

MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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10 MECHANIC STREET, SUITE 301
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February 28, 2014

Carlene C. Hamlin, Town Clerk
Town of South Hadley
116 Main Street
South Hadley, MA 01075

RE: South Hadley Special Town Meeting of November 19, 2013 - Case # 7027
Warrant Articles # 10, 11 and 12 (Zoning)
Warrant Articles # 6 and 9 (General)

Dear Ms. Hamlin:

Articles 6, 9, 10 and 11 - We approve the amendments to the South Hadley by-laws adopted under Articles 6, 9, 10 and 11 at the November 19, 2013 Special Town Meeting.

Article 12 - The Attorney General's deadline for action on Article 12 is extended for 30 days under the authority conferred by G.L. c. 40, § 32 as amended by Chapter 299 of the Acts of 2000. The agreement with Town Counsel for an additional 30 day extension is attached hereto. The amendments adopted under these Articles will be acted upon by the Attorney General on or before **April 2, 2014**.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) **general** by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) **zoning** by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MARTHA COAKLEY
ATTORNEY GENERAL

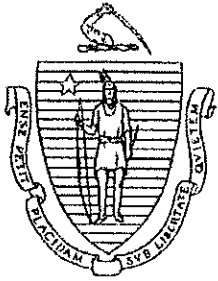
Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division

Director, Municipal Law Unit
Ten Mechanic Street, Suite 301

Worcester, MA 01608
(508) 792-7600 x 4402

cc: Town Counsel Edward J. Ryan



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February 27, 2014

Edward J. Ryan, Esq.
Ryan, Boudreau, Randall & Kirkpatrick
129 College Street
South Hadley, MA 01075

Re: **Extension of review period of Article 12**
South Hadley Special Town Meeting of November 19, 2013 - Case # 7027

Dear Attorney Ryan:

Pursuant to the requirements of G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000, the Attorney General and the Town Council are authorized to extend the 90-day period provided for the Attorney General's review of town by-laws for not more than an additional 90 days. This letter serves to satisfy the requirements of G.L. c. 40, § 32, as amended. In light of our need for time to further discuss the by-laws' consistency with state law, we hereby jointly agree to extend the Attorney General's 90-day review period of Article 12 for an additional 30 days. The decision on Article 12 will now be due on or before April 2, 2014.

Please sign this letter to reflect your agreement and email it back to us or authorize this Office to sign it on your behalf. We will then file the letter with the Town Clerk via electronic mail, with a copy to you. Thank you.

Very truly yours,
MARTHA COAKLEY
ATTORNEY GENERAL

Kelli E. Gunagan

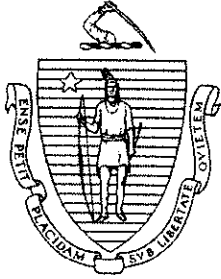
by: Kelli E. Gunagan, Assistant Attorney General
Municipal Law Unit
Office of the Attorney General
Ten Mechanic Street, Suite 301
Worcester, MA 01608

Edward J. Ryan

Town Counsel

2/27/14

Date



MARTHA COAKLEY
ATTORNEY GENERAL

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April 2, 2014

Carlene C. Hamlin, Town Clerk
Town of South Hadley
116 Main Street
South Hadley, MA 01075

Re: South Hadley Special Town Meeting of November 19, 2013 - Case # 7027
Warrant Articles # 10, 11 and 12 (Zoning)
Warrant Articles # 6 and 9 (General)

Dear Ms. Hamlin:

Article 12 - We approve the amendments to the South Hadley by-laws adopted under Article 12.¹ Article 12 makes a number of changes to various sections of the Town's zoning by-laws in order to establish where, and under what conditions, medical marijuana facilities may be allowed in the Town's zoning districts. Many of these provisions present no conflict with state law or the Constitution, including the amendments to the Use Regulation Schedule (Section Y (5)); the prohibited locations (Section Y (3)); the use restrictions (Section Y (4)); the majority of the physical requirements (Section Y (5)); the application requirements (Section Y (6)); the reporting requirements (Section Y (7)); and the requirements regarding transfer/discontinuance of use, dispensary security, and multi-tenant facilities (Sections Y (8-10)).

