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CITY OF CAMBRIDGE

Office of the City Solicitor
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September 19, 2022

Yi-An Huang
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Response to Council Order No. O-13 of 9/12/22 Re: Report on legal opinion on the following questions regarding Policy Order #11 (proposed amendments to the Cannabis Business Permitting Ordinance) from the September 12, 2022 City Council meeting.

Dear Mr. Huang:

I am writing in response to Council Order No. O-13 of 9/12/22 which seeks a legal opinion answering a number of questions arising out Council Order No. O-11 of 9/12/22, which seeks to amend the Cannabis Business Permitting Ordinance, Chapter 5.50 of the Cambridge Municipal Code. Specifically, Council Order No. O-11 seeks to extend the cannabis business permitting preference period for Priority A Applicants for an additional two years, and seeks to do so on an emergency basis so that the amendment can be passed through all stages of ordination in one meeting. Below I will address the Council's questions concerning the proposed amendment to the Cannabis Business Permitting Ordinance.

1. Does this qualify as an "emergency involving the health and safety of the people of Cambridge or their property"?
and
2. Are we able to forgo following the normal ordination process and notification process?
and
3. How quickly could we amend the ordinance to extend the moratorium if we followed the normal "non-emergency" process?

I will start with answering the second and third questions together.

To amend an ordinance, other than the Cambridge Zoning Ordinance, the City Council's usual practice is to refer the proposed amendment to the Ordinance Committee. Section 1.12.030(a) of the Municipal Code, Public Notice and Hearing Requirements, requires that "[f]or every proposed ordinance which is referred to the Ordinance Committee by the City Council, the Ordinance Committee shall hold a public hearing and shall publish notice of such hearing in at least one newspaper of the City at least seven days before the hearing." Therefore, if this amendment to the Cannabis Business Permitting Ordinance preference period were referred to the Ordinance Committee, notice of the Ordinance Committee would have to be published in accordance with this requirement (as well as posted in accordance with the Open Meeting Law).

After an Ordinance Committee hearing is held and an amendment comes back before the Council, Section 1.12.030(b) of the Municipal Code requires that "[e]very proposed ordinance or loan order, except emergency measures and revenue loan orders, shall be published once in full in at least one newspaper of the City, and in any additional manner that may be provided by ordinances, at least ten days before its final passage." Pursuant to the rules of statutory construction which guide the interpretation of ordinances, the requirement for publication before final passage is mandatory. I have been informed by the City Clerk that if an ordinance amendment is passed to a second reading on a Monday, the proposed ordinance has to be sent to the newspaper, typically by a Thursday, and it could then be published the following Thursday. The Council can then vote on ordination after at least ten days have passed, which would be the second Monday after publication.

There is a mechanism for the Council to pass an ordinance in one meeting if the Council determines that the proposed ordinance or amendments relate to a special emergency involving the health or safety of the people of the City or their property, and if there are no other statutes or ordinances that would prevent passage in one meeting.

Pursuant to Rule 20 of the City Council Rules and G.L. c.43, §22, an ordinance may be passed through all stages of legislation at one session if no member of the City Council objects thereto. Additionally, pursuant to G.L. c. 43, §20, the City Council may pass an ordinance on the date on which it is introduced if it orders by a two-thirds vote that the proposed ordinance or amendments relate to a special emergency involving the health or safety of the people of Cambridge or their property. The proposed amendment to the Cannabis Business Permitting Ordinance is not a zoning amendment requiring compliance with G.L. c.40A, §5, so we are not aware of other statutes or ordinances that would require that a different process be applicable to this proposed amendment.

If the Council wants to pass this proposed amendment in one meeting, the Council needs to take two votes; one two-thirds vote to find a special emergency involving the health or safety of the people of Cambridge or their property, and a second majority vote to pass the amendment.

I now return to the first question: Does this qualify as an "emergency involving the health and safety of the people of Cambridge or their property"?

