

City of Biddeford
Zoning Board of Appeals
October 12, 2016/6:00 PM/COUNCIL CHAMBERS

1. Pledge of Allegiance
2. Acceptance of Minutes
3. Old Business/Tabled Items
4. New Business

- 4.1. **2016.001 William, Jay, and Robyn Sahagian, 6 Riverside St, Marblehead, MA 01945.** Applicants are requesting an administrative appeal for the denial of a permit. Property is located on South St., Map 1 and Lot 36-1 in the RF Zone. Property is owned by the applicant and presentation is made by Alan Shepard, Esq.

[Application.pdf](#)

5. Other Business
6. Adjourn

Shepard & Read

ATTORNEYS AT LAW

93 MAIN STREET KENNEBUNK, MAINE 04043

ALAN E. SHEPARD
BRUCE M. READ

Tel: (207) 985-2291
Fax: (207) 985-2326
EMail: alan@shepardandreadlaw.com

August 31, 2016

Biddeford Zoning Board of Appeals
205 Main Street
Biddeford, ME 04005

RE: Sahagian R1/36/1 South Street Property Appeal

Dear Members of the Board:

Our office represents William and Jay Sahagian, who are the record owners of a parcel of land of approximately 43 acres, located on South Street. This was an unimproved parcel at the time my clients filed for a building permit on November 24, 2015, to construct a 40 by 60 foot barn with an apartment. The proposed land use on the permit (attached as Exhibit 1) was originally described as "Storage/Camp".

My clients are appealing from the denial of the Code Enforcement Office to allow two State registered Caregivers, from growing medical marijuana within this structure. As is described below, my clients received approval and a certificate of occupancy to have one Caregiver at the property, but were denied a second Caregiver on the basis of the enactment of a moratorium by the City Council. This was in error, as the operation of a Caregiver is a permitted use in this zone as made clear by the granting of the initial permit and certificate of occupancy, and as such it was not affected by the moratorium.

This first came up during the course of an inspection of the property, when the Code Enforcement Office made inquiry as to whether there was any additional activity that is going to take place within this structure. My clients informed them at that time, that they planned to allow a State registered Caregiver to grow marijuana within this space, all in accordance with State Law.

In order to clarify the nature of the activity, the Code Office asked for a Letter of Intent, which was sent to the Code Office by an email dated March 24, 2016 (attached as Exhibit 2).

The Code Office then had some discussions with the Town Attorney, to determine whether such a Caregiving operation is a defined use within the Zoning Ordinance and whether it is permitted on this property that is in the RF Zone.

An additional email was sent by this office on Monday, March 28, 2016, that provided some background on the regulation of medical marijuana in the City of Biddeford (copy attached as Exhibit 3).

By way of a brief explanation, Biddeford first adopted a moratorium in 2010, when the medical marijuana law first authorized dispensaries. On September 7, 2010, the City Council voted on establishing permitted locations for what was described as "Medical Marijuana Dispensaries", and in the final vote, chose not to provide any locations for what was described as "Medical Marijuana Growing Facilities." (Copy of minutes attached as Exhibit 4).

After this vote, the City Planner Greg Tansley sent an email (and attached as Exhibit 5) to Maine Municipal, questioning whether the City could "zone out" or otherwise prohibit stand-alone growing facilities. In this email, Mr. Tansley states, "My understanding is that State Law specifically provides for a stand-alone growing facility as a means to produce the medicine to be provided at dispensaries." (Emphasis added).

The response from Maine Municipal and specifically Attorney Richard Flewelling, was that while municipalities had specific authority to regulate the locations of dispensaries within a town or city limits, any further regulation of a growing facility would be preempted and unenforceable. (Copy of email attached as Exhibit 6).

At the counsel meeting of September 21, 2010, (see Exhibit 7), there was reconsideration of the prior vote, and the Ordinance was thus amended to read as it presently does, which allows Medical Marijuana Dispensaries as a "Conditional Use" in the B-2, M and I-3 Zones, and "Medical Marijuana Growing Facilities" in the I1 and I2 Zones.

It is critical for the understanding of this Appeal to recognize that what the City Planner and the Maine Municipal attorney addressed were growing facilities that provides marijuana to dispensaries. The City did not at the time address in any way a Caregiving operation which is regulated under a different section of State Law.

This important distinction was confirmed in an exchange of emails with Robby Fecteau dated Wednesday, June 29, where he acknowledges that, "Biddeford doesn't address caregiver/growing facilities." (Copy of emails attached as Exhibit 8).

At the time, it was additionally pointed out to the Code Office, that the proposed activities at the South Street property for a caregiver falls squarely under the definitions of "Agriculture", "Commercial Gardening", and "Commercial Greenhouse" (which are all set forth in the Exhibit 9 attached).

The Code Office agreed that the proposal for a Caregiver at the South Street property, was a permitted use, and a Certificate of Occupancy was issued on August 19, 2016 (See attached Exhibit 10).

I have enclosed excerpts from the Biddeford Code, (see Exhibit 11) which shows that Agriculture as well as Commercial Gardening and Commercial Greenhouse are all permitted uses in the RF Zone, and that a Medical Marijuana Growing Facility is not a permitted use. This clarifies that at the time the Certificate of Occupancy was issued, it was not for a Medical Marijuana Growing Facility which was not permitted in that zone. As stated earlier, the City considered these to be larger scale facilities that provide product to the registered dispensaries. A Caregiver operation, is of a much smaller scale, and provides marijuana for up to five registered patients.

On April 5, 2016, the Biddeford City Council implemented a six-month moratorium on the establishment of any new "Medical Marijuana Dispensaries" and "Medical Marijuana growing Facilities" within the city limits. This was the precise language used in the Council vote.

In the meantime, my clients had an opportunity to get a second Caregiver into their property and sought permission from the Code Office. On July 25, 2016, I wrote a letter to the Code Office on the second Caregiver operation, and presented the argument that the moratorium does not effect this request (Copy of letter attached as Exhibit 12).

By letter dated August 5, 2016, the City Attorney advised that Code Office to deny the permit on the basis of the moratorium. (Copy attached as Exhibit 13).

