St. George Board of Appeals
St. George Town Office
February 11, 2021

Board of Appeals Hearing – Midcoast Marijuana Company (Kyle Murdock) / Applicant
The Board of Appeals meeting was called to order at 7:15 p.m. in person and via Zoom. Members present were: Steve Miller, Chair, Mark Bartholomew, Richard Cohen, William Reinhardt, Fred Carey attended in person; Sandra Roak and Pauline Miller attended via Zoom. Also present: CEO Terry Brackett, Richard Bates, Kyle Murdock, John Murdock, Anne Cox, Anne Cogger, Michael Jordan, Mary K. Hewlett, Tammy Willey, Paula Rytky, Liz Connolly, and Attorney Brandon Mazer.

Quorum: Sandra Roak (regular member) will step down as a voting member for the Appeals Hearing and the Findings of Fact, and Fred Carey (the alternate) will be raised to the position of a voting member. A quorum was present.

Conflict of Interest: There were no conflicts of interest.

Nature of Appeal: Midcoast Marijuana Company (Kyle Murdock) filed an Administrative Appeal on December 21, 2020, based on a decision made by the Planning Board to deny a permit for the use of the structure at 56 Mussel Farm Road for a marijuana growing business.

Chair Miller asked the Board if they felt they had jurisdiction to hear the appeal. Reinhardt believed they had standing to hear the appeal. A consensus of the five voting members of the Board of Appeals agreed they have jurisdiction to hear the appeal.

Standing and Determined Parties: Kyle Murdock is representing his company, Midcoast Marijuana Company, and will speak on his behalf. Attorney Mazer is representing the Board of Appeals on the Murdock Administrative Appeal.

Attorney Mazer stated the decision of the Planning Board and the record that is before the Board of Appeals (given it is an appellate review), will only review what is in the record. No new testimony is necessary from Planning Board members, but they can clarify information.

Testimony: (non-verbatim and edited) In July 2020, we applied for a Use permit to the Planning Board for a portion of the existing facilities at 56 Mussel Farm Road for the purpose of cultivating medical marijuana as we saw that was required by Section 12(C)(5) of the Shoreland Zone Ordinance, the change of use of a nonconforming structure. After several meetings and an on-site public hearing, the matter was investigated in great detail by all parties involved.

In October 2020, as the Planning Board was making its decision, it seems to have agreed that the proposed activities constituted both agricultural and commercial use and because of the water dependency restrictions on commercial uses in the CFMA, it was not allowed. I am appealing

this determination as I believe the Planning Board has misinterpreted two parts of the Shoreland Zone Ordinance. First, in their definition of a commercial use and then in their application of that definition to this project. I believe that the definition used by the Planning Board for the commercial use is the general dictionary definition of the word which would be making or intending to make a profit on a venture. However, the ordinance itself divides these money-making enterprises or business activities into several different categories, each of which is defined in Section 17, and it divides them into agriculture, aquaculture, timber harvest, commercial, industrial, mineral extraction, campgrounds, rental properties, home occupations, to list a few of the key ones.

The definition of Commercial Use is use of lands, buildings, or structures, other than a "home occupation," defined below, the intent and result of which activity is the production of income from the buying and selling of goods and/or services. It is that last Section that I appealed. To me it seems this limits the definition of commercial which is used throughout the ordinance to only those enterprises that act as a middleman, purchasing goods for services which they then resell to customers. Examples that were discussed in the Planning Board meetings were establishments such as restaurants that purchase food items and pay their employees to serve them; retail stores which purchase goods and pay their employees to then (unintelligible); or law offices which buy their employees skilled labor and then resell it to their clients. If the definition of commercial were not limited in this way, it would seemingly disallow many other uses in the Shoreland Zone. Two that stuck out to me were timber harvesting (Appellate lost his internet connection and had to reboot.)

