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January 15, 2019

Karen M. LaCroix, Town Clerk
Town of Charlton
37 Main Street
Charlton, MA 01507

Re: Charlton Special Town Meeting of October 15, 2018 -- Case # 9154
Warrant Article # 11 (Zoning)
Warrant Article # 13 (General)

Dear Ms. LaCroix:

Article 11 – We approve Article 11 from the Charlton Special Town Meeting of October 15, 2018.

Article 13 – We disapprove certain text in Article 13 because it conflicts with G.L. c. 94G, § 3, and interferes with the contracting authority of the Board of Selectmen. Under Article 13, a citizen petition warrant article, the Town voted to amend the Town's general by-laws to add a new Chapter 157 Marijuana and Section 157-4, "Host Agreement" to require that Town Meeting approve any community host agreements regarding marijuana establishments. The proposed by-law also declares "null and void" any previously signed host community agreements that do not comply with G.L. c. 94G ("Regulation of the Use and Distribution of Marijuana Not Medically Prescribed"). We disapprove certain text in the by-law (as noted in bold and underline below) because it conflicts with G.L. c. 94G, § 3, in that it imposes "unreasonably impracticable" by-law requirements and interferes with the contracting authority of the Board of Selectmen. We explain our decision below.

I. Summary of By-law Amendments Adopted Under Article 13

Article 13 proposes to add a new Section 157-4 "Host Agreement" as follows (disapproved text in bold and underline):

Section 157-4 Host Agreement

Selectmen shall comply with the provisions of G.L. c. 94G **and obtain town meeting approval of the terms of any host agreement pursuant to G.L. c. 94G**

prior to signing. Any G.L. c. 94G host agreement previously signed by the board of selectmen which does not comply with the provisions of G.L. c. 94G, § 3(d) is declared null and void.

The warrant describes the purpose of the by-law as follows: "This general by-law will protect the town of Charlton from any host agreements which do not comply with MA state law."

II. Attorney General's Standard of Review of By-laws

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.

III. Analysis of By-law Amendments Adopted Under Article 13

A. Statutory and Regulatory Requirements

General Laws Chapter 94G, Section 3, authorizes towns to adopt by-laws regulating the operation of marijuana establishments "provided [the by-laws] are not unreasonably impracticable." G.L. c. 94G, § 3. The statute defines the term "unreasonably impracticable" as follows:

> That the measures necessary to comply with the regulations, ordinances or by-laws adopted pursuant to this chapter subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.

G.L. c. 94G, § 1.

General Laws Chapter 94G, Section 3 (d), requires a marijuana establishment to enter into a host community agreement with the municipality where the establishment seeks to operate, as follows:

> (d) A marijuana establishment or a medical marijuana treatment center seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community setting forth the conditions

> to have a marijuana establishment or medical marijuana treatment center located within the host community which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment or a medical marijuana treatment center. An agreement between a marijuana establishment or a medical marijuana treatment center and a host community may include a community impact fee for the host community; provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment or medical marijuana treatment center and shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years. Any cost to a city or town imposed by the operation of a marijuana establishment or medical marijuana treatment center shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4.

The statute does not require town meeting approval of a host community agreement on behalf of the host community.

The implementing regulations issued by the Cannabis Control Commission (CCC) (935 CMR 500.000 "Adult Use of Marijuana") similarly require that the applicant and the host community execute a host community agreement before the application will be considered complete:

> 500.100 Application for Licensing of Marijuana Establishments
>
> 500.101: Application Requirements
>
> (1) New Applicants. An applicant in any category of Marijuana Establishment shall file, in a form and manner specified by the Commission, an application for licensure as a Marijuana Establishment. The application shall consist of three packets: an Application of Intent packet; a Background Check packet; and a Management and Operations Profile packet…The application will not be considered to be complete until the Commission determines each individual packet is complete and notifies the applicant that each packet is complete.
>
> (a) Application of Intent: An applicant for licensure as a Marijuana Establishment shall submit the following as part of the Application of Intent:…(a) (8) Documentation in the form of a single-page certification signed by the contracting authorities for the municipality and applicant that the applicant for licensure and host municipality in which the address of the Marijuana Establishment is located have executed a host community agreement.

500.101 (1) (a) (8).

The regulations do not require town meeting approval of the host community agreement but do require that the single-page certification be signed by the municipality's "contracting authority." 500.101 (1) (a) (8).