The basis of the Appeal, is that the moratorium specifically only covers Dispensaries and Medical Marijuana Growing Facilities which is an undefined term of the Ordinance, but from the information that was provided herein, was always designed to regulate a facility that was producing the marijuana for the dispensaries.

As stated in Robby Fecteau's email of June 29, 2016, the Biddeford Ordinance does not regulate Caregiver operations. It is also critical to understand that a Certificate of Occupancy was issued for this property in the RF Zone for one Caregiving operation, and as set forth on the land use tables, neither a Medical Marijuana Dispensary nor Medical Marijuana Growing Facility is an allowed use in the RF Zone. So it makes little sense that the Code Office allowed the operation of one Caregiver operation at this property as a permitted use and denying a second Caregiver on the basis of the Moratorium which does not prohibit this activity.

It is my understanding that the City is contemplating the regulation of Caregivers, but until such time as it does, and these changes are incorporated into the Ordinance, there are no regulations and no prohibition against this type of use.

Under these circumstances, it was an error for the Code Office to effectively deny my client's permission to operate a second caregiving operation at their residential property in the RF Zone, and this Board is asked to reverse the Code Enforcement Officer's decision.

I look forward to addressing any additional questions or concerns that you may have at your upcoming Hearing.

Yours truly,

SHEPARD & READ

A handwritten signature in dark ink, appearing to read "Alan E. Shepard", with a long, sweeping underline.

Alan E. Shepard

AES:ktr
/Encls.

cc: William Sahagian
Jay Sahagian

Application Fee: \$200
Fee at time of
issuance

BUILDING/DEMOLITION PERMIT APPLICATION

Code Enforcement Office

205 Main Street
Biddeford, Maine 04005
(207)284-8236 FAX (207) 285-9382



For Office Use
Date: 12/1/2015
Fee: \$ 9,42.20
Issued By: RPF
Permit #: 16-12-241

Date of Application: 11/24/15
Address of Construction: South Street
Map/Lot: 1-36-1
Zone: _____

Type of Permit Requested: (Check all that apply)
 New structure
 Addition
 Demolition
 Remodel interior
 Remodel exterior
 Sign
 Change of use
 Change of occupancy
 Swimming Pool
 Move structure(s)
 Commercial
 Other _____

Owner Name: William Sahagian
ADDRESS 6 Riverside Drive
CITY, STATE & ZIP Marblehead, MA 01945
TELEPHONE # 781-631-6807 / cell # 781-248-6387
EMAIL: bsahagian@miklitech.com

Contractor name: Brian Doncause Same as owner
ADDRESS 85 Gould Rd
CITY, STATE & ZIP Dayton, ME 04005
TELEPHONE # 207-229-6447
Erosion control required: YES NO
Site contractor erosion control Cert # _____

Complete Description of Work and Construction Cost of Project: \$
40'x60' shed with bath, kitchen and 1 bedroom \$67,300.00
Present land use: field Proposed land use: Storage/Camp
ARE THERE ANY ASBESTOS CONTAINED MATERIALS? YES NO

Required Property Line Setbacks
FRONT _____ BACK _____
LEFT _____ RIGHT _____

Lot coverage
Allowed: _____
Proposed: _____

Water Setbacks
WETLAND _____ STREAM _____
TIDAL _____ POND _____
RIVER _____

This property has: Town water or Well Driveway opening DPW Yes No
 Septic or Sewer Sewer fee paid Yes No

Plumber: Same as applicant
NAME _____
ADDRESS _____
CITY, STATE & ZIP _____
TELEPHONE _____

SEPARATE PERMITS ARE REQUIRED FOR ELECTRICAL AND PLUMBING WORK.

Electrician: Same as applicant
NAME _____
ADDRESS _____
CITY, STATE & ZIP _____
TELEPHONE _____

PLEASE NOTE: Prior to ground disturbance erosion control must be in place.

Every permit holder shall be liable unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the job by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced.

Notes: _____

DOCUMENTATION REQUIREMENTS

Floor Plans and Elevations of new construction

- Include floor plan of existing structure as well as new construction for alterations and additions
- Detail removal of all partitions and string of any new structural beams
- Detail any new walls or permanent partitions

Cross Sections with material description and framing details

- Stair details including dimensions of: riser/run, head room, guards/handrails, baluster spacing

Window and Door Schedules (include window that meet egress requirements of 5.7 sq ft clear operable area, clear operable width of 20", and clear operable height of 24")

Foundation Plan indicating soil type, footer dimensions, required drainage and foundation wall dimensions

Deck Construction including: plan layout, framing, fasteners, guards stair dimensions

Plot Plan including:

- Shape and dimension of the lot
- Footprint of existing and proposed structure with distance from actual property lines
- Other structures including decks, porches, sheds, pools, and garages
- Location and dimensions of parking areas and driveways
- **THIS DATA MUST BE ACCURATE! PROPERTY LINE LOCATIONS AND SETBACKS ARE THE APPLICANT'S RESPONSIBILITY.**

Sewer Impact fee Recalcul or New Sewer Design (where required)

Street opening permit from DPW

*****ALL DRAWINGS MUST BE TO SCALE OR HAVE DETAILED DIMENSIONS*****

I certify that the information contained in this application and any related submissions to be true and accurate to the best of my knowledge. I understand that I am responsible for compliance with all applicable town, state and federal regulations and that failure to comply may result in the imposition of fines, legal fees, and the abatement of any violations to include abandonment of use and occupancy and corrective notice such as the removal or modification of improvements if setbacks or other requirements have not been met and satisfied. I understand that this is an application and that I shall not begin any improvements until the appropriate permit (s) is/are issued nor will I make use of the improvements without first having obtained an occupancy permit. I further understand that any associated plumbing, electrical, and heating work to be undertaken in connection with this request requires separate permits. In addition, I understand that if this project involves the creation of a new lot, a subdivision, as defined in Title 26-308A, Section 101(4), as amended, has not been created without first obtaining the required approvals

Signature of owner/applicant

11/24/15

Date

Signature of building inspector

Date

Other information:

