

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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March 5, 2019

Carolyn Hurley, Acting Town Clerk  
Town of Fairhaven  
40 Center Street  
Fairhaven, MA 02719

FAIRHAVEN,  
MASS.

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RECEIVED  
TOWN CLERK

Re: Fairhaven Special Town Meeting of November 13, 2018 -- Case # 9251  
Warrant Article # 9 (Zoning)

Dear Ms. Hurley:

Article 9 - We approve Article 9 from the November 13, 2018 Fairhaven Special Town Meeting. Our comments on Article 9 are provided below.

Article 9 amends the Town's zoning by-laws to make several changes relating to marijuana establishments. One change deletes Section 198-29.7, "Medical Marijuana Facilities," in its entirety and inserts a new Section 198-29.7, "Marijuana Establishments." We offer comments on the new Section 198-29.7.

1. Section 198-29.7 (C) - Eligible Locations

Section 198-29.7 (C) (1) provides that marijuana establishments may be allowed by special permit from the Planning Board only in the Medical Marijuana Overlay District ("Overlay District"), provided that they meet the requirements of Section 198-29.7. Although the by-law allows marijuana establishments by special permit in the Overlay District, it is unclear whether there are other uses allowed by right in the Overlay District. General Laws Chapter 40A, Section 4, provides in pertinent part, that any zoning by-law that divides the Town into districts shall be uniform within the district for each class or kind of structures or uses permitted. In SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984), the court held that a by-law that required a special permit for *all* uses in a business district violated the uniformity requirement embodied in G.L. c. 40A, § 4. To comply with the uniformity requirement, a zoning by-law must provide that "certain uses are permitted as of right within each district, without the need for a landowner or developer first to seek permission which depends upon the discretion of local zoning authorities." Id. at 107. We construe the new Section 198-29.7 to allow by right or by special permit all uses that are allowed by right or by special permit in the underlying zoning district. So construed, the by-law creating the overlay district would not violate the uniformity requirement. However, the Town may wish to amend

Section 198-29.7 at a future Town Meeting to make it clear what uses are allowed by right in the Overlay District.

2. Section 198-29.7 (G) - Special Permit Requirements for Marijuana Establishments

Section 198-29.7 (G) (1) (e) allows for the revocation of a special permit under certain circumstances. The process for revocation of a special permit under Section 198-29.7 (G) (1) (f) is as follows:

- i. Determination of violation, abandonment, or other cause for revocation by the Building Commissioner;
- ii. Notice sent by the Building Commissioner to the permit holder and the Planning Board;
- iii. Vote of the planning Board to either continue or revoke/terminate the Special Permit;
- iv. Record notice of revocation/termination in the Registry of Deeds.

Although the by-law provides that notice will be sent to the permit holder, it is silent as to other due process considerations, such as the permit holder's opportunity for a hearing prior to revocation. In addition, the by-law does not identify any standards or criteria that the Planning Board will utilize in making its determination whether to revoke the special permit. To avoid any due process challenge, the Town may wish to amend the by-law at a future Town Meeting to establish a hearing process, as well as identify any standards and criteria that will guide the Planning Board's decision. The Town should consult with Town Counsel with any questions on these issues.

**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

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
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cc: Town Counsel Thomas P. Crotty



# Town of Fairhaven, MA Clerk's Office

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**SPECIAL TOWN MEETING – TUESDAY, NOVEMBER 13, 2018**  
**WALTER SILVEIRA AUDITORIUM – ELIZ. HASTINGS MIDDLE SCHOOL**  
**TOWN MEETING MEMBERS PRESENT 166 – QUORUM REQUIRED 100**

## **ARTICLE 9 – ZONING BYLAW AMENDMENT; CONSOLIDATED MARIJUANA ZONING**

By 2/3 Vote, the Town of Fairhaven voted to amend the Fairhaven Zoning Bylaw as follows:  
(Deletions shown in strike-through and new text shown as underlined.)

**1. By deleting §198-29.7, Medical Marijuana Facilities, in its entirety, and replacing it with a new §198-29.7, Marijuana Establishments, as follows: 198-29.7 - MARIJUANA ESTABLISHMENTS**

### A. Purpose

The purpose of this section of the Zoning Bylaw is to permit Marijuana Establishments to operate and be located in such a way as to protect the health and safety of Fairhaven residents, as well as patients seeking treatment and customers seeking to purchase marijuana for recreational use, while minimizing adverse impacts on adjacent properties, residential neighborhoods, schools, and other sensitive locations, by regulating the siting, design, placement, security, modification and removal of such uses.

