MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

July 22, 2013

Nancy J. Yendriga, Town Clerk
Town of Westborough
34 West Main Street
Westborough, MA 01581

RE: Westborough Annual Town Meeting of March 16, 2013 - Case # 6630
Warrant Article # 16 (Zoning)

Dear Ms. Yendriga:

We approve the large majority of the by-law amendments adopted by the Town under Article 16 regarding zoning for Medical Marijuana Treatment and Dispensing Facilities, and Marijuana Cultivation. As explained below, we approve the following provisions regarding Facilities, and Cultivation associated with Facilities:

- Special permit requirements
- Siting restrictions, including locating only in the Town's Adult Entertainment District, and requiring a 500 foot buffer between such uses and any residential district or schools and certain other listed uses
- Sign restrictions, and
- Visibility restrictions

However, when the Town amended its by-law at the Annual Town Meeting in March, it did not have the benefit of the Department of Public Health (DPH) regulations (approved May 8, 2013) implementing Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana" (the Act). In the following two respects Article 16 directly conflicts with the Act or the DPH regulations and we therefore must disapprove this text:

- Requiring a special permit for hardship cultivation and limiting hardship cultivation to the Town's Adult Entertainment District
- Prohibiting off-site delivery of marijuana by Medical Marijuana Treatment and Dispensing Facilities

The conflict arises because the DPH regulations require hardship cultivation at the primary residence of a qualified patient or caregiver, and the DPH regulations require testing at an independent laboratory – which may require off-site delivery to the laboratory. A town by-law requiring a special permit for hardship cultivation and banning it in a residential district, and a town by-law ban on off-site delivery, would make it impossible to comply with the DPH regulations in these respects. *See* American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006) (a conflict arises between state statute or regulation and local by-law where the purpose of the statute cannot be achieved in the face of the local by-law.) Because in these two categories the by-law amendments directly conflict with the Medical Marijuana Act and/or the DPH regulations, we must disapprove and delete certain text from Article 16. (See pp. 6-7 for **Disapproval # 1 of 3**; p. 7 for **Disapproval # 2 of 3**; and p. 8 for **Disapproval # 3 of 3**).

We recognize that a municipality retains the zoning power to regulate the accessory structures (sheds or greenhouses, for example) where hardship cultivation might be conducted pursuant to the regulations. *See* 105 CMR 725.035 (H) ("Cultivation and storage of marijuana shall be in an enclosed, locked area accessible only to the registered qualifying patient or his or her persona; caregiver(s)…"). We also recognize that a municipality may adopt general by-laws or Board of Health regulations to regulate noise, ventilation or other nuisance and security concerns related to hardship cultivation or off-site delivery. However, by subjecting a qualifying patient with a hardship cultivation registration to a special permit application process, and by prohibiting off-site delivery, the proposed by-law interferes with the operation of the regulations and, in this respect, is unlawful. *See* 105 CMR 725.600 (B) ("[N]othing in 105 CMR 725.000 shall be construed so as to prohibit lawful local oversight and regulation, including fee requirements, that does not conflict or interfere with the operation of 105 CMR 725.000").

We emphasize that our disapproval of certain text in Article 16 in no way implies any position on the policy views that led to the adoption of this text. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state and federal law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

This decision briefly describes the by-law amendments, the Act and the regulations; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we must disapprove certain text in Article 16 because it conflicts with the Act and/or regulations. We also explain why certain other sections of Article 16 cannot be applied to prohibit hardship cultivation in residential districts, and cannot be applied to interfere with the statutory protection granted to certain agricultural uses in G.L. c. 40A, § 3.

I. General Description of Article 16.

Article 16 amends the Town's zoning by-law in several ways. First, it adds to the zoning by-law's definition of "Agricultural" the following text: "Agricultural shall not include any uses or activities associated with Medical Marijuana Treatment and Dispensing Facilities or Marijuana Cultivation." Second, it creates a new Section 5700 which defines "Medical Marijuana Treatment and Dispensing Facilities" and "Marijuana Cultivation," and establishes that these uses may only be conducted by special permit in the Town's Adult Entertainment District under certain limited conditions.