- | | | | |
|------------------------------------|--|-------------------------------|--|
| 1. Flood hazard development permit | <input type="checkbox"/> Yes <input type="checkbox"/> No | 6. Shoreland overlay district | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| 2. Coastal dune | <input type="checkbox"/> Yes <input type="checkbox"/> No | 7. Subdivision | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| 3. Historic preservation district | <input type="checkbox"/> Yes <input type="checkbox"/> No | 8. Fire Marshall | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| 4. Resource protection area | <input type="checkbox"/> Yes <input type="checkbox"/> No | 9. DEP | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| 5. Other permits | <input type="checkbox"/> Yes <input type="checkbox"/> No | 10 Army Corps | <input type="checkbox"/> Yes <input type="checkbox"/> No |

INSPECTION SCHEDULE

It is understood that the applicant or his/her representative will notify the Building Inspector for the following inspections at least 24 hours in advance of the required inspections

FOOTINGS AND BASEMENT WALLS

Approved by _____ Date _____
Do not back-fill until signed above

ROUGH PLUMBING

Approved by _____ Date _____
ROUGH ELECTRICAL

Approved by _____ Date _____
FRAMING

Approved by _____ Date _____
Do not cover work until above has been signed

INSULATION

Approved by _____ Date _____
FINAL PLUMBING

Approved by _____ Date _____
FINAL ELECTRICAL

Approved by _____ Date _____
FINAL BUILDING

Approved by _____ Date _____

Erosion control inspection

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

Do not occupy until above has been signed and Certificate of Occupancy has been issued by the Building Inspector

Alan Shepard

From: Alan Shepard <alan@shepardandreadlaw.com>
Sent: Thursday, March 24, 2016 3:17 PM
To: 'robby.fecteau@bpd.net'
Subject: Sahagian
Attachments: Biddeford Intent Letter.docx

Roby:

Thanks for the voice message. I had expected some sort of disconnect when Roger told my clients that he wasn't concerned about the use of the property.

They had asked me to edit their "letter of intent", but unfortunately we missed connections before they went and met with Roger with the new plans. I am attaching the revised edition which sets forth the issue of use a little more clearly. This is something I thought you might want to share with Keith when you speak with him.

My clients are interested in getting an answer on renting to a caregiver, so hopefully you can speak with Keith soon. I will wait to hear back from one of you.

If you need any more info let me know.

Thanks

Alan E. Shepard
Shepard & Read
93 Main St.
Kennebunk, Maine 04043
(207) 985-2291
(207) 985-2326
alan@shepardandreadlaw.com
Real estate paralegal: Susan Harrington
e-mail: sue@shepardandreadlaw.com
Legal Assistant: Rosemary Faridani
e-mail: rosemary@shepardandreadlaw.com
website: www.shepardandreadlaw.com

Letter of Intent
for
South Street Barn
March 21, 2016

The intent of the owners of our South Street property is to build a split barn for living and storage facility for family members.

In our process of building the facility we were approached by a Maine licensed caregiver, who inquired about leasing the facility to legally grow medical marijuana. He stated that he would live at the facility while following all legal local and state rules concerning state certified caregivers growing the legal amount of plants for his patients.

I now understand that it is the Code Enforcement Officer's opinion that renting to a tenant who is a medical marijuana caretaker, is not an allowed use in this residential zone. We have spoken with our attorney about this, and it is his opinion that the City of Biddeford cannot prohibit this use, and the City's ordinance doesn't have a definition of "medical marijuana growing facility" which is also problematic.

We would like to finish the building and understand that we are only approved for a residence and will not allow any medical marijuana to be grown at the property. We would thereby request that you lift the stop work order, as I am also providing you with the drawings you requested to show that the residence will be constructed to State and City standards.

We would like at the same time for you to issue a denial of our intent to rent the property to a marijuana caregiver, so we can appeal this decision to the Zoning Board of Appeals.

Regards,

Bill Sahagian

Alan Shepard

From: Alan Shepard <alan@shepardandreadlaw.com>
Sent: Monday, March 28, 2016 10:59 AM
To: 'robby.fecteau@bpd.net'
Cc: 'Brian Eagar'; 'Bill Sahagian'
Subject: Sahagian Map 1 Lot 36
Attachments: DOC032816.pdf

Roby:

This is a follow up to my earlier email, and the voice message I left today. My client need to get some word on their proposal to use the structure they are building on South Street for the growing of medical marijuana by a caretaker.

In conducting research on this issue, I saw how Biddeford adopted a moratorium back in 2010 when the medical marijuana law first authorized dispensaries. There was a letter written by the Town Planner to Maine Municipal at that time seeking an opinion on whether the City could prohibit what he called "stand alone growing facilities that serve such dispensaries".

I have included a copy of that letter along with the reply by Richard Flewelling of Maine Municipal. As you can see from his letter. Mr. Flewelling was of the opinion that all the City could do was restrict the location of dispensaries, and that all other regulations were preempted by State law.

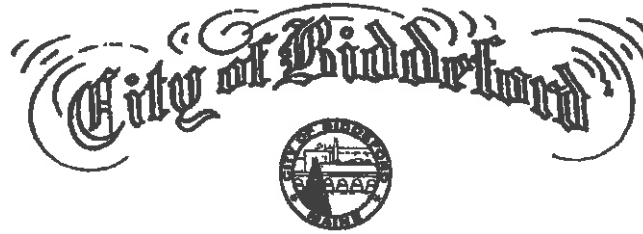
It seems to me that at best, the classification of " Medical Marijuana Growing Facilities " as a use restricted to some zones, was an attempt to regulate facilities that supply marijuana to dispensaries. It was never intended to regulate the ability of a person to grow marijuana as a caregiver for individual patients (the law allows growing for up to 5 patients).

The attached information which I got online out of the September 2010 Council package, also appears to strike the section that would regulate "Medical Marijuana Growing Facilities". Since it appears that Mr. Flewelling was advising against this regulation, I am wondering when or if this got officially accepted. This is more of a curiosity since I do not believe that even if the use of " Medical Marijuana Growing Facilities" was adopted into the ordinance, I do not think it applies to caregiving operations.

