



Rochester Hills

Minutes

Planning Commission

1000 Rochester Hills Dr.
Rochester Hills, MI
48309
(248) 656-4600
Home Page:
www.rochesterhills.org

Chairperson William Boswell, Vice Chairperson Deborah Brnabic
Members: Gerard Dettloff, Dale Hetrick, Greg Hooper, Nicholas O. Kaltsounis, David A. Reece, C. Neall Schroeder, Emmet Yukon

Thursday, November 4, 2010

7:00 PM

1000 Rochester Hills Drive

CALL TO ORDER

Chairperson William Boswell called the Special Meeting to order at 7:05 p.m. in the Auditorium.

ROLL CALL

Present 9 - William Boswell, Deborah Brnabic, Gerard Dettloff, Dale Hetrick, Greg Hooper, Nicholas Kaltsounis, David Reece, C. Neall Schroeder and Emmet Yukon

Quorum Present

Also present: Ed Anzek, Director of Planning and Economic Development
John Staran, City Attorney
Maureen Gentry, Recording Secretary

COMMUNICATIONS

A) Letter from City of Auburn Hills re: Rezoning Request on Auburn, west of Adams

DISCUSSION

2010-0441 Medical Marihuana Act - Informational Workshop and Discussion

(Reference: White Paper about the Medical Marihuana Act, prepared by Gerald Fisher, Consultant, dated October 5, 2010, and Editorial by Glenn Gilbert of the Oakland Press, dated October 23, 2010 had been placed on file and by reference became part of the record thereof.)

Mr. Anzek explained that the purpose of the forum was to engage public input. There had been a notice in the paper; it was posted on the website and he had received about 15 phone calls since last April from people who were interested, and they had been called. Some of those people were caregivers and some were patients. He noted that there were only three people in attendance, and Staff had anticipated more public

participation. He suggested that if there was limited participation, the Planning Commission could engage in some of the medical marihuana issues as they related to land use and how the City might deal with them.

Mr. Anzek recalled that the topic became a State initiated vote that was received favorably by 62% at the State level and 61.3% in Rochester Hills from an 85% turnout. There was a significant amount of support at the local level. He met with Mr. Staran and the Mayor about how to proceed. He met with other planning directors about how the matter could be implemented and controlled. There was not a clear direction one way or the other about how to do so. He noted that many articles had been published, and there was a broad array of opinions. He indicated that there were many concerns ahead.

Mr. Anzek continued that in trying to find a solution, the City was not fully prepared to establish any regulations, so City Council established a moratorium to give Staff time to prepare an ordinance. It was approved on July 19 and will expire on January 17, 2011. The public forum was part of the analysis, and they had hoped the audience would help educate everyone. He had brought a power point presentation, prepared by someone from the State, but he informed that the projector bulb was out. It had been shown at the Rochester-Auburn Hills coalition a couple of months ago, which some members of the Planning Commission had attended. He had contacted other local communities to see what they were proposing. Auburn Hills approved standards about a year ago regarding the distances away from residential and keeping the operations only in the business district, but in September of 2010 they adopted complete prohibition. Rochester adopted a moratorium a few weeks after the City did. Some communities refined things to avoid legal challenges. He stated that it was a moving target, and referred to the white paper he had provided from Gerald Fisher. The paper looked at the issue from all angles, noting shortcomings and problems with certain ordinances. He said that hopefully, Staff would be provided guidance from the Planning Commission. The City Council was looking for a recommendation, with unbiased opinions from the members.

Chairperson Boswell advised that he had developed an outline of how he thought things would go during the forum, but it changed given the low turnout. He pointed out that the Commissioners were not to discuss the merits or demerits; that decision had been made. They were directed to discuss whether and to what extent medical marihuana uses would be permitted in the City, the zoning districts in which they might be allowed, and the effect medical marihuana uses would have on residential

districts. They could decide if it should be allowed in specific districts, such as commercial, and what effects it would have on the City overall. They could decide whether to recommend a new ordinance and about restrictions, such as distances from schools, licensing fees, etc., and limit the discussion to those. They would not discuss people who had a certificate from the State who used it for personal consumption. That was not a land use about which they should be concerned. If that person sold it to someone else, the City should take action, however. He mentioned that there were cards to fill out if people wished to speak or to be notified when the matter came back before the Commission.

