

To: Pepperell Planning Board
Town of Pepperell

From: New England Craft Cultivators, LLC
Wes Ritchie, Esq.

Date: April 28, 2021

RE: Pepperell Marijuana Zoning Bylaw Interpretation



Dear Pepperell Planning Board Members:

We have attached a memorandum detailing our belief that the Pepperell Planning Board has the authority to grant two special permits to cannabis retailers in town.

Over the past 10 months we have provided two in-house legal memorandums outlining the legal rationale undergirding our belief about the number of available special permits can be 2. Rather than just providing our thinking alone, we have engaged a reputable cannabis law firm to analyze the issue as you weigh this decision before you.

The lead memo attorney, Courtney Elgart, is a Massachusetts-licensed attorney with deep legal and policy backgrounds. She served as a staff member in the Massachusetts Legislature to now-Senate President Karen Spilka and has served as an elected Framingham Town Meeting member. She has extensive experience in Massachusetts state and municipal government.

As we have hoped from the beginning of this process, we remain truly thrilled and optimistic about becoming contributing members of the Pepperell business community. As you can see from our detailed plans to occupy a long-vacant unit in town and redevelop the whole mall as a new commerce center, we are committed to being long-term economic development partners with the town.

If you have any questions, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Wes Ritchie".

Wes Ritchie
Co-CEO
New England Craft Cultivators

A handwritten signature in black ink, appearing to read "Tyre Turnbull".

Tyre Turnbull
Co-CEO
New England Craft Cultivators

SULLIVAN & TRIGGS, LLP
A Registered Limited Liability Law Partnership

1230 Montana Avenue
Suite 201
Santa Monica, California 90403
Telephone: (310) 451-8300
Facsimile: (310) 451-8303

To: New England Craft Cultivators, LLC
From: Courtney A. Elgart, Gillian C. Kuhlmann
Date: April 27, 2021
Subject: Town of Pepperell Planning Board Licensure Decision

You engaged us to analyze whether the Town of Pepperell Planning Board has authority to issue a second special permit to New England Craft Cultivators, LLC ("NECC") under the relevant laws. This memorandum summarizes our research and analysis.

I. Short Answer

Yes. The Town of Pepperell Planning Board has the authority to issue a second special permit to NECC based on the number of off-premises licenses available within the Town. The Planning Board has considerable authority to adopt reasonable interpretations of the zoning bylaws. It is our opinion that it would be reasonable to interpret the Recreational Marijuana Zoning Bylaw Amendment to allow for two special-use permits for at least four reasons:

1. The language of the Recreational Use Bylaw is consistent with fixing the number of special-use permits to the number of off-premises licenses available within the Town;
2. State law calls for a permissive approach in municipalities such as Pepperell whose voters supported legalization;
3. Other municipalities have interpreted similar bylaws to fix the number of special-use permits to the number of off-premises licenses available; and
4. Practical considerations militate in favor of fixing the number of special-use permits to the number of off-premises licenses available within the Town.

II. Background

It is our understanding that the following has occurred:

In November 2016, Massachusetts voters voted to legalize the recreational use of marijuana by a margin of 53.3% to 44.4%.¹ The ballot initiative received even more support in the Town of Pepperell, with 54.4% of voters voting in favor of legalization.² Indeed, legalization won the majority of support in all three of the Town's precincts.³

In December 2016, the Massachusetts Legislature passed a regulatory framework implementing legalized recreational marijuana.⁴ This law is codified at Massachusetts General Law Chapter 94G. The law, among other things, restricts the ability of municipalities like Pepperell to limit the number of licenses. Specifically, a municipality whose voters voted in favor of legalization cannot restrict the number of marijuana retailers "to fewer than 20 per cent of the number of licenses issued within the city or town for the retail sale of alcoholic beverages not to be drunk on the premises where sold under section 15 of chapter 138."⁵

In May 2019, the Town amended its zoning bylaws to adopt the Recreational Marijuana Zoning Bylaw Amendment.⁶ Section 6640.5 of the Recreational Use Bylaw provides that "consistent with M.G.L. c. 94G, § 3(b)(2), ... [t]he number of Marijuana Retailers shall not exceed twenty percent (20%) of the number of alcohol licenses issued pursuant to M.G.L. c. 138, §15 for retail sale of alcohol not to be drunk on the premises in the Town of Pepperell, said 20% figure to be rounded up to the next whole number."

In 2019, NECC approached the Town about opening a retail marijuana dispensary. The Town indicated that it believed its zoning bylaw allowed for two retail stores and it set forth a process where the Town would only engage in conversations with two retail companies at a time.⁷ The Town then issued a Host Community Agreement to two companies, one of which is NECC.

¹ Secretary of the Commonwealth, *Election Results 2016 Middlesex County Question 4* (accessed April 27, 2021), available at https://electionstats.state.ma.us/ballot_questions/view/7297/filter_by_county:Middlesex.

