

July 25, 2024

Via email only

Littleton Planning Board
37 Shattuck Street
Littleton, MA 01460

Re: Marijuana Establishment and Medical Marijuana Treatment Center Zoning Bylaw

Dear Members of the Planning Board,

The Planning Board has requested that Town Counsel's office review the existing Registered Marijuana Dispensary and Adult Use Marijuana Establishment zoning bylaws to ensure compliance with state law. The Board has also asked whether the Town could limit the number of places that marijuana may be cultivated in Town and if so, the process for doing so. I will address each item in turn.

I. Bylaw Revisions

In 2014, the Town adopted Article XXVII of the Zoning Bylaw, which regulates the siting and operation of Registered Marijuana Dispensaries (RMDs), establishments licensed to grow, produce, and sell cannabis for medical use. In 2017, the Town adopted Article XXVIII of the Zoning Bylaw, which regulates the siting and operation of Adult Use Marijuana Establishments. Both bylaws conflict with the current statutory and regulatory scheme governing cannabis businesses in the Commonwealth. Some areas of conflict include:

1. *References to the Department of Public Health:* The Department transferred its oversight of the medical marijuana program to the Cannabis Control Commission on January 1, 2018.¹ The Town's RMD bylaw refers to the Department and cites to repealed regulations.
2. *Terminology:* Medical marijuana establishments are no longer called RMDs. The correct term is Medical Marijuana Treatment Centers (MTCs).
3. *Not-for-profit status:* MTCs are no longer required to be not-for-profit entities. However, the zoning bylaw requires non-profit status as a condition of eligibility. The Attorney General's Municipal Law Unit has held that such a provision is inconsistent with state law, refusing to issue bylaw approvals.²

¹ Chapter 55 of the Acts of 2017.

² Municipal Law Unit Case No. 10819 (Washington).

4. *Buffer Zones*: The Commission's regulations permit a community to establish a buffer zone of 500 feet from the nearest school entrance. Where such buffer zone is imposed, the regulations requires the buffer zone to be measured in a straight line from the geometric center of the MTC to the geometric center of the school entrance, as follows:

The buffer zone distance of 500 feet shall be measured in a straight line from the geometric center of the MTC or Marijuana Establishment Entrance to the geometric center of the nearest School Entrance unless there is an Impassable Barrier within those 500 feet; in these cases, the buffer zone distance shall be measured along the center of the shortest publicly-accessible pedestrian travel path from the geometric center of the MTC or Marijuana Establishment Entrance to the geometric center of the nearest School Entrance.

Impassible Barrier means, for the purposes of determining the 500 feet buffer zone, a highway, public or private way or path, inaccessible structure, body of water, or other obstruction that renders any part of the 500-foot straight-line distance between an establishment and the school inaccessible by a pedestrian or car. The Town's current buffer zone conflicts with the new regulations and needs to be amended.

Accordingly, I advise consolidating the two bylaws into one uniform, updated Adult Use Marijuana Establishment and MTC zoning bylaw, addressing the siting of all cannabis establishments.

II. Prohibition of Cultivation in Town

The Planning Board is interested in exploring the process of prohibiting or limiting cultivation in Town. This letter will outline the types of cultivation licenses available and the limits that the Town may defensibly impose. I will also explore whether a vote of the voters is needed to effectuate the proposed zoning change.

a. Types of Cultivation

Before discussing the ability of the Town to prohibit cultivation of cannabis, it is important for the Board to understand the various types of cultivation licenses available:

1. *Adult Use Cultivator*: A Cultivator is a business licensed to cultivate, process, and package cannabis and to transfer marijuana to other Adult Use Marijuana Establishments, but not to consumers. A licensee may not have a total canopy of more than 100,000 square feet.
2. *Adult Use Craft Marijuana Cooperative (CMC)*: A CMC is a type of Cultivator that allows growers to join together and grow up to 100,000 square feet of marijuana plants among them. A cooperative must satisfy various eligibility conditions.³ This

³ Notably:

type of license was envisioned as a model for small agricultural businesses. Regulators believed the license type would allow small businesses to pool resources in order to operate in an industry currently dominated by bigger corporations with large financial backing. As of June 27, 2024, no CMC has obtained final licensure.⁴

3. *Adult Use Microbusiness*: A Microbusiness is a co-located adult use Marijuana Establishment that can be either a Tier 1 Cultivator or Product Manufacturer, or both. Tier 1 Cultivators, the smallest tier, may cultivate up to 5,000 square feet of canopy. Like the CMC license, the Microbusiness licenses were created to offer entrepreneurs the ability to enter into the regulated cannabis industry without as much of a capital investment. Currently, there are 12 Microbusinesses currently licensed in the state.⁵
4. *Medical Marijuana Treatment Center*: An MTC is a vertically integrated business that cultivates, processes, and retails its own marijuana and marijuana products for medical use. MTCs also may deliver marijuana and marijuana products to Registered Qualifying Patients.

Currently, the Town has issued a special permit to Sanctuary Medicinals, Inc. to operate as an Adult Use Cultivator and as an MTC that cultivate cannabis for medical use. In addition, the Select Board has issued Host Community Agreements to Community Care Collective, Inc.,⁶ and the Harvest Club, LLC,⁷ that allow for the cultivation of marijuana.

b. Prohibition of Use

G.L. c.94G regulates adult use of marijuana and G.L. c.94I regulates the medical use of marijuana in the Commonwealth. While similar, there are some key distinctions between these two statutory schemes, especially in the ability of a community to limit or prohibit the use.

