

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

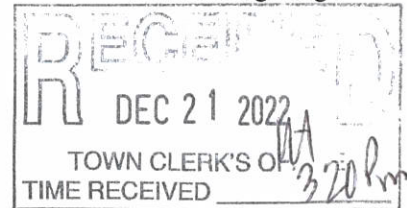
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December 15, 2022

Nancy J. Talbot, Town Clerk
Town of Ware
126 Main Street, Suite F
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**Re: Ware Annual Town Meeting of May 9, 2022 -- Case # 10725
Warrant Articles # 21 and 22 (Zoning)
Warrant Article # 20 (General)**

Dear Ms. Talbot:

Articles 20 and 21 - We approve Articles 20 and 21 adopted at the Ware May 9, 2022 Annual Town Meeting. Our comments on Article 21 are provided below. ¹

Article 21 - Under Article 21 the Town voted to amend the definitions and Use Table sections of the Town’s zoning by-laws. Below we comment on the changes related to craft distilleries, microbreweries, and marijuana uses.

A. Changes Regarding Craft Distilleries and Microbreweries

Article 21 amends Article 2, “Definitions,” to add definitions for “Craft Distillery and “Microbrewery” and amends the Town’s Use Table to allow craft distilleries and microbreweries by special permit in several zoning districts and prohibit them in others. The definitions of “Craft Distillery” and “Microbrewery” state as follows:

Craft Distillery - A plant or premise where distilled spirits are produced, manufactured, or distilled for human consumption, limited to a maximum annual production of 10,000 proof gallons (12,500 gallons) of distilled spirits per year. Such establishments may also offer on-site tastings, sell their product on-site and/or sell wholesale to other parties as stated in M.G.L. Ch. 138 §19E.

Microbrewery - An establishment that specializes in the production and manufacturing of beer/malt beverages and sells at least 25 percent or more of its beer/malt beverages for on-site consumption. Such establishments can sell their beer/malt beverages at wholesale under the regulations set forth in M.G.L. Ch. 138. This definition includes brewpubs, taprooms, and

¹ By agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended the deadline for our review of Article 22 for 90-days until March 16, 2023.

craft breweries. Microbreweries located in the Rural Residential District must have a Farmer Brewery license under M.G.L. Ch. 138 §19C and shall produce no more than 1,000 barrels (31,000 gallons) of beer/malt beverages annually. Microbreweries located in all other zoning districts may have either a farmer brewery license (M.G.L. Ch. 138 §19C) or a pub brewery license (M.G.L. Ch. 138 §19D) and shall produce no more than 15,000 barrels (472,000 gallons) of beer/malt beverages annually.

We approve the by-law amendments related to craft distilleries and microbreweries because the Town has authority under its zoning powers to regulate such uses. However, the Town must apply these amendments consistent with G.L. c. 138, and the jurisdiction of the Alcohol Beverages Control Commission (ABCC) over the licensing and sale of alcohol. The “[r]egulation of the liquor industry in Massachusetts is comprehensive and pervasive.” Cellarmaster Wines of Mass., Inc. v. Alcoholic Bevs. Control Commn., 27 Mass. App. Ct. 25, 27, 534 N.E.2d 21 (1989). In G.L. c. 138, § 2 the Legislature stated its intent to preempt the field of alcohol sales regulation: “No person shall ... sell or expose or keep for sale, store, transport ... alcoholic beverages or alcohol, *except as authorized by this chapter.*” *Id.* (emphasis added.) Pursuant to G.L. c. 138, the local liquor licensing authority (LLA) issues retail licenses for both on-premises consumption and off-premises consumption of alcoholic beverages. See G.L. c. 138, §§ 12 and 15, respectively. Once the LLA approves a license, the ABCC then approves the license, and the LLA issues the license upon the payment of the required fees. See, e.g., G.L. c. 138, § 15.

The LLA is authorized to adopt reasonable rules and regulations for the issuance of these licenses. See G.L. c. 138, § 23. While G.L. c. 138 is a comprehensive statute that governs the alcoholic beverage licenses, we are unable to determine that it preempts the town’s zoning power to regulate where alcohol retail establishments may be located in the Town. However, the Town must ensure that it applies Article 21, including the definitions of craft distilleries and microbreweries, consistent with G.L. c. 138, regarding the licensing and sale of alcohol, as further discussed below.

Although G.L. c. 138, § 1 defines several terms for purposes of the State’s liquor licensing statutes, it does not define the term “craft” brewers and the ABCC does not issue “craft” licenses. Rather, according to the ABCC, it issues farmer-series licenses that include farmer-breweries and farm-distilleries. A farmer-brewery and farmer-distillery are defined in G.L. c. 138 § 1 as:

“Farmer-brewery”, any plant or premise where malt beverages are produced from the fermentation of malt with or without cereal grains or fermentable sugars, or of hops, provided that said hops or cereal grains are grown by the farmer-brewer.

“Farmer-distillery”, a plant or premise where distilled spirits are produced, manufactured or distilled.

A “farmer-brewery” is licensed by the ABCC pursuant to G.L. c. 138, § 19C and a farm-distillery is licensed by the ABCC pursuant to G.L. c. 138, § 19E. Neither Section 19C nor Section 19E limits the number of barrels that are produced by a farm-brewery or a farm-distillery. Moreover, according to the ABCC, a town is not authorized to limit the production by a farm-brewery or a farm-distillery because doing so would amount to a change of the license granted under G.L. c. 138. See Hub Nautical Supply Co., Inc. v. Alcoholic Beverage Control Commission, et. al., 11 Mass. App. Ct. 770, 774 (1981) (condition imposed by the local liquor licensing commission that only allowed the sale of alcoholic beverages to ships conflicted with c. 138 because it created a new type of license in derogation of the Legislature’s sole power to establish classes of license under G.L. c. 138).