### B. Applicability

- 1) Definitions. See Massachusetts General Laws Chapter 94G, Section 1, Chapter 94I, Section 1, and the 18 regulations promulgated thereunder, as they may be amended, as well as Section 198-33, Definitions and Word Use, of the Fairhaven Zoning Bylaws for further definitions of applicable terms.
- 2) Severability. If any provision of this Chapter or the application of any such provision to any person or circumstance shall be held invalid, the remainder of this Chapter, to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby, and to this end the provisions of this Chapter are severable.
- 3) Special Permit. All Marijuana Establishments shall be permitted by Special Permit pursuant to this section and Site Plan Review pursuant to §198-29. The Special Permit Granting Authority shall be the Planning Board.

A Special Permit granted under this section of the Zoning Bylaws shall have a term limited to the duration of the applicant's continued use of the premises for a Marijuana Establishment

licensed by the state. Any new or additional license, or a transfer of an existing license to a new owner, shall require a new Special Permit pursuant to the Fairhaven Zoning Bylaws.

- 4) A special permit issued prior to November 13, 2018, allowing the use of premises for a Medical Marijuana Treatment Center shall remain in effect subject to its own terms and conditions; provided that any subsequent change in use, including the use of the premises for an additional or different form of Marijuana Establishment, or for the expansion or alteration of the existing Medical Marijuana Treatment Center, or a change in ownership of the licensed establishment, shall be subject to the terms of this section.

#### C. Eligible Locations for Marijuana Establishments

- (1) Marijuana Establishments may be allowed by Special Permit from the Planning Board only in the Medical Marijuana Overlay District provided the facility meets the requirements of this Chapter.
- (2) Medical Marijuana Overlay District shall be comprised of the following Map and Lot numbers: Map 24: Lots 16, 16A, 18; Map 26: Lots 62, 62A, 63, 71, 71A, 72; Map 30A: Lots 86A, 86C, 86D, 86H; Map 36: Lots 13, 14, 14A, 14B, 14C, 14D, 14E, 14F, 14K, 14N, 15, 15A, 15B, 15C, 15D, 15F, 15G, 15J. A map of the over lay district is also on file at the Town Clerk's Office and the Planning Board's Office.

#### D. Limit on the Number of Special Permits for Marijuana Retailers

- 1) No new Special Permit shall be issued if the resulting number of Special Permits for Marijuana Retailers within the Town exceeds the smallest whole number which is not less than twenty per cent (20%) of the number of liquor licenses for off premises alcohol consumption issued within the Town pursuant to Chapter 138, § 15 of the General Laws. Special Permits previously granted for Marijuana Retailer shall not be affected by a change in the number of liquor licenses for off premises alcohol consumption.
- 2) All Marijuana Establishments are prohibited from offering marijuana or marijuana products for consumption on the premises of a Marijuana Establishment.

#### E. Limit on the Number of Special Permits for Adult Use Marijuana Establishment Licenses other than Marijuana Retailers

No new Special Permits shall be issued if the resulting number of Special Permits for each particular type of adult use Marijuana Establishment, except Marijuana Retailers, exceeds the number of licensed Medical Marijuana Treatment Centers permitted in the Town. Special Permits previously granted each particular type of adult use Marijuana Establishment, except Marijuana Retailers, shall not be affected by a change in the number of licensed Medical Marijuana Treatment Centers permitted in the Town.

F. Application Requirements. Above and beyond the standard application requirements for Special Permits and Site Plan Review approval, an application for a use under this section shall include the following:

- 1) The name and address of each owner of the facility/operation;
- 2) Copies of all documentation demonstrating appropriate application status under state law, or registration or license, issued to the applicant by the Commonwealth of Massachusetts and any of its agencies for the facility;

- 3) Evidence that the Applicant has site control and the right to use the site for a facility in the form of a deed or valid purchase and sale agreement, or, in the case of a lease, a notarized statement from the property owner and a copy of the lease agreement;
- 4) A notarized statement signed by the organization's Chief Executive Officer and corporate attorney, if any, disclosing all of its designated representatives, including officers and directors, shareholders, partners, members, managers, directors, officers, or other similarly-situated individuals and entities and their addresses. If any of the above are entities rather than persons, the Applicant must disclose the identity of all such responsible individual persons;
- 5) A Security Plan, approved by the Cannabis Control Commission as part of the issuance of a Provisional License, to be approved by the Police and Fire Departments prior to the issuance of a Special Permit, with details showing all exterior proposed security measures for the premises, including lighting, fencing, gates and alarms, etc. ensuring the safety of employees and patrons and protecting the premises from theft or other criminal activity;
- 6) A Management Plan, including a description of all activities to occur on site, including all provisions for the delivery of marijuana and related products to Marijuana Establishments or off-site direct delivery consistent with state law and regulations;
- 7) A Resource Plan, for all marijuana cultivators, shall be submitted to the Planning Board and the Board of Health to demonstrate best practices for waste disposal, use of energy, water, and other common resources, and to ensure that there will be no undue damage to the natural environment. The Resources Plan shall include an electrical system overview, proposed energy demand and proposed electrical demand off-sets, ventilation system and air quality, proposed water system and utility demand;
- 8) A Traffic Impact Report shall be required for all Marijuana Establishments. The Planning Board may require a traffic study if in their determination one is warranted because of public safety concerns.

