



TOWN CLERK

TOWN OF ACTON
472 MAIN STREET
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MARCH 7, 2019

MIDDLESEX, SS:

ON THE ABOVE DATE, I POSTED ATTESTED COPIES OF THE AMENDMENT TO THE ZONING BYLAWS, ARTICLE 4 AND GENERAL BYLAWS, ARTICLES #1, WHICH PASSED AT THE SPECIAL TOWN MEETING THAT CONVENED ON DECEMBER 3, 2018. THE ARTICLES MENTIONED FOR THE ZONING BYLAWS AND GENERAL BYLAWS WERE APPROVED BY THE ATTORNEY GENERAL, MAURA HEALY ON MARCH 6, 2018 AND IS POSTED AT THE FOLLOWING PLACES IN THE TOWN OF ACTON:

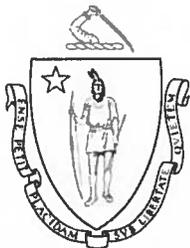
NAGOG WOODS POST OFFICE, TOWN HALL, WEST ACTON POST OFFICE, CENTER POST OFFICE, CENTER LIBRARY AND PUBLIC SAFETY FACILITY;

AS WELL AS THE TOWN WEB PAGE.

CONSTABLE

CLAIMS OF INVALIDITY BY REASON OF ANY DEFECT IN THE PROCEDURE OF ADOPTION OR AMENDMENTS OF THESE BYLAWS MAY ONLY BE MADE WITHIN NINETY DAYS (90) PER CHAPTER 40, SECTION 32, OF THE GENERAL LAWS OF THE COMMONWEALTH.

EVA K. SZKARADEK
TOWN CLERK



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

MAURA HEALEY
ATTORNEY GENERAL

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(508) 795-1991 fax
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March 6, 2019

Eva K. Szkaradek, Town Clerk
Town of Acton
472 Main Street
Acton, MA 01720

Re: Acton Special Town Meeting of December 3, 2018 -- Case # 9258
Warrant Article # 4 (Zoning)
Warrant Article # 1 (General)

Dear Ms. Szkaradek:

Articles 1 and 4 - We approve Articles 1 and 4 from the December 3, 2018 Acton Special Town Meeting. However, as explained below, the extension of the Town's temporary moratorium on marijuana establishment, adopted under Article 4, has ended as of today, March 6, 2019, the date of the Attorney General's approval of Article 1 (the Town's general by-law banning recreational marijuana establishments). Our comments on Articles 1 and 4 are provided below.

Article 1 - Based on the Attorney General's limited standard of review of town by-laws, we approve Article 1. Article 1 amends the Town's general by-laws to add a new Chapter Z, "Marijuana Establishments" as follows:

The operation within the Town of Acton of any marijuana establishment, as defined in Massachusetts General Laws c. 94G, § 1, including without limitation, a marijuana cultivator, marijuana testing facility, marijuana product manufacturer, marijuana retailer, or any other type of licenses marijuana-related business, is prohibited. This prohibition shall not apply to the sale, distribution, or cultivation of marijuana for medical purposes by a Registered Marijuana Dispensary as defined by and registered under Chapter 369 of the Acts of 2012.

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. General versus Zoning By-law

Based on the Attorney General’s limited standard of review of town by-laws, we approve Article 1. We have analyzed the question whether a by-law amendment (such as this one) that prohibits or limits the number or type of marijuana establishments in a town should be adopted as a zoning by-law rather than as a general by-law. Zoning by-laws are those “by-laws, adopted by ...towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of ...towns to protect the health, safety and general welfare of their present and future inhabitants.” G.L. c. 40A, § 1A. We note that the statute that regulates the use and distribution of non-medical marijuana (G.L. c. 94G, § 3) specifically authorizes towns to adopt by-laws that prohibit, or limit the number of, marijuana establishments so long as certain statutory procedures are met, but the statute is silent on whether such a local by-law must be a zoning by-law or can be a general by-law. Thus, adoption of Article 1 as a general by-law does not present a clear conflict with the local control procedures set forth in G.L. c. 94G, § 3.