B. By-law's Requirement for Town Meeting Approval of Future Host Community Agreements

1. *The Disapproved Text Qualifies As "Unreasonably Impracticable" By-Law Requirements*

We approve the first clause of Section 157-4 ("Selectmen shall comply with the provisions of G.L. c. 94G") because it is consistent with the statute and the regulations. We also encourage the Town to review the CCC guidance document regarding the requirements for lawful host community agreements, "Guidance on Host Community Agreements," August 9, 2018 (https://mass-cannabis-control.com/document/guidance-on-host-community-agreements), to assist the Town to comply with the statutory requirements for valid host community agreements.

However, we disapprove the remaining portions of Section 157-4 (as indicated in bold and underlined above, p.1) because we determine they are "unreasonably impracticable" requirements in conflict with G.L. c. 94G, §§ 1, 3. The statute defines the term "unreasonably impracticable" as follows:

> That the measures necessary to comply with the regulations, ordinances or by-laws adopted pursuant to this chapter subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.

G.L. c. 94G, § 1.

There are no judicial decisions interpreting what by-law requirements would qualify as "unreasonably impracticable" under G.L. c. 94G. This analysis will necessarily be a fact-specific one. Moreover, such a determination would in many cases require consideration of evidence and determination of factual issues going outside the bounds of the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32. In some instances, however, such as this one, the by-law requirements are so clearly onerous and impractical on their face that, even on our limited record and under our limited standard of review, we must conclude that a reasonably prudent businessperson would not choose to operate a marijuana establishment with the by-law requirements in place.

The by-law's requirement that town meeting must approve the terms of any negotiated host community agreement before the Board of Selectmen may sign the agreement poses a clear and unreasonable business risk to an applicant for a marijuana establishment. The negotiations for a host community agreement can be protracted and time consuming, given the statutorily required terms of "the conditions to have a marijuana establishment or medical marijuana

treatment center located within the host community" and "all stipulations of responsibilities between the host community and the marijuana establishment or a medical marijuana treatment center." G.L. c. 94G, § 3 (d). Communities may include the authorized "community impact fee" as part of the host community agreement, and the amount of this fee (no more than three per cent of the gross sales of the marijuana establishment, id.) must also be negotiated. In most cases, these negotiations would be undertaken by a representative of the town's contracting authority (a town manager on behalf of the board of selectmen, for example) and a representative of the applicant – representatives with the authority to agree to terms on each party's behalf. However, there is no "representative" of town meeting who could agree to terms on behalf of town meeting before the town meeting vote takes place.[1] There is thus no method by which the parties could know, prior to town meeting, whether town meeting will approve the negotiated terms. If town meeting were required to approve each term of the host community agreement, as is proposed in the by-law, these protracted negotiations would potentially be for naught, and the representatives of the applicant and the host community would have to start the negotiations anew if even one provision caused town meeting to disapprove the agreement. A reasonably prudent business person would not likely be able to expend time and money negotiating the terms of a detailed host community agreement with a town if all the terms are then contingent on a town meeting vote, the outcome of which is entirely unforeseeable.

The unreasonable risk to the applicant posed by such a town meeting approval requirement is especially clear in light of the scheduling requirements for town meeting. If the by-law's requirement of town meeting approval were in place, the warrant for the town meeting would be required to include a copy of the negotiated agreement because G.L. c. 39, § 10 requires that "[T]he warrant for all town meetings shall state…the subjects to be acted upon thereat…" The warrant article would likely read along the lines of "To see if the Town will agree to the terms of the host community agreement as follows…". If the vote is "no" (not agree) the negotiations would have to start again, and a new agreement be presented for approval at the next town meeting, with the potential for numerous cycles of negotiated agreements and town meeting votes on approval. This raises the prospect of a time-consuming and costly process for both parties, especially in light of the warrant notice requirements for each town meeting (fourteen days before each special town meeting and seven days before each annual town meeting). Because the statute requires a signed host community agreement in order for the application to the CCC to be considered complete, the prospect of never getting town meeting approval of a negotiated agreement in these circumstances exposes an applicant to unreasonable risk and "such a high investment of risk, money, time or any other resource or asset that a

[1] "The New England town meeting is a special form of government dating back to the colonial era and often considered an exemplar of pure democracy." Curnin v. Egremont, 510 F. 3d 24, 26 (1st Cir. 2007). "The distinctive characteristic of town government…is the town meeting…in which are vested the traditional powers of the legislative branch of any level of government the power to make laws (called by-laws in these cases) and the power of the purse." Johnson et al, "*Town Meeting Time: A Handbook of Parliamentary Law*," (3d Ed. 2001), pp. 1. 61, and154. All action taken at town meeting is taken by votes upon motions. Id. at 61. Because Charlton has an open (rather than representative) town meeting, all registered voters in town may vote (G.L. c. 39, § 18), and in general the required quantum of vote is a majority of those present and voting. *Town Meeting Time*, p. 154. The town meeting dynamic is such that there would be no potential for renegotiating a host community agreement with an applicant during town meeting itself; an agreement that does not receive town meeting approval would have to be re-negotiated after town meeting and the new agreement would have to be presented to the next annual or special town meeting for a vote.

