

Auburn Board of Appeals Meeting Minutes November 8, 2018

ROLL CALL:

Regular Members present: Courtney McDonough – Presiding, Dana Staples, Michael Corey, Kristen Muszynski and Kyle Hall

Regular Members absent: Christopher Gendron and Bruce Richardson

Associate and other Members present: Deana Chapman

Associate and other Members absent: Michael Mathieu

Also present representing City staff: Eric Cousens, Deputy Director of Economic & Community Development, Michael Malloy, Attorney representing the Zoning Board of Appeals, and Amy Chao, of Drummond-Woodsum, Attorneys at Law, representing the City of Auburn.

Chairperson McDonough called the meeting to order and asked for a roll call. She stated there was a quorum of 5 members and then proceeded to read the following appeal for the record:

Appeal of Vincent and Shannon Gogan, petitioners for the property at 197 Turner Street (PID 251-022). The appellant is appealing “the city’s refusal to issue a certificate of occupancy for my clients’ caregiver business” pursuant to Article XV. Board of Appeals, Division 4, Section 60-1186 of the Code of Ordinances of the City of Auburn. The intent of the appeal is to allow for the sale of medical marijuana without the following limitation on the Certificate of Occupancy: The approval of this certificate does not authorize any uses of the building premises for the retail sales of goods that are not authorized under state law. (This is the same appeal postponed from the September 24, 2018 meeting)

Chairperson McDonough stated there were 5 Full members and 1 Associate member present so elevated Deana Chapman’s Associate member status to full voting rights for this meeting. She then listed the following documents that were submitted to the Board and posted on the City’s website:

- Petition letter and supporting information
- Staff report letter from Agnieszka A. Dixon, Attorney for the City of Auburn and dated September 20, 2018

Chairperson McDonough said she wanted to have a conversation amongst the Board in regard to Jurisdiction to hear the appeal. Mr. Malloy mentioned additional documents had been distributed from the applicant and listed the following for the record:

- Pages 1 through 149 of applicant’s material
- Memorandum submitted by the applicant
- 6-page memo to the Board of Appeals dated November 11, 2018, provided by Attorney Dubois

Mr. Malloy stated the Board had a question regarding whether the Certificate of Occupancy should be amended as stated by the Chair. He said from a legal perspective, you have a City moratorium ordinance that has also been passed and that ordinance states that it prohibits the issuance of the Certificate of Occupancy. That moratorium ordinance has been placed in the record and he advised the Board that he would reference the Board to that. Sections 1 defines what a retail medical marijuana caregiver storefront is for purposes of the ordinance and Section 2 states applicability of that ordinance. He said the gating issue for the Board is whether or not that moratorium applies. And if so, then, whether the Board can take any other action on this request tonight. He read for the Board in reference to the applicability, stating it references any applications that are pending before the City Clerk, Code Enforcement Officer or the Planning Board on or at any time after May 31, 2018. He said the 1st issue the Board may want to reach is whether the applicant's application was pending on or before that date.

Dana Staples stated that in the memo provided by Mr. Dubois, the timeline states that on June 4th a final inspection was done so wouldn't that indicate that this process was pending on that time? Mr. Malloy suggested that it would be best to open up the Hearing and allow the sides to explain their positions on that issue.

09:30 on recording

Chairperson McDonough asked the Board members if they agreed to move forward with this appeal and to listen to the 2 sides.

Dana Staples asked if the Board had jurisdiction over a Certificate of Occupancy. Mr. Malloy responded yes, that is a legal issue for the Zoning Board of Appeals.

Chairperson McDonough proceeded to explain the process of the Board of Appeals and gave the appellant the choice of presenting their case first or waiting until after the City presented their side.

12:00 on recording

Vincent Gogan, Appellant and Matt Dubois, Attorney for the appellant went over the timeline of events that had occurred and presented their case. They stated the following

- May 9th, the Gogans applied for building permit to move across the street from 120 Center Street to 197 Turner Street
- Primarily had to move due to tenant - landlord disputes and largely due to neighbor complaints
- Permits were issued; Electrical, Plumbing, Excavation, Sign, installing new gas furnace, Change of Use, and Zoning was approved at new location for changing office space to a retail medical caregiver storefront
- Substantial renovations were done at significant cost to the applicant.
- On June 4th, Mark Stambach, Building Inspector, Charlie DeAngelis, City Electrician, Cristy Bourget, Sanitarian & CEO and David O'Connell, Fire Safety Inspector went through for a final inspection in order to obtain the Certificate of Occupancy
- Inspectors during final walk-thru eluded to the fact that it all appeared to be passing inspection.
- Some debate between David O'Connell and Cristy Bourget about whether or not a police approval was required so Lieutenant Cogle was called.
- Lieutenant Cogle said to contact Kelsey Earle, License Specialist in the City Clerk's Office before the end of the day to determine if the Certificate of Occupancy would be issued.