#### G. Special Permit Requirements for Marijuana Establishments

- 1) General Requirements
  - a) Marijuana Establishments shall comply with applicable State and local laws, regulations, bylaws, codes, conditions and agreements with the Town.
  - b) An approved Host Community Agreement shall be required prior to the granting of a Special Permit for a Marijuana Establishment.
  - c) Marijuana Establishments shall maintain all permits and licenses required by State and local laws. Any voiding, revocation or suspension of the Marijuana Establishment's Cannabis Control Commission license shall result in an automatic suspension of the Special Permit, pending hearing or the opportunity therefore afforded to the Marijuana Establishment by the CCC, and pending determination by the Planning Board during a regularly scheduled public meeting that the Marijuana Establishment has cured any violation with State laws and is duly licensed by and in good standing with the CCC.

- d) A violation of the Host Community Agreement shall result in automatic suspension of the Special Permit and may result in the revocation of the Special Permit.
- e) A Special Permit may also be revoked under the following circumstances:
  - i. Upon determination by the Building Commissioner that the permit holder is no longer operating under the Special Permit and its conditions or under the requirements of this bylaw, or that the use has been abandoned;
  - ii. The applicant has failed to report annually as required under this bylaw, or on the schedule approved as part of a Special Permit;
  - iii. Upon request by the permit holder of a desire to cease operations.
- f) The process for revoking a Special Permit shall be as follows:
  - i. Determination of violation, abandonment, or other cause for revocation by the Building Commissioner;
  - ii. Notice sent by the Building Commissioner to the permit holder and the Planning Board;
  - iii. Vote of the Planning Board to either continue or revoke/terminate the Special Permit;
  - iv. Record notice of revocation/termination in the Registry of Deeds.

## 2) Use Regulations:

- a) No smoking, burning, consumption or use of Marijuana or Marijuana Products shall be permitted on the premises of a Marijuana Establishment.
- b) Marijuana manufacturing or extraction shall not be done in any building containing residential units including transient housing such as motels and dormitories, assembly, educational, health care, ambulatory health care, residential board and care, motels, or detention and correctional facilities, or inside a movable or mobile structure such as a van or truck.
- c) The hours of operation shall be set by the Planning Board as a condition of the Special Permit.
- d) Marijuana Establishment operations shall not create nuisance conditions in parking areas, sidewalks, streets and areas surrounding its premises and adjacent properties. "Nuisance" includes, but is not limited to, disturbances of the peace, open public consumption of Marijuana, excessive pedestrian or vehicular traffic, odors emanating from the Marijuana Establishment's premises, lighting trespass on adjacent properties, illegal drug activity under State or local law, harassment of passersby, excessive littering, excessive loitering, illegal parking, excessive loud noises, excessive citation for violations of State traffic laws and regulations and/or Transportation Division Rules and Regulations, queuing of patrons (vehicular or pedestrian) in or other obstructions of the public way (sidewalks and streets), collisions between vehicles, bicyclists, and pedestrians, lewd conduct or police detentions and arrests.
- e) Marijuana Establishments are prohibited from use of on-site self-service displays. Self-service displays are defined to mean displays from which customers may select Marijuana

or Marijuana Products without assistance from an employee or store personnel, and include vending machines.

- f) The proposed use shall not display on-premises signage or other marketing on the exterior of the building or in any manner visible from the public way, which may promote or encourage the use of marijuana or other drugs by minors.

