

## ***A Plausible Risk—In Consideration of Local Zoning for Medical Marijuana Uses***

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### **Summary**

*The Westborough Planning Board has drafted a zoning bylaw for consideration by the residents of the Town. The bylaw is a ban with fallback zoning.*

*In a single article the bylaw first disallows completely marijuana related uses. If the ban is overturned, there is a ready-made process for a proponent under the fallback zoning provision. The fallback allows the use in the Adult Entertainment District subject to a special permit.*

*The proposed zoning defines “marijuana”. The bylaw defines marijuana-related uses to include any product that does not have FDA approval and that contains the active ingredient THC. The bylaw extends to equipment and paraphernalia related to the consumption of marijuana based products. The bylaw further defines “Agricultural” uses to exclude cultivation associated with marijuana.*

*Both the ban and fallback zoning applies to dispensaries (“Treatment Centers”); personal cultivation by “qualifying patients”; and cultivation by “personal caregivers” on behalf of “qualifying patients”.*

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### **Background**

With the passage of Initiative Petition 11-11, Question 3, in November 2012, The Massachusetts Medical Marijuana Law (MMML) took effect on January 1, 2013.

As a result, local officials were handed two new land uses not anticipated in local zoning—marijuana dispensaries (or “Treatment Centers”) and marijuana cultivation.

Further complicating their consideration, these uses are illegal under Federal Law, and while proposed as “medical” in nature, circumvent any existing laws, systems or controls for the delivery, monitoring, or assurance of safety that currently govern established medical prescription programs.

Ultimately, the resident participants of our town at public hearings, and at Town Meeting will consider the proposed zoning for these uses and will decide on an appropriate stance. Their consideration of the issue will be guided by their own as well as the input of public officials charged with committing the time to extensively research the issue.

The process began in October 2012 in anticipation of the possibility of the passage of Question 3. The Planning Board solicited input from other Town boards, Town Counsel and the planners and counsels of other towns. A draft of the bylaw was submitted to the Attorney General’s office for preliminary review and comment.

In consideration of the possible impacts of these new land uses on our Westborough community, the Planning Board approached the issue with guidance from the Precautionary Principle.

The “precautionary principle” or “precautionary approach” provides a guideline for making public policy in situations where there is no consensus on the evidence.

### **The Will of the People**

The 63% vote, in favor of Question 3 has been called "the will of the people".

Motivated by compassion, and based on the way the question was worded, it is a reasonable working assumption that the will of the people was that marijuana would be an option for the relief of suffering. And, that it would be safely available to profoundly ill people with specifically defined severe conditions for whom conventional medicine has not proved effective.

It is reasonable to assume also that it was the people's assumption that public health and safety would NOT be adversely affected by the implementation of this law.

The people were promised by proponents of the ballot question that this would be among the most tightly regulated medical marijuana programs in the country. The responsibility to ensure that this is the case falls to the Massachusetts Department of Public Health (DPH).

However, in the event that the state law proves not to adequately regulate this use, it is an appropriate and responsible position of local Planning Boards, School Committees, Departments of Health, Police Departments and Boards of Selectman to act to ensure that adverse public health and safety consequences related to the passage of this law be prevented or minimized.

It is the role of a Planning Board and other municipal officials to plan, not react. We can either act to change or manage the direction of our community's future, or choose not to act and allow the future to define our community.

### **Precautionary Principle**

The precautionary principle implies that there is a social responsibility to protect the public from exposure to harm, when investigation has found a plausible risk. These protections can be relaxed if further findings emerge that provide sound evidence that no harm will result.

In consideration of any newly defined "use" within a community, it is the responsibility of Planning Boards to consider the use not only from the perspective of proponents, but in consideration of the community at large. This includes those without a say in local government, for example, our youth.

If investigation finds that the allowance of a use in general or within a specific existing or to be created zone, might have a detrimental effect on abutters, residents, or the Town in general, then the Precautionary Principle would suggest the responsible way to act is to do the least harm.

In the case of marijuana related uses, this might mean to disallow and/or restrict the use in such a way as to minimize potential detrimental effects.

If in the future it is confirmed by a preponderance of evidence that our concerns and a more restrictive position were unfounded, we can, at that point, revisit the position in consideration of relaxing it.