Whether the proposed amendment to the preference period in the Cannabis Business Permitting Ordinance constitutes a special emergency involving the health or safety of the people of Cambridge or their property is a determination for the Council to make. I note that last year, on September 13, 2021, before the original cannabis business permitting preference period was set to expire on September 23, 2021, the Council voted to expand the categories of applicants eligible for the preference period and voted to extend the preference period by a year; and the Council voted to find that those amendments related to a special emergency involving the health or safety of the people of Cambridge or their property.

4. If we follow the normal ordinance procedure and we do not meet the current September 23rd expiration date, is there any danger of any non-EE or SE cannabis candidates getting permitted in the brief interim it would take for us to follow the normal process?

It is difficult to answer this question because it would require us to speculate as to how long the Council would take to pass any amendments, given that the length of that process varies depending on a number of factors such as: how quickly an Ordinance Committee hearing could be scheduled, whether the Ordinance Committee hearing be concluded in one meeting, how many City Council meetings would there be before the Council takes a vote on ordination, and so on. It is also difficult to answer this question without having sufficient time to research all potential Priority B Applicants¹ and what would be required of them to “get permitted.” Lastly, it is difficult to answer this question without knowing whether the Council is asking if any Priority B Applicants could receive a Cannabis Business Permit in the interim, or whether the Council is asking if any Priority B Applicants would be able to obtain any of the other necessary permits and licenses and actually open for adult-use sales in the interim.

That being said, an applicant must go through the following steps before a Cannabis Business Permit is issued, which are set out here - <https://www.cambridgema.gov/iwantto/applyforacannabisbusinesspermit>:

- Local Approval 1: Cannabis Business Permit Eligibility Review
 - CDD’s Economic Development Division verifies that the Applicant is eligible to receive a Cannabis Business Permit. In Cambridge, only Priority A Applicants are eligible at this time.
- Local Approval 2: Planning Board Special Permit
 - Applicants may apply for and receive a Special Permit from the Planning Board before completing Local Approval 1.
 - Local Approval 2 is required for all Applicants, except a Cannabis Courier.
- Local Approval 3: Host Community Agreement
 - Applicants may submit a Statement of Interest for a Host Community Agreement after completing Local Approvals 1 & 2 (unless a Cannabis Courier, for which Local Approval 2 is not required).

¹ Pursuant to the Cannabis Business Permitting Ordinance, even after the end of the preference period, only Priority A Applicants and Priority B Applicants are eligible to receive a Cannabis Business Permit. A Priority B Applicant is defined as “an RMD within the City that was licensed or registered by the Massachusetts Department of Public Health not later than July 1, 2017 to sell cannabis products in a Cannabis Retail Store pursuant to the Commonwealth’s medical use of marijuana laws, which seeks to operate as a licensed marijuana retailer pursuant to the Commonwealth’s adult use of marijuana laws.”

- Local Approval 3 is required for all Applicants.
- Once an Applicant has secured Local Approvals 1-3, the Applicant may notify the MACCC to obtain their Provisional Marijuana Establishment License.
- After receiving the Provisional License from the MACCC, the Applicant must provide a copy to City Staff through the Viewpoint platform to receive their final Cannabis Business Permit.
- After receiving a Cannabis Business Permit, the Applicant can apply for a Building Permit.

As set forth above, there are a number of steps an applicant is required to go through before the final Cannabis Business Permit is issued. Therefore, it is possible that Priority B Applicants would not make it through the process while the Council goes through the usual process to amend the Cannabis Business Permitting Ordinance.