As you know my clients are working to get the building finished and it is critical for the final construction that they know whether a caregiving operation will be allowed. So I am asking you to give this some priority, and if you are still of the opinion that it is a prohibited use, then I would ask that you deny them the use, so we can file a timely appeal with the ZBA.

Thanks

Alan E. Shepard
Shepard & Read
93 Main St.
Kennebunk, Maine 04043
(207) 985-2291
(207) 985-2326
alan@shepardandreadlaw.com
Real estate paralegal: Susan Harrington
e-mail: sue@shepardandreadlaw.com



2010.93 IN BOARD OF CITY COUNCIL...SEPTEMBER 7, 2010
 BE IT ORDAINED, by the City Council of Biddeford, Maine to amend the Code of Ordinances of the City of Biddeford as follows:

Part III (Land Development Regulations), Article V (Establishment of Zones), TABLE A:

	Article VI Section ¹	B-2	I-1	I-2	I-3	Medical
<u>Medical Marijuana Dispensaries</u>		€ 23, 24			€ 23, 24	€ 23, 24
<u>Medical Marijuana Growing Facilities</u>			€ 23	€ 23		

**Part III (Land Development Regulations), Article V (Establishment of Zones), TABLE A,
 Notes:**

23. All Medical Marijuana Dispensaries and Growing Facilities shall be governed by, and subject to, the Maine Department of Health and Human Services, Division of Licensing and Regulatory Services, 10-144 CMR Chapter 122 (as amended).
24. Medical Marijuana Dispensaries shall be Conditional Uses in the B-2 Zone only as follows:
 (a) West of Interstate 95; and
 (b) In the Route 1 area, south of Travers Street (i.e., the B-2 Zone south of, and including, now or formerly, Biddeford Tax Map 18, Lots 1 and 1-3, and Biddeford Tax Map 88, Lot 5).

Note 1: Since the Moratorium is set to expire September 12, 2010, Staff recommends that the City Council pass the amendments as emergency amendments to take effect immediately upon passage, so as to take effect prior to the moratorium's expiration of September 12, 2010. *Note: Charter Reference: Article III, §8. Procedure.*

September 7, 2010

Motion by Councilor Mills, seconded by Councilor G. Lamontagne to grant the first reading of the order.

Motion by Councilor Boston, seconded by Councilor Gagnon to amend the ordinance by removing all but the Use in the I-3 Zone for Medical Marijuana Dispensaries; and to remove Medical Marijuana Growing Facilities completely.

Motion by Councilor Emerson, seconded by Councilor Boston to amend the amendment to change the Use in the I-3 Zone from conditional use to permitted use.

Vote: 3/6; Councilors Emerson, Boston and Gagnon in favor.

Councilors Bourque, Fleurent, A. Lamontagne, Mills, Laverriere and G. Lamontagne opposed. The 2nd amendment fails.

Vote on 1st amendment: 6/3; Councilors Bourque, G. Lamontagne and Mills opposed.

Councilors Emerson, Fleurent, A. Lamontagne, Laverriere, Gagnon and Boston in favor. Amendment carries.

Vote on ordinance, as amended: 5/4; Councilors Fleurent, Bourque, G. Lamontagne and Mills opposed.

Councilors Emerson, A. Lamontagne, Laverriere, Gagnon and Boston in favor.

1st Reading carries.

Motion by Councilor Laverriere, seconded by Councilor G. Lamontagne to suspend the rules to allow for the 2nd Reading so that this ordinance may take effect immediately upon passage, so as to take effect prior to the moratorium's expiration of September 12, 2010.

Vote: 8/1; Councilor Fleurent opposed.

Councilors Emerson, Bourque, A. Lamontagne, Mills, Laverriere, Gagnon, Boston and G. Lamontagne in favor. Motion carries.

Vote on 2nd Reading: 8/1; Councilor Fleurent opposed.

Councilors Emerson, Bourque, A. Lamontagne, Mills, Laverriere, Gagnon, Boston and G. Lamontagne in favor.

2nd Reading carries.

Attest by: _____
Carmen J. Lemieux, City Clerk



From: Tansley, Greg [mailto:gtansley@Biddefordmaine.org]
Sent: Thursday, September 09, 2010 12:46 PM
To: Legal Services Department
Subject: City of Biddeford - Attention: Richard Flewelling

Attn: Richard Flewelling

Hello Richard,

I will try to explain in brief what I talked to you earlier about on the phone.

The City of Biddeford Tuesday night adopted a Zoning Ordinance Amendment that allows for Medical Marijuana Dispensaries (with associated growing facilities "on-site" only) in a particular zone in Biddeford.

The City also specifically "zoned-out", or in other words, prohibited stand-alone growing facilities in the City of Biddeford.. My understanding is that State Law specifically provides for stand-alone growing facilities as a means to produce the medicine to be provided at dispensaries.

Citing 10-144 CMR Chapter 122, Rules Governing the Maine Medical Use of Marijuana Program, Section 6.6 (Local regulation of dispensary): "These rules do not prohibit a political subdivision of this State from limiting the number of registered dispensaries that may operate in the political subdivision or from enacting reasonable regulations applicable to registered dispensaries", the question has arisen regarding whether or not Biddeford, or any community for that matter, can prohibit stand-alone growing facilities, especially given that they serve the dispensaries that are identified by State Policy, Legislation, and Rules, as permitted and of import to "the citizens of Maine who will benefit from the use of medical marijuana" (Brenda M. Harvey, Commissioner, State of Maine Department of Health and Human Services, January 27, 2010 transmittal to John Elias Baldacci, Governor of Maine).

The issue at hand appears to me to be the ability for a community to prohibit this, or any other use for that matter, that is lawful within the State of Maine. Does the Legislation and Rules related to Medical Marijuana pre-empt a community's Home Rule Authority regarding the ability to prohibit not only dispensaries, but also stand-alone growing facilities that serve such dispensaries?

I look forward to you response and opinion regarding this matter, and an e-mail response would be preferred to letter.