### 3) Locational and Physical Requirements

- a) All Marijuana Establishments' licensed operations must take place within a building at a fixed location and shall not be visible from the exterior of the business.
- b) Marijuana Establishments may cultivate, process, test, store and manufacture Marijuana or Marijuana Products only within an area that is enclosed and secured in a manner that prevents access by persons not permitted by the Marijuana Establishment to access the area.
- c) No outside storage of marijuana, related supplies, or educational materials is permitted.
- d) All business signage, marketing, advertising, and branding shall be subject to the requirements promulgated by the Cannabis Control Commission and the requirements of the Fairhaven Zoning Bylaws and Sign Code. In the case of a conflict, the stricter requirement shall apply.
- e) The gross floor area of Marijuana Establishments accessible to patients or customers, and not including space dedicated to administration or operations and accessible only to employees of the facility, shall be no greater than the following:
- i. Medical Marijuana Treatment Centers: 4,500 square feet
  - ii. Marijuana Retailers: 2,500 square feet
- f) Ventilation. All facilities shall be ventilated in such a manner that:
- i. No pesticides, insecticides or other chemicals or products used in the cultivation or processing are dispersed into the outside atmosphere; and
  - ii. No odor from marijuana or its processing can be detected by a person with an unimpaired and otherwise normal sense of smell at the exterior of the Marijuana Establishment or at any adjoining use or property.

### 4) Reporting Requirements.

- a) All Special Permit holders for uses under this section shall provide the Police Department, Fire Department, Building Commissioner, Board of Health, and Special Permit Granting Authority with the names, phone numbers, mailing and email addresses of all management staff and key-holders, including a minimum of two (2) operators or managers of the facilities identified as designated contact persons to whom notice should be made if there are operating problems associated with any use under this section. All such contact information shall be updated as needed to keep it current and accurate
- b) One of the two designated contact persons shall notify the Police Department, Fire Department, Building Commissioner, Board of Health and Special Permit Granting Authority in writing a minimum of thirty (30) days prior to any change in ownership or management of a facility regulated under this section.

- c) The designated representatives of permitted facilities shall file an annual report with the Special Permit Granting Authority and shall appear before said Authority to present the report no later than 30 days following renewal of a state license or registration, providing a copy of all current applicable state licenses for the owners and facilities, to demonstrate continued compliance with the conditions of the Special Permit. If there is a notice of deficiencies or violations said notice shall be included with the Annual Report.
  - d) The designated contact persons shall be required to respond by phone or email within twenty-four (24) hours of the time of contact and inquiry regarding operation of the facility by a town official to the telephone number or email address provided as the contact for the business.
- 5) Discontinuance of Use. Any Marijuana Establishment permitted under this section shall be required to remove all marijuana and marijuana products, equipment and other paraphernalia by the earlier of:
- a) immediately following the expiration, revocation or voiding of its state issued license or permit or
  - b) within 120 days of ceasing operations.

H. Findings. In addition to the findings required under Section 198-29 of the Zoning Bylaw and meeting the provisions of all other applicable sections of this Bylaw, the Planning Board shall not issue a Special Permit for a Marijuana Establishment unless it finds that the use as proposed:

- 1) Does not contravene the limit on the number of Special Permits that may be granted.
- 2) Meets all of the permitting requirements of all applicable agencies within the Commonwealth of Massachusetts and will as proposed be in compliance with all applicable state laws and regulations.
- 3) Meets all the applicable conditions and requirements as set forth in this Chapter.
- 4) Will provide copies of registrations and licenses and a copy of a signed Host Community Agreement with the Town of Fairhaven, in accordance with M.G.L. Chapter 94G and subsequent regulations, including 935 CMR 500, to the Building Commissioner prior to the issuance of a Certificate of Occupancy.
- 5) Is designed to minimize adverse visual impacts on abutters and other parties in interest.
- 6) Provides a secure waiting area, as required by state law or regulations.
- 7) Provides adequate security measures to ensure that no individual or group participant will pose a direct threat to the health or safety of other individuals, and that the storage and/or location of cultivation of marijuana is adequately secured in enclosed, locked facilities.
- 8) Adequately addresses issues of vehicular and pedestrian traffic, circulation, parking and queuing, especially during peak periods at the facility, and adequately mitigates the impacts of vehicular and pedestrian traffic on neighboring uses.
- 9) Adequately demonstrates best practices with regard to the use of energy, water, waste disposal and other common resources, with no undue damage to the natural environment.