- At 4:00 pm arrived at the City Clerk's window to inquire about the Certificate of Occupancy. Ms. Earle looked at her notes and said Police Chief Crowell had not approved the Certificate of Occupancy because of a moratorium on medical marijuana caregivers.
- Said this was the first time they had ever heard of a caregiver storefront moratorium in Auburn.
- Ms. Earle said more information would be available at the City Council Workshop at 5:30 that evening so they attended the workshop and heard the presentation regarding the moratorium presented by Chief Crowell.
- Sent a letter the following day, June 5th to Eric Cousens's office requesting a written decision regarding a Certificate of Occupancy by the following day.
- Received a letter back from the City Attorney, Aga Dixon who explained that the city needed more time to discuss the matter. It would be the 11th before they could determine if a Certificate could be issued.
- Another letter was received on the 11th from Ms. Dixon's office informing us that she had advised the City not to issue a Certificate of Occupancy yet for 2 reasons. #1 there was a 14 day review period on the business license application form and #2 there were questions raised as to whether or not the proposed operation would comply with state law.
- Ultimately received an email from Mr. Cousens on the 13th of June which contained a limited Certificate of Occupancy only authorizing 1 part of Mr. Gogan's proposed use as a retail tobacco store and he clarified that it would not allow a caregiver storefront use.
- Was still working with the Maine CDC which over-sees the medical marijuana program to try to obtain some kind of verification of compliance with state law.
- On June 15th, Mr. Dubois filed a notice of appeal and 2 days later received a limited Certificate of Occupancy appealing the decision not to issue the caregiver license??
- On the 18th, did receive a verification from Wade Maddox of the Maine CDC that their previous inspection on May 16th, caregiver storefront inspection at 120 Center Street had passed with no non-compliance whatsoever.
- Immediately submitted the verification to Ms. Dixon's office
- On the 18th, attended a City Council meeting at which the Council voted to waive the 2nd Reading on the moratorium and also voted to make the moratorium retroactive to reach back to May 31st, 2018 to negate any pending matters that were open at the time.
- On the 22nd, Ms. Dixon followed up with Mr. Dubois explaining that yes, based on the moratorium, the City is denying your client's request for a Certificate of Occupancy as retroactive nature for the moratorium back to May 31st as foreclosed of any approvals of any pending matters.
- Spoke about vested rights – a party, a developer, a business owner has begun substantial work on a project and has a permit under which they are performing this work, they attain vested rights.
- City was aware they were performing a significant remodel project for a medical marijuana caregiver as depicted on the permit that was issued to the Gogans.
- Spoke at length about vested rights and cited court case that mirrored vested rights.
- Said City officials delayed issuing a Certificate of Occupancy knowing it soon would be too late.
- Vincent & Shannon Gogan were licensed as caregivers, registered with the State of Maine and the fact that they had passed inspections in the past seems sufficient that they were compliant with state law.

- As requested, they provided the CDC documentation finding no non-compliance with the Gogan's storefront. There is no other real means to obtain any other proof of compliance with state law.
- Believes that's a delay - refusal to do their duty after all the conditions have been met, fees have been paid and repeated attempts to find a reason to deny his client, 1st attempt being future possibility of a moratorium, permission withheld by the Police Chief when it's not even clear if he is required to weigh in at this instance and then eventually a week later denial based on the bare possibility that this model could somehow be in violation of state law with no evidence to suggest that.
- Hopes that these factors will be compelling to the Board and do request that the Board revise the Deputy Director's decision to issue a limited Certificate of Occupancy. Order that it be revised to authorize not only for a retail tobacco store but also a caregiver store.
- Under Section 60-1153, Board of Appeals may by an affirmative vote of the majority of those members present, amend or revise a decision that the Building Inspector, Code Enforcement Officer or any other municipal office acting under the Zoning Ordinance

39:15 on recording

Amy Chao, Attorney for the City proceeded to explain the City's position. She said she agreed with Mr. Malloy about the Board of Appeals having jurisdiction over the Certificate of Occupancy. She said there is a 2nd jurisdictional point which the Board will have to decide and that is whether or not this Board has authority or has jurisdiction to grant the relief that the applicant is seeking here and she said she would submit that the Board of Appeals does not have that jurisdiction or authority because there was a valid enactment of the moratorium on the medical caregiver retail storefront that applies to this very situation and the issuance of the Certificate of Occupancy. She said one of the legal issues for the Board to decide is when there was a pending proceeding and would submit that the pending proceeding was the date of the inspection which was the 4th of June 2018 so that means that this falls squarely under the moratorium which was enacted retroactively effective May 31, 2018.

Ms. Chao then proceeded to go over some factual background and the moratorium itself. She said the best way to describe this is very simple, you don't get vested rights to engage in illegal activity. She spoke about LD1539 which is the law that will go into effect on December 13, 2018 – among many other things, this law regulates medical marijuana caregiver retail storefronts. It needed to be passed because there needed to be expressed authorization for type of use. Ms. Chao addressed the points that were made by Mr. Dubois when presenting their side.

53:45 on recording

Mr. Dubois asked if he could present a rebuttal and Chairperson McDonough said he could. One of the points Mr. Dubois made was regarding the medical marijuana program and whether or not retail stores are legal and permitted according to state law. He said he believes they are permitted and are legal because they are not prohibited. He gave examples of retail establishments.....

A very lengthy discussion ensued between all parties which concluded with the following motion being made:

149:36 on recording

A motion was made by Dana Staples that the Zoning Board of Appeals refuse to accept that the Board has the right to hear this appeal because the medical marijuana moratorium prohibits it. He added, based on this being a pending application of when the moratorium went into effect, this precludes the Board from acting on it.

Mr. Malloy stated he would try to clarify the motion and asked Mr. Staples if the motion he made is to deny the appeal to amend the Certificate of Occupancy on the basis that the application was pending after the effective date of the ordinance? Mr. Staples replied yes and said if the moratorium is in effect, then the Board does not even have the right to do this so if that means it's a denial then it's a denial.

Mr. Staples amended his motion to read; the Board denies the appeal based on the fact that the Board does not have jurisdiction with the moratorium in effect. The motion was seconded by Kyle Hall. After a vote of 6-0-0, the appeal was denied.

ADJOURNMENT

Chairperson McDonough asked for adjournment.

A motion was made by Dana Staples and seconded by Kyle Hall to adjourn the meeting. After a vote of 6-0-0, the meeting was adjourned.