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August 20, 2013

Barbara J. Gaynor, Town Clerk
Town of Halifax
499 Plymouth Street
Halifax, MA 02338

**RE: Halifax Special Town Meeting of April 8, 2013 - Case # 6739
Warrant Article # 18 (Zoning)**

Dear Ms. Gaynor:

Article 2 – We approve the amendments to the Halifax by-laws adopted under Article 2 at the April 8, 2013 Special Town Meeting.

The amendments adopted under Article 2 amend the Town’s zoning by-laws in three ways. First, they add a definition for the term Medical Marijuana Treatment Center to Chapter 167-3, Definitions.¹ Second, they impose a temporary moratorium through June 30, 2014 on the use of land or structures for a Medical Marijuana Treatment Center. Finally, they amend the Schedule of Use Regulations for Agricultural Uses under Section 167-7C to exclude marijuana from the listed use of “Farm,” and to exclude medical marijuana dispensaries from the listed use of “salesroom or stand for the display or sale of horticultural and/or floricultural products...”

A. Temporary Moratorium.

Chapter 167-7D (14) establishes the purpose of the temporary moratorium as follows:

By vote at the State election on November 6, 2012, the voters of the Commonwealth approved a law regulating the cultivation, distribution, possession and use of marijuana

¹ The by-law’s definition of Medical Marijuana Treatment Center mirrors the definition in Chapter 369 of the Acts of 2012, “An Act for the Humanitarian Medical Use of Marijuana.” The Department of Public Health (DPH) regulations (105 CMR 725.000) promulgated pursuant to Chapter 369 clarify that a medical marijuana treatment center will now “be known as a registered marijuana dispensary (RMD)” (725.004). We use the term “registered marijuana dispensary” throughout this decision.

for medical purposes. The law provides that it is effective on January 1, 2013 and the State Department of Public Health is required to issue regulations regarding implementation within 120 days of the law's effective date. Any regulations promulgated by the State Department of Public Health are expected to provide guidance to the Town in regulating medical marijuana, including Medical Marijuana Treatment Centers. The regulation of medical marijuana raises novel and complex legal, planning, and public safety issues and the Town needs time to study and consider the regulation of Medical Marijuana Treatment Centers and address such novel and complex issues, as well as to address the potential impact of the State regulations on local zoning and to undertake a planning process to consider amending the Zoning Bylaw regarding regulation of Medical Marijuana Treatment Centers and other uses related to the regulation of medical marijuana. The Town intends to adopt a temporary moratorium on the use of land and structures in the Town for Medical Marijuana Treatment Centers so as to allow the Town sufficient time to engage in a planning process to address the effects of such structures and uses in the Town and to enact bylaws in a manner consistent with sound land use planning goals and objectives.

Further, Section 167-7D (14) includes the following text regarding the Town's planning process:

During the moratorium period, the Town shall undertake a planning process to address the potential impacts of medical marijuana in the Town, consider the Department of Public Health regulations regarding Medical Marijuana Treatment Centers and related uses, and shall consider adopting new Zoning Bylaws to address the impact and operation of Medical Marijuana Treatment Centers and related uses.

We approve the temporary moratorium because it is consistent with the Town's authority to "impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies." Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980). Such a temporary moratorium is clearly within the Town's zoning power when the stated intent is to manage a new use, such as a registered marijuana dispensary and related uses, and there is a stated need for "study, reflection and decision on a subject matter of [some] complexity..." W.R. Grace v. Cambridge City Council, 56 Mass. App. Ct. 559, 569 (2002) (City's temporary moratorium on building permits in two districts was within city's authority to zone for public purposes). The time limit Halifax has selected for its temporary moratorium (through June 30, 2014) appears to be reasonable in these circumstances, where the final version of the DPH regulations was issued on May 8, 2013, and those regulations are expected to provide guidance to the Town. The moratorium is definite in time period and scope (to the use of land and/or structures for registered marijuana dispensaries), and thus does not present the problem of a rate-of-development by-law of unlimited duration which the Zuckerman court determined was ordinarily unconstitutional. Zuckerman v. Hadley, 442 Mass. 511, 512 (2004) ("[A]bsent exceptional circumstances not present here, restrictions of unlimited duration on a municipality's rate of development are in derogation of the general welfare and thus are unconstitutional.")

B. Amendments to Schedule of Use Regulations Re: “Agricultural.”

Article 2 amends the Town’s Schedule of Use Regulations for Agricultural Uses to exclude marijuana and medical marijuana dispensaries. We approve this amendment 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, 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 cannot 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.² We suggest the Town consult with Town Counsel concerning the proper application of Article 2 in this regard.

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,

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Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
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cc: Town Counsel Lawrence P. Mayo

² The Town has submitted Form 3 with a copy of a map entitled “Zoning in the Vicinity of the AE District.” We appreciate this information from the Town as it has assisted us in our review of Article 16. However, because there were no amendments to this map voted under Article 16, the map submitted with Form 3 does not need Attorney General review and approval pursuant to G.L. c. 40, § 32. Therefore, we take no action on the map and will retain it in our file.