But we have serious concerns about the constitutionality of the sign content restriction in Section Y (5) (f) (iii), as detailed below (see pp. 2-3). On the limited record available to the Attorney General in review of town by-laws, we cannot disapprove and delete this provision in Section Y (5) (iii). However, we strongly encourage the Town to consult with Town Counsel regarding whether this provision should be repealed at a future Town Meeting. We also offer comments regarding the by-law's definitions of marijuana uses, and the requirement for Selectboard approval of the various marijuana facilities.

¹ In a decision issued February 28, 2014 we approved Articles 6, 9, 10 and 11.

I. Attorney General's Standard of Review.

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). "The legislative intent to preclude local action must be clear." Id. at 155.

II. Summary of Article 12.

Article 12 makes a number of changes to the Town's zoning by-laws regarding where (and under what conditions) various Medical Marijuana Facilities may be located in Town. One change (Section 7 (y) (5) (f)) describes the sign requirements for Medical Marijuana Facilities as follows:

- f. Signage shall conform to Section 8 (F) of the South Hadley Zoning Bylaw and requirements of State laws and regulations governing such facilities. However, the signage and other marketing on the exterior of the building or in any other manner visible from a public way or adjoining property shall not promote or encourage:
 - i. The use or abuse of marijuana or other drugs for non-medical purposes; or
 - ii. The use or abuse of marijuana or other drugs by minors; or
 - iii. ***The active marketing or (sic) marijuana*** or other drugs ***for medicinal purposes.***
- 1). Provided, however, that these restrictions shall not preclude any signage required by the MA Department of Public Health.

The text reflected in bold and italics above prohibits any signs from promoting "the active marketing of marijuana...for medicinal purposes."² However, Chapter 369 of the Acts of 2012 ("An Act for the Humanitarian Medical Use of Marijuana") allows qualifying patients with debilitating medical conditions to obtain marijuana for medical use from registered marijuana dispensaries. The Act makes the use of marijuana for medicinal purposes a lawful activity, so

² We have confirmed with Town Counsel that this is the correct interpretation of the text in Section 7 (y) (5) (f) (iii).

long as the marijuana is dispensed and used in compliance with the Act and the Department of Health (DPH) Regulations implementing the Act ((105 CMR 725.000). It thus appears that a sign that “active[ly] market[s]” marijuana for medicinal purposes would concern a lawful activity, which is one of the factors giving rise to First Amendment protection for commercial speech, as explained below.

III. First Amendment Protection for Commercial Speech.

Commercial speech (such as that regulated under Article 12) is subject to the First Amendment, but is afforded a lesser measure of protection than other types of speech. United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993). The Supreme Court has developed the following framework for determining the validity of a regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980). Relying on Central Hudson, courts have invalidated Massachusetts regulations governing the advertising of smokeless tobacco and cigars (Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)) and a City of Worcester ordinance prohibiting the outdoor advertising of tobacco products (National Assoc. of Tobacco Outlets v. City of Worcester, 851 F.Supp. 2d 311 (D. Mass. 2012)).

The Central Hudson test requires a detailed factual record which the Attorney General does not receive from the towns in her review of town by-laws pursuant to G.L. c. 40, § 32.³ A determination of the validity of the sign provision would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32. However, based on the Central Hudson, Lorillard and City of Worcester decisions, we have great concern that the prohibition against the “active marketing” of marijuana for medicinal purposes Section 7 (y) (5) (f) (iii) would not withstand constitutional scrutiny. Therefore, we strongly recommend that the Town consult with Town Counsel regarding a future amendment to the by-law to delete this provision.⁴

³ For example, the Central Hudson test requires an analysis of whether the sign is “misleading,” and whether the governmental interest which supports the by-law is “substantial.” Central Hudson, 447 U.S. at 566. The materials required to be submitted to this Office per G.L. c. 40, § 32 do not include any information on those factors, and we therefore cannot determine the validity of the sign provision on this limited record. We note, however, that the first factor (the speech must concern lawful activity) would seemingly be satisfied.

⁴ We have communicated with Town Counsel on this issue and we understand that he will recommend that the Town vote to delete this provision at the next Town Meeting.

