

DECISION AND ORDER
ZONING BOARD OF APPEALS
TOWN OF ST. GEORGE, MAINE

IN RE: Appeal of Jonathan and Winifred Murdock for
Administrative Appeal and Request for a Variance 56 Mussel
Farm Road, Tenants Harbor, Maine; Tax Map 222, Lot 026

The Zoning Board of Appeals for the Town of St. George met on February 1, 2018 at the Town Office located at 3 School Street, Tenants Harbor, Maine. The following Members of the Board sat as voting Members and heard this matter: Steve Miller, Chairman, Mark Bartholomew, Fred Carey, Richard Cohen, William Reinhardt and Crystal Tarjick (alternate, not voting).

The Board conducted the hearing regarding the Administrative Appeal of Jonathan and Winifred Murdock (hereinafter referred to as “Appellants” or “Applicants”) of 48 Wallston Road, Tenants Harbor, Maine regarding a certain Notice of Violation issued by the Code Enforcement Officer for the Town of St. George, Terry Brackett on October 11, 2017. The second issue before the Board was a request for a Variance to grant non-water related activities on the second floor of the premises owned by the Applicants, which is that certain building located at 56 Mussel Farm Road, Tenants Harbor and as depicted on Map 222, Lot 026 of the Tax Maps of the Town of St. George (hereinafter referred to as “the Premises”). Said property is located in the CMFA zone.

After convening, Board Member Richard Cohen disclosed to the Board that he and his wife had some business relations with the Murdocks in terms of them managing some real property that he and his wife own on Mohegan Island, as well as a prior relationship where Mr. Cohen’s wife represented the Murdocks with real estate sales, but they currently didn’t have anything listed. After discussion, at which time both the Code Enforcement Officer and the Murdocks made clear

that they had no objection to Mr. Cohen sitting in on the hearing, the Board Members also found that Mr. Cohen had no conflict of interest which should disqualify his sitting in on this matter.

The Board then proceeded to review the Application of the Appellants.

Mr. and Mrs. Jonathan Murdock and their son, Kyle all spoke in their presentation to the Board in which they presented their position which was that the use of the second floor of the building for the purpose of growing, harvesting, packaging and distributing medical marijuana was in fact an “Agricultural use” under the definition of Agriculture as found in the Shoreland Zoning Ordinance for the Town of St. George. The Murdocks submitted Exhibit A which included highlighting the description of a Commercial Fishery/ Maritime Activities District (CFMA) and Section 14 of the Table of Land Uses. The Murdocks identified the fact that Agriculture is a permitted use in the CFMA Zone without the need for any Permit from the Planning Board or the Code Enforcement Officer. They additionally highlighted Section 15(N), entitled “Land Use Standards,” for the purpose of emphasizing that as the Agriculture use was subject to the provisions of Section 15(N), there was nothing within that Section which prohibited the use of the second floor of their building for a growth facility for medical marijuana plants. Mr. Murdock described the history of the property in the recent years as well as the difficulty of leasing the property after his renovations of the building and securing it from vandalism and unlawful use as a “party” spot. He indicated that the first floor of the premises is still used for purposes relating to the Lobster industry through a Tenant. Mr. Murdock then went through a series of email correspondences with the Code Enforcement Officer and what he characterized as confusion about the uses allowed and not allowed per discussion through the Code Enforcement Officer of the Town of St. George.

Mr. Murdock also stated that the former Tenant was a company called Onacraft, LLC, which had used the second floor of the Premises from June, 2017 through November, 2017. The area of the second floor of the Premises, formerly rented by Onacraft, LLC, is depicted on a scale drawing which includes two areas noted as “former box storage”, a “lunch” room and the “bathroom”, which the Murdocks presented to the Board. They indicated that Onacraft, LLC also wished to expand to other areas on the second floor. However, Onacraft, LLC has now vacated the premises as a result of the October 11, 2017 Notice of Violation from the Code Enforcement Officer. Mr. Murdock further testified that in order for Onacraft, LLC to use the Premises for the production of medical marijuana, it required substantial amounts of electrical power, rewiring and additional fuse boxes and he stated that the only other property in the area with as much power capacity was the Dragon Cement Plant. In order to facilitate the growing, harvesting and packaging of the medical marijuana, the second floor included a watering system for individual plant pots with soil to grow the plants; it also included grow lights, air conditioners, heat pumps, restricted access and security to the building, drying and batching of the product on site and then transportation off site directly to end users. He indicated that waste water goes directly into the existing subsurface waste water system on-site. Exhibit A submitted by the Murdocks also included photographs of this industrial type building located approximately 8 to 10 feet off the high water line, and the pictures depicted loading bays for direct loading onto trucks and tractor trailers. The Murdocks spent a substantial amount of time reviewing and clarifying the description of “Agriculture” and requesting that the Board find that the use in question was, in fact, an Agricultural use.