I was speaking about the limitations of the definition of commercial in this way. It seems to me to be important to the other activities allowed in the Shoreland Zone such as timber harvesting is allowed with certain restrictions. If I wanted to cut my land and I found someone to cut it and pay me stumpage that could be applied as nonwatery-dependent commercial use by the broad definition used by the Planning Board so I would not be able to do that. I would only be able to cut down trees if I burnt them after. Similarly, home occupations allowed throughout the various districts of the Shoreland Zone with some limitations but adoption of this broader definition of commercial would make it seem like any of the number of shorefront property owners who may be taking Zoom calls from the home office during the pandemic may be performing a nonwater-dependent commercial use.

If the Board does not agree with my interpretation of the Commercial and Agricultural Uses but believes that the Planning Board was correct in its determination, I would draw the Board's attention to the difference between principal and accessory uses. The Shoreland Zone Ordinance defines a principal use as a use other than one which is fully incidental or accessory to another use on the same lot and conversely, it defines an accessory use as a use or structure which is incidental and subordinate to a principal use.

I would argue that the agricultural use of cultivating plants is the principal use which the Planning Board did not seem to disagree with. They in turn argued that we had a second

principal use of commercial, but I would suggest that the commercial use or any use of the structure itself is actually incidental and subordinate to the primary purpose of cultivating plants. That is to say that I would not have any products to sell if I did not first cultivate the plants. If we look at that in terms of square footage, 85% of the proposed space that we would like to use would be used for cultivation of plants and the remaining 15% would be dedicated to cultivation and adjacent to activities involved in the preparation of these plants into their saleable products, such as drying and curing. There is no dedicated space in which a commercial activity would occur. That is the buying or selling of goods. The predominant commercial activity which would be us selling our product will occur principally off-site through a delivery service. So, we would say that even if the Board were to agree that the Planning Board's determination in that we are both agricultural and commercial is correct, that we would suggest that the principal use at this facility is exclusively the cultivation. The commercial aspect is not happening at this facility. It is not what we are using it for. It would be no different than say if we had a storefront in Rockland where we sold all of our product and this facility is just where we grew it.

In summary, there are two points that we think were misinterpreted. The definition of Commercial Use and how it was applied to the property itself being that the commercial activities do not principally occur at the subject property. It's not what we were applying to use the property for. I hope that the Appeals Board may now review this case and make a determination that an error was made in this interpretation and allow us to proceed from there.

Board Discussion with the Applicant:
Bartholomew: Do you with your cultivation of the plants, do you expect to make a profit?
Murdock: Yes.
Bartholomew: Is it important to be able to grow the plants to make a profit?
Murdock: Yes.
Bartholomew: Is that not commercial?
Murdock: It is not commercial as defined by the Shoreland Zone Ordinance which is the basis of my argument.

Reinhardt: Are there other activities going on in that building or will there be other activities going on in that building that is not associated with your marijuana growing operation?
Murdock: Not associated with it? (Reinhardt: Yes.) Yes, there are.
Reinhardt: And those are functionally water-dependent or marine-related, correct?
Murdock: Yes.

Discussion by Attorney Mazer to the Board: In the record, do you have the minutes and decision from the Planning Board?
Chair Miller: Yes. They are part of the appellate packet the members received and were available to the public before tonight. I don't know if we have to formally vote to include all the information into the record. Usually not. It's just part of the appellate process and it is all included in the appeal.

Attorney Mazer: All right. I just wanted to make sure in the Findings that I can prove what you reviewed. The party, itself, is the Planning Board. The Chairman of the Planning Board is more than welcome to clarify those questions the Board of Appeals has. I am here representing you, as the Board of Appeals. I am not here on behalf of the Planning Board. The Planning Board has a separate counsel. I spoke with the CEO about this distinction yesterday or the day before, so I am here on behalf of the Board of Appeals and not present the case on behalf of the town. You are more than welcome to ask to clarify the questions. The key is to not because this is an administrative review, give any new testimony or evidence other than what is in the record. So, what is in the Planning Board's record and its findings?

Discussion by the Board:
Chair Miller asked if the Board had any questions or needed any clarifications. In particular, the decision.

