Attorney Kelly asked, "You may know this answer? What do they do when they harvest? Is it vacuumed sealed? In jars? Or what do they do to process it and move it out?"

Kyle Murdock, "I don't know how they were storing it. I know that the facility, itself, was purely for cultivation. There were no transactions that took place on site. They ran a delivery service, where they would deliver to their patients."

Attorney Kelly, "Right from the site."

Kyle Murdock, "Leaving the site and then go to their patient's house."

Attorney Kelly, "So, somehow they are taking it and putting it in a container or package or something."

Kyle Murdock, "Some sort of (unintelligible)."

Attorney Kelly, "Not just bringing them a plant."

Kyle Murdock, "Most people would use like a zip lock bag."

Attorney Kelly, "Would they do weighing and pricing there?"

Kyle Murdock, "I would assume they were batching it on site. But when we cleaned it out, we did not find any scales or anything like that."

Attorney Kelly, "Their lease. You are no longer in a relationship, contractually?"

Mrs. Murdock, "No, we had to kick them out because we were told they had to cease and desist."

Mr. Murdock, "They saw the writing on the wall. They didn't like what they were seeing."

Attorney Kelly, "Anything about the operation, you haven't described in terms of what was going on in the building?"

Kyle Murdock, "I'm not sure if it would make a difference to the Board's interpretation of Agriculture but they were growing the plants in soil medium not in actual pots with dirt and not some kind of hydroponic system."

Tarjick asked if they were grown from seeds. Mrs. Murdock said they did not know about that.

Kyle Murdock, "The way that most people do, is they maintain a small generation of seed stock then make cuttings from those plants to grow from. That is generally the most economically efficient way."

Richard Cohen asked if there was any waste water. Kyle Murdock said there was some but not much, as they disposed of it into the septic system. He said the DEP said they could not go overboard with it because of residual huge (unintelligible) in the water.

Bartholomew asked what the sources of their 55 gallon drums of water? Kyle Murdock said there is an onsite well that yields about 44 gallons per minute.

Carey asked, "Do I understand it, you have lost your tenant?"

Mrs. Murdock said they kicked them out because they were told they had to, so they did. She said they were trying to be good townspeople. She said they were supposed to meet with the Appeals Board a month ago, but because of the storm, the meeting was cancelled.

Fred asked if the Murdocks had anticipated having another tenant. Mr. Murdock said they have had a lot of medical marijuana people before these people were looking. He said they have a lot of power going into that building and because of the amount of power; it is desirable for their business.

Reinhardt asked Brackett, "Is it your contention or your assentation that a Planning Board permit would be needed or that it would not conform to the ordinance? Because it never went to the Planning Board. A couple of the emails that were provided, some of them rather insinuated it had to go to the Planning Board and it never did." He asked Brackett if he could explain that.

Brackett said, "It took me a while to find out what Onacraft was actually doing. I had mentioned that they may need a Planning Board Change of Use permit, earlier on. Checking into it even

further, there was an indication it probably did not meet the water dependency, and that definition. It did not seem to meet that definition."

Reinhardt said, "Basically, they decided, or the owners decided, or the applicant decided not to go to the Planning Board?"

Brackett, "Mr. Murdock said that he had requested that the tenants come to me to see what they needed for the permits. I have no doubt that he did suggest that to them, but I never saw anyone."

Mr. Murdock, "I never thought of going to the Planning Board for a Change of Use permit, because it says that agriculture is allowed in that zone without a permit, with no need to go to the Planning Board."

Reinhardt, "But it is a commercial operation. It is a change of use. So, there are a couple of ordinances that would be involved with that other than Shoreland Zoning."

Kyle Murdock, "I would imagine when the code reference agriculture, they didn't mean you grown a vegetable in your back yard. I am almost certain that the ordinance refers to commercial agriculture. He read Section 17, Definitions, Agriculture. That is a commercial activity, all the agriculture."

Mr. Murdock, "It said that agriculture is allowed in that zone."

Brackett, "When, you read that Agriculture definition. It says, including but not limited to. I believe back when this was written, there was not a lot of medical marijuana (facilities)."

Kyle Murdock, "If it is the town's intention to forbid medical marijuana from the agricultural definitions, then the town needs to modify the ordinance to state that. There is ambiguity in the ordinance, is not our fault. It is the operators."