Thus, although the Town is authorized to utilize production thresholds as a method of defining a land use in its zoning table, the Town cannot apply the definitions of “Craft Brewery” and “Microbrewery” to impose a limit on production because such application would conflict with G.L. c. 138. The Town should consult with Town Counsel regarding this issue and consider a future clarifying amendment.

B. Changes Regarding Marijuana Related Uses

As to the changes to the Town’s zoning by-laws regarding marijuana, the Town amended several sections of the zoning by-laws, as follows: (1) Section 2, “Definitions,” to add new marijuana related definitions; (2) Section 4.2, “Use Table” to add the new use “Marijuana Delivery;” and (3) Section 4.8.8, the Town’s Marijuana By-law. The Town must ensure that these by-law amendments are applied consistent with the applicable statutes and regulations, including recent amendments to 935 CMR §§ 500.000, effective January 8, 2021. In addition, the Town should consult with Town Counsel to determine if future by-law amendments are needed in light of the recently updated CCC regulations. This is especially important given the court’s holding in West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) that towns are preempted from adopting by-law requirements that impose different requirements on marijuana establishments than those imposed by the CCC.

In light of the CCC’s regulations, including updated definitions and delivery requirements, we offer comments on the amended Sections 2. 4.2 and 4.8.8 for the Town’s consideration of potential future clarifying amendments.

1. Section 2 – Definitions

The Town added a new definition of “Marijuana Delivery Operator” that provides as follows:

An entity licensed to purchase at Wholesale and Warehouse Finished Marijuana Products acquired from a Marijuana Cultivator, Marijuana Product Manufacturer, and Microbusiness, sell and deliver Finished Marijuana Products, Marijuana Accessories and Marijuana Branded Goods directly to Consumers, but is not authorized to Repackage Marijuana or Marijuana Products or operate a storefront under this license.

This same definition appears again in Section 4.8.8, “Marijuana Bylaw.” These by-law definitions differ from the CCC regulations definition that defines a Marijuana Delivery Operator as follows (emphasis added):

Marijuana Delivery Operator or Delivery Operator means an entity licensed to purchase at Wholesale and Warehouse Finished Marijuana Products acquired from a Marijuana Cultivator, Marijuana Product Manufacturer, Microbusiness or Craft Marijuana Cooperative, and White Label, sell and deliver Finished Marijuana Products, Marijuana Accessories and Marijuana Branded Goods directly to Consumers, but is not authorized to Repackage Marijuana or Marijuana Products or operate a storefront under this license. A Delivery Operator is an additional license type under M.G.L. c. 94G, § 4(b)(1) that allows for limited delivery of Marijuana or Marijuana Products to Consumers; and shall not be considered to be a Marijuana Retailer under 935 CMR 500.002 or 500.050 and shall be subject to 935 CMR 500.050(1)(b).

The CCC regulations definition allows a Marijuana Delivery Operator to purchase Finished Marijuana Products from a “Craft Marijuana Cooperative” in addition to a Marijuana Cultivator, Product Manufacturer or a Microbusiness. However, the by-law does not include a Craft Marijuana Cooperative. In addition, the CCC regulations definition is broader than the by-law’s definition in that the CCC’s definition authorizes a Marijuana Delivery Operator to “White Label” (as that term is defined in the CCC regulations), in addition to sell and deliver. The by-law definitions do not include this provision. The Town must apply the by-law consistent with the CCC regulations. The Town should consult with Town Counsel to determine if a future by-law amendment is needed to address these issues.

2. Section 4.2 – Use Table

Under Article 21 the Town amended Section 4.2, “Use Table” to add a new line for the use “Marijuana Delivery” and to allow such use in the Downtown Commercial (DTC), Mill Yard (MY), and Highway Commercial (HC) districts by special permit and prohibit such use in all other districts. The term “Marijuana Delivery” is not defined in the Town’s by-laws. However, the Town has added new definitions for “Marijuana Delivery License” and “Marijuana Delivery Licensee” as follows:

Marijuana Delivery License: A Marijuana Courier License or a Marijuana Delivery Operator License.

Marijuana Delivery Licensee: Marijuana Courier or a Marijuana Delivery Operator authorized to delivery Marijuana and Marijuana Products directed to Consumers and as permitted, Marijuana Couriers to Patients and Caregivers.

The Town has also defined the term “Marijuana Delivery Operator” but has not separately defined the term “Marijuana Courier.” Therefore, it is not clear whether the Use Table use of “Marijuana Delivery” includes both Marijuana Delivery Operators and Marijuana Couriers. The Town should discuss with Town Counsel whether a future clarifying amendment is needed to clearly establish what uses are encompassed in the category “Marijuana Delivery.”

3. Section 4.8.8 – Marijuana Bylaw

Under Article 21 the Town amended the definition of “Registered Marijuana Dispensary (RMD)” to delete “MA Department of Public Health” (DPH) and replace it with the “Cannabis Control Commission.” The medical marijuana program was transferred to CCC oversight, and the previous regulations, 105 CMR 725.000 *et seq.* have been superseded by the CCC regulations at 935 CMR 500.00 (“Adult Use of Marijuana”) and 935 CMR 501.00 (“Medical Use of Marijuana”). The Town may wish to consider a future amendment to refer to the CCC regulations, 935 CMR 500.001.

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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
MAURA HEALEY
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