Reinhardt had a question for Anne Cox or Terry Brackett. He read the denial motion: "A motion was made by Jordan, seconded by Letourneau, to disapprove the Midcoast Marijuana Company application on the grounds that the Shoreland Zoning Ordinance provides for special protection of the Commercial Fisheries/Marine Activities business in the CFMA District, that the requirement of functional water-dependent use in the Commercial Activities line of the Land Use Table is more consistent with the purpose and intent of the ordinance than the apparently unlimited zone of agriculture within the CFMA District in Line 13 of the Table, and it is more consistent of the ordinance and is more consistent with the Town of St. George Comprehensive Plan. The vote was 5-0. The application is denied."

Reinhardt: My question arises from reading the minutes then seeing the letter that was sent to the appellate that said enclosed is your Application for Building or Use Permit that recently went to the Planning Board. The Planning Board has denied the application on the grounds found on the last page of the application. I go to the last page of the application and I go through the application and it's written by Terry Brackett. I just want to make sure what it says here. It says the Planning Board found the proposed use of growing medical marijuana at 56 Mussel Farm Road, Map 022, Lot 026 was in the 75-foot buffer zone in the Shoreland Zone is not a functionally water-dependent in the CFMA zone and therefore, the application is denied.

Reinhardt: The reason why I went there to look at it was because his appeal mentions one of his four points which is having to do with the 75-foot setback. I don't see that in the minutes. Maybe I missed it.

Chair Miller: I don't either.

Reinhardt: I didn't see anything about in any of the minutes of the Board any discussion about that.

Chair Miller: That is an important part of the Shoreland Zoning rulings and ordinances. It is that setback requirement that makes it so difficult to deal with as a business on the shore.

Reinhardt: It was denied based on what I just read but then the letter sent to the applicant was based on something different.

Planning Board Chair Cox: I believe that Terry may have added in the 75-foot restriction and indeed that wasn't part of the conversation because a CFMA District basically allows activity within the 75-foot zone so that was never part of our discussion. It is very much a boilerplate for many of the activities within the Shoreland Zone District and all of this activity is within the 75-foot zone, so that was added into that description that was written. I am not sure it impacts the decision that we made because it is within the CFMA which can run down to the water because of its unique district. She asked Brackett if he wanted to clarify that.

Reinhardt: The dilemma I have because the Appellate is appealing it. Point number one of his appeal says the denial written on November 10, 2020, states the reason for denial that the Planning Board found that the proposed use was not allowed within the 75-foot setback of the Shoreland Zone. No such setback limitation was discussed with the Company at any point. So, I am in a dilemma as I am reading the denial in the minutes.

Chair Cox stated it would not have mattered if it had not been put in there because the CFMA runs right down to the water and allows activity within the 75-foot setback.

Jordan: I am a member of the Planning Board. I agree with what Anne said. We didn't consider anything about the 75-foot setback or findings or what they were. Jordan said that it is not even quite clear that the rooms in which the cultivation was going to occur or even within the setback. It might have been. It might not have been. It was not anything we considered because we didn't have to.

Chair Miller: I understand Bill's question. The flow of what we are talking about in the decision. There is a connection if you know the ordinance thoroughly, but I am not sure I see how it was defined or explained. Is that what you are asking, Bill? How are the two connected? Was it explained?

Reinhardt: There is no record in the minutes that anything was discussed, and I understand why it wasn't but then in the denial that the applicant got and one of his points he is what he is basing his appeal on. That is my problem.

Bartholomew: (unintelligible) a problem because the Shoreland Zoning is, regardless of setbacks or anything else.

Reinhardt: It is a problem for the appellant. It is one of his arguments. Because it what he was told he was denied for.

Cohen: That was never discussed in the Planning Board meetings.

Reinhardt: The reason he was denied in his letter of denial was the 75-foot setback activity.