Chairperson Boswell asked for a motion to open the public forum.

MOTION by Schroeder, seconded by Kaltsounis, that the Rochester Hills Planning Commission hereby approves opening the public forum for discussion.

Ayes: All
Nays: None
Absent: None

Chairperson Boswell stated that the motion had passed unanimously, and he opened the public forum to public comments at 7:16 p.m. Seeing no one come forward, he closed the public comments. He asked the Commissioners if they could offer input or direction to go forward.

Mr. Schroeder commented that the State would not do anything until the newly elected representatives were in office. He thought the matter would go back to Lansing.

Mr. Anzek said that he had discussed it with Mr. Staran. He informed that the Legislature was pushed to take up the matter, but rejected it. He asked Mr. Staran if the Legislature would follow any type of schedule.

*Mr. Staran also heard that they did not want to take up the matter. There had been a lot of publicity and a lot written. He referred to a case called *The People versus Redden*, which was the first Michigan appellate court case regarding the Medical Marijuana Act. One of the judges wrote a concurring opinion, with much detail, which commented on the law and shortfalls, and ended with a call to arms to the Legislature to do something. (The case was on file with the Planning and Development Department). The opinion highlighted the issues and problems that related to the ability of the State and local government to regulate*

ancillary issues - growing operations, dispensaries, passion clubs and things beyond personal use and patient giver relationships. There could be issues of criminality, because it was now risky to exercise rights under the Medical Marihuana Act. It would behoove everyone to get clarification about the subject. He had hoped it would be done during the lame duck session, but it appeared that the legislators wanted to wait until after the first of the year.

Chairperson Boswell commented that it appeared that Mr. Fisher "threw up his arms." Mr. Staran noted that there were court cases resulting from the recent Sheriff's raids in several Oakland County cities, and there were cases in other States. He stated that if the Legislature did not fix things, there would be litigation to construe and interpret, and there was a lot more to be clarified.

Mr. Kaltsounis said he was disappointed in the turnout. He thought there would be many people to hear from. He brought up the fact that the voters in the City passed the issue. His concern was that they could be one conservative President away from being sued by the Federal government. Chairperson Boswell indicated that the current administration was not doing things constitutionally.

Mr. Kaltsounis stated that if the City allowed medical marihuana, he would like to see it done so they did not encounter litigation. The City had 100 years of case law to determine property basis, but the issue of medical marihuana was brand new. Whatever they did, they had to cover the bases thoroughly. To him, if someone had a card and wanted to grow it in his or her own home, he would be fine with it. The City would have to define what own home meant - whether it also meant the yard or basement, for example. They had to define the details. He did not want to see compassion clubs, and dreaded the day he could see giant pot seeds on signs or the words medical marihuana at a business. He wondered if they should allow it in industrial districts only or leave it up to one person to say no.

Chairperson Boswell noted that some cities had prohibited it because it was against Federal law. Other communities had come up with dispensaries where more than five people could be catered. The law said nothing about dispensaries. Oxford Township recently added dispensaries to its zoning ordinance. He questioned how much leeway the City had to expand upon what the law said. He wondered if the City should add it to industrial zoning only.