Reinhardt said, "I don't see anywhere the intention of the town to specifically prohibit medical marijuana growing, but I do see there are some conflicts. One thing, there seems to be confusion about the Shoreland Zoning Ordinance. What the Table of Land Uses is, is primarily by its definition is anything within that 250-foot Shoreland Zone. That is the only thing we have for zoning. Also, any commercial operation or change of use on operation requires a permit from the Planning Board under our Site Plan Review Ordinance. There is confusion there, on that."

Kyle Murdock asked which Ordinance would supersede?

Reinhardt, "You would have to comply with both. That is my understanding. It is confusing regarding the agriculture. My feeling having been involved years ago in writing or editing a lot of this, your building was there before we created a CFMA zone. That was put in a CFMA zone because of the use of the building at that time. It was functionally water dependent. What was there Great Eastern Mussel Farm, it was a use that was allowed in that district. Agriculture. In my opinion, it had to do with small gardens, greenhouses, etc., whereas a commercial venture or

"industrial" venture of growing things, whatever it is, marijuana, inside of a building is a little bit more than just agriculture."

Mr. Murdock, "You are going to have to change your thinking because it very specific, what it says in agriculture."

Reinhardt, "Going further, it was the complete intent of the DEP and the town at the time when they created the CFMA district that everything that was going to be allowed in that zone, would be functionally water dependent."

Miller said, "The idea of this ordinance, and it doesn't necessarily make us decide how we are going, but the premise of this, we understand that times change, was put in not necessary to protect businesses. It was to protect the shoreline and the businesses that were going in there were marine related and in general the intent was not to harm the environment or the shoreline. I understand we are moving ahead to something different, new times, but that philosophy is the understatement of it and now we have to decide if we are going to evolve from that."

Kyle Murdock, "If it was the town's intention to prohibit agriculture or other non-water dependent uses, why the ordinance does not reflect that because it quite clearly reflects the exact opposite sentiment. Medical marijuana has been legal in the state of Maine for 19 years. This ordinance in that time period has been revised almost a dozen times. There was plenty of opportunity for the town to open up and address this issue in any of its ordinances including the Shoreland Ordinance."

Attorney Kelly, "I think I can help frame the discussion, but you have to make a decision."

Mr. Kelly asked a procedural question stating what normally happens is the applicant describes their cases. I think they have been fairly thorough in terms of why they believe the use falls under agriculture. We heard from the CEO and now you have to do your work. What I would suggest, is ask if the appellant is finished with the information they wish to present. Same with the CEO, then have a deliberative process of just the Board. I am not here to determine anything but am here to try inform you what the law is and what is happening with other ordinances and interpretations of different places. You are not bound by any of it. You get to decide what you want tonight.

Attorney Kelly said, "To stop getting repetitive, I think you have made your (Murdocks) case, quite well in terms of your perspective. Do you have anything else you would like to add?"

Mr. Murdock, "Part of my appeal was if the Board found for any reason, but I don't know why they wouldn't by way their ordinance is written, but if it is not allowed in that area, part of my appeal was I wanted to approach it as a hardship. I have more information about that."

Attorney Kelly, "If it is okay with the Chair, we will stop the hearing on the first part, which is the CEO's letter. Would you both agree on saying the Murdocks and the CEO that everything you have said so far, is essentially the record, stipulating those are the facts you want this Board to consider regarding the Notice of Violation letter?" Both parties said yes.

Attorney Kelly, "We are going to have referenced the fact, in the minutes, that the parties are stipulating that what they both have presented so far is the record to be reviewed regarding the Code Enforcement Officer's letter. Those other emails that came back and forth, our focus is really the Code Enforcement Officer's letter. That is the scope. That is the breadth of what you are here to review. Whatever happened before, may inform you, but the real issues are whether the Code Officer is correct legally or incorrect about his interpretation of what this use is."

Chair Miller, "For the record, we are concluding testimony, only on the administrative appeal." We are doing to have discussion first.

Attorney Kelly asked the Chair, if he could inform the Board what has happened elsewhere in the state, and what the courts had found about this.

Attorney Kelly said, first on the use issue. The reason he asked Mr. Murdock about what went on there, is because that's what other bodies and Boards are looking at, to wrestle with the question before you. As the photographs show, you have very good power to it, only this and Dragon Cement have. That is necessary for this product to be cultivated. There was additional wiring and fusing, there are grow lights, air conditioning, heat pumps, restricted access and security, batching onsite and delivery from there to sell to whomever.