Please contact me if you have any questions.

Sincerely,

Greg D. Tansley, AICP
 City Planner
 Biddeford, Maine
 207-284-9115

See below....

From: Legal Services Department [mailto:Legal@memun.org]
Sent: Monday, September 13, 2010 2:50 PM
To: Tansley, Greg
Subject: RE: City of Biddeford - Attention: Richard Flewelling

Dear Greg,

You have asked whether a municipality may legally prohibit stand-alone marijuana cultivation facilities within its corporate limits under the State's newly revised medical marijuana law (Maine Medical Use of Marijuana Act, 22 M.R.S.A. Sections 2421-2430-A). Because your deadline and my schedule do not permit it, I have not researched your question in depth. However, I have previously considered similar questions from other municipalities and have concluded that municipal authority to regulate in this field is probably limited to that authority expressly acknowledged in 22 M.R.S.A. Section 2428(10), which reads, "This chapter does not prohibit a political subdivision of this State from limiting the number of dispensaries that may operate in the political subdivision or from enacting reasonable regulations applicable to dispensaries."

Municipalities in Maine do of course have broad "home rule" ordinance authority (see Maine Constitution, Article VIII, Part 2, Section 1; 30-A M.R.S.A. Section 3001). This local power to regulate is curtailed, however, where State law has denied ("preempted") it, either expressly or by clear implication. Although there is no express preemption of municipal authority in the new medical marijuana law, in my opinion it clearly implies a preemption of local authority (except for the expressly acknowledged authority in Section 2428(10), quoted above). This is because, in my view, the new law establishes a comprehensive statewide scheme of regulation that is intended to occupy the field and which would be frustrated by local regulation that is not otherwise expressly authorized (again, see above).

Accordingly, in my opinion any municipal ordinance regulating any activity already regulated under the State's new medical marijuana law is probably preempted and, as a result, unenforceable except to the extent it is clearly authorized under 22 M.R.S.A. Section 2428(10). Of course, I encourage you to consult the City's attorney as well.

I hope this abbreviated opinion is helpful. Please let me know if you have anything further.

Best regards,

Richard P. Flewelling, Assistant Director
Legal Services Department

Maine Municipal Association
60 Community Drive, Augusta, ME 04330
1-800-452-8786 (in-state)
207-623-8428
FAX 207-624-0187
legal@memun.org

This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you.

**MUNICIPAL OFFICERS MEETING
SEPTEMBER 21, 2010**

Mayor Twomey called the meeting to order at 7:00 p.m.

Roll Call: James Emerson, David Bourque, Clement Fleurent, Alfred Lamontagne, Bob Mills, Rick Laverriere, Raymond Gagnon, Patricia Boston, George Lamontagne

The Council honored the Flag by reciting the Pledge of Allegiance.

There were no adjustments to the agenda.

Presentation: Update on Diamond Match Property

Brian Phinney, Environmental Code Officer, gave a brief update on the status of the Diamond Match Property Project. A conceptual design has been completed and now the council needs to decide if they want to proceed with an RFP for construction-level design. Funds for this work are available through CDBG.

Community Notes: None

Public Addressing the Council..(5 minute limit per speaker)
Many citizens addressed their concerns to the Council.

Motion by Councilor Laverriere, seconded by Councilor Mills to adjourn.

Vote: Unanimous.

Time: 7:47 p.m.

**COUNCIL MEETING
SEPTEMBER 21, 2010**

Mayor Twomey called the meeting to order at 7:47 p.m.

Roll Call: James Emerson, David Bourque, Clement Fleurent, Alfred Lamontagne, Bob Mills, Rick Laverriere, Raymond Gagnon, Patricia Boston, George Lamontagne

Adjustment to the Agenda:

- Remove the Executive Session

Consideration of Minutes: **September 7, 2010**

Motion by Councilor Laverriere, seconded by Councilor Mills to accept the minutes as printed.

Vote: Unanimous.

Second Readings:

{For a copy of the orders and first readings, see the Council meeting minutes of Sept. 7, 2010}

2010.91) Amendment/Ch. 42, Motor Vehicles & Traffic/Sec. 42-104 – Closed to Vehicular Traffic/Bradbury Street Extension

Motion by Councilor Laverriere, seconded by Councilor G. Lamontagne to grant the second reading of the ordinance.

Vote: 6/3; Councilors Gagnon, Boston and A. Lamontagne opposed.

Councilors Emerson, Bourque, Fleurent, Mills, Laverriere and G. Lamontagne in favor.

Motion carries.

Motion by Councilor Laverriere, seconded by Councilor Mills to reconsider the 2nd Reading of the ordinance.

Vote: Unanimous.

Motion by Councilor Mills, seconded by Councilor Laverriere to grant the second reading of the ordinance.

Vote: 6/3; Councilors Gagnon, Boston and A. Lamontagne opposed.

Councilors Emerson, Bourque, Fleurent, Mills, Laverriere and G. Lamontagne in favor.

Motion carries.

2010.93) *Reconsideration:* Amendment/LDR, Part III, Art. V, Table A – Table of Land Uses/Medical Marijuana Dispensaries & Growing Facilities

Motion by Councilor Mills, seconded by Councilor Laverriere to reconsider the 2nd Reading and amendment of Order 2010.93, made at the September 7th Council Meeting.

Vote: 7/2; Councilors Boston and Fleurent opposed

Councilors Emerson, Bourque, A. Lamontagne, Mills, Laverriere, Gagnon and G. Lamontagne in favor. Motion carries.

Motion by Councilor Bourque, seconded by Councilor Mills to amend the ordinance to revert back to the original language, as was presented at the September 7, 2010 Council Meeting.

Motion by Councilor Laverriere, seconded by Councilor Boston to amend the amendment to allow stand alone facilities in the I-3 Zone and to send the ordinance back to the Planning Board.

Vote: 3/6; Councilors Boston, Laverriere and Fleurent in favor.

Councilors Emerson, Bourque, A. Lamontagne, Mills, Gagnon and G. Lamontagne opposed. Amendment fails.