Nonetheless, an argument could be made that the Article 1’s prohibition is better suited to regulation as a matter of zoning. The term “marijuana establishment,” as used in Article 1, is broadly defined in G.L. c. 94G, § 1 (j), and includes many uses that may be more appropriately regulated by way of a zoning by-law amendment. *See Spenlinhauer v. Town of Barnstable*, 80 Mass. App. Ct. 134, 141-42 (2011) (comprehensive bylaw regulating parking should have been adopted as a zoning by-law because town had historically regulated parking through its zoning by-law and the record reflected no public health concerns that would justify use of the general by-law police power). Such an argument might carry enhanced weight in Acton, where the Town has also chosen to regulate marijuana establishments by way of a zoning by-law imposing a temporary moratorium, rather than a general by-law (*see* Article 5 from the Special Town Meeting of December 4, 2017, approved by the Attorney General in case # 8740 on March 12, 2018).¹ As the court in *Spenlinhauer* noted, one factor in determining whether a particular topic should be regulated by way of a zoning by-law, rather than a general by-law, is how the town has historically regulated the topic. *Id.* at 140 (“The bylaw as a whole, then, clearly evinces the town’s historical reliance on the zoning bylaw to deal with parking.”). *See also Rayco Inv. Corp. v. Selectmen of Raynham*, 368 Mass. 385 (1975) (holding that a trailer park regulation should have been adopted as a zoning by-law rather than a general by-law, in part because the town’s zoning by-law had previously dealt specifically with trailer parks).

¹ *See also* Article 2 from the December 3, 2018 Special Town Meeting proposing a zoning by-law amendment to regulate marijuana establishments. We understand that the vote on Article 2 at the December 2018 Special Town Meeting was a vote to take no action on the Article.

The distinction between a general by-law and a zoning by-law is an important one. “[V]alid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A,” Spenlinhauer, 80 Mass. App. Ct. at 137. These procedural protections include a report by the planning board after a duly noticed public hearing with notice to the Town’s residents, abutting cities and towns, the regional planning agency (if any), and the state Department of Housing and Community Development. *See* G.L. c. 40A, § 5. “Moreover, changes in zoning [by-laws] protect some prior existing uses, *see* G.L. c. 40A, § 6, but general [by-laws] typically do not.” Spenlinhauer, 80 Mass. App. Ct. at 137. Because, however, “the line dividing matters a town can regulate only through zoning [by-laws] and those it may regulate through general [by-laws] is not always clear,” *id.* at 138, and given our limited standard of review, we cannot determine that there is a clear conflict between Article 1 and the Constitution or laws of the Commonwealth that would require us to disapprove this by-law. On that basis, we approve Article 1.²

Article 4 - Article 4 proposes to amend the Town’s existing zoning by-law that imposes a temporary moratorium on marijuana establishments by deleting the moratorium end date of “December 31, 2018” and inserting in its place the following text (emphasis added):

the earliest of (1) the Attorney General’s approval of the Town’s General Bylaw banning recreational marijuana establishments, (2) the Town’s approval of a Zoning Bylaw regulating the time, place, and manner of the sale of recreational marijuana, or (3) June 30, 2019.

I. Analysis of the Moratorium Time Period

In this decision issued today (March 6, 2019), we approve Article 1 from the Acton December 3, 2018 Special Town Meeting, amending the Town’s general by-laws to prohibit marijuana establishments. Article 4, seeking to extend the temporary moratorium of marijuana establishments, provides that the temporary moratorium shall be in effect through “the earliest of (1) the Attorney General’s approval of the Town’s General by-law banning recreational marijuana establishments, (2) the Town’s approval of a Zoning Bylaw regulating the time, place, and manner of the sale of recreational marijuana, or (3) June 30, 2019.” (emphasis added). Therefore, by virtue of the Attorney General’s approval today of Article 1 (the Town’s general by-law banning recreational marijuana establishments), the extension of the temporary moratorium on marijuana establishments voted under Article 4 has ended as of today, March 6, 2019.