Importantly, the Town has defined the term "Marijuana Cultivation" to include both cultivation related to Medical Marijuana Treatment and Dispensing Facilities and "personal cultivation by qualifying patients or cultivation by personal caregivers on behalf of qualifying patients or others." Article 16 subjects all such Marijuana Cultivation to a special permit, and prohibits all such cultivation in any district other than the Adult Entertainment District. Finally, Article 16 amends Section 2300, Use Regulation Schedule, to reflect that Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation are allowed only by special permit from the Planning Board in the Town's Adult Entertainment District.

II. Summary of Medical Marijuana Act.

Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana" ("the Act") was adopted by the voters under Question 3 on the state ballot. The Act allows qualifying patients – those "diagnosed by a licensed physician as having a debilitating medical condition" (Section 2 (K)) – to obtain a registration card from the Department of Public Health (DPH) authorizing the person to possess "no more marijuana than is necessary for the patient's personal medical use, not exceeding the amount necessary for a sixty-day supply [as defined by DPH]." Sections 4, 12.

The Act authorizes the DPH to issue registrations for up to thirty-five medical marijuana treatment centers in the first year after the Act's effective date, "provided that at least one treatment center shall be located in each county, and not more than five shall be located in any one county." Section 9 (C). The DPH is authorized to increase the number of registered treatment centers in a future year if the DPH determines "that the number of treatment centers is insufficient to meet patient needs." Section 9 (C).

The Act allows for hardship cultivation registrations for qualifying patients whose access to a medical marijuana treatment center "is limited by verified financial hardship, a physical incapacity to access reasonable transportation, or the lack of a treatment center within a reasonable distance of the patient's residence." Section 11. Such hardship registration allows the patient, or the patient's personal care-giver, to cultivate a limited number of plants (sufficient for a 60-day supply) in an enclosed locked facility. Section 11.

Finally, Sections 8 and 13 direct the DPH to issue regulations defining the quantity of marijuana that could reasonably be presumed to be a sixty-day supply for qualifying patients, and regulations to implement Sections 9 through 12 of the Act (governing registration of treatment centers, their agents, hardship cultivation, and qualifying patients and caregivers).

III. **Summary of Regulations**.

On May 8, 2013 the Public Health Council approved the implementing regulations, 105 CMR 725.000. The regulations clarify that a medical marijuana treatment center will now "be known as a registered marijuana dispensary (RMD)" (105 CMR 725.004). The regulations also require that applicants for a hardship cultivation registration must include the "address of the single location that shall be used for the cultivation of marijuana, which *shall be either the registered qualifying patient's or one personal caregiver's primary residence*." (105 CMR 725.035 (B) (4) (emphasis supplied)). Hardship cultivation must be in an enclosed, locked area (defined as a "closet, room, greenhouse, or other indoor or outdoor area equipped with locks," 105 CMR 725.004) accessible only to the registered person, and marijuana shall not be visible from the street or other public areas. (105 CMR 725.035 (H)). The regulations thus require that such hardship cultivation will occur at the patient's or personal caregiver's primary residence under secure conditions.

The regulations anticipate and allow municipal regulation of RMDs, hardship cultivation, and other medical marijuana issues, so long as such local regulation does not conflict or interfere with the operation of the regulations:

> The Department does not mandate any involvement by municipalities or local boards of health in the regulation of RMDs, qualifying patients with hardship cultivation registrations, or any other aspects of marijuana for medical use. However, nothing in 105 CMR 725.000 shall be construed so as to prohibit lawful local oversight and regulation, including fee requirements, that does not conflict or interfere with the operation of 105 CMR 725.000.

105 CMR 725.600 (B). Indeed, the Phase 2 application for RMD registration requires the applicant to demonstrate compliance with local codes and by-laws, by submitting with its application:

> (f) If available at the time of submission, pursuant to 105 CMR 725.100 (B) (3) (c), a description of plans to ensure that the RMD is or will be compliant with local codes, ordinances, and bylaws for the physical address of the RMD and for the physical address of the additional location, if any, including any demonstration of support or non-opposition furnished by the local municipality.

105 CMR 725.100 (B) (3) (f). The regulations thus allow for, and require compliance with, local codes and by-laws that do not conflict or interfere with the operation of 105 CMR 725.000.