Motion by Councilor Boston, seconded by Councilor Laverriere to amend the amendment to allow growing facilities in the I-1 Zone and Dispensaries in the I-3 Zone.

Vote: 3/6; Councilors Boston, Emerson and Laverriere in favor.

Councilors Bourque, Fleurent, A. Lamontagne, Mills, Gagnon and G. Lamontagne opposed. Amendment fails.

Vote on original amendment (Bourque/Mills) and 2nd Reading: 5/4; Councilors Emerson, Boston, Fleurent and Laverriere opposed.

Councilors Bourque, A. Lamontagne, Mills, Gagnon and G. Lamontagne in favor.

Motion carries.

Orders of the Day:

2010.95

IN BOARD OF CITY COUNCIL..SEPTEMBER 7, 2010

BE IT ORDAINED, by the City Council of the City of Biddeford that the Revised Code of Ordinances, Chapter 2, Article V Finance, Division I, Generally, is hereby amended by adding a section to be numbered 2-327, which section reads as follows:

Sec. 2-327 Municipal Service Fee.

A) Authority:

Pursuant to 36 M.R.S.A. §508, the City of Biddeford may impose a municipal service fee on tax-exempt entities deriving income from the rental of residential real estate.

B) Applicable to Properties Exempt from Property Taxes.

1. Exempted Property:

Pursuant to 36 M.R.S.A. §652, properties in the City that are owned by benevolent and charitable institutions shall be exempt from property taxation. This section incorporates by reference the definitions of "benevolent and charitable institutions in accordance with 36 M.R.S.A. §652.

2. Municipal Service Fee Imposed On property Used as Rental Property; Exception.

Pursuant to authority granted under 36 M.R.S.A. §508, the owners of residential properties exempt from taxation under 36 M.R.S.A. §652 that are used to provide rental income (with the exception of student housing or parsonages), and for which a landlord/tenant relationship exists; shall pay to the City of Biddeford a service fee in lieu of a property tax.

3. Calculation of Fee.

The fee for services in lieu of property tax shall be calculated according to the actual costs of providing municipal services to the property. Municipal services included in the calculation shall mean and include all services provided by the City of Biddeford except for education and welfare. In no instance shall this fee exceed two percent (2%) of the gross annual revenues of the institution or organization, derived from the rental of residential units located within the City of Biddeford.

Biddeford Code of Ordinance

PART III LAND DEVELOPMENT

ARTICLE II DEFINITIONS

AGRICULTURE

The production, keeping or maintenance for sale or lease of plants and/or animals, including but not limited to, forages and sod crops; grains and seed crops; dairy animals and dairy products; poultry and poultry products; livestock, fruits and vegetables; and ornamental and greenhouse products. Agriculture does not include forest management or timber harvesting activities.

COMMERCIAL GARDENING

Any land area in which plants, vegetables, flowers and similar materials are grown for sale.

COMMERCIAL GREENHOUSE

Any structure in which plants, vegetables, flowers and similar materials are grown for sale.

MEDICAL MARIJUANA GROWING FACILITY

No definition

Alan Shepard

From: Alan Shepard <alan@shepardandreadlaw.com>
Sent: Wednesday, June 29, 2016 10:44 AM
To: 'Fecteau, Roby'
Cc: 'Keith R. Jacques'; 'bsahagian@miklintech.com'
Subject: RE: Sahagians Map 1 Lot 36

Roby:

Thanks for your detailed response. It was the intent from the beginning to have an apartment for a resident caregiver, who happens to be a close friend of the owner. The idea of "renting to a caregiver" would be someone that was not residing in the building. In this case it looks like the second caregiver will be the daughter of the friend of the owners, which affords even more flexibility under State law.

I think the State law is clear that anyone with a caregiver's license can grow in their residence, and I do not believe the Town can legally restrict this activity. Beyond this there is nothing in the Biddeford Land Use Ordinance that I have seen that would prevent another caregiver from leasing a space in a residential neighborhood.

The moratorium is for dispensaries and growing facilities. As you know there is currently no definition for "growing facility" in the ordinance, so I do not think you can use that to deny my clients the right to a second caregiver.

I also do not see why they would have to make a new application. I think as the ordinance now stands, I do not think they even needed to describe what they were intending to do in the lease/storage areas, but the choice was to not hide anything.

We would ask that you issue the COO on the one caregiver occupation, and then consider our request for a second caregiver as a separate matter. If you deny that request we will seek the legal remedies. That being said, I do not think that the ordinance as it now stands prohibits this in any way. This is cultivation of a product that would be no different from constructing a greenhouse for tomatoes or flowers that may be sold off premises.

I am sure that you have already contemplated that the timing of this request is related to the potential changes to the land use ordinance, which by the recent memo may contemplate defining "growing facility" as having more than one caregiver in the same location. In the memo it openly contemplated that this may run afoul of State law, and I think that warning is well founded. There are over 2,000 registered caregivers in the State, and I think most of these are in private residences that often have more than one caregiver.

I would be more than happy to talk more about this by phone, but will otherwise await your response.

Alan E. Shepard
Shepard & Read
93 Main St.
Kennebunk, Maine 04043
(207) 985-2291
(207) 985-2326
alan@shepardandreadlaw.com
Paralegal: Rosemary Faridani
e-mail: rosemary@shepardandreadlaw.com
website: www.shepardandreadlaw.com

Alan Shepard

From: Fecteau, Roby <robby.fecteau@bpd.net>
Sent: Wednesday, June 29, 2016 12:03 PM
To: Alan Shepard
Cc: 'Keith R. Jacques'; bsahagian@miklitech.com
Subject: RE: Sahagians Map 1 Lot 36
Attachments: SCode Enfor16062911090.pdf; SCode Enfor16062911310.pdf

Good Morning Alan,

I do not believe I can fulfill your request to issue a Certificate of Occupancy "on the one caregiver occupation" because of the Certificate of Occupancy requirements stated in the ordinance(Which I have attached) clearly states it must be in compliance with the ordinances. As you mentioned, Biddeford doesn't address caregivers/ growing facilities . On the other hand, I have also attached the original building permit. I have no issue with issuing a CO if construction complies with the ordinances of the city Biddeford and the construction complies with the Current building Code. PLEASE NOTE: I have attached the latest drawing (this drawing has changed 3 times) and the actual construction for the dwelling does not comply with the Building code, therefore an occupancy for permit #16-12-241 will not be issued.