### **The Law as Passed by Initiative Petition**

A careful reading of the MML reveals numerous undefined or loosely defined aspects that do not make for a well-constructed public policy.

These include: no definition of a bone-fide relationship between patient and doctor; no requirement that doctors be certified in Massachusetts; no definition of a 60-day supply; no parental consent for use by minors; no tracking of "prescriptions" or number of prescriptions filled by a cardholder; no expiration date on "prescriptions"; no definition of "other debilitating conditions"; to name a few.

It has been left to the State DPH to better define law within a 120-day timeframe. This seems hardly realistic, particularly given the burdens the DPH has been under of late in respect to the State Crime Lab and the handling of the NECC (New England Compounding Center) issues. As of February 3<sup>rd</sup>, the DPH has announced that it will likely miss the May 1, 2013 deadline prescribed in the law.

Again in this respect, from a precautionary perspective, it seems prudent for Towns to define for themselves a position from which to address this use in the event that the DPH is unable to act in time or in a manner that adequately regulates these new land uses.

### **The Plausible Risk—Health, Safety and Welfare**

Hundreds of hours of research have revealed that there is plenty of evidence of a plausible risk of harm to communities in allowing marijuana-related uses. The following is just a partial list of the extensive evidence of plausible risk:

- 1) Similarly worded laws passed in other states have led to widespread abuse. The law provides no requirement that recommending physicians be certified in Massachusetts. The law, while identifying certain diseases from which marijuana may provide relief also contains an "other conditions" clause. It is under this clause that experience shows recommendations are easy to obtain for almost any malady. Colorado reports that just 2% of its medical marijuana cardholders have cancer, and less than 1% report HIV/AIDS. In California it was reported that the average "patient" was a 32 year old male with no history of debilitating disease. *Reverend Scott Imler, who co-wrote the California medical marijuana law has said, "We created [the law] so that patients would not have to deal with black market profiteers. But today it is all about the money. Most of the dispensaries operating in California are little more than dope dealers with store fronts"*
- 2) Our own Chief of Police, as well as the Massachusetts Police Chiefs Association, is concerned for the probable increase in drugged driving and the lack of personnel trained to detect the cause.
- 3) Dispensaries and "home grows" are magnets for crime. Banks will not deal with dispensaries because they would be in violation of Federal law and would lose their FDIC backing. As a result dispensaries are not only repositories of valuable marijuana crops but large amounts of cash. Problems of increased crime in other states around dispensaries as well as home invasions of "patients" and "caregivers" that cultivate for personal use are well documented;
- 4) From other "medical marijuana" states we learn of cities and towns attempting to claw their way back from abuse of similarly loosely worded initiative petition laws. A growing number of communities in other states (85 in Colorado, 180 in California) and a growing number in other states have banned or are trying to ban these uses. The Supreme Court in MI, last week, upheld the right to ban, and the CA Supreme Court is expected to do so in a case currently under consideration;
- 5) From the principals of our Commonwealth's four (soon to be six) "recovery high schools" established to cater to our youth who are succumbing to dependency at increasing rates, we learn that our youth start down the road to addiction with marijuana;

- 6) From our medical community, including Dr. John Knight of Children's Hospital who warns of permanent and often irreversible brain and lung damage to youth users, we learn that two things drive youth use rates: 1) availability, and 2) perception of risk. Medical marijuana sends both the wrong message and will be more readily available through diversion directly to our youth;
- 7) From our prevention and recovery professionals, who deal with the destructive downstream effects of youth and adult dependency, and who caution that decriminalization and now medicinalization of smoked marijuana has sent the wrong message to youth and parents and is resulting in increased use and dependency. The Metrowest Health Foundation's annual youth risk behavior data has shown that youth use of marijuana has climbed each year since the decriminalization ballot question in 2008;
- 8) From science we learn that marijuana is a dangerous and dependence-forming drug. THC levels in marijuana that in the '60's and '70's were around 2-3% are now, through hybridization and controlled indoor growing routinely around 10% and can be as high as 18-23%. The proponents, while working for 20 years towards legalization have failed to produce a single credible study proving that smoking marijuana is medically beneficial and that would satisfy FDA double-blind and other scientific research standards. On the other hand the National Institute of Drug Abuse underscores the validity of studies that have proved the serious effects on the brain of regular users and that one in six who start smoking before age 18 will become dependent on marijuana (as will as many as one in nine adults).
- 9) And, if we expand our data set to include the Netherlands, we can reference a three decades-long experiment that has resulted in the retraction of access to marijuana, its banning to tourists, and its banning by the majority of municipalities. Citing nuisance, criminality and drug trafficking associated with marijuana, the Netherlands experiment has proved what our own esteemed medical community has warned, that THC levels in today's marijuana are beyond what was previously considered a "soft" drug.