IV. **Attorney General's Standard of Review and General Zoning Principles**.

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, 398 Mass. at 795-96. 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, the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. 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, 363 Mass. at 154 (emphasis added). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 16, as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Durand, 440 Mass. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). Nevertheless, where a zoning by-law conflicts with state law or the constitution, it is invalid. *See* Zuckerman v. Hadley, 442 Mass. 511, 520 (2004) (rate of development by-law of unlimited duration did not serve a permissible public purpose and was thus unconstitutional).

V. **Disapproved Text Based On Conflict With Regulations**.

1. Definitions – Marijuana Cultivation.

We disapprove and delete [**Disapproval #1 of 3**] the following text (in underline and bold) from the definition of Marijuana Cultivation because this text, combined with many operative sections of the by-law, unlawfully regulates hardship cultivation in conflict with the Act and regulations:

> Marijuana Cultivation: The process of propagation, including germination, using soil, hydroponics, or other mediums to generate growth and maturity. The intended process of bringing a plant or other grown product to maturity for harvesting, sale, refining or use as an ingredient in further manufacturing or processing. This definition encompasses marijuana cultivation related to Medical Marijuana Treatment and Dispensing Facilities**, personal cultivation by qualifying patients or cultivation by personal caregivers on behalf of qualifying patients or others**.

The Act and regulations specifically authorize hardship cultivation at a primary residence when a registered qualifying patient's access to RMDs is limited. (105 CMR 725.035). An applicant for a hardship cultivation registration must include the "address of the single location that shall be used for the cultivation of marijuana, which *shall be either the registered qualifying patient's or one personal caregiver's primary residence*." (105 CMR 725.035 (B) (4) (emphasis supplied)). The regulations prohibit hardship cultivation at any location other than the location specified in the application approved by the DPH. (105 CMR 725.035 (D)). The regulations thus require hardship cultivation to occur at the patient's or personal caregiver's primary residence.[1] If the Town required a discretionary special permit for hardship cultivation, or prohibited hardship cultivation at the primary residence of a qualified patient or personal caregiver, this would frustrate the purpose of the Act and regulations to allow for an alternative access to medical marijuana. *See* Tri-Nel Mgmt, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 223 (2001) (local regulation is inconsistent with a state statute when "the purpose of the statute cannot be achieved in the face of the local [regulation]."

By attempting to require a discretionary special permit for hardship cultivation the by-law presents a foundational conflict with the Act and regulations. The regulations grant to the DPH the authority to first determine whether an applicant meets the criteria for registration as a qualifying patient, based upon physician certification that the patient suffers from a debilitating medical condition. (105 CMR 725.015). The DPH must next determine whether the qualifying patient has adequately demonstrated that his access to a RMD is limited and therefore is appropriate for a hardship cultivation registration. (105 CMR 725.035). If the DPH grants a hardship qualification registration to a qualifying patient, the patient (or his personal caregiver) is authorized to cultivate at the location specified in the application approved by the DPH. (105 CMR 725.035 (D)). To allow a special permit granting authority, which has broad discretion to

[1] The Department has explicitly stated that "Nothing in [the regulations] shall be construed to limit the applicability of other law as it pertains to the rights of landlords, employers, law enforcement authorities, or regulatory agencies." 105 CMR 725.600 (B).

deny an application, Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 794 (2003), to second-guess these DPH determinations would conflict with the Act and regulations. *See* Wendell v. Attorney General, 394 Mass. 518, 529 (1985) ("An additional layer of regulation at the local level, in effect second-guessing the [state-level] sub-committee, would prevent the achievement of the identifiable statutory purpose…"). This is particularly true here where the DPH's hardship cultivation decision is based on a review of medical, and in some cases financial hardship documentation. (105 CMR 725.015 and 105 CMR 725.035 (A). The hardship cultivation determination is therefore very different from the standard land use determinations made by a special permit granting authority: whether a use is "in harmony with the general purpose and intent of the zoning ordinance or by-law," what "general or specific provisions" the use should be subject to, and what "conditions, safeguards and limitations on time or use" should be imposed. G.L. c. 40A, § 9.

2 Section 5754 Off-Site Delivery.

We disapprove and delete [**Disapproval # 2 of 3**] the following text (in underlined and bold) in Section 5754 because it conflicts with the DPH requirement that marijuana be tested by an independent laboratory:

> 5754 **Off-Site delivery prohibited**: All sales **and distribution** of medical marijuana by a licensed Medical Marijuana Treatment and Dispensing Facility shall occur only upon the permitted premises, **and the registrant shall be strictly prohibited from delivering medical marijuana to any person at any other location**.