Thanks
Roby

From: Alan Shepard [mailto:alan@shepardandreadlaw.com]
Sent: Wednesday, June 29, 2016 10:44 AM
To: Fecteau, Roby
Cc: 'Keith R. Jacques'; bsahagian@miklitech.com
Subject: RE: Sahagians Map 1 Lot 36

Roby:

Thanks for your detailed response. It was the intent from the beginning to have an apartment for a resident caregiver, who happens to be a close friend of the owner. The idea of "renting to a caregiver" would be someone that was not residing in the building. In this case it looks like the second caregiver will be the daughter of the friend of the owners, which affords even more flexibility under State law.

I think the State law is clear that anyone with a caregiver's license can grow in their residence, and I do not believe the Town can legally restrict this activity. Beyond this there is nothing in the Biddeford Land Use Ordinance that I have seen that would prevent another caregiver from leasing a space in a residential neighborhood.

The moratorium is for dispensaries and growing facilities. As you know there is currently no definition for "growing facility" in the ordinance, so I do not think you can use that to deny my clients the right to a second caregiver.

I also do not see why they would have to make a new application. I think as the ordinance now stands, I do not think they even needed to describe what they were intending to do in the lease/storage areas, but the choice was to not hide anything.

We would ask that you issue the COO on the one caregiver occupation, and then consider our request for a second caregiver as a separate matter. If you deny that request we will seek the legal remedies. That being said, I do not think that the ordinance as it now stands prohibits this in any way. This is cultivation of a product that would be no different from constructing a greenhouse for tomatoes or flowers that may be sold off premises.



OFFICE OF CODE ENFORCEMENT

Certificate of Occupancy

This is to certify that the following property has been approved and may now be occupied in accordance with the ordinances and laws governed by the City of Biddeford and the State of Maine.

Date: 08-19-2016

Tax Map and Lot: 1-36-1

E911 Street Address: 674 South St.

Building Permit Date: 11-24-2015

Building Permit #: 16-12-241

Roof Construction:

Primary Use: 40 x 60 building with dwelling unit inside

TEMPORARY C/O conditions: none

If Business, list **TWO (2)** 24 hour emergency contact names and telephone numbers.

If occupancy is granted for a business, you must adhere to all restrictions placed upon your business by the Planning Board. Refusal may result in this occupancy permit being revoked and Land Use citations being issued.

Issued to: William Sahagian

6 Riverside Dr

Marblehead, MA 01945

Signed by:


Building Inspector

Electrical Inspector

Distribute to:

Owner/agent
File
Assessor
Police Department
Engineering

BIDDEFORD CODE

	Article VI Section*	SR-1	CR	B-1-A	R-2	R-3	E-1	E-2	I-1	I-2	I-3	W-1	W-2	W-3	R-F	LR-F	M	IN*	OR	MSRD-1*	MSRD-2	MSRD-3	
Commercial gardening, commercial greenhouse*	17	C	C	C											P								
Commercial recreation*	18						C	C	C						P								
Commercial school*	33						P	F			C				C						P		P
Drugs/medical supply							P	F													P		P
Financial institution							P	F									P				P		P
Firewood processing*	33						P	F	C									C19			P		P
Fisheries processing, storage*	34														P	P							P
Funeral parlor							P	P	P			P											
Gasoline service station*	36						P	F	P														P
Hotel/motel*	40						P	F	P						C								
Indoor theater							P	F	P				P								P		P
Kennel, veterinary hospital*	42							P	P												P		P
Medical marijuana dispensaria									P						P								P
Medical marijuana growing facilities									C23, 24			C23						C23					
Neighborhood convenience store/service		C4	C4	C4	P	P	P	P		C23	C23												
Off-street loading and parking lot and facilities, commercial parking garage	49				C	P	P	P	P		A	P	P	P	C						P	C	
Office, business and professional*	52						P	P	P	P	F		P	P							P	C	P
Planned unit developments*	73						C	C									P10		C		P	C	P
Publishing, printing							P	F	P	P	P										C		C
Restaurant*	56						P	F	P	P	P								C		P		P
Retail store							P	F	P		P	P	P	P	C		C				P		P
Sawmill*	33											P	P	P	C		C				P		P
Services																							
Shopping center							P	F	P		P		P	P	C		C				P		P
Telecommunications facilities	71						C	C	C		C								C		P		P
Wholesale business											C				C	C							P
Industrial uses:																							
Air transportation related use											C												P
Air transportation dependent use*											C												
Airport	4								C	C													
Bulk oil terminal*	41								C	C													

BIDDEFORD CODE

	Article VI Section*	SR-1	CR	R-1-A	R-2	R-3	B-1	B-2	I-1	I-2	I-3	W-1	W-2	W-3	R-F	LR-F	M	IN ¹⁸	OR	MSRD-1 ¹⁹	MSRD-2	MSRD-3	
Outdoor, nature-based uses																							
Agriculture ^a	3, 31														F								
Agricultural products processing and storage ^a	3, 31								P						F								
Animal breeding or care	42														F								
Campground ^a	13														C								
Cemetery	14.1	C	C	C	C	C									F	C			C19				
Extractive industry ^a	30							P2	P2						F2	P2							
Farm stands ^a IS	31														F								
Timber harvesting	64		C												P	P ¹			C19				
Golf course excluding miniature golf		P	P	P											P								
Parks and recreation ^a		P	P	P	P	P	P	P	P	P	P	F	P	P	P	P			V19		P	P	P

NOTES:

* This column has been provided to serve as an aid in finding specific performance standards, but does not address all standards that may apply. Please consult Article VI for subsequent standards that may apply to a particular project. All uses cited above are subject to specific lot and setback, height, and performance requirements, as well as specific notes below:

