

City of Malden

Massachusetts

Board of Appeal
215 Pleasant St.
Malden, Massachusetts 02148

Telephone 781-397-7100

BOARD OF APPEAL DECISION

January 19, 2022 Hearing¹

Petition 22-001 by Christopher G Fallon² on behalf of Benevolent Botanicals LLC dba Continuum for a variance of MCC 12.12.190 (F) (1) (c) - Location of a Marijuana establishment within 75 feet of a residential use - Title 12 of the revised Ordinances of 2020 as amended of the City of Malden –as per Plans CMID-040216-2021 at the property known as and numbered 926 Eastern Ave, Malden, MA and also known by City Assessor's Parcel ID #127-433-306.

Findings of Fact

Petitioner is seeking to open a recreational marijuana dispensary and has applied for a variance of the City's "buffer requirement," which prohibits marijuana establishments from being located seventy-five feet from any residential use. Petitioner contends that, due to the many zoning requirements for establishments of this type, there are few locations in the City where a dispensary can be located. Additionally, Petitioner represented that this location has unique circumstances due to its location by a nearby bike trail, and Petitioner would suffer hardship because it would not be able to open this business without a variance.

Building Commissioner Nelson Miller appeared before the Board and explained that the sole matter before the Board was Petitioner's request for a variance, and that the City Council would need to approve Petitioner for a special permit as a later step in the overall approval for a marijuana establishment. The Board read into the record numerous letters of support for this petition and heard comments from many city residents in support of this dispensary. The Board read into the record several letters in opposition to this request and comments from several persons opposed to this variance.

Findings of Law

To grant a variance, the Board must find that (1) owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, (2) a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that (3) desirable relief may be granted without substantial detriment to the public good and (4) without nullifying or

¹ In accordance with the City of Malden Local Executive Order issued on January 4, 2022 regarding COVID-19, this meeting was held remotely via technological means, and no in-person attendance by members of the public was allowed.

² Attorney Patrick MacDonald represented Petitioner at the January 22, 2022 hearing.

substantially derogating from the intent or purpose of such ordinance or by-law. G.L. c. 40A, § 10A. “[A] decision of the board of appeals granting a variance cannot stand unless the board specifically finds that each statutory requirement has been met.” *Planning Bd. of Springfield v. Bd. of Appeals of Springfield*, 355 Mass. 460, 462 (1969).

The Board’s authority to grant a variance comes from G.L. c. 40A, § 10A, which does not permit the Board to consider many of the points that supporters of this project offered at the hearing. *Damaskos v. Board of Appeal of Boston*, 359 Mass. 55, 62 (1971) (“If variances (or exceptions, unless bestowed fairly in accordance with ascertainable standards properly stated in the zoning provisions) are granted with undue frequency or liberality, and without strict compliance with the prescribed statutory criteria, zoning regulations can become a matter of administrative whim.”).

The Board finds nothing unique about 926 Eastern Avenue, which would suggest that the City did not contemplate a parcel of this type when it passed the applicable zoning ordinances for marijuana establishments. The Board similarly does not find that Petitioner will suffer a hardship if the Board does not grant a variance. While Petitioner may not be able to open its business without a variance, hardship must “be based only upon circumstances which directly affect the real estate and not upon circumstances which cause personal hardship to the owner.” *Huntington v. Zoning Bd. of Appeals of Hadley*, 12 Mass. App. Ct. 710, 715 (1981).

The Board similarly finds that this variance would nullify the applicable zoning ordinances concerning marijuana establishments. The extensive, stringent requirements for such establishments suggest that the City purposely intended to limit the number of locations suitable for these businesses. Any change in this process must be made by the City Council—not the Board of Appeal.

Upon motion by Sherwin, which was seconded by King, the Board voted unanimously to DENY Petitioner’s request.

Decision filed with City Clerk: January 24, 2022

FINAL DATE for FILING APPEAL of DECISION with SUPERIOR COURT February 14, 2022

[Any appeal must be made pursuant to M.G.L. c. 40A, §17 and filed within 20 days after date this Notice is filed with City Clerk.]

Members of the Board Voting:

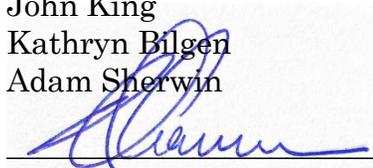
Nathaniel Cramer

William Sullivan

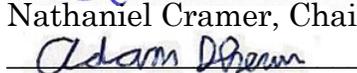
John King

Kathryn Bilgen

Adam Sherwin



Nathaniel Cramer, Chairman



Adam T. Sherwin, Esq.

Legal Member