At the end of the presentation by the Murdocks, the Code Enforcement Officer described the basis for his finding that the property was either a “Commercial” use or an “Industrial” use, both of which require, pursuant to the Table of Uses, a finding that they are in fact “functionally water dependent” uses. His finding was that this leased use for the growing of medical marijuana was not in fact a “functionally water dependent” use and the use of the Premises was either Industrial or Commercial in his opinion under the Ordinance. As it failed the functionally water dependent test, the CEO determined that the use in question was an unpermitted and unlawful use and that formed the basis of him serving his October 11, 2017 Notice of Violation on the Murdocks.

Upon completion of the submission of Exhibit A and testimony of the Murdocks and the Code Enforcement Officer, the Parties stipulated that the information presented that evening at the hearing was the factual record basis that the parties wished to put before the Board of Appeals by Stipulation regarding the facts in question as understood by the Murdocks and as relied upon by the Code Enforcement Officer in his Notice of Violation and upon which the Zoning Board of Appeals would be required to deliberate and act. At that point, the Board delayed hearing any information regarding the Undue Hardship Variance sought by the Applicants and deliberated on the first issue of determining the use in question and whether or not the Code Enforcement Officer’s letter of October 11, 2017 was or was not appropriately served.

The Board engaged considerable discussion regarding the nature of the process of activities on the property for medical marijuana cultivation, and had a general debate as to whether or not the use of this facility, high electric power needs, a watering system, security system, air conditioners and heat pumps, together with drying, batching and packaging of the finished

product, was in the nature of “Manufacturing/Industrial/Commercial” or did it fall under the definition of “Agriculture” in the Shoreland Zoning Ordinance. The Board spent considerable time going back and forth reviewing the Ordinance definitions in relation to these issues as well as the definition of “functionally water dependent” uses.

The Town Attorney for the Zoning Board of Appeals for this matter, William Kelly, provided reference to the similar Superior Court case of *Briggs et al. v. Town of York and Robert M. Grant*, York Superior Court, Docket Number: AP-14-28, wherein a Zoning Board of Review found that medical marijuana cultivation in a building was a “Manufacturing” use under the York Ordinance in question. The Court found that a medical marijuana cultivation facility was in fact a “Manufacturing use” and therefore, the *York* Court upheld and supported the finding of the York Zoning Board of Appeals. Specifically referenced was the fact that the Zoning Board of Appeals and the Court in the *York* case considered the plant as “unshaped composition of matter” which must be dried and packaged using machines and that the process involved a degree of human and mechanical manipulation involving special equipment and processes. The *York* Court concluded: “Thus, as a preliminary matter, cultivating and packaging medical marijuana fits within the ‘common dictionary definition’ of ‘manufacture’.” *Id.* at 12. Mr. Kelly emphasized that regardless of what was found in the *York* case, it was merely an aid to this Board in terms of other findings that other Courts have made and the St. George Zoning Board of Appeals was required to review and decide this case based upon the actual definitions of the uses within the St. George Shoreland Zoning Ordinance. The Board then continued its review of the matter through deliberation.

Motion was made by Board Member Carey and seconded by Board Member Cohen to find that the use in question was an “Agricultural” use. The Board then again considered the aspects of the definitions of “Agricultural,” “Industrial” and “Commercial” uses as defined in the Shoreland Zoning Ordinance. The Motion failed with a vote of 2 in favor and 3 opposed.