### **Federal Preemption**

While the health and public safety evidence provides ample substantiation of plausible risk, local officials should additionally consider that the allowance of these uses conflicts directly with the federal Controlled Substances Act (CSA).

The CSA expressly prohibits the distribution of marijuana for *any* purpose.

As recently as January 22, 2013 a federal appeals court in Washington has rejected a petition to reclassify marijuana from its current federal status as a dangerous drug, having a high potential for abuse, with no currently accepted medical use.

In 2011, responding to an increase in the "commercial cultivation, sale, distribution, and use of marijuana for purported medical purposes," the U.S. Justice Department released a memorandum drawing a clear distinction between the potential prosecutions of individual patients and commercial dispensaries. The memorandum declared that individuals operating dispensaries would be targets for federal enforcement.

In addition, several U.S. Attorneys have informed state officials, and by extension municipal officials, that they are not immune from criminal liability under the federal CSA.

In this situation, it is reasonable for municipalities like Westborough to decide that the best approach is to not actively promote organizations that deal and/or cultivate a drug that is illegal under federal law.

This is even more sensible given the current position of federal law enforcement agencies in states with medical marijuana laws which have seen an increase in federal DEA raids on marijuana dispensaries and cultivation facilities.

### **Does Westborough Lack Compassion?**

Hardly. Westborough has a long and laudable relationship with drug-related land uses. We have preferred, historically, to compassionately accommodate uses related to undoing the damage of addiction rather than to enabling it.

We are home to secure Department of Youth Services (DYS) facilities for teenage boys and girls respectively. In addition, we are home to Spectrum Services—a comprehensive, residential substance-abuse treatment facility that is doing the painstaking work of rebuilding lives devastated by substance abuse.

And, like all other communities, we have a properly established, monitored and functioning pharmacy system through which vetted, approved medicines are sold and dispensed.

### **Towards a Responsible Medical Marijuana Policy**

The benefits to the profoundly ill that are promised from marijuana-derived medicine can be responsibly delivered to those that truly need it.

Current alternative legislation in Massachusetts proposed by Senator Keenan of Quincy endeavors to do so without marijuana dispensaries and home cultivation.

And, FDA-approved cannabis-derived medicine (*Marinol—a capsule*) available through legitimate prescription and through our established pharmacy and prescription monitoring systems already exists. Others are under evaluation (*Sativex—a mouth spray—possible FDA approval in 2014*).

### **Local Decision Making**

During its annual meeting last month, the Massachusetts Municipal Association held a session on medical marijuana uses that was well attended by Planners, including Westborough's Jim Robbins, and other local officials. The message from MMA Executive Director Geoffrey Beckwith was forthright and clear:

“We’re advising them to not wait but to go through a methodical process and make a local decision,” he said.

“The attorney general, we hope, will recognize that communities should have the right to say no.”

### **Act So As to Do the Least Harm**

It is likely that the proponents of the MMML have crafted counter arguments to much of the above. That fact alone justifies the precautionary approach--when there is no consensus on the evidence, act so as to do the least harm and soften your position if sound evidence that the caution was unfounded comes to light.

It is in this spirit that the Westborough Planning Board proposes a “Medical Marijuana Treatment and Dispensing Facilities and Marijuana Cultivation” bylaw for consideration by its residents for adoption at the March 16<sup>th</sup>, 2013 Town Meeting.

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*PS> This paper is intentionally not foot-noted with citations. The evidence and positions stated have been shown during research to be reflected in many sources. If interested in the source material, please feel free to contact us.*

*Much of the section on Federal Preemption is restated verbatim, or nearly so, from the January 30<sup>th</sup>, 2013 letter of the Bellotti Law Group, PC by John Sofis Scheft, Esq, in support of the Wakefield, MA ban, with his permission to do so.*

*Questions on the content of this paper should be addressed to Lester Hensley, Chair Westborough Planning Board, or Jim Robbins, Town Planner.*