



Mayor Joshua Garcia

City of Holyoke

Law Department

December 17, 2021

Honorable Councilors
of the City Council
City Council Chambers
536 Dwight Street
Holyoke, MA 01040

Re: Denial of Special Permits for Marijuana Facilities

Dear Honorable Councilors:

During an Ordinance Committee meeting conducted on December 14, 2021, the members of the Committee requested a legal opinion as to potential liability that the City of Holyoke may have if the special permits requested by H&H Holdings, Inc and ACMJ, Inc. for the establishment of marijuana cultivation facilities are denied.

It was mentioned during this meeting that these special permit requests must be moved through committee because upon the expiration of a Ninety (90) period, the special permits will be deemed to have been granted. This statement is accurate. Pursuant to M.G.L. c. 40A, §9, a failure by the special meeting authority, which in this case is the Holyoke City Council, to take action on a special permit within Ninety (90) days after the public hearing, such special permit shall be deemed to have been granted. It is my understanding that the public hearing for this matter closed on October 26, 2021; meaning that the City Council has until January 18, 2022 [or January 26, 2022, if the City Council calls a Special Meeting] to take action on the special permits referred.

During the meeting, there was a concern that the change to the Holyoke Zoning Ordinance, Appendix A, Section 7.10.5.3 regarding buffer zones had not yet been made. Please know that such amendment is on the December 21, 2021, agenda for the City Council to consider. If the amendment is passed, then liability does not become an issue. However, if the amendment is not passed, then liability becomes an issue.

It is my understanding that the reason for the amendment to the Zoning Ordinance was to correct a scrivener's error. More specifically, I have reviewed a letter from the Holyoke Planning Board dated November 18, 2021, which states that their suggested changes to the Zoning Ordinance was to correct an inadvertent imposition of a 200-foot buffer for all Marijuana Establishment Uses from any other uses in the Table of Principal Uses.



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The letter also states that, from the legislative history of this ordinance, it was not the intention of the City Council to impose such a buffer, and that, if not corrected, there will be a serious impact on cannabis businesses that are in the stages of the permitting process and will harm the city's reputation in the industry.

As a matter of Massachusetts zoning law, I have found no decision made by any court which supports a denial of a special permit due to a scrivener's error in a municipal zoning ordinance. According to M.G.L. c. 40A, §9, the purpose of zoning ordinances/bylaws is to provide specifications on the types and locations of uses to be permitted within a municipality. The denial of a special permit is based upon determinations that a particular use is not allowed in a particular area, or that certain requirements such as setbacks or frontage would not be satisfied.

The Massachusetts Land Court in the matter of Bask, Inc. v Borges, 2020 WL 7688035 explained that the analysis for denying a special permit for marijuana use is the same for denying a special permit for any other type of use. The court also explained that, in order to prevail in a case alleging wrongful denial of a special permit, the municipality must make detailed findings supporting its decision. Mere conclusory statements of an adverse effect on traffic or safety concerns are not sufficient. In order to prevail in court, the municipality must make exact statements supported by facts and documents evidencing that the denial was justified.

The letter from the Planning Board herein discussed does not support the denial of the special permits herein requested if the denial is based upon the inadvertent mistake in the city's zoning ordinance. Further, if the denial is based for some other reason, I not aware of any statements or documents that would support the denial of these special permits using the analysis set forth in Bask, Inc. v. Borges, 2020 WL 7688035.

If these special permits were denied and subsequent litigation ensues, I am of the opinion that it is unlikely that a court would uphold the denial, and the remedy would be, absent claims of disability or religious discrimination or claims involving an area other than zoning law, an order to the city to grant the special permit being requested.

Very truly yours,

Kathleen E. Degnan
Assistant City Solicitor