



**PLANNING & DEVELOPMENT DEPARTMENT
STAFF REPORT**

BOA Meeting Date: September 24, 2019

Item #: SE2019-03

**STAFF REPORT – 50A WYMAN AVENUE – SPECIAL EXCEPTION USE REQUEST /
MAJOR HOME OCCUPATION**

Project Name: 50A Wyman Avenue

Applicant: Tammie Snow, Esq

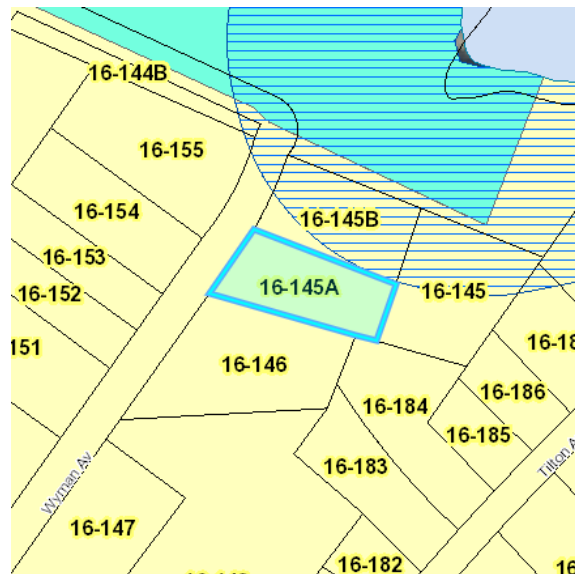
Owner: Mitchell Delaney

Proposed Development: Major home occupation: Medical marijuana primary caregiver

Requests: Special Exception Use per LUDC Section 16.7.3.2.4C.(9), seeking approval for a major home occupation as a medical marijuana primary caregiver

Site Addresses: 50A Wyman Avenue

Map & Lot Numbers: 16-145A



Current Zoning:

Residential – Urban (R-U) - The purpose of the Residential – Urban is to preserve the physical,

aesthetic and social quality of Kittery's urban area and, consistent with this goal, to provide therein for the location of a variety of residential uses in accordance with the standards of this title.

The existing dwelling use is permitted by right in the zone. The following uses are permitted as a Special Exception Use in the R-U Zone: (9) Major home occupations as an accessory use.

Staff Recommendation: **APPROVAL WITH CONDITIONS** of Special Exception Use request.

District Standards:

Residential – Urban (R-U) Zoning District Standards			
Land Area per DU	20,000 sf	Front Yard Setback (min.)	30 feet
Building Coverage (max.)	20%	Rear Yard Setback (min.)	15 feet
Lot Size	20,000 sf	Side Yard Setback (min.)	15 feet

Current Use: One dwelling unit.

Surrounding Land Uses:

West: Residential – Urban (R-U) and Shoreland Overlay Zone (OZ-SL), dwelling unit

East: Residential – Urban (R-U), dwelling unit

North: Residential – Urban (R-U) and Shoreland Overlay Zone (OZ-SL), dwelling unit

South: Residential – Urban (R-U), dwelling unit

Future Land Use:

The subject property is located within a Growth Area in the Future Land Use Map, defined in the Comprehensive Plan as “areas where the Town would like to encourage future development to occur.” Growth Area include parts of Town where 75% or more of future non-residential growth is expected, areas that are or can relatively easily be served by public facilities and services, are accessible by a variety of modes of transportation, promote more compact and denser pattern of development, and where there is existing development.

Site Description:

The subject property consists of approximately 18,134 square feet (.4163 acres) located along the western right-of-way of Wyman Avenue, a public road off of Whipple Road. The property is zoned Residential – Urban (R-U) and is a legal non-conforming lot. The property is not located in the Shoreland Overlay Zone, though their neighbors to the North and West are. The lot contains one single-family dwelling of approximately 1,762 square feet of living area.

History of the Property:

Prior to 2008 this property was part of the M16 L145. In 2008 a condominium agreement was entered to create Lot A and Lot B. In 2009 a single-family dwelling unit constructed on the subject property. Tax records show the dwelling consists of approximately 2,968 gross square feet area over three floors including 858 square feet of basement. The house is on public sewer. The existing primary structure is conforming as to the required front, side, and rear setbacks.