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1. All members of the cooperative must have lived in Massachusetts for at least one year prior to submitting an application.
 2. The cooperative must include Massachusetts residents who have formed a limited liability company, limited liability partnership, or a cooperative corporation.
 3. The members of a Craft Marijuana Cooperative may not have a controlling interest in any other Marijuana Establishment.
 4. A Craft Marijuana Cooperative is not limited to a particular number of cultivation locations, but is limited to three locations for activities authorized for marijuana Product Manufacturers with a total canopy of 100,000 square feet.
 5. One member of the Craft Marijuana Cooperative must have filed a Schedule F tax form during the past five years.
 6. The Craft Marijuana Cooperative must operate according to the seven cooperative principles published by the International Cooperative Alliance in 1995.

⁴ <https://masscannabiscontrol.com/licensing-tracker/> (accessed June 27, 2024).

⁵ *Id.* I don't have data on how many of these establishments cultivate.

⁶ Community Care Collective has not requested a provisional license for cultivation from the Commission. It is unclear whether they will move forward with plans for cultivation.

⁷ The Harvest Club has shared that it will not be proceeding with its plans to locate in Littleton.

1. *Medical Marijuana*

Chapter 94I and its predecessor statutory scheme, Chapter 369 of the Acts of 2012 (the “2012 Act”), are silent on a municipality’s ability to adopt local bylaws that govern the time, place and manner of an MTC’s operation. Pointing to a community’s Home Rule authority, the Attorney General’s municipal law unit has approved bylaws regulating the medical use of marijuana provided the bylaw’s terms do not conflict with state law.

In contrast, the Attorney General has disapproved zoning bylaws that allegedly crossed the line from regulating the use into prohibiting the use.⁸ The rationale was the 2012 Act’s legislative purpose could not be served if a municipality could prohibit MTCs within its borders, for if one municipality could do so, presumably all could do so. Thus, the current guidance from the Attorney General is that a community cannot prohibit MTCs or any portion of an MTC’s operation in Town.

However, according to Margaret Hurley, Chief legal Counsel at the Municipal Law Unit of the Attorney General’s office, the Attorney General is currently reviewing whether a ban on MTCs or a type of MTC operation, conflicts with state law. In my view, if the legislature had wanted to limit local control of MTCs, it could have done so in Chapter 94I, like it did with adult use in Chapter 94G (see below). The lack of any limit on local control suggests that communities have more authority over the siting of MTCs than Adult Use Marijuana Establishments, such that a prohibition against an MTC is defensible.

Ultimately, this will be a decision for the Attorney General to make. The Town could attempt to limit MTC cultivation in Town, but if the Attorney General does not alter her prior position, it is likely that the bylaw will be disapproved.

2. *Adult Use Marijuana*

In comparison to Chapter 94I, the statutory scheme governing Adult Use Marijuana Establishments, Chapter 94G, expressly addresses the bounds of local control. G.L. c.94G, §3(a)(2) permits a community to adopt time, place and manner restrictions on the operation of adult use marijuana establishments. Bylaws that restrict the operation of Marijuana Establishments, as outlined below, require a ballot vote to take effect:

- A. Bylaws that prohibit the operation of 1 or more types of adult use marijuana establishments;
- B. Bylaws that limit the number of marijuana retailers to fewer than 20 per cent of the number of licenses issued within the town for the retail sale of alcoholic beverages not to be drunk on the premises where sold under G.L. c.138, §15; or

⁸ Municipal Law Unit Case # 6601 (Town of Wakefield).

- C. Bylaws that limit the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment centers registered to engage in the same type of activity.

Prohibitions of any “type” of adult use Marijuana Establishment therefore requires a ballot vote to take effect.

Planning Board members have previously asked why the Town was permitted to limit the number of delivery special permits to two without a ballot vote. As outlined above, the Town can cap the number of any type of establishment. A ballot question is only required if the bylaw prohibits the use, reduces the number of permitted adult use establishments to fewer than the number of medical MTCs *registered*⁹ to engage in the same type of activity in the town, or caps the number of adult use retailers to fewer than 20% of the number of Section 15 package store liquor licenses. The limitation on the number of delivery special permits available did not trigger any of these ballot requirement.

3. Options

The Planning Board has the following options:

- A. Do not restrict or limit cultivation: The Town can continue not to cap the number establishments that may cultivate cannabis.
- B. Limit cultivation: The Town could adopt a bylaw that only allows for the operation of one MTC, one Cultivator, one CMC, and one Microbusiness. This bylaw would require Town Meeting approval to take effect. A ballot vote would not be needed.

The Planning Board has issued an MTC and an Adult Use Cultivator special permit already. Thus, one CMC and one Microbusiness could obtain a special permit for operation of a business that includes cultivation.

- C. Prohibit cultivation except for MTC cultivation: The Town could adopt a bylaw that prohibits all or some of the types of cultivation licenses, while still allowing an MTC to cultivate marijuana for medical use. A ballot vote, in addition to Town Meeting approval, would be required.
- D. Prohibit all types of cultivation: The Town could adopt a bylaw that prohibits all forms of cultivation, including MTC cultivation. As described above, it is unclear how the Attorney General would view the legality of an MTC cultivation ban. A Town Meeting approval and a ballot vote would also be required to effectuate the ban on the Adult Use cultivators.

⁹ I interpret “registered” in this context to mean MTCs registered as of the November 8, 2016 ballot question or, conservatively, July 28, 2017, when the Governor signed the revised legislation. However, this question has yet to be litigated and a court may take a different opinion.

Please do not hesitate to reach out with any questions or concerns.

Sincerely,

Ivria Glass Fried

Ivria Glass Fried

cc: Town Administrator