The DPH regulations require that RMDs have all marijuana tested at an independent laboratory:

> The RMD is responsible for having all marijuana cultivated by the RMD tested in accordance with the following…
>
> (d) All testing must be conducted by an independent laboratory ….
>
> (i) All transportation of marijuana to and from laboratories providing marijuana testing services shall comply with 105 CMR 725.110 (E)[.]

105 CMR 725.105 (C) (2).

This testing will in many cases require transport of marijuana to an off-site laboratory. A town by-law which prohibits delivery of marijuana to any person at a location other than the RMD would make it impossible for the RMD to comply with the testing requirement – if no independent laboratory will travel to the RMD site for testing. In this respect, the by-law text conflicts with the operation of the DPH regulations and we must disapprove and delete it. [2]

[2] We note that the DPH regulations contain numerous references to home delivery by RMDs which reflect a

3. Section 5758 Cultivation Activities.

We disapprove and delete [**Disapproval #3 of 3]** the following text (in underline and bold) from Section 5758, Cultivation Activities, because it conflicts with the operation of the DPH regulations:

> 5758 Cultivation Activities: Cultivation, as defined in this Bylaw, by any **qualifying patient, personal caregiver, or** Medical Marijuana Treatment and Dispensing Facility in any location other than where specifically permitted shall be disallowed. This disallowance shall include cultivation, even when proposed as an accessory use, by any **qualified patient, personal caregiver, or** Medical Marijuana Treatment and Dispensing Facility.

As explained *supra* at pp. 6-7, the Act and regulations specifically authorize hardship cultivation at a primary residence when access to RMDs is limited. (105 CMR 725.035). The regulations envision that such hardship cultivation will occur at the patient's or personal caregiver's primary residence. If the Town prohibits hardship cultivation in a primary residence, this would frustrate the purpose of the Act and regulations to allow for an alternative access to medical marijuana. *See* Tri-Nel Mgmt, 433 Mass. at 223 (2001) (local regulation is inconsistent with a state statute when "the purpose of the statute cannot be achieved in the face of the local [regulation]."). Because the highlighted text in Section 5758 conflicts with the operation of the Act and regulations, we disapprove and delete it from the proposed by-law.

VI. Potential Conflicts between Article 16 and the Act or Regulations, or other State Law.

A. Sections Which Cannot Be Applied to Hardship Cultivation.

We approve the following Sections of Article 16, but our disapproval and deletion of the words "personal cultivation by qualifying patients or cultivation by personal caregivers on behalf of qualifying patients or others" from the definition of "Marijuana Cultivation" means that the following Sections (Sections 5720, 5721, 5730, 5740, 5750, 5751, and 5753) do not apply to hardship cultivation by qualifying patients or personal caregivers:

1) Section 5720:

The cultivation, production, processing, assembly, packaging, retail, or wholesale

---

regulatory intent that qualified patients should have at least the potential for access to medical marijuana by a RMD home-delivery system or personal caregiver transport. *See, e.g.,* 105 CMR 725.100 (B) (5) (d) ("For purposes of scoring, the Department may take into account…the presence of a home delivery system, and other mechanisms to ensure appropriate patient access… "). A by-law that conflicted or interfered with the Department's regulations on this topic would be invalid.

sale, trade, distribution or dispensing of marijuana for medical use is prohibited unless permitted as a Medical Marijuana Treatment and Dispensing Facility under this Section.

2) Section 5721:

No Medical Marijuana Treatment and Dispensing Facility or any Marijuana Cultivation use shall be established except in compliance with the provisions of this Section.

3) Section 5730:

Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation shall be authorized by Special Permit only in District(s) provided, as set forth in Section 2300, Use Regulation Schedule of the Zoning Bylaws. Any such Special Permit issued by the Special Permit Granting Authority shall comply with all relevant local, state, and federal laws.

4) Section 5740:

No Medical Marijuana Treatment and Dispensing Facilities or Marijuana Cultivation Special Permit shall be issued to any person convicted of violating the provisions of Mass General Law, Chapter 119, Section 63, or General Law, Chapter 94C, or similar laws in other jurisdictions…..

5) Section 5750:

Any Medical Marijuana Treatment and Dispensing Facility or Marijuana Cultivation activities permitted under this Section shall be located only in a zoning district that is designated for its use within this Zoning Bylaw.