Chair Miller: If there is some disconnect between them and the paragraph or two at the end of 13 and the beginning of 14 of the Planning Board's decision. I understand the letter is part of the formalization, almost the same thing that this Board has after it makes a decision of a Finding of

Fact is equivalent to that. They have to have a 100% connection between the two. It is not whether they made the denial or acceptance, it is the connection between those two and figure it out before we can figure out the rest of it, I think.

Chair Cox: Would you ask Terry to explain why he wrote that in the description?

Brackett: I guess I was thinking about in other Shoreland Zone Districts that 75-foot played a role. I was thinking of that as I was writing it.

Reinhardt: The 75-foot setback still plays a role in the CFMA District, also.

Chair Miller: It is still applicable. (Reinhardt said it sure is on certain things.) Can we make a decision if the letter and written decision of the Board does not connect? We haven't faced this before.

Cohen: What are our options? To strike that as a reason because the Planning Board never discussed it.

Chair Miller: Are you going on the basis of the decision that was based on the Planning Board or the decision that is almost? It's the same if you know the whole thing, but it is different on paper and how do we handle that?

Reinhardt: It is only one point that he is appealing on, but it is one of four that he is basing his appeal on. I'm a little hesitant because he was given a notice of denial that doesn't totally reflect what the Board's motion was. I guess I'd ask the appellant how that stands with him on that because we can act on the further points that he has raised on his appeal. Is that what you want or is that a moot point? Maybe our lawyer can advise us.

Cohen: Would this be our mission to actually take these four reasons for the denial and discuss each one and approve or? I would like to go through each one of these and have a vote on them.

Jordan: May I make a suggestion? (Chair Miller: Yes.) The proceeding that is before the Board of Appeals is on whether the Planning Board's decision was correct and not on whether it was correctly communicated. That the Planning Board made the decision on the basis on which you have and that is the record, and you can proceed on that. If it was imperfectly communicated by the CEO then I think it would be up to the appellant to show you that he was prejudiced by that, but I don't think he was prejudiced because he was there for all of the proceedings in the Planning Board and I will leave it to Mr. Mazer.

Attorney Mazer: I am going to caution, to get too much new. I think you have a fair point. The ordinance allows this appeals board to hear a decision of the Planning Board. That decision is in the record, so I think one of the points that Mr. Murdock brought up is the written findings by the CEO which I think is a valid point to raise for the Board to review. But he also raised it and entered it into the record, the full decision of the Board. I think, as the Planning Board has raised, then clarifying it for the Appeals Board (unintelligible) really is moot and not applicable. I think the other points are right to be heard by this Board of Appeals and then make a decision on the Planning Board's interpretation of the uses and how the ordinance is applied to those uses.

Chair Miller: For the purpose of our discussion and questions (going through the points), the only thing that is ringing through my head is a couple of things that were said. This is an appeal of the Planning Board's decision. The Planning Board's decision, whatever we. It is fairly simple to go through their decision and analyze it. I think we have to make a choice. I don't know how you could just postpone the whole thing and start all over again. I think this Board has to decide if that as it is mentioned and alluded to, should we just go with the Planning Board's decision and maybe not ignore the CEO's letter. It is an appeal to the Planning Board. That is how I am seeing. I am not trying to make a decision one way or the other. That is only one way I see that we can simplify this and move forward. The Planning Board's decision didn't jive with the CEO. After this, may raise the legal question and a point of discussion to have more clarity between the two in the future but for our purposes, I am just suggesting that.

Cohen: We have in the past; we have sent things back to the Planning Board for more discussion for review of that point. That certainly is an option for us.

Bartholomew: I don't think that is an option at this point because as the attorney said it's not really germane.

Chair Miller: They are not totally apart but they're not together. The decision, the 13 and 14 pages here, and the CEO letter are not exactly the same. I am just saying we are not qualified to go above that level. We have to decide. For me, it is an appeal of the Planning Board and we should take their decision and not Terry's interpretation of it. Take their decision and discuss it.

Bartholomew: Were the minutes available to the applicant? Mr. Murdock, did you have a copy of the minutes of the final decision of the Planning Board before the letter?