**2. And by amending §198-33, Definitions and Word Use, by deleting the definitions of "Marijuana" and "Marijuana for Medical Use," and inserting new definitions as follows:**

**MARIJUANA**—The same substance defined as "marihuana" under the provisions of M.G.L. c. 94C, as amended from time to time. [Added 2-12-2014 STM by Art. 8]



MARIJUANA FOR MEDICAL USE — Marijuana that is designated and restricted for use by, and for the benefit of, Qualifying Patients in the treatment of Debilitating Medical Conditions as set forth in the provisions of M.G.L. c. 94C, as amended from time to time. [Added 2-12-2014 STM by Art. 8]

MARIJUANA — All parts of any plant of the genus Cannabis, not excepted below and whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin including tetrahydrocannabinol as defined in section 1 of chapter 94C; provided, however, that "Marijuana" shall not include (1) the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture or preparation of the mature stalks, fiber, oil or cake made from the seeds of the plant or the sterilized seed of the plant that is incapable of germination; (2) hemp; or (3) the weight of any other ingredient combined with Marijuana to prepare topical or oral administrations, food, drink or other products. Marijuana also includes Marijuana Products except where the context clearly indicates otherwise.

a. Hemp — The plant of the genus Cannabis or any part of the plant, whether growing or not, with a delta-9-tetrahydrocannabinol concentration that does not exceed 0.3 per cent on a dry weight basis of any part of the plant of the genus Cannabis, or per volume or weight of Marijuana product, or the combined per cent of delta-9-tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the plant of the genus Cannabis regardless of moisture content.

MARIJUANA ESTABLISHMENT — A Marijuana Retailer, Marijuana Product Manufacturer, Marijuana Cultivator, Craft Marijuana Cultivator Cooperative, Independent Testing Laboratory, Standards Laboratory, Research Facility, Marijuana Micro-business, Marijuana Transporter, or any other type of Marijuana-related business, including a Medical Marijuana Treatment Center, that has been duly licensed by the Massachusetts Cannabis Control Commission or relevant State agency.

a. Marijuana Retailer — An entity licensed to purchase and transport cannabis or marijuana product from Marijuana Establishments; and to sell or otherwise transfer this product to Marijuana Establishments; and to sell this product to consumers. Retailers are prohibited from delivering cannabis or marijuana products to consumers; and from offering cannabis or marijuana products for the purposes of on-site social consumption on the premises of a Marijuana Establishment. A Marijuana Retailer is an entity authorized to purchase and deliver marijuana and marijuana products from Marijuana Establishments and to sell or otherwise transfer marijuana and marijuana products to Marijuana Establishments and to consumers.

b. Medical Marijuana Treatment Center — An entity registered by the State under 105 CMR 725.100 that acquires, cultivates, possesses, processes (including development of related products such as edible Marijuana products, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers Marijuana, products containing Marijuana, related supplies, or educational materials to registered qualifying patients or their personal caregivers for medical use. Unless otherwise specified, RMD refers to the site(s) of dispensing, cultivation, and preparation of cannabis or marijuana for medical use.

MARIJUANA PRODUCTS — Products that have been manufactured and contain Marijuana or an extract from Marijuana, including concentrated forms of Marijuana and products composed of Marijuana and other ingredients that are intended for use or consumption, including edible products, beverages, topical products, ointments, oils and tinctures.

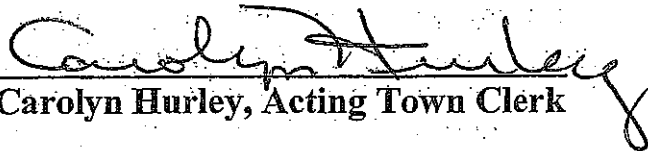
3. And by amending §198-16, Use Regulation Schedule, COMMERCIAL USES, of the Fairhaven Zoning Bylaw by deleting the "Medical Marijuana Facilities" use and inserting the following new uses, and by amending footnote 21 as follows:

Activity or Use	District								
	RR/RA	RB	RC	P	B	I	AG	MU <sup>14</sup>	WRP <sup>16</sup>
<u>Medical Marijuana Facilities</u>									
<u>Marijuana Establishment (except Social Consumption)</u>	N	N	N	N	N	A <sup>21</sup>	N	N	N
<u>Marijuana Retailer Social Consumption</u>	N	N	N	N	N	N	N	N	N

Footnote 21: May only be allowed by Special Permit from the Planning Board only in the Medical Marijuana Overlay District. Any alterations, additions and/or changes of an approved Medical Marijuana Facilities Establishment Special Permit shall require a new Special Permit.

4. And by deleting §198-32.3, Temporary Moratoria, Temporary Moratorium on the Sale and Distribution of Recreational Marijuana, in its entirety.

A TRUE COPY, ATTEST:

  
 Carolyn Hurley, Acting Town Clerk

Note:

Claims of invalidity of this bylaw by reason of any defect in the procedure of adoption or amendment may only be made within ninety days of such posting as provided for in M.G.L. Chapter 40, Section 32. Copies of the by-law may be examined and obtained in the Town Clerk's Office or Department of Planning and Economic Development.