No Medical Marijuana Treatment and Dispensing Facilities use or Marijuana Cultivation activities shall be located with (*sic*) five hundred (500) linear feet of a property line where the following Districts or activity or uses occur:

1. Any Residential District as defined in these Zoning Bylaws;
2. Any school or child care establishment, or place where minors frequent (e.g. a library, ball field, sports or family recreation facility, religious facility or the like);
3. Any other Medical Marijuana Treatment or Dispensing Facility or Marijuana Cultivation site;
4. Any drug or alcohol rehabilitation facility;
5. Any correctional facility, half-way house or similar facility; or
6. Any establishment licensed under the provisions of General Law, Chapter 138, Section 12.

6) Section 5751:

1. No marijuana or marijuana based product shall be sold or grown or cultivated, interior or exterior, of a residential dwelling unit or residential district. Growing and related cultivation activities shall occur only in districts as permitted in this Bylaw.

7) Section 5753:

In order to lawfully engage in the business of selling, cultivating marijuana, or manufacturing medical marijuana, or products containing marijuana, cannabis, or THC, in the Town on and after the date of passage of this Bylaw, any person must qualify for an obtain a special permit in accordance with the requirements of this Bylaw.

The Town should consult closely with Town Counsel when applying Sections 5720, 5721, 5730, 5740, 5750, 5751, and 5753, to ensure that they are not applied to hardship cultivation.

B. Special Permit Provisions.

1. Denial of special permit based on federal law.

The requirement in Section 5730 that any special permit "shall comply with all relevant local, state, and federal laws" cannot be applied in a way that amounts to total ban on Medical Marijuana Treatment and Dispensing Facilities or Marijuana Cultivation in the Town. The Town has the authority to adopt regulations regarding RMDs, and to a certain extent hardship cultivation, but cannot prohibit them entirely because such a complete ban would frustrate the purpose of the Act to allow qualifying patients reasonable access to medical marijuana. (*See* AGO Decision on Wakefield Case # 6601 issued March 13, 2013; currently under appeal in Wakefield v. Attorney General, SUCV2013-01684).

For example, the Town may question whether it can deny a special permit for a Marijuana Treatment and Dispensing Facility on the basis that such Facilities are illegal under federal law. We recognize that marijuana remains a Schedule I drug and that the federal government is empowered to enforce the Controlled Substances Act (CSA) against those possessing or cultivating medical marijuana. Gonzales v. Raich, 545 U.S. 1 (2005). However, no Massachusetts appellate level court has considered the question whether a municipality may effectively ban RMDs based on their asserted inconsistency with federal law, when our state law specifically allows RMDs and evidences an intent that qualifying patients have reasonable access to them. Ordinarily it is the duty of public officials to act in accordance with duly enacted state statutes, not to decline to implement them based on the view that they are inconsistent with federal law; such determinations belong to the courts.[3] Moreover, one court has held that claimed

[3] Cf. National Revenue Corp. v. Violet, 807 F.2d 285, 289 (1st Cir. 1986) (state attorney general should not agree to judgment that statute is unconstitutional, but may inform court if of the opinion that statute is flawed, leaving final determination to court); Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 374 (2006) (Spina, J., concurring) ("The duty of a public official is simply to enforce duly enacted and presumptively constitutional statutes"); Tsongas v. Sec'y of the Comm., 362 Mass. 708, 713 (1972) (officials "had no authority to depart from the

federal preemption of a state's medical marijuana law is not a valid basis for upholding a municipal zoning ordinance banning medical marijuana dispensaries that are authorized by that state law. Qualified Patients Ass'n v. City of Anaheim, 187 Cal. App. 4th 734, 761-62, 115 Cal. Rptr. 3d 89, 109 (Cal. App. 4 Dist. 2010) ("a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana"). [4] *See also* Ter Beek v. City of Wyoming, 823 N.W.2d 864 (Mich. App. 2012) (city ordinance banning land uses that are contrary to federal law, including CSA, and thus preventing qualified patient from growing marijuana in home as permitted under Michigan Medical Marijuana Act (MMMA), was inconsistent with purposes of MMMA and thus invalid; rejecting city's defense that relevant section of MMMA was preempted by federal CSA), leave to appeal granted, 828 N.W.2d 381 (Mich. 2013). The same reasoning would seem to apply to a decision of a local board (such as the Westborough Planning Board) to disapprove a RMD special permit application on the basis of claimed federal illegality of RMDs.[5] For this reason, the Town should consult closely with Town Counsel when applying this provision in Section 5730.