1. Multifamily use shall not exceed 10 units per structure.
2. Requires Planning Board approval.
3. Accessory structures shall be limited to:
 - (a) Private detached garages for the storage of no more than three automobiles.
 - (b) Private greenhouses less than 200 square feet in floor area.
 - (c) Private swimming pools.
 - (d) Storage sheds, provided that they are uninhabitable and less than 200 square feet in area.
 - (e) Decks, porches, patios, gazebos, summerhouses, and other structures intended for outdoor use, provided they are uninhabitable.
4. No closer than 1,000 feet to another similar facility.
5. (Reserved)
6. (Reserved)
7. Drive-through establishments (except as provided in Note 8) and street level residential uses are prohibited in the MSRD-1 Commercial Core District in the following areas:
 - (a) Along both sides of Main Street between the intersection of Elm Street (Route 1) and Main Street through to the Saco City Line north of Water Street;
 - (b) On both sides of Adams Street from Main Street to Jefferson Street;
 - (c) On the north side of Jefferson Street from Main Street to Alfred Street;
 - (d) On both sides of Washington Street from Main Street to Jefferson Street;
 - (e) On both sides of Federal Street between Washington Street and Franklin Street;
 - (f) On both sides of Franklin Street;
8. Financial institutions are permitted drive-throughs limited to two lanes, are a conditional review by the Planning Board, and must adhere to the following standards:
 - (a) Located on the side or rear of the building and never between the building and the Main Street.
 - (b) Access drive located to minimize impact on pedestrians:
 - Not between building and the street;
 - Entrance from a side street where possible;
 - Sidewalk material carried across any driveways.
 - (c) Adequate queuing land preferably separate from the parking lot.
 - (d) Architectural treatment compatible with main building.

Shepard & Read

ATTORNEYS AT LAW

93 MAIN STREET KENNEBUNK, MAINE 04043

ALAN E. SHEPARD
BRUCE M. READ

Tel: (207) 985-2291
Fax: (207) 985-2326
EMail: alan@shepardandreadlaw.com

July 25, 2016

Mr. Roby Fecteau
Code Enforcement Officer
City of Biddeford
205 Main Street
Biddeford, ME 04005

Re: Sahagian R1/36/1 Sell Street Property

Dear Roby:

As a follow up to the recent conditional certificate of occupancy that was issued for the above-referenced property, my clients want to allow this same space to be used for a second caregiver licensed by the State under the Medical Marijuana Law.

While I do understand that there is a moratorium in place, I do not believe that this moratorium applies to caregiving operations in a residential zone. As I understand it, the council voted on a moratorium for medical marijuana dispensaries, and also "medical marijuana growing facilities".

There is no definition for "marijuana growing facilities" in the ordinance. As I see it, this was an attempt to regulate dispensaries and growing facilities related to these dispensaries. There is nothing in the ordinance or under State Law to suggest that a marijuana growing facility covers a caregiving operation, and there are several attorneys including counsel for Maine Municipal that have given an opinion that Towns are pre-empted from regulating caregiving facilities in residential properties..

My client's property is in the R-F zone which allows by right "commercial gardening" and a "commercial greenhouse". Under the ordinance, commercial gardening and a commercial greenhouse is an "area in which plants, fruits, vegetables, flowers and materials are grown for sale".

These are permitted uses in this zone. As such, my client should be able to grow medical marijuana just as they can grow fruits, vegetables, flowers, and plants as a gardening operation.

While I do not think technically my clients have to apply for permission for a second caregiver, this letter should serve as an official request. If the code office is under the opinion that a second caregiver is not allowed in the zone or if somehow the moratorium applies to this request, then I would ask that you issue a denial and the matter can be pursued through the zoning board of appeals.

If you have any questions or need any further information, please feel free to contact me.

Yours truly,

SHEPARD & READ



Alan E. Shepard, Esquire

AES:rf

cc: Bill Sahagian
Jay Sahagian
Keith Jacques, Esq.

WOODMAN EDMANDS DANYLIK AUSTIN
SMITH & JACQUES, P.A.

ATTORNEYS-AT-LAW

ROBERT B. WOODMAN
THOMAS DANYLIK
RALPH W. AUSTIN
JAMES B. SMITH
KEITH R. JACQUES
MICHAEL J. O'TOOLE
HARRY B. CENTER II
SANDRA L. GUAY
AMY McNALLY

234 MAIN STREET
P.O. BOX 468
BIDDEFORD, ME 04005-0468
TELEPHONE: 207-284-4581
FAX: 207-284-2078
E-MAIL: KRJ@woodedlaw.com

PETER L. EDMANDS
(Retired)

August 5, 2016

VIA FIRST CLASS MAIL & E-MAIL – alan@shepardandreadlaw.com

Alan Shepard, Esq.
Shepard & Read
93 Main Street
Kennebunk, ME 04043

RE: Sahagian R1/36/1 South Street Property

Dear Alan:

Roby Fecteau has asked that I respond to your letter dated July 25, 2016 regarding the above property. I understand that a Certificate of Occupancy has been issued and that one caregiver currently is growing medical marijuana on the property. Your July 25, 2016 letter seeks approval for a second caregiver to operate on the property.

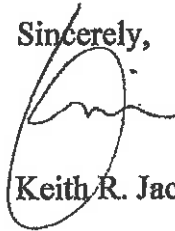
As you know, on April 5, 2016, the Biddeford City Council implemented a six month moratorium on the establishment of any new medical marijuana dispensaries and/or growing facilities within the City. Unless extended, the six month moratorium expires in October 2016. The moratorium had been in place for almost four months when your client first requested authorization for a second caregiver.

While the duly enacted moratorium is in effect, the Code Enforcement Officer is precluded from granting authorization for a second caregiver to operate on your client's South Street property. Once the moratorium is lifted, your client may renew his or her request to allow a second caregiver to operate out of the same South Street location.

Alan Shepard, Esq.
August 5, 2016
Page | 2

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith R. Jacques", written over a circular stamp or seal.

Keith R. Jacques

KRJ/cem

cc: Roby Fecteau, Code Enforcement Officer
James Bennett, City Manager