Description of the Issue:

The owner/applicant wishes to operate a licensed medical marijuana caregiver per Maine state law (22 M.R.S. § 2425) out of his home. The owner is proposing to use 744 square feet of the existing basement for a grow room. The application also includes a proposed 12'x18' shed be built and retrofitted into an office, where sales would take place. The owner further states that he has been granted an Individual Caregiver License from the Maine Medical Marijuana Program and provides a copy of the license.

Town Code provides certain standards for a major home occupation in Section 16.8.22.3 of the LUDC. The medical marijuana use is allowed with a registered primary caregiver in a dwelling unit. The Town has not opted in to any other provisions of state law to allow retail sales of marijuana.

Applicant's Special Exception Use Request:

Section 16.6.6 requires the Board of Appeals to use the following process when hearing requests:

§ 16.6.6 Basis for decision.

A. Conditions.

- (1) In hearing appeals/requests under this section, the Board of Appeals must first establish that it has a basis in law to conduct the hearing and decide the question.*

LUDC Section 16.6.4.D.(1) allows the Board of Appeals to “hear, decide and may grant an applicant's special exception use request where authorized in Chapter 16.3 for any application excluded from Planning Board review as stated in § 16.10.3.2, if the proposed use meets the criteria set forth in § 16.6.6, Basis for decision.” Since this property is not in the Shoreland Overlay or Resource Protection Overlay Zones, the special exception use request falls to the Board of Appeals.

The requested activity is a major home occupation, defined in the code as “a type of home occupation that fails to meet all of the standards for a minor home occupation established in § 16.8.22.2, but is found by the Board of Appeals to satisfy the standards established in § 16.8.22.3 to ensure that a business results in no more than a minor intrusion in the quality of life of residents in the surrounding neighborhood.” Home occupations as an accessory use are allowed only as a Special Exception Use in the Residential – Urban (R-U) zone.

- (2) In hearing appeals/requests under this section, the Board of Appeals must use the following criteria as the basis of a decision, that:*

- (a) The proposed use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use zones;*

The use can be granted only as an accessory use by the Board of Appeals, and will not prevent the orderly and reasonable use of adjacent properties. All adjacent properties are zoned Residential – Urban containing the same single dwelling use as the subject property

and have the same opportunity to apply for home occupations per the code.

- (b) *The use will not prevent the orderly and reasonable use of permitted or legally established uses in the zone wherein the proposed use is to be located or of permitted or legally established uses in adjacent use zones;*

The use will not prevent the orderly and reasonable use of legally established uses in the zone since the use is the same as adjoining properties and there are no use restrictions between adjacent dwelling units in the zone.

- (c) *The safety, the health and the welfare of the Town will not be adversely affected by the proposed use or its location; and*

The use will not adversely affect the health and welfare of the Town, as long as conditions are met to ensure safe and legal operations.

- (d) *The use will be in harmony with and promote the general purposes and intent of this title.*

The use is in harmony with Title 16 and promotes its general purposes.

Factors for consideration. In making such determination, the Board of Appeals must also give consideration, among other things, to:

- (1) *The character of the existing and probable development of uses in the zone and the peculiar suitability of such zone for the location of any of such uses;*

The use involved is legally permitted in the zone, per review by Board of Appeals.

- (2) *The conservation of property values and the encouragement of the most appropriate uses of land;*

The proposed home occupation will occur within the existing dwelling unit, which is an appropriate and compatible use of the land.

- (3) *The effect that the location of the proposed use may have upon the congestion or undue increase of vehicular traffic congestion on public streets or highways;*

There is no proposed change in the underlying use of the property nor increase in density of the existing dwelling unit. The applicant will presumably accept clients arriving via cars. Client vehicular traffic should conform to the hours of operation restrictions in the code or imposed by the Board. Off-street parking for the home occupation shall be provided in the driveway.

- (4) *The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use;*

The property is connected to adequate sewer systems.

- (5) *Whether the use, or materials incidental thereto, or produced thereby, may give off obnoxious gases, odors, smoke or soot;*

The proposed use has the potential for odors and the applicant has proposed the installation of 3 Q Max 8” Pro Series fans with attached charcoal filters to abate any odors.

- (6) *Whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise;*

The use causes no disturbing emission of electrical discharges, dust, light, vibration or noise.

- (7) *Whether the operations in pursuance of the use will cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities, if existing, or if proposed by the Town or by other competent governmental agency;*

No undue interference should result from this use.

- (8) *The necessity for paved off-street parking;*

The property has suitable existing space for off-street parking.