Murdock: I did not have a copy of the minutes available at the time I drafted the appeal. The minutes had not been posted online yet.

Bartholomew: If you had a copy of the minutes, would you have changed your appeal?

Murdock: I guess without waiving my rights to appeal on that, I also don't see how I was injured by that language which is the CEO's decision that we can all agree that we all fundamentally understand the expanse of the Planning Board's decision and that is really what we are talking about.

Chair Miller: I think we should at least acknowledge, some of it is in the minutes that the basis of this appeal, we are going to accept the decision as written in the minutes of the Planning Board's decision. Should we have a motion for clarity?

Reinhardt: I think we always are clear that we make it on the record and the record we have which includes the minutes.

Attorney Mazer: I can ensure that in the Findings of Fact, I will make a decision that it is clear that your (the Board's) decision was based upon the decision as found in the minutes, not the CEO's written findings.

The Board of Appeals discussed whether to review the four points in Mr. Murdock's appeal.

Carey: Reading through the Planning Board minutes of October 27, 2020, page 11, #7. The proposed facilities have been vacant and available for lease for 5 years except for the brief time they were occupied by another medical marijuana cultivator. Could anyone shed any light on what happened to that other? We have a double standard here. What kind were they permitted and now they are not being considered to be permitted?

Bartholomew: It was based on the Cease-and-Desist Order from the Code Enforcement Officer. It has not anything to do with the Planning Board. It's irrelevant. It was ruled not to be a permissible use.

Chair Miller: That issue is not germane to this discussion.

Chair Miller: Do we have to discuss all four points?

Bartholomew: We have discussed point number one.

Attorney Mazer: If it helps the Board to go through each one of the appellants' points, you are more than welcome to do that but really that is his formatting and not necessarily yours. You are more than welcome to just look at the final decision of the Planning Board and determine whether or not their interpretation of the ordinance was correct. That is the scope of your task this evening.

Bartholomew: Points 1-4 do not really address the reason for disapproval which was the requirement of functional water-dependent use in the commercial activities line of the ordinance. The only issue the applicant can really bring to us is that upon which the application was denied. I can't see where he has shown anything to support an appeal on the reason for denial nor has he shown anything that supports or refutes the reason for denial.

A motion was made:

I, Mark Bartholomew, would therefore move to deny the appeal on the grounds that the appellant has not shown cause or solution for the reason for denial. I move that we affirm the position of the Planning Board. Seconded by Fred Carey.

Reinhardt: My personal feeling is we should discuss this more. I am not comfortable with that motion without discussion. (Chair Miller indicated it was open for discussion.) First, looking at the motion that was made to deny, in reading between the lines, but I assume what the Planning Board determined that the use was a Commercial Use. The applicant applied for a Change of Use. The application originally as it came to the Planning Board was for a Change in Use. Correct? On the application, I believe, it said changing and use to agricultural use.

CEO Brackett read the appellant's project description as written on his application.

Reinhardt: So, wouldn't you determine that was a Change of Use application?

Cohen: It is. It says in the next line. Commercial fishing and processing to agriculture. (Brackett stated yes.)

Reinhardt: I am reading from the minutes that the denial was that it was a commercial activities that the requirement for a function that the requirement of functional water-dependent use in the Commercial Activities line of the Land Use Table is more consistent. So, I assume the Planning Board determined that it was a commercial activity and not an agricultural activity.

Bartholomew: That is why I asked Mr. Murdock if he expected to make a profit. If you are making a profit, then I would submit then that would be a Commercial Use.

Cohen: Theoretically, if he was just growing marijuana for himself that would be allowed? If he wasn't selling it? Is that what you are suggesting, Mark?

Bartholomew: I don't think your statement is germane because your question is if he was not intending to grow it for himself (unintelligible) medical marijuana crop which (unintelligible) is growing it for someone who has a prescription.