reasonably prudent businessperson would not operate a marijuana establishment." G.L. c. 94G, § 1. [2]

During the course of our review of Article 13, we received communications from Attorney Francis Fennessey on behalf of the citizens who sponsored Article 13. We appreciate these communications as they have assisted us in our review and have demonstrated the importance of the issues to the citizen-petitioners. We recognize, as Attorney Fennessey points out, that G.L. c. 40, § 4, grants town meeting authority to decide how a town will exercise its contracting authority:

> A city or town may make contracts for the exercise of its corporate powers, on such terms and conditions as are authorized by the town meeting in a town... Or as otherwise authorized in accordance with a duly adopted charter.

We also recognize that Charlton's existing by-laws contain provisions relevant to our analysis of Article 13. Section 20-4 of the Town's general by-laws states (emphasis added):

> ***Unless otherwise provided by a vote of Town Meeting***, and subject to the provisions below, the Board of Selectmen ("Board") or Procurement Officer appointed by the Board pursuant to § 50-2 of these Bylaws and Massachusetts General Laws Chapter 30B shall have full authority to enter into and sign all contracts, leases and other agreements for the exercise of the Town's corporate powers, on such terms and conditions as the Board or Procurement Officer deems appropriate.

Another provision of the Town's general by-laws (Section 20-13(b)) refers to town meeting approval of contracts (emphasis added):

> Nothing in this bylaw is intended to make any contract, lease or agreement which by the terms of Chapter 30B is exempt from Chapter 30B subject to the bidding or proposal provisions or procedures of Chapter 30B, ***nor shall this bylaw affect in any way any contract approved by Town Meeting*** before the effective date of this bylaw or legally entered into before such effective date.

Together these by-law provisions generally envision a scenario whereby the Town could adopt a by-law requiring town meeting approval of a contract, consistent with the statutory authorization in G.L. c. 40, § 4.

[2] If town meeting fails to approve a negotiated host community agreement, there would be no vehicle for a marijuana establishment applicant to force town meeting to approve the agreement. Because town meeting is a deliberative legislative body performing discretionary acts (Curnin v. Egremont, 510 F.3d 24, 29 (1st Cir. 2007) it is not subject to a writ of mandamus. "Relief in the nature of mandamus is not appropriate to compel performance of discretionary acts." Murray v. Commonwealth, 447 Mass. 1010 (2006) *citing* Forte v. Commonwealth, 429 Mass. 1019, 1020 (1999).

However, a separate provision of the Town's zoning by-laws specific to marijuana establishments, Section 5.20 (E), grants to the Board of Selectmen authority over host community agreements and makes no provision for town meeting approval: "The applicant shall negotiate a host community agreement and impact fee with the Board of Selectmen prior to applying for a special permit." In light of this specific grant of authorization to the Board of Selectmen, and in light of the statutory prohibition in G.L. c. 94G, § 3 against "unreasonably impracticable" by-law requirements, we cannot agree that Article 13 must be approved in light of the general authority granted to Town Meeting in G.L. c. 40, § 4. Because the town meeting approval requirement in Article 13 poses a clear conflict with G.L. c. 94G, § 3, we must disapprove it.

2. *The Requirement of Town Meeting Approval Interferes with the Contracting Authority of the Board of Selectmen*

Based on facts similar to those presented here, the court in Twomey v. Town of Middleborough, 468 Mass. 260 (2014), determined it was the town's board of selectmen, not town meeting, that had the authority to establish the percentage of the total monthly premium for HMO coverage to be paid by employees: "[G]iven the broad authority conferred on the board of selectmen by the Legislature with respect to the implementation of [G.L. c. 32B, § 16], and given the complete absence of any reference to the town meeting in that same statutory section, it is reasonable to conclude that it is the province of the board of selectmen to determine what portion of the total monthly premiums for HMO coverage should be borne by the town's retired employees." Id. at 268-69. A board of selectmen acts as the chief executive officer of the town (G.L. c. 4, § 7, Fifth B), and as such is traditionally the town's contracting authority. *See generally* D.A. Randall & D.E. Franklin, Municipal Law and Practice § 6.13 (5th ed. 2006)). Where, as here, the statute (c. 94G, § 3) and the regulations (935 CMR 500.101 (1) (a) (8)) are silent as to town meeting approval of host community agreements, and the regulations refer only to a municipality's "contracting authority" being involved with host community agreements, it is reasonable to conclude that the Legislature did not intend to require town meeting approval of host community agreements but rather anticipated that the municipality's contracting authority (here, the Board of Selectmen) would exercise its traditional contracting role.