Mr. Staran stated that from a draftsmanship standpoint, they had to determine whether it was legal and in compliance with Federal and State law. It would have to still be decided by the courts. In Michigan, there was no one model approach to follow. Communities were all over the board. Some prohibited it and some did not regulate it. Grand Rapids considered allowing medical marihuana uses (growing and dispensary) as home occupations. It was not allowed in commercial or industrial areas as a permitted use. Grand Rapids allowed it as a Conditional Land Use in commercial districts. Other cities only allowed it in industrial areas. That came from the strong approach from the Sheriff's office. They were taking the interpretation suggested by a judge on the Court of Appeals that it was violative of Federal law, and that dispensaries were not allowed by State law. They continued to be criminal activities. More communities were going toward a simple ordinance which stated that uses violative of Federal law were not permitted under local zoning. He reiterated that it was wide open until the State Legislature took it on.

Ms. Brnabic asked Mr. Staran about the fact that law enforcement had a problem because it could not differentiate between legal and medical use of marihuana. That could not be identified because there was no place to call to see whether an I.D. was valid. She suggested that it was one of the simpler things to be ironed out. She stated that although the County was busy, she felt they could have a line open to answer questions about identification. Mr. Staran remarked that there was nothing simple at the State level. It created safety issues, as well, but the law officials could not obtain info from the State because of the privacy laws.

Ms. Brnabic thought that the law enforcement should be able to call for verification of an I.D. card without getting any other info. She felt there were things that could be done, but that those steps had not been taken. She stated that the vote was a compassionate move by the public, and she thought the public assumed the matter would be dealt with through pharmacies or something similar. She questioned whether the moratorium could be extended.

Mr. Staran said that it could be, but the moratorium would only be valid and appropriate if the Planning Commission and City Council were diligently studying the issue and the moratorium would be limited to that purpose for a reasonable amount of time. They could not adopt another moratorium as a stall or delay. If there were still unanswered questions within the 180 days, the City Council could consider an extension.

Ms. Brnabic stated that there were a lot of critical issues, and she did not

think they could make a decision with so many unanswered questions and no regulations in place. She did not feel she could come to an intelligent and proper decision at this point. She would like to see things more defined so the Commissioners had more guidance. She also did not think that local governments could undo things the people voted on.

Mr. Staran said that local governments could not prohibit something that State law permitted, nor could the City permit something that State law prohibited. That could extend to the Federal level. He commented that things were not always black and white, and there were interpretation issues. People were saying that the law was poorly drafted, broadly worded, and that there were many unanswered questions they could not answer. It would have to be done through the courts, or the Federal government would have to change its stance.

Ms. Brnabic indicated that it was a Catch-22, and that the legislature needed to take action. If the City let it go, things could get out of control. Mr. Staran said that the City had to take a position about what would happen if a dispensary operation decided to come in and utilize an empty facility or retail storefront. The zoning ordinance did not currently state anything about it and that was what they were dealing with and why there was a moratorium. They were trying to be proactive and regulate or decide not to regulate them before they were established. He agreed they were in a Catch-22 situation. They did not know what to do, but they needed to do something or they would have to react to the marketplace and the population.

Chairperson Boswell recalled that he had sent an email to Mr. Anzek and he had also mentioned a Catch-22 situation. He did not see any way out that was satisfactory. They would have to write an ordinance that was the least offensive to everyone. The U.S. government said it was illegal, but the City was trying to allow something. It seemed like they were just going in circles trying to figure it out.

Mr. Hetrick stated that it was his opinion to defer to Federal law and say it was a violation and move forward in that regard. It was unenforceable. Privacy laws did not allow the City or the police to do their jobs. If it was home based, the people did not have to disclose their I.D.'s, so he questioned how the City would know how to regulate. He did not think they could do much of anything. They could potentially find a way to license the caregiver facilities, but they were not supposed to know who they were because of privacy laws. Until the police had access, they could not do their job. He was not pleased about people doing things on their own.

Also, according to the white paper, inspections could be by-passed, and there could be water damage, mold, electrical violations, etc, endangering the health and safety of many. He said he would not want his neighbor's house to go up in flames. He felt they should do what Auburn Hills did - state that it was in violation of Federal law and prohibit it until the State Legislature got its act together.