Chair Miller: I have a sentimental fact of the understanding of these: the working waterfront, the commercial ordinances that allow certain activities along the coast and that includes in the town. We have mostly related to saltwater, but it includes freshwater. We have a lot of state definitions that we work with. I thought a working waterfront property had to be using the saltwater or using the water. That is why it is allowed to be in that commercial zone along the water, no matter what the item is. I thought any business whether or agriculture or whatever, the reason you need that use there is because you can't do anywhere else and can only exist on that piece of property. That is the fundamentals, and it didn't actually turn that down. What am I missing?

Cohen: (What) I am getting hung up on is that agriculture is allowed under this ordinance and clearly this is agriculture. Whether he is selling it, not selling it. You are growing something as a business. Agriculture is allowed in that zone.

Bartholomew: That makes it commercial.

Cohen: Raising mussels on a rope is a commercial business. Yes, it is using saltwater, but it is commercial. So, that is allowed in that zone. I just don't know how we can deny it that agriculture is not allowed there. Yes, it is a working waterfront, but agriculture is allowed in the ordinance. It states it clearly. It doesn't say it has to be.

Chair Miller: I think we have gone through the philosophy of this a couple of times. I keep going back to that it is a commercial operation. I don't know if it has to be one or the other. You could be commercial agriculture. You could start a tree farm and when you start culling them you go from being a farm to commercial.

Cohen: It is a commercial building. It is not a residential building. (Miller: Right.) But the ordinance states agriculture is one of the things. It is still in the back of my mind that somehow, we deny agriculture in a building that had zoning.

Bartholomew: But it still has to be functionally water-dependent.

Cohen: It is functionally water-dependent. It does not say saltwater.

Carey: Why doesn't the zoning say specifically saltwater?

Reinhardt: Because the Shoreland Zoning applies to lakes and ponds.

Chair Miller: It applies to the water it is on. It doesn't apply to a pond nearby. Unfortunately, the 75 foot and some of the definitions, kind of define how close you can be to the water. I don't think the rule says, you have to have water. It doesn't say salt or fresh. It is the water you are on.

Cohen: Anything you do there in that building would be for a business. It would be commercial by my understanding of what that word means. You're in a business; it's commercial.

Chair Miller: I think it has to be dependent on the water.

Cohen and Carey: It doesn't say that. Carey: Every time you flush the toilet, you are dependent on water. Take a drink of water, cup of coffee, it is all the same. It is water-dependent. What business in St. George isn't water-dependent? If they've got a faucet, they're dependent.

Chair Miller: I think the question is where you can have that. I can't move my house within 75 feet of the water and say that I am a water-dependent place, that I couldn't survive without water. What you are saying is true but that doesn't mean the ordinance allows me commercial or otherwise to be down on the water without dependency on that body of water. That is what they call it, it is like a body of water that you are bordering on. Tearing down a shed, or having rental cottages are commercial. There are still limits on the water on that. If you are in a business, you are in a business.

Cohen: I don't think being commercial is a reason to deny a permit.

Reinhardt: Our Shoreland Zoning Ordinance, in the respect regarding agriculture models the state ordinance and they use the definition agriculture right out of the state model ordinance, which is a model ordinance, a guideline. I agree with you that it specifically states (referring to a DEP pamphlet review related to agriculture activities) that agriculture is allowed in every single district in St. George. It is clear from reading all the information involved with the model ordinance that when they referred to agriculture, it is primarily other than a few exceptions, is outdoor. All their restrictions and all their things are talking about tilling the soil, spreading the manure, fertilizer, storage of fertilizer, all the land-use restrictions or guidelines are all having to do with what we would normally associate with agriculture.

Reinhardt: Here we have a very different situation. We have an existing building that the applicant is proposing to grow inside, and he is calling it agriculture. Everything you read, every guideline or discussion has to do with their concern about why they allow agriculture in (unintelligible). They even have restrictions of where agriculture can go in those plants including setbacks. They refer to tilled land as a structure (almost). I am sure the Planning Board decided it was a commercial activity more so than it was an agricultural activity.