Attorney Kelly found one case on this issue of what exactly is this use, Agriculture or akin to Industrial. A case in York County, 2 ½ years ago. "That case turned on whether or not the processing (in this case marijuana, it could be something else – lavender, strawberries), if you need a facility in which you need special equipment, processing, grow lights, mechanized systems, is this plant matter what they call unshaped composition of matter mass. It has to be dried, packaged using machines and sent out. As the court found (he read from the record), as a preliminary matter, cultivating and packaging medical marijuana fits within the common dictionary definition of manufacturing. It was in that nature of something that is being processed onsite and then distributed. That fits more closely with your definition of an industrial use. Your definition of industrial use is "assembling, fabrication, finishing, manufacturing, packaging or processing of goods, (and oddly) for the extraction of minerals."

Attorney Kelly, "When you are deciding what this use is, you are going to be looking at this word industrial. The complication is, if you find it industrial, there is a footnote in your table of uses that says it may be industrial, but it has to be water dependent industrial. You have a limitation in your table of uses. Once you decide it is industrial, you then have to decide whether or not their use of it does or does not fall under that functional water dependent definition.

On the alternative, you have Mr. Murdock's argument. He gave you all the relevant sections of the ordinance as to whether or not you would find that this more of an agricultural use based on that definition. He is absolutely right. Agricultural use is permitted without a permit, but you have to decide which one it is.

The court decided on the case, that was different than what you have when you are in a field, sowing corn and leaving the field and letting it grow. The court said when you have all these

things put together, that is manufacturing. You do not have a manufacturing use here, so the closest you have is industrial.

What are other towns doing? He read a memo from Cape Elizabeth, June 2017. It is crucial for marijuana growers to preserve the purity of species strain of marijuana plants, generate predictable THC levels, growing is done indoors, large buildings under laboratory like conditions, it involves the extraction of THC to produce various things. Cape Elizabeth said it was an industrial use. The town of Hampden, very similar. Memos prepared to the town by Planning department. They called it an Industrial use: tightly controlled indoor growing rooms to prevent contamination, no public access, need for high power, processing, packaging and shipped off."

Attorney Kelly, "I am not telling you should not find it's an agricultural use. You could, based on what the Murdocks have said, but I wanted you to get a sense of the full scope of things. That is why I asked those additional questions of the Murdocks. That is all I have."

Bartholomew said he was still in the dark as to how to interpret it as anything being water dependent and related. He asked if there was anything precedent for that.

Attorney Kelly, "Fair question, but you first have to find its Industrial then you decide whether or not you would actually make Findings of Fact, tonight. Whether or not you do or do not find it falls under functionally water dependent."

Cohen and Carey had questions regarding the definition of agriculture and water dependent. The Board reviewed the definition from the ordinance.

Chair Miller said in the broad sense, this applied to fresh water as well as around the great ponds and streams. Reinhardt agreed. Miller said this was not just about salt water, it applied to great ponds, streams, river and anything else. It applied to fresh water, as well. He thought the Board would be stretching to say this operation was water dependent.

Attorney Kelly said it said both or inland waters. As functional water dependent uses. Attorney Kelly said that meant a water body, not water out of a hose.

Chair Miller explained. "It is not that the business needs water, it depends upon the body of water of which is abutting." The Board also reviewed the definitions for Industrial and Commercial use.

Question: Does the Board feel this is an Industrial/Manufacturing type operation or whether you are going to say it is Agriculture as defined by Mr. and Mrs. Murdock?

Cohen asked how much of it is really the growing of it and how much is the packaging.

Bartholomew said it needed specialized equipment for processing.

Carey asked for the reading of Industrial, again, then asked if it could be either or? He said if they brought in the plants and all they did was take the leaves and go somewhere else for the manufacturing. Wouldn't that be agriculture? Where if they did the industrialization, they are going to start the seeds, grow it, process, dry it, package it and ship it?

Chair Miller said it was however the Board wants to define it.

Cohen, asked for an estimate of how much was growing and how much was packaging?

Miller said the Murdocks had stated how many plants and pots they had, earlier.

Cohen was asking about time. It is a one-month cycle? Two-month?

Miller said it is a year-round operation. Need a dry room for storage so they don't mold. It is quite a process. It is a lab process.

Carey said we do not know who Mr. Murdock's ultimate customer is going to do in there, do we? He could do just an agricultural or do a manufacturing operation?

Miller said, yes.

Attorney Kelly stated, "You have touched on a secondary issue which is mootness. The letter was issued by the CEO, and in response, responsible people complied, and the tenant is gone. In the world of code enforcement that means there is no conflict, anymore and there is nothing to appeal. That is one way to look at this. The downside to this is, the Murdocks would like feedback and a decision even though there is no one still there. You are asked to make a decision somewhat in the abstract because you do not have an existing operation and the next operation may have different facets of how much is growing and how much is processing? Attorney Kelly said this would not be the first time that a Board said, we cannot entertain this because we do not have an actual controversy.