Next a Motion was made by Board Member Bartholomew and seconded by Board Member Reinhardt to find that the use in question was in fact an Industrial use under the Ordinance. The Board engaged further discussion regarding the relevant definitions in the Ordinance and in a vote of 3 to 2, the Board voted in favor of the Motion and found that the use in question was in fact an Industrial use as defined in the Shoreland Zoning Ordinance. Additionally, upon a Motion made by Board Member Bartholomew and seconded by Board Member Reinhardt, the Board made the following findings of fact to support its conclusion that the use was an Industrial use:

1. The use in question takes specific equipment and processes including quality control in a controlled environment and goes beyond planting a seed and watching it grow.
2. An analogy was made to growing corn, which in itself would certainly be an agricultural process; however, once corn is processed to make into meal, corn mash, bourbon or corn starch, such processing is a different use that starts with a raw material and ends with a finished product that results in the industrialization of a basic agricultural product.
3. Unlike the use of land for purely agricultural purposes, the nature of this use requiring an industrial building, with security, high electrical power, heating, cooling, drying

and packaging of a product goes beyond the traditional concept of Agricultural use or production.

The Board having found that the use in question was an Industrial use, then addressed the second question as the Land Use Table requires that for a permitted Industrial use within the CFMA zone, there must be a finding that the use is in fact “functionally water dependent.” The Board went through a series of discussions and review of the definition of “functionally water dependent” and found that there was nothing about this use of cultivation and processing of medical marijuana in the building in question, that made it functionally dependent on being next to either a fresh or salt water body of water with regard to its “primary” purpose. It was specifically noted that the growing and processing of medical marijuana could certainly be located away from these water bodies. Motion was made by Board Member Cohen and seconded by Board member Reinhardt to find that the use in question was not in fact a water dependent use. The Motion was approved by a vote of 5 to 0.

Upon Motion, a simple finding of facts was also approved in a vote of 5 to 0 that the use in question simply does not require proximity to the shore line or the water line and does not require any salt water for processing or cooling.

Upon these findings, the Board then turned its attention to the second aspect of the Application and Mr. Murdock was provided a second opportunity to present evidence and explain why the Zoning Board of Appeals should grant an Undue Hardship Variance under Section 16H(2) of the Shoreland Zoning Ordinance. The Murdocks submitted a two page document, herein identified

as Exhibit B, in which the four elements of “Undue Hardship”, as described in Section 16H(2)(c)(2) of the Shoreland Zoning Ordinance, were listed with a narrative explanation by the Murdocks following each element. Nothing within the materials or the presentation of Mr. Murdock identified any form of dimensional requirement for which he was seeking a Variance. Instead, it was made clear that his purpose was to seek a Variance from the Board’s finding that the use of the Premises was an Industrial use, which also required that it be “functionally water dependent.” Thus, effectively, he was seeking to have the Zoning Board of Appeals authorize the use as a permitted Agricultural use which would allow the proposed use. The Board of Appeals then referenced to the Murdocks the fact that Variances could only be granted from “dimensional requirements including but not limited to, lot width, structure height, percentage of lot coverage and setback requirements.” (See Article 16(H)(2)(a)). The Board then also referenced Article 16(H)(2)(b) which states that “Variances shall not be granted to permit a use otherwise prohibited by this Ordinance.” As the use in question was not found to be an Agricultural use, and did not meet the Industrial requirement of being functionally water dependent, then in that event, the Board could reach no conclusion other than the fact that the Applicants were seeking a “Use Variance” which is not permitted by Maine Law or the Ordinance in question. The Board mentioned that they did not have jurisdiction to grant such a Variance as it is prohibited by the Ordinance. Upon this discussion, the Board voted 5 to 0 to find that the Applicants were seeking a Use Variance which is not permitted, and therefore the Undue Hardship Variance Application was denied. Motion was made by Board Member Reinhardt and seconded by Board Member Carey.

Upon disposition of these issues, the Board voted to adjourn the hearing and to schedule February 12, 2018 at 5:00 p.m. as the follow-up meeting to this matter at which time the Board would review and approve its written Decision and Order.

The Applicants are hereby hereby advised, consistent with Article 16(H)(5) of the Shoreland Zoning Ordinance, that they have a right to Appeal this matter to the Knox County Superior Court pursuant to 30-A M.R.S. §2691(3)(F) within 45 days of the date of the Decision of the Board of Appeals. The Date of the Decision of the Board was February 1, 2018.

SO ORDERED.

Dated this 12th day of February, 2018.


Steve Miller, Chairman


Mark Bartholomew


Fred Carey


Richard Cohen


William Reinhardt