Cohen: Your point is, it is being done in a building, so it is not really agriculture?

Reinhardt: It is a very gray area.

Cohen: They have been growing mushrooms in buildings for two centuries. It is still agriculture.

Reinhardt: If you go on that thinking that it is an agricultural activity and not a commercial activity. Primarily agricultural activity? (Cohen: For profit, yes.) It doesn't matter if it is profit or not. So, the applicant is saying it's an agricultural activity, it's allowed in that district. It is actually allowed permanent in the Land Use Standards. Even though it is allowed in the district, it is not functionally water-dependent, it has to comply with the 75-foot setback. That is right in the Land Use Table on setbacks. Growing marijuana is not a functionally water-dependent use. It requires access to that body of water; therefore, it has to conform (and it is a change of use) to the setback. Suppose he wanted to have a grocery store there? It's commercial activity?

Chair Miller: Last time we dealt with a similar situation; parts of the building are within the 75-foot zone. The general philosophy of this ordinance is if you can prove that the business you are putting on the shore has to be dependent on that body of water and it could be someplace else. That was how it was for a long time. The mussel farm, the boats could basically come into the dock and the building was right there and they could conveyer right up in. They had a lot of trucks, but it was almost the definition of Commercial Use in the Shoreland Zoning. One philosophy on the Maine working waterfront, the coast, is that we are all farmers; the lobstermen, the clammers, we are trying to make the industry sustainable.

Chair Miller: If you have a business on the shore, it has to be water related. By water-related, I don't mean you put a swimming pool upstairs that you rent out. That is water-related but by the rules that Bill's going through, most of them are the state, they have to be related to the body of water.

Cohen: So, you are a salmon farmer. You are growing those salmon in freshwater, not in saltwater. You are using freshwater which an agricultural business would use freshwater. They are allowing a fish processing plant (in Belfast). They are using freshwater there, too. I know there have to be some guidelines, so you understand what is being done elsewhere.

Cohen: My other point is, if it is agriculture, you cannot grow anything with saltwater. It kills plants, so you need fresh water.

Murdock: May I ask for a point of information? (Miller: Yes.) In the chart of Land Uses at the bottom there is footnote #5 requires that the land use be functionally water-dependent or use accessory to such water-dependent uses. If you look through the chart, you will see several instances where footnote #5 is applied to a use. Under agriculture, that footnote is not applied to any of the districts.

Reinhardt: That is because it is allowed in that district. It doesn't mean that it is exempt from all setback requirements. In the CF, agriculture is specifically allowed in all districts and specifically in the CFMA even though it is not regarding saltwater, it is not a functionally water-dependent use. Where it is not a functionally water-dependent use, it still has to abide by the setback requirements.

Reinhardt: In one regard of the appeal, I think it is clear, that the Planning Board looked at it as a commercial activity. They still got to the right answer even though I don't agree with that being commercial activity. I think it is agricultural, this application. That is just my opinion.

Chair Miller: They went back and forth a lot on that.

Reinhardt: The point is that even though agricultural activities are allowed in that district and it still has to abide by the setbacks, it is not a functionally water-dependent use for that water body. There is another argument that it is not an agricultural activity.

Attorney Mazer: I just want to caution. There is a lot of discussion on the setback and where that building is and may not be. That is not really in the record for the Board of Appeals to determine. You could remand back to the Planning Board for more information if needed. I think your discussion this evening has been on whether the interpretation was applied appropriately for the definition but that next step would be beyond the scope of whether the record, although within the CEO's findings that were being **clear** by the Planning Board members, it was beyond the scope of what they determined that evening.

Carey: Is there anything in Shoreland Zoning that you are familiar with that talks about primary and secondary usage? Because this is a secondary usage.

Chair Miller: No, I think it is the primary business as he explained in there. (Carey: With 12 marijuana plants?) I think it was 70-80% when he was asked about it, of the building's business. Not the building itself.

Cohen: The building isn't being used? He's a lessee, right? I don't believe he does own it.