Mr. Dettloff asked if people called mainly wanting to set up dispensaries. Mr. Anzek said they asked about growing and storefront operations. Mr. Dettloff asked Mr. Anzek how they were handled in other cities or whether they were put on hold. Mr. Anzek said that the people that have called have been gracious and patient, acknowledging that the City needed time to put something in place. They worked with other communities and realized there were issues, but they had been understanding. He appealed to them to come to the forum to help educate the Commissioners, which might help them with land use determinations. He was surprised at the low turnout. Mr. Dettloff said that the way the law was, if someone was properly licensed as a caregiver, they could serve up to five patients. He asked if the City was aware of any home-based operations. Mr. Anzek said he believed there were, but no one really had told him. A caregiver could have five patients and could be a patient also, totaling six. He was not sure what good a storefront would do, unless it assembled numerous caregivers.

Mr. Dettloff said that he heard the venture was not set up to be a money maker, and that if someone was a caregiver, he might have a break even basis or moderate profit. He asked Mr. Staran if the City would be subject to a challenge in court if it prohibited the use because Federal law did, even though the voters in the State approved it.

Mr. Staran questioned what the voters actually voted. The Act authorized medicinal use of marihuana and to have a relationship between qualifying patients and primary caregivers, but nothing in the proposal voted on or the Medical Marihuana Act talked about dispensaries, growing operations or compassion clubs. It did not talk about private parties growing marihuana for personal use. Mr. Dettloff said that it was his opinion that until people were willing to tighten the language, it could perpetuate, and they would not be able to answer where they were going with it. Mr. Staran thought it might come about soon, but there had not been a Federal court ruling on the specific issue of whether the Federal Controlled Substances law trumped State law. Mr. Dettloff said he would like to hear from communities that had a structure in place. He asked if there were any workshops to attend regarding that.

Mr. Anzek noted that Royal Oak and Auburn Hills had changed direction from an original stance. Grand Rapids allowed home occupations, but had concerns about how it was structured and about confidentiality. Most communities had moratoriums in place and were trying to see where cities were going. Everyone was very guarded, and everything was subject to challenges from the local prosecutors.

Mr. Schroeder said he was concerned about the patients. This was supposed to be a benefit to the patients, but they were becoming the victims, with no protection. The patients did not have the ability to do things for themselves - they were at the mercy of who they ran into. He felt that there needed to be some consideration for their protection.

Mr. Anzek recalled that one of the caregivers informed him that 80% of his clients were immobile, and that all transactions were done by home delivery. Mr. Anzek suggested that it could perhaps be on a delivery basis only, with no storefronts. Mr. Schroeder stated that there was no control over the product - the patients would not even know what they were getting.

Mr. Kaltsounis wondered how they would stop dispensaries from selling other items. Mr. Anzek said they would be solely for the sale of medical marihuana. The concern was the selling of paraphernalia and other illegal items. A child under 18 could become a card carrier if certified by two physicians. Mr. Staran reminded that there were different forms for ingesting marihuana. There were baked goods, lollypops, drinks, etc., and they needed to consider all the different forms.

Mr. Reece stated that they just came off of a monumental election and the people spoke loudly in the State about medical marihuana. He asked if the confidentiality issue (not being able to get information from patients) was driven by the HIPPA laws. Mr. Staran said it was driven by the Medical Marihuana Act to keep the patient and caregiver relationship confidential, and it was analogous of HIPPA. Mr. Reece asked if the City could just ban it. He mentioned the analogy of strip clubs, which were allowed in Michigan. Mr. Staran agreed they were a first amendment right. Mr. Reece said that some communities banned them, and Mr. Staran said they did, but by other means, such as banning alcohol or in other ways. Mr. Reece said he was trying to get his arms around whether they could ban it. He added that Oakland County had a law that banned strip clubs, and it was not prohibited by the State. Mr. Staran explained that it had been avoided through zoning, social and economic and

political pressure. It forced those businesses to go to places where they had less resistance. Mr. Reece said that potentially, the zoning ordinance could be written so that medical marihuana dispensaries or the use of medical marihuana was strictly prohibited in Rochester Hills. Mr. Staran agreed that could be one approach. Other communities had not come out and said they were prohibited, but land uses were inconsistent with other Federal laws so it was not allowed under local zoning. The fact was that it was a Federally controlled drug, and it was illegal. Mr. Reece asked if the law defined what marihuana was, and Mr. Staran said it referred to the public health code where it was defined.