² *Id.*

³ *Id.*

⁴ 2016 Mass. Legis. Serv. Ch. 334 (H.B. 3932) (Dec. 15, 2016).

⁵ Mass. Gen. Laws ch. 94G, § 3(a)(2)(ii).

⁶ Town of Pepperell, *By-Laws/Rules & Planning Documents* (accessed April 27, 2021), available at <https://town.pepperell.ma.us/262/By-LawsRules-Planning-Documents>.

⁷ Town of Pepperell, *Select Board Meeting Minutes* (Oct. 14, 2020), available at https://town.pepperell.ma.us/AgendaCenter/ViewFile/Minutes/_10142020-2671 ("In working with the Planning

In August 2020, NECC became the first company to achieve Provisional Licensure status in Pepperell with the Cannabis Control Commission (“CCC”). As part of this process, the Town was required to certify to the CCC that NECC complied with local zoning laws.

Around the same time, NECC learned that the Town began debating whether it could issue two special permits because it had only granted three off-premises licenses even though it was allotted eight of them.

In March 2021, Town Meeting voted on an amendment to the Recreational Use Bylaw which would have struck the current language in Section 6640.5 and replaced it with language fixing the number of licenses at two.⁸ It is our understanding that the amendment gained a majority vote but fell just short of passing a two-thirds vote. We also understand that Town Meeting voted to reject an amendment that would have limited the number of licenses to one.

III. Analysis

The Planning Board has considerable authority to adopt reasonable interpretations of the zoning bylaws.⁹ It would be reasonable to interpret the Recreational Use Bylaw to fix the number of special-use permits to the number of off-premises licenses available within the town for at least four reasons.

A. The language of the Recreational Use Bylaw is consistent with fixing the number of special-use permits to the number of off-premises licenses available within the Town.

At bottom, the Recreational Use Bylaw is worded in such a way that allows for well-meaning parties to have different interpretations of what it requires. The Bylaw fixes the number of special permits to the number of off-premises licenses “issued ... in the Town.” And the Recreational Use Bylaw references Massachusetts General Laws ch. 138, § 15, which itself is unclear but primarily discusses a local licensing authority “grant[ing],” not “issuing,” an application for an off-premises liquor licenses.¹⁰ In other words,

Board and the Planning Department for more than a year, and with the applicants for almost a year, we have been operating under a two retailer premise until very recently.”).

⁸ Town of Pepperell, *Warrant Article for Zoning Bylaw Amendment* (accessed April 27, 2021), available at https://town.pepperell.ma.us/DocumentCenter/View/5845/marijuana_zoning_amend__number_of_establishments.

⁹ *Lundberg v. Dimes*, No. 09 MISC 396124(AHS), 2011 WL 285639, at *5 (Mass. Land Ct. Jan. 19, 2011) (citing *Livoli v. Zoning Bd. Of Appeals of Southborough*, 22 Mass. App. Ct. 473, 479 (1986)); cf. *Pelullo v. Croft*, 18 N.E.3d 1092, 1095 (Mass. App. Ct. 2014).

¹⁰ See Mass. Gen. Laws ch. 138, § 15 (“The local licensing authorities in any city or town which votes to authorize the granting of licenses for the sale of all alcoholic beverages, and such authorities in any city or town which votes to authorize the granting of licenses for the sale of wines and malt beverages only, may grant licenses for the sale at retail of such alcoholic beverages or wines and malt beverages, as the case may be, not to be drunk on the premises,

the Bylaw does not specifically fix the number of special-use permits to either the number of off-premises licenses allotted to the town, which would result in two permits, nor to the number of off-premises licenses granted by the Town, which would result in one permit. But either could reasonably be considered the number of off-premises licenses “issued ... in the Town.”

B. State law calls for a permissive approach in municipalities such as Pepperell whose voters supported legalization.

Massachusetts General Laws ch. 94G, § 3 requires municipalities to abide by the will of the voters in setting limits on marijuana retail establishments. In any city or town where the voters supported legalization, the municipal government cannot severely restrict marijuana retail establishments without getting approval from the voters themselves.

In other words, the state law is specifically structured to favor a permissive approach in municipalities where the voters voted in favor of legalizing recreational marijuana. In Pepperell, legalization passed by an even greater margin than it did across the Commonwealth. Thus, this state law policy favoring a permissive approach to licensing militates in favor of interpreting the Recreational Use Bylaw to permit the issuance of two licenses.

C. Other municipalities have interpreted similar bylaws to fix the number of special-use permits to the number of off-premises licenses available.

Other municipalities have interpreted similar bylaws to fix the number of special-use permits to the number of off-premises licenses available, not to the number of off-premises licenses granted. Indeed, Pepperell would join the City of Worcester, Massachusetts’s second-largest municipality, in interpreting a substantively identical bylaw to require the issuance of special-use permits equal to 20 percent of the off-premises licenses available within in the City.