The Twomey court also noted the basic premise that "a town meeting cannot exercise authority of over a board of selectmen when the board is acting in furtherance of a statutory duty." Id. at 270. *See also* Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) (Selectmen not bound by town meeting vote purporting to establish the town's rate of contribution for group insurance benefits); Russell v. Canton, 361 Mass. 727 (1972) (town meeting could authorize board of selectmen to take land by eminent domain, but could not direct how much land was to be taken); Breault v. Auburn, 303 Mass. 424 (1939) (town meeting vote directing board of health to hire an employee was ineffective because hiring power was conferred solely on board); Lead Lined Iron Pipe v. Wakefield, 223 Mass. 485 (1916) (town meeting vote directing board of selectmen to hire engineer was void). Where it is a town's board of selectmen that is traditionally vested with the power to enter into contracts on the town's behalf, the town meeting cannot exercise authority over the board of selectmen in the board's exercise of that authority. Twomey, 468 Mass. at 270. By requiring town meeting approval of

host community agreements, the by-law text usurps the authority of the Board of Selectmen to enter into contracts on the Town's behalf and must be disapproved on this additional ground.

C. Previously Signed Host Community Agreements

That portion of the by-law that declares "null and void" any host community agreement previously signed by the Board of Selectmen which does not comply with the provisions of G.L. c. 94G, § 3(d), similarly conflicts with the statute as "unreasonably impracticable." During the course of our review of Article 13, we received a letter from counsel to Valley Green Grow, an applicant that has a signed host community agreement with the Town of Charlton. The letter details the steps Valley Green Grow has taken to negotiate a host community agreement with the Town, as well as a Development Agreement "which contractually obligates the Town to issue Host Community Agreements to co-locators (licensed tenants) at the Project on substantially similar terms to VGG." (Duffy letter, October 31, 2018, p.3). The letter reaffirms our conclusion that the prospect of a previously negotiated agreement being potentially rendered "null and void" by a later determination that it does not comply with G.L. c. 94G, § 3(d), poses unreasonable risk to an applicant such that a reasonably prudent business person would not proceed under that requirement. This is especially the case because the by-law does not specify who will determine whether any previously signed host community agreement is in violation of the statute or the process by which this determination will be made. It is foreseeable that a reasonably prudent business person would not undertake contract negotiations for a host community agreement under these circumstances. [3]

We emphasize that our disapproval of this text in Section 157-4 in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst, 398 Mass. at 798-99. For the reasons explained in this decision we approve the first clause of the by-law (requiring the Board of Selectmen to comply with G.L. c. 94G) but disapprove the rest (requiring Town Meeting approval of host community agreements before the Board signs them and declaring null and void previously signed agreements that do not comply with G.L. c. 94G, § 3(d)). [4]

[3] We acknowledge that any signed host community agreement may be subject to a court challenge, from a party with standing to do so, on the basis that it violates G.L. c. 94G and that a court may declare the agreement null and void. We express no opinion on the likely outcome of such a challenge. In disapproving this provision in Section 157-4, we simply conclude that Town Meeting does not have the authority to retroactively declare certain previously negotiated agreements "null and void" because this conflicts with G.L. c. 94G, § 3.

[4] We have considered the arguments made by the opponent that the by-law text declaring "null and void" certain previously negotiated host community agreements violates the Contracts Clause (Art. 1, § 10, cl. 1) of the U.S. Constitution ("No State shall…pass any…law impairing the Obligation of Contracts.") Id. This analysis requires a determination whether the impairment is substantial, and if so whether the impairment is reasonable and necessary to serve an important public interest. *See* Massachusetts Community College Council v. Commonwealth, 420 Mass. 126, 131-132 (1995). Similarly, a due process challenge may be made to the by-law's retroactive application and potential interference with vested contract rights. Although these theories raise potential additional/alternative court challenges to the by-law's requirements, we are not able to conclude, on this record and the Attorney General's standard of review, that we have the authority to disapprove the by-law on these additional grounds.

<u>Note</u>: 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) <u>general</u> 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) <u>zoning</u> by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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