Bartholomew asked what if someone wanted to go there and manufacture rope or cardboard boxes?

Chair Miller said that would be a change of use.

Kelley said, "You have a job to do based on the facts before you and an application. You are not here to amend the ordinance or think about something else that may or may not occur in the future. The Murdocks have a second avenue, they can request the Select Board to tailor a permitted use for this property and have it approved at a Town meeting. You cannot do all things here, tonight. You are working on Code Enforcement Officer's letter. That is the scope of your inquiry and then the appeal as the Murdocks have described it. That is your task. It is ultimately a definitional one – is it Agricultural or Industrial? If you find it is Industrial, is it functionally water dependent. It is a two-step process in order for you to find the Code Enforcement Officer correct."

Cohen felt since they do not have a tenant, perhaps they should seek the Planning Board to give them permission.

Chair Miller said that would be up to them. We do not even have to worry about that. "The item we are concerned about is fairly simple.

Chair Miller, "You have the letter in which the business was told to cease operations because it was an Industrial use and was not a water dependent use. Those are the two things we are discussing. Whether it is Agricultural or not and whether it is water dependent or not, or whether it is Commercial or not? We have to state whether we agree or disagree with the Code Enforcement Officer and on what basis we agree and on what basis we disagree."

Tarjick suggested the Board first decide whether or not it is agricultural. Then if they decide it is not, they can move on to the other issue which has multi-facets. She said, "If you determine it is agricultural first, then you do not have to go any further. That would mean you do not agree with the Code Enforcement Officer."

Chair Miller stated, "No further discussion? I would entertain a motion to vote either for or against the Code Enforcement Officer's negative response to the appeal."

Discussion on the Motion:

Chair Miller did not think it was due to the size and magnitude and where it is operating.

Reinhardt said the fact that it requires huge amounts of power.

Carey asked if it was 40 plants or 400 plants, wasn't it still agricultural. Miller said not in his interpretation.

Reinhardt said if he was growing plants outside in the garden, marijuana, cotton or whatever, he thought that was agricultural. If he was in a garden or greenhouse setting outside that does not require a processor that does not require a large amount of power, a system for water and ancillary to that is the picking, processing, packaging and transport for sale.

Chair Miller said in a business sense, if you start do some part time welding in your back yard, that is one thing that will be treated by the CEO and Planning Board. If you create a 100' x 200' two story building and you are building as many snow plows as Fisher, that is the absolute degree, but what you have to do. To me it is width and breadth it is not.

Carey asked how many plants did you have to have before it went from Agricultural to Industrial?

Chair Miller said for him it was the interpretation of the Shoreland Zone. If you are going to be in that area, other than a minor part, you should be shoreland related and water related business or industry.

Reinhardt said for him it was not the number of plants. He felt it was a Commercial operation.

Bartholomew said he did not care what product was being grown, medical marijuana was a nonfactor. He felt it was a very intensive operation that started with plants and went well beyond that. It was probably manufacturing/industrial which put them in direct conflict with the water dependent.

Cohen said to read the definition of Agriculture. This allowed for some process to be done.

Chair Miller said they had discussed two points about the definition of water dependent in the Shoreland Zone.

Cohen said that was an Industrial, not Agricultural process, was that correct?

Chair Miller said if you think it is pure Agriculture, you don't care whether it is water dependent or not.

Motion: A motion was made by Board member Carey, seconded by Cohen that the Onacraft LLC is an Agricultural operation. A vote was taken. The vote was 2-3. Motion denied. (2 in favor, 3 opposed).

Motion: A motion was made by Board member Bartholomew, seconded by Reinhardt to support the Code Enforcement Officer's determination that Onacraft LLC was considered, by definition, Industrial use and was prohibited. A vote was taken. The vote was 3-2. Motion carried (3 in favor, 2 opposed).

The Board found that it was industrial use based on the following facts:

1. This requires specific equipment and processing, and quality control to produce and package the product.
2. It is looked at akin to the difference to merely growing corn and then processing it into a finished product for sale.
3. That Agriculture is more akin to use of the land and not use within a controlled environment.

Motion: A motion was made by Board member Bartholomew, seconded by Reinhardt, to accept the Findings of Facts. A vote was taken. The vote was 3-2. Motion carried (3 in favor, 2 opposed).