- (9) *Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use, or by the structures to be used, or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus, or by the undue concentration or assemblage of persons upon such plot;*

The applicant proposes to install lights in a grow room, which could put significant strain on the typical residential electrical system. The applicant must verify the electrical system can handle the additional load from such lights. Any fire hazards can be mitigated with proper construction and inspection.

- (10) *Whether the use, or the structures to be used, will cause an overcrowding of land or undue concentration of population or unsightly storage of equipment, vehicles or other materials;*

No overcrowding should result from this use.

- (11) *Whether the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof;*

The existing lot is a legal, non-conforming lot of record.

- (12) *Whether the proposed use will be adequately screened and buffered from contiguous properties;*

Adequate existing vegetation exists.

- (13) *The assurance of adequate landscaping, grading and provision for natural drainage;*

No changes are proposed to the land, which already includes adequate drainage.

- (14) *Whether the proposed use will provide for adequate pedestrian circulation;*

No existing pedestrian facilities currently existing.

- (15) *Whether the proposed use anticipates and eliminates potential nuisances created by its location; and*

The applicant must take care to avoid any public nuisances, abate any odors emanating from the use, and abide by restrictions on hours of operation.

- (16) *The satisfactory compliance with all applicable performance standard criteria contained in Chapters 16.8 and 16.9.*

Other than the request applied by the applicant here, the property conforms to Title 16.8 and 16.9 in its existing state. The applicant must abide by specific conditions outlined in section 16.8.22.3 and any conditions placed on the use by the Board of Appeals.

16.6.6.C. Additional special exception conditions. Special exception approvals may be subject to additional conditions as determined by the BOA, including the following:

- (1) *Front, side or rear yards in excess of minimum requirements*
- (2) *Modifications of the exterior features of buildings or other structures;*
- (3) *Limitations on the size of buildings and other structures more stringent than the minimum or maximum requirements;*
- (4) *Regulation of design of access drives, sidewalks and other traffic features;*
- (5) *Off-street parking and loading spaces in excess of the minimum requirements; or*
- (6) *Restrictions on hours of operation.*

Using the standards and criteria found in the LUDC, Staff recommends **APPROVAL WITH CONDITIONS** of the Special Exception Use request for a major home occupation as a medical marijuana licensed primary caregiver in an existing dwelling unit located in the R-U zone, with the following conditions:

1. The owner must abide by all provisions of Maine State Law on medical marijuana licensed caregivers, 22 M.R.S. § 2425.
2. The applicant must be a resident of the dwelling on the premises where the home occupation will occur. An applicant who is not the owner of the property, but is residing on the premises, must submit written permission of the property owner for the proposed home occupation.
3. The maximum total amount of square footage attributed to the home occupation use must not exceed 1,480 square feet.
4. There must be no more than five adults, inclusive of residents of the premises, working in the home occupation at the site at any one time.
5. No other major home occupations may be conducted on the premises while operating as a licensed medical marijuana caregiver.
6. One (1) sign no greater than eight (8) square feet is allowed for the home occupation.
7. Business activities involving clients or customers on the premises or vehicular traffic to and from the premises must not be conducted between the hours of 7:00 p.m. and 7:00 a.m. The applicant must submit a plan that provides safe and sufficient off-street parking to meet the needs of the business and prevent parking from overflowing off the site.
8. All outdoor storage of equipment, vehicles or items associated with the home occupation must be screened from view of abutting properties and from all streets except for one (1) vehicle used in conjunction with the home occupation and vehicles owned by residents of the premises with valid license plates.
9. All business activities on the site must take place within an enclosed building.
10. All refuse and recyclables must be stored in containers that are screened from view of abutting properties and from streets.
11. Prior to the installation of any lighting systems for the home occupation, an electrical load test of the dwelling's electrical system must be performed by a licensed electrician. The results of the load test must be shared with the Code Enforcement Officer.
12. A suitable ventilation system must be installed to abate any odors, subject to the

review and inspection by the Code Enforcement Officer.

- 13. The proposed home occupation will not be allowed to operate until all proposed interior improvements for the grow room and work area have been completed and inspected to the satisfaction of the Code Enforcement Officer, the Fire Chief, and the Police Chief.**
- 14. Upon approval of a major home occupation by the Board of Appeals and compliance with the above conditions, the Code Enforcement Officer is authorized to issue a certificate of occupancy permit for not more than a one-year time period. Such permit may be renewed annually upon application to the Code Enforcement Officer. The annual permit may be renewed only if the Code Enforcement Officer finds the major home occupation complies with all applicable standards of this Code and any conditions required by the Board of Appeals in the original approval.**