IV. Definitions of Medical Marijuana Uses.

A. The By-law Definitions Differ From Those in Act/Regulations.

Article 12 defines various Medical Marijuana Facilities and adds those definitions to Section 3 of the Town's zoning by-law. The Town adopts definitions for a "Medical Marijuana Cultivation and Processing Facility (MMCPF)," a "Medical Marijuana Treatment Center (MMTC)," and a "Medical Marijuana Off-Site Dispensary (MMOSD)." These definitions are different from the definitions for Medical Marijuana Treatment Center found in the Act and the DPH regulations. Because of this, the by-law definitions may cause some confusion for special permit applicants and the Special Permit Granting Authority. In addition, the Town cannot apply the by-law definitions in a way that conflicts with the Act or regulations. We recommend the Town consult closely with Town Counsel on this point.

B. Exemption from Agricultural Protection of G.L. c. 40A, § 3.

The by-law's definitions for "Medical Marijuana Cultivation and Processing Facility" and "Medical Marijuana Treatment Center" include the following text:

The cultivation and processing of medical marijuana in accordance with these regulations is considered to be a manufacturing use and is not agriculturally exempt from zoning.

We approve this text but remind the Town that certain agricultural uses enjoy protections from regulation by way of G.L. c. 40A, §3. The Town has no power to eliminate this statutory protection by way of a by-law amendment. *See Schiffenhaus v. Kline*, 79 Mass.App.Ct. 600, 605 (2011) ("[I]t is axiomatic that [a] by-law cannot conflict with the statute").

General Laws Chapter 40A, Section 3, extends certain protections to agricultural uses and provides in pertinent part as follows:

No zoning . . . by-law . . . shall . . . prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products....

General Laws Chapter 128, Section 1A, defines agriculture and provides in pertinent part as follows:

“Farming” or “agriculture” shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

These statutes together establish that all commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture uses must be allowed as of right (1) on land zoned for such uses; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from such uses generates \$1,000 per acre or more of gross sales. If a use qualifies under any one of these three categories, the use enjoys the protections accorded under G.L. c. 40A, § 3, and a municipality cannot restrict such uses in those areas.

Therefore, despite the by-law definitions for “Medical Marijuana Cultivation and Processing Facility” and “Medical Marijuana Treatment Center”, to the extent that an RMD’s cultivation of marijuana and associated activities covered by G.L. c. 128A, § 1A, constitute “commercial agriculture,” the Town may not require a special permit for, unreasonably regulate, or prohibit such activities: (1) on land zoned for agriculture; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates \$1,000 per acre or more of gross sales. We recommend the Town consult closely with Town Counsel when applying the by-law to ensure compliance with G.L. c. 40A, §3.

V. Selectboard Approval.

Section Y (11) (a) of Article 12 requires that a proposed operator of a “Medical Marijuana Cultivation and Processing Facility,” a “Medical Marijuana Treatment Center,” or a “Medical Marijuana Off-Site Dispensary,” obtain approval from the Selectboard as follows:

Recognizing the particular security, lighting, and other issues not directly related to zoning associated with such enterprises, in addition to obtaining a Special Permit or Site Plan Review as detailed above, and in Section 5(d), any entity seeking to establish or operate a MMCPF, MMTC, or MMOSD facility must also obtain approval from the Selectboard.

Section Y (11) (a) does not provide any guidance to the Board of Selectmen in determining whether to grant the approval for a medical marijuana use. We understand from communication with Town Counsel that the Town intends to supplement Section Y (11) (a) in the form of a future general by-law (or BOS regulations or policies) to describe the criteria the Selectboard will use in reviewing applications, and information regarding the process for requesting such approval. Until such supplemental bylaw or regulation is implemented we strongly suggest the

Town consult closely with Town Counsel regarding any pending applications for Selectboard approval under Section Y (11).

Finally, although we approve the remaining portions of Article 12, the Town should take care to apply the amendments in a manner that does not conflict or interfere with the operation of 105 CMR 725.000. We encourage the Town to consult with Town Counsel on this issue.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
MARTHA COAKLEY
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Office of the Attorney General Martha Coakley
Ten Mechanic Street, Suite 301
Worcester, MA 01608

cc: Town Counsel Edward J. Ryan

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