Worcester reasonably interpreted Massachusetts General Law ch. 94G, § 3 to require the City to base the number of special-use permits on the number of off-premises licenses allotted to the City.¹¹ Accordingly,

to applicants therefor who are citizens and residents of the commonwealth.” (emphasis added)); see *Weiner v. Attorney General*, 484 Mass. 687, 689 (2020) (“Most licenses for such sales are granted by cities and towns, subject to the approval of the alcoholic beverages control commission (commission).” (citing Mass. Gen. Laws ch. 138, § 15)); see also Mass. Gen. Laws ch. 138, § 17 (“[T]he local licensing authorities may also grant one license under the provisions of section fifteen for each population unit of five thousand or additional fraction thereof, but may, regardless of population, grant at least two licenses under said section fifteen.” (emphasis added)).

¹¹ Edward M. Augustus, City Manager, *Memo to the Worcester City Council on Implementation of Recreational Marijuana Use Law* (Sept. 19, 2017) (“The highest limit is the ‘no fewer than 20% of the off-premise alcohol licenses.’ The city has been allotted 74 off-premises licenses. Twenty percent of 74 is 15 (14.8). Therefore, the city may limit the number of recreational marihuana establishments operating in the city to 15.”); see also Cannabis

it adopted a bylaw that reads, “The number of Marijuana Retailers that shall be permitted is limited to 20% of the number of licenses issued within the city of Worcester for the retail sale of alcoholic beverages not be drunk on the premises where sold under section 15 of chapter 138.”¹² And it interpreted the bylaw to allow for 15 licenses, which represent 20 percent of the 74 off-premises licenses allotted to the City.¹³ We know this because the City has only granted 57 off-premises licenses, which, if used as the measurement of special-use permits available, would restrict the number of special-use permits to 12.

Following Worcester’s example, the Town would have two special-use permits available.

D. Practical considerations militate in favor of fixing the number of special-use permits to the number of off-premises licenses available.

Practical considerations strongly favor interpreting the number of licenses “issued ... in the Town” to refer to the number of licenses allotted to the Town and not to the number of licenses granted by the Town. If the Town ties the number of available special-use permits to the number of off-premises licenses currently in use (as opposed to the number allotted under the quota system), it necessarily makes the availability of a special-use permit uncertain and wholly dependent on the business successes or failures of one or more off-premises liquor stores in town.

The number of special-use permits available would rise and fall with the number of off-premises licenses in use. Accordingly, if not all of the off-premises licenses are in use, a business could manipulate the number of special-use permits available by applying for off-premises licenses to increase the total in use. On the flip side, if multiple special-use permits are granted because of an increase in the number of off-premises licenses, the status of those permits could be in flux if, for any reason at any time in the future, one or more package store owners close their stores, let their licenses lapse, or have their local licenses revoked by the Town.

Control Commission, *Guidance for Municipalities* at 10 (Feb. 25, 2019) (“A municipality may pass a bylaw or ordinance limiting the number of marijuana retailers to 20% or more of the number of liquor licenses issued pursuant to M.G.L. c.138 §15 (sale for off-premises consumption) in that municipality. For example, if a municipality has 100 such liquor licenses, that municipality may set a maximum limit for 20 marijuana retailers.” (emphasis added)).

¹² City of Worcester Zoning Ordinance § 15(E)(2), available at <http://www.worcesterma.gov/uploads/27/13/2713f492f23bac1f30773b1b8c079d8/rec-marijuana-zoning-amendment.pdf>.

¹³ See City of Worcester, *Marijuana Regulations* (accessed April 27, 2021), available at <http://www.worcesterma.gov/planning-regulatory/planning-initiatives/marijuana-regulations> (“In accordance with M.G.L. c. 94G and its implementing regulations 935 CMR 500, Worcester is required to facilitate the establishment of 15 regulated Marijuana Retailers.”).

Additionally, tying the number of special-use licenses to those off-premises licenses actually granted allows a municipality to create a de facto ban on special-use permits by manipulating the number of off-premises licenses it grants. This outcome contradicts the spirit and the letter of the state law which prohibits the government of a city or town that voted in favor of legalization from severely restricting or banning the number of marijuana retailers in that municipality without a vote of the people.¹⁴

On the other hand, the number of allotted off-premises licenses is tied to population, a much more stable and reasonable measure of how many special-use permits should be available within a given community.¹⁵ Accordingly, the Planning Board should consider these very real practical considerations, which militate in favor of fixing the number of special-use permits to the number of off-premises licenses available not the number granted within the Town.

IV. Conclusion

For these reasons, we conclude that the Pepperell Planning Board has authority to issue a second special-use permit based on the number of off-premises licenses available in the Town. We are available to answer any questions you have.

¹⁴ Mass. Gen. Laws ch. 94G, § 3(e).

¹⁵ Mass. Gen. Laws ch. 138, § 17.