2. Special permit criteria.

As noted above, the by-law amendments allow qualifying Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation in the Town's Adult Entertainment District by special permit from the Planning Board. A town by-law, together with the Zoning Enabling Act (General Laws Chapter 40A), must "provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits….[However] the standards need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638 (1970). The Town's by-law includes certain siting restrictions (e.g. Section 5750 Eligible Locations and Section 5752 Separation), and recites as one of its purposes "[t]o minimize the adverse impacts of Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation on adjacent properties, residential neighborhoods, schools and other places where children congregate, local historic districts, and other land uses potentially incompatible with said Facilities." This purpose language is similar to the special permit criteria upheld in Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 118 (1955) (ordinance instructing the special

---

statutes on the ground that the statutes were unconstitutional"); Assessors of Haverhill v. New Eng. Tel. & Tel. Co., 332 Mass. 357, 362 (1955) ("In general an administrative officer cannot refuse to proceed in accordance with statutes because he believes them to be unconstitutional," citing Smith v. State of Indiana, 191 U.S. 138, 148 (1903)).

[4] In response to the claim that California's medical marijuana law was preempted because it posed an obstacle to accomplishing the full purposes and objectives of Congress, the Qualified Patients' Ass'n court explained that "obstacle preemption only applies if the state enactment undermines or conflicts with federal law to such an extent that its purposes cannot otherwise be accomplished"; but the need to remove state and local obstacles to federal objectives "is not a license to commandeer state or local resources to achieve federal objectives." 187 Cal. App. 4th at 761, 115 Cal. Rptr. 3d at 108 (emphasis added).

[5] The Supreme Court of California's recent decision in City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc., 300 P.3d 494, 512 n.14 (2013) did not reach the issue of federal preemption of California's medical marijuana statutes.

permit granting authority to consider only "the effects upon the neighborhood and the City at large" upheld as adequate). However, the by-law amendments contain no specific direction to the Planning Board regarding what it should consider when reviewing a special permit application. In our discussion with Town Counsel on this issue, he indicated the Town follows the criteria established by G.L. c. 40A, § 9:

> Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.

The amendments adopted under Article 16 appear to comply with G.L. c. 40A, § 9. However, the Town may wish to consult with Town Counsel regarding a future amendment to the by-law to list specific criteria for the Planning Board to consider when reviewing the application.

C. Amendment to Use Regulation Schedule.

Article 16 amends Section 2300 of the Town's zoning by-law, Use Regulation Schedule, to add a new line depicting that Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation are allowed only in the Town's Adult Entertainment District. We approve this text, but repeat our caution from Sections 5720 and 5721 *supra* that, in light of our disapproval at pp. 6-7, the Town cannot require a special permit for hardship cultivation, and cannot prohibit hardship cultivation at the primary residence of a qualifying patient (or his personal caregiver). The Town should consult closely with Town Counsel when applying Section 2300.

D. Signage.

Section 5755, Signage, requires any permitted Facilities to comply with the Town sign by-law, and prohibits "off-site signage or advertising in any form, including billboards…" We approve this text because 105 CMR 725.105 (L) governs RMD marketing and advertising, and allows for local signage requirements. However, the DPH regulations allow RMDs to have websites (105 CMR 725.105 (A) (16); 105 CMR 725.105 (E) (2) (B); 725.105 (E) (3) (B)) and so the by-law's prohibition against "off-site" signage or advertising cannot be applied to interfere with RMD website advertising. We suggest the Town consult with Town Counsel when applying this provision.

E. Amendments to By-law Definition of "Agricultural."

Article 16 amends the Town zoning by-law definition of "Agricultural" (at Article 5, Definitions, Agricultural) by adding the following sentence to exclude uses associated with medical marijuana:

> Agricultural shall not include any uses or activities associated with Medical Marijuana Treatment and Dispensing Facilities or Marijuana Cultivation.

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, (despite the by-law definition of "Agricultural"), 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. [6]

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 Gregory Franks (via electronic mail)

[6] 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.