Chair Miller: His parents own it.

Cohen: If he is leasing a portion of the property?

Chair Miller: He is represented as being the owner of the property. It doesn't matter to use whether he is leasing or owns it.

Cohen: He is applying as a tenant, which is my only point. (Miller: Owner of the business.) Owner of the business and a tenant in a building, so the setback may or may not apply.

Chair Miller: I think you are going down the road which is beyond our scope. We are only related to the materials in front of us. If enough members wanted to send it back to the Planning Board for further clarity. I don't think you will get them to change their decision. They came to it pretty quick.

Bartholomew: The question before us is whether the Planning Board made a proper determination. That is the only question before us. There is a misinterpretation of the ordinance. Our question is it the correct decision, and is it consistent with the ordinance? I call the question.

Chair Miller: The question has been called. We are voting on whether to support the decision of the Planning Board. If you vote in the affirmative, you are supporting the decision of the Planning Board. If you vote nay, this would be turned down and go to plan b.

Restatement of the Motion after Discussion:

A motion was made by Mark Bartholomew, seconded by Fred Carey, to deny the appeal on the grounds that the appellant has not shown cause or solution for the reason for denial and reaffirm the position of the Planning Board. The vote was 2 in favor, 3 opposed. The motion failed. Miller and Bartholomew were in favor and Cohen, Carey, and Reinhardt opposed.

Chair Miller: Where do we go from here?

Reinhardt: We can ask our attorney, but I would send it back to the Planning Board for further discussion on their point and more clarification regarding the motion.

Attorney Mazer: One of the options for this Board is to remand back to the Planning Board for further information that would help you to make your determination. You summarized well in that the Planning Board and their decision applies to commercial use over agricultural use. You can certainly remand it back to them.

Attorney Mazer: Another option would be to determine that they determined it incorrectly that it should have been applied in agriculture, at which point it would be (unintelligible) either the ordinance so that 75-foot piece would rightly be a determination of the CEO in reviewing the use and the Planning Board. I believe if I understand the ordinance correctly, it went to the Planning Board was that commercial use aspect. So, your determination on that application could matter on how it goes back to the Planning Board. If that 75-foot matters, it certainly can go back, and they can certainly find through that in their interpretation if that matters to this Board.

Reinhardt: He (Mazer) is absolutely right. If we determine and make a judgment that it's an agricultural use by the Board, here, by determining it was in Commercial, it really means that its permitted use, as a Code Officer looks at it, from the setback issues. I know why Terry and why it went to the Planning Board because the issues are up there – whether it was commercial or agricultural. Miller said it fits the setback requirement. Bill said that is why we have a Planning Board. (unintelligible) we are remanding it back to the Planning Board for further clarification and determinations.

Miller: Without necessarily putting our stamp on it.

Jordan: What does the Board think the Planning Board needs to clarify?

Mazer: In the record in the motion, you really should be very clear what the Board of Appeals is looking for in that further information of clarification.

Cohen: I would like to see what the Planning Board says: is a Commercial Use; is Agricultural Use?

Carey: And the basis for why they said it.

Miller: They didn't give any other mitigating circumstances because there's more been brought to our attention. They can deal with it; we can't.

Reinhardt: Furthermore, whatever the determination of use, what setbacks apply. That's what I would make that motion.

Motion on Appeal:

A motion was made by Reinhardt, seconded by Cohen to remand this application back to the Planning Board for a definitive determination whether they view this as Agricultural Use or a Commercial Use and their reasons, therefore; and also determine what setbacks would apply on **what (unintelligible)**. The vote was 5-0, in favor.

Attorney Mazer will write the Findings of Fact and Conclusions of Law. The next Board of Appeals meeting will be held on February 18, 2021, at 6:30 p.m.

There was no further discussion.

At 8:42 p.m., a motion was made by Bartholomew, seconded by Reinhardt to adjourn the hearing.

Respectfully submitted,

Marguerite R. Wilson
Recording Secretary