Mr. Hetrick brought up that most people who called Mr. Anzek were asking for dispensaries instead of talking about the relationship. Mr. Anzek said that most he spoke with asked about regulation. Some said they were a grower, some were caregivers with patients. They were very open about what they did. There were also calls from law offices wanting to know about the City's standards, and they were referred to Mr. Staran. There were some calls from residents asking how the City would handle the issue. Mr. Hetrick said that he got the impression that people wanted an industrial type operation. He asked if the public health log talked about the quality of marihuana. Mr. Staran advised that the Medical Marihuana Act allowed the use of marihuana for medical purposes, but it did not address dosage or frequency issues, other than the fact that someone could not have more than 2.5 ounces in his or her possession. Mr. Hetrick said he would be concerned about the quality of the product. Mr. Staran said that it could be a huge money making operation, and the challenge was the legitimate use for medicinal use. Mr. Hetrick thought it would be great if there was a plan to protect the people, police, children and the City.

Mr. Hooper asked if there was a City regulation for use in the Act and was told no. Mr. Hooper asked if there was any City regulation for the caregiver and if both of the questions regarded home based operations or other locations in the community without regulation. Mr. Staran advised that was generally correct. For home based, growing up to 12 plants, the City would put that in the same category as someone growing tomatoes. It would not be considered a use separate from the single-family residential use. The same thing could be true for a primary caregiver in his own home. The 12 plants, or up to 72 plants, was allowed in a home. Things would get tricky when people were coming and going. He could work in his home as a lawyer, but if he started having traffic and clients, he would be flirting with being a business in excess of a home occupation. The City did not regulate those types of uses, but there were incidental

aspects of people coming and going and sales was a big issue. The Medical Marihuana Act authorized primary caregivers to provide to qualifying patients and they could cover costs, but the question about whether they could make a profit was unanswered. Mr. Hooper asked what would cause a home based business to become a community nuisance.

Mr. Anzek said it would usually be a complaint. When a neighbor complained, it would be observed and tracked. Mr. Hooper clarified that it was in the current City ordinance, and Mr. Staran said it addressed any type of business activity in a home deemed not to be a home occupation. Mr. Hooper asked if they should add something to the ordinance because of medical marihuana. Mr. Staran did not think so, but said that the ordinance did not address something like growing medical marihuana in an industrial zone. Mr. Hooper clarified that the Act did not define growing operations, and Mr. Staran said that communities would have to take a position on that. Mr. Hooper stated that until the State law was defined or clarity was brought forward, he would support prohibition, which did not change caregiver use, and until it was defined or there was another voter initiative, he thought it was fruitless to go down the path. It put them in the wrong direction.

Mr. Yukon asked Mr. Staran how the Act defined a caregiver. Mr. Staran read, "A person who is at least 21 years old and has agreed to assist with a patient's use of medical marihuana and has not been convicted of a felony with illegal drugs." Mr. Yukon asked if the City could adopt an ordinance allowing for dispensing of medical marihuana through a licensed physician only, based on the definition. Mr. Staran did not think so because they would be regulating something beyond State law and would run afoul of State and Federal law. Physicians could not prescribe marihuana now under Federal and State law. It could not be prescribed by anyone.