Discussion on the Motion:

Cohen said it was not located on fresh water.

Bartholomew said water dependent was for great ponds or other water.

Cohen said unless you were processing seafood.

Chair Miller said the interpretation to this was the major body of water which they were on but whatever was there, should be dependent upon these waters.

Bartholomew said they were reviewing the CEO's interpretation and not trying to legislate. No precedence. It was not a comment on any sort of industry or anything else.

Tarjick said they should ask what the water dependent definition said. She read from the Ordinance. Do you need to have that operation on land that is submerged? Maybe not. It did not need to be on land. It said which cannot be located from these waters. You did not need water to grow these plants, but someone could technically have a growing plant in the desert and truck water in. The growing facility could be located away from these waters.

Chair Miller said whatever was there should be dependent upon these waters.

Motion: A motion was made by Cohen, seconded by Reinhardt, that the growing facility was not considered functionally water dependent. A vote was taken. The vote was 5-0. Motion carried.

The Board found that growing facility was not functionally water dependent, based on the following facts:

1. It does not require salt water the salt water it is located on.

Motion: A motion was made by Board member Reinhardt, seconded by Cohen, to accepting the Findings of Fact as the growing facility is not functionally water dependent because this use did not require proximity to the shoreline no large volumes of salt water for processing. A vote was taken. The vote was 5-0. Motion carried.

Discussion/Decision of the undue hardship for John and Winifred Murdock:

Chair Miller read the Murdock's statement for appeal. The Murdocks asked the Appeals Board to grant a non-water related activity on second floor of the building, specifically, agriculture which is already allowed in this zone.

Mr. Murdock summarized from his written list, the reasons for his undue hardships. A copy of the variance hardship criteria will be attached to the minutes.

Discussion:

Mark Bartholomew asked if the Board was in a position to grant a variance or should it go to the Planning for a Change of Use request. He was concerned about the process.

William Reinhardt felt the Board could not grant a variance because they are only allowed to grant variances on dimensional requirements. The Board is not allowed to grant variances on change of use. He read from Variance Appeals, Section 2. B. Variances shall not be granted to permit a use otherwise prohibited from this ordinance.

Mr. Murdock felt this was a hardship case and that Reinhardt was not reading it correctly.

Attorney Kelly said that variances are created by statute, and they give the Board of Appeals the kind of authority the Planning Board does not have. It gives the Board of Appeals discretionary judgment when applying the standard. "Mr. Reinhardt is right. There is no such thing in the State of Maine as a Use Variance. The courts have found that if you ask the courts to give you a Use Variance, you are doing an end run around the legislative process. All the uses that are permitted are uses that have been approved at town meeting, with a vote of the whole population. This Board is without authority to say this particular property can now have a use that is not permitted. If we did get to Dimensional Standard Review, in order to give an undue hardship, you have to have no use of the property. It sounds extreme but if you got to that point, the court has found that, and undue hardship occurs when there is a practical loss of all beneficial use of the land. Reasonably return does not equal maximum. Even the absolute inability to develop a lot because of zoning setbacks, does not deprive the property of all beneficial use."

Mrs. Murdock asked, "We cannot go to the Planning Board, either?" Attorney Kelley responded to the question of where do you get relief? Mr. Kelly said the only relief available was by seeking an amendment through the zoning ordinance, which would or would not be supported by the voters. There was nothing that prohibited the Murdocks from asking the town to look at the property and approve this use; but it had to go through the process of having a special town meeting or by a warrant article at town meeting. He told them they might want to talk to the Select Board on how they could find a way the town would support them to get their property in a position where they could find the tenants, they needed.

Chair Miller said, "What you have brought up is defined as lack of jurisdiction because we are not allowed to hear these by town ordinance."

Chair Miller said he would entertain a motion that the Board could not grant a variance based on the Findings of Fact.

Motion: A motion was made by Reinhardt, seconded by Carey, that the Board of Appeals cannot grant a variance to John and Winifred Murdock, because the applicants requested a Change of Use, and the Ordinance does not allow the Board of Appeals to do that. A vote was taken. The vote was 5-0. Motion carried.

Chair Miller asked if the Board had any objections to Attorney Kelly writing the Findings of Fact. There were no objections.

The Board of Appeals will meet on February 12, 2018 at 5 p.m. to review the minutes and motions of the Murdock Appeal. The minutes will be adopted at the same time.

On a motion by Carey, seconded by Reinhardt, the meeting adjourned at 9:05 p.m.

Respectfully submitted,

Marguerite R. Wilson
Recording Secretary