II. Conclusion

We approve Article 1, amending the general by-laws to establish a ban on recreational marijuana establishments. And we approve the extended moratorium proposed in Article 4, but

² General Laws Chapter 94G requires approval by the voters at a local ballot vote for some types of local by-laws and ordinances in some communities. *See* G.L. c. 94G, § 3(a)(2); § 3(e). It is our understanding that the Town held a special election on November 6, 2018, and the Town voted 50.03% to 49.36% to adopt a by-law prohibiting marijuana establishments.

by its terms, the moratorium expires today, upon the Attorney General's approval of Article 1. Please feel free to contact with Office with any questions regarding this decision.

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,

MAURA HEALEY
ATTORNEY GENERAL

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cc: Town Counsel Stephen D. Anderson



TOWN CLERK

A TRUE COPY, ATTEST:

Em K. Sykora

TOWN CLERK, ACTON, MA

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EXCERPT OF THE SPECIAL TOWN MEETING HELD
MONDAY, DECEMBER 3, 2018, 7:00 P.M.
ACTON-BOXBOROUGH REGIONAL HIGH SCHOOL AUDITORIUM

NUMBER OF REGISTERED VOTERS ATTENDING TOWN MEETING
DECEMBER 3, 2018 – 1097

Article 1 **Amend General Bylaws – Chapter Z – Marijuana Establishments**
(Majority vote)

To see if the Town will vote to amend the General Bylaws by adding Chapter Z – Marijuana Establishments, or take any other action relative thereto.

CHAPTER Z – MARIJUANA ESTABLISHMENTS

The operation within the Town of Acton of any marijuana establishment, as defined in Massachusetts General Laws c. 94G, § 1, including, without limitation, a marijuana cultivator, marijuana testing facility, marijuana product manufacturer, marijuana retailer, or any other type of licensed marijuana-related business, is prohibited. This prohibition shall not apply to the sale, distribution, or cultivation of marijuana for medical purposes by a Registered Marijuana Dispensary as defined by and registered under Chapter 369 of the Acts of 2012.

MOTION:

Ms. Green moves that the Town amend the General Bylaws as set forth in the Article.

MOTION CARRIES



TOWN CLERK

A TRUE COPY, ATTEST:

Eva K. Sykora

TOWN CLERK, ACTON, MA

TOWN OF ACTON
472 MAIN STREET
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EXCERPT OF THE SPECIAL TOWN MEETING HELD
MONDAY, DECEMBER 3, 2018, 7:00 P.M.
ACTON-BOXBOROUGH REGIONAL HIGH SCHOOL AUDITORIUM

NUMBER OF REGISTERED VOTERS ATTENDING TOWN MEETING
DECEMBER 3, 2018 – 1097

Article 4 **Amend Zoning Bylaw – Extension of Marijuana Establishment**
(Two-thirds vote) **Temporary Moratorium**

To see if the Town will vote to amend the Zoning Bylaw to extend the existing temporary moratorium on marijuana establishments, which temporary moratorium is in place to permit appropriate planning by the Town, by amending Section 3.12.3, "Temporary Moratorium," striking and replacing "December 31, 2018" with the following: "the earliest of (1) the Attorney General's approval of the Town's General Bylaw banning recreational marijuana establishments, (2) the Town's approval of a Zoning Bylaw regulating the time, place, and manner of the sale of recreational marijuana, or (3) June 30, 2019.", or to take any other action relative thereto.

MOTION:

Ms. Green moves that the Town amend the Zoning Bylaw as set forth in the Article.

MOTION CARRIES
Declared 2/3 by Moderator*

*Town of Acton has accepted MGL CH 39 Sec 15 at its Annual Town Meeting April 2001, Article 43 and the amended Bylaw 5A was approved by the Attorney General on Aug. 6, 2001. (The Town Meeting Moderator is not required to count a 2/3 required vote.)