Ms. Brnabic said she could understand protecting people's privacy, but no matter what, they were discussing a substance that was illegal, with an exception. She did not understand why the I.D.'s had to be so private and stated that it was hindering the law enforcers. She thought it was one area that could stop a lot of problems - if they had somewhere to call to verify if a patient qualified. She questioned the issue to some extent, including why picture ID's were not required, and Mr. Staran offered that it was a State issue that was not addressed in State law.

Mr. Schroeder indicated that it was a no-win situation. There was a big

vacuum. He agreed with Mr. Hooper's logic. He asked if the Commission could send notice to the State Legislature, declaring that there was a big problem. He suggested that as a group, they should send something to the State.

Mr. Staran said there had been efforts to do that. Royal Oak passed a resolution to do it. The Court of Appeals judge wrote a lengthy opinion. County Executive L. Brooks Patterson issued a plea, as well. It was up to the officials in Lansing, and they could not force them to do something. He was not sure what the government would do. Mr. Schroeder reiterated that they should contact the legislators to try to get something going. Mr. Staran noted that it was a grassroots effort that got it going, and that perhaps there should be another one to get some clarity. Mr. Schroeder asked if Staff could draft a letter to the Legislature for the Planning Commission's signature.

Mr. Anzek reminded that they could all email their representatives. The Planning Commission could make a motion asking the City Council and the Mayor to call on the representatives. Ms. Brnabic thought they should do that as a body, and that the more cities that did it the better. Mr. Anzek said he would be happy to put a resolution together for the next meeting, identifying conflicting issues and asking for clarification. Mr. Schroeder suggested that the police and sheriff departments should also pursue it. Mr. Staran agreed that the State needed to listen to the different sides, because they needed direction before they could fix it.

Mr. Reece asked about a private resident consuming at home and if the plants had to be kept in an enclosed area only accessible by that person. Mr. Staran said there was some room for interpretation as to what an enclosed, locked facility was and who could have access. It should be no one but the primary caregiver.

Mr. Kaltsounis said he also shared Mr. Hooper's beliefs. He said that if it were in front of him for a vote, he would vote for prohibition based on the Federal laws. He agreed with Mr. Schroeder that the patients were the victims. He would like to see a Resolution brought forward to send up the ladder. He suggested that they send a Resolution to either recommend extending the moratorium or prohibiting the use until they have clarification. They should add an urgency clause regarding having the patient's needs met as soon as possible. Mr. Hooper reminded that a prohibition would not do anything to a caregiver.

MOTION by Brnabic, seconded by Dettloff, the Rochester Hills Planning

Commission hereby recommends that Staff drafts a letter to be sent to the State Legislature urgently outlining the problems the community has because of the Medical Marihuana Act, and prepares a Resolution asking that City Council and the Mayor join in this effort and appeal to the State Legislature. The Planning Commission also hereby recommends that City Council extend the Medical Marihuana Moratorium for an additional six months.

A motion was made by Brnabic, seconded by Dettloff, that this matter be Approved. The motion CARRIED by the following vote:

Aye 9 - Boswell, Brnabic, Dettloff, Hetrick, Hooper, Kaltsounis, Reece, Schroeder and Yukon

Mr. Anzek did not see a problem asking for the Moratorium to be extended. The City did not yet have clear direction from the State, and it would be to the City's benefit.

Chairperson Boswell commented that he ordinarily did not like it if the Commission did not make a decision, but he did not see any way they could. He remarked that it was like Pandora's Box.

ANY OTHER BUSINESS

There was no further business to come before the Planning Commission.

NEXT MEETING DATE

The Chair reminded the Commission that the next event scheduled was a workshop on November 9, 2010 regarding the M-59 Corridor Study at the OU INCubator Collaboratory, and that the next regular meeting was scheduled for December 7, 2010.

ADJOURNMENT

Hearing no further business to come before the Commission, and upon motion by Kaltsounis, the Chair adjourned the Special Meeting at 9:00 p.m., Michigan time.

William F. Boswell, Chairperson
Rochester Hills Planning Commission

Maureen Gentry, Recording Secretary