5. Does this extension of the moratorium violate the state cannabis law in any way?

As this is still a relatively new area of the law, we cannot say with certainty whether a court would find that the preference period conflicts with state law. However, there are strong arguments to make that the Cannabis Business Permitting Ordinance, and the preference period in particular, are not in conflict with state law, and we have thus far been successful in making those arguments. In 2019, when the City initially enacted the Cannabis Business Permitting Ordinance, there was a lawsuit against the City challenging the preference period. Revolutionary Clinics II, Inc. v. City of Cambridge, Middlesex Superior Court, 1981CV03035. The plaintiff in that case argued that the preference period conflicted with the state adult-use cannabis law found at G.L. c. 94G, *et seq.* The plaintiff moved for a preliminary injunction asking the Court to order that the City could not enforce its preference period during the duration of the lawsuit. Although the Superior Court initially granted the plaintiff's request, and for a period of time the City was enjoined from enforcing the preference period, we successfully appealed that decision to a Single Justice of the Appeals Court, who vacated the preliminary injunction. The plaintiff then tried again with a new motion for a preliminary injunction, and that time we were successful both in the Superior Court and a second appeal to a Single Justice of the Appeals Court. In the appellate proceeding, the Single Justice of the Appeals Court found as follows:

"Rev Clinics asserts it will likely succeed on the merits because the Ordinance is in conflict with state law, Chapter 55 of the Acts of 2017, codified at G.L. c. 94G, *et seq.*, thereby violating the Home Rule Amendment to the Massachusetts Constitution. ... Rev Clinics first asserts that the purpose of Chapter 55 of the Acts of 2017 and G. L. c. 94G is to "grant RMDs a statutory right to convert to CMOs [a co-located medical and adult-use business] on a priority and expedited basis"; and that the Ordinance frustrates that purpose by imposing a two-year delay. It next argues that the Legislature intended the CCC to be the exclusive licensing authority in the Commonwealth, and expressly limited local governments' ability to regulate cannabis businesses to five narrow areas: (1) time, place and manner restrictions, (2) limits on the number of cannabis establishments, (3) public nuisance mitigation, (4) signage restrictions and (5) civil penalties. G. L. c. 94G, s. 3(a) (1)-(5). Rev

Clinics contends the Legislature intended to preclude municipalities from establishing local regulations concerning adult-use cannabis.

After careful review of all the submissions -- including Rev Clinics' petition, memorandum and appendix, the City's opposition, the Single Justice's April 24, 2020 decision and both of the Superior Court's orders -- I reach the same conclusion the trial judge reached. Rev Clinics has not established a "sharp conflict" between the Ordinance and the state law. G. L. c. 94G, s. 3(a)(1), provides in part that

"[a] city or town may adopt ordinance and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter and that: (1) govern the time, place and manner of marijuana establishment operations and of any business dealing in marijuana accessories...."

It expressly authorizes the local regulation of marijuana establishments which do not conflict with the statute.

Contrary to Rev Clinics' contention that the Ordinance frustrates the Legislature's decision to reserve licensing decisions for the CCC, the local regulation coincides with the City's authority under G. L. c. 94G, s. 3. ...

Under the CCC's regulations, 935 Code Mass. Regs. s. 500.102(2), the Commission is required to provide existing RMD priority applicants and EE Applicants with "priority application review." However, the fact that the Ordinance gives additional priority to EE Applicants, even over RMD applicants, does not amount to a sharp conflict. As the previous Single Justice concluded, "[N]othing in the [CCC's] regulatory scheme suggests that municipalities have any duty to ensure that equal numbers of Economic Empowerment Applicants and dispensaries apply to the CCC for a license."

The Ordinance does not prevent RMDs from converting to CMOs; rather, it simply delays their right to do so by providing a two-year priority period to EE Applicants. Notably, this two-year priority does not interfere with priority review of RMD applicants. Chapter 55 of the Acts of 2017, s. 73(a), outlines an "expedited review process" for already accredited applicants, like Rev Clinics -- requiring updated information only. Under these circumstances, I see no sharp conflict between the City's Ordinance and G. L. c. 94G, Chapter 55 of the Acts of 2017 and the CCC Regulations.

I conclude, therefore, as did the trial judge, that the City has not exceeded its statutory authority to enact local regulations of the adult-use cannabis business. Accordingly, Rev Clinics has failed to establish a likelihood of success on the merits."

Several months after the Single Justice of the Appeals Court issued the decision quoted above, the plaintiff voluntarily dismissed the case on January 28, 2021. Accordingly, there was never a final decision on the merits in the case. The Single Justice of the Appeals Court's decision does not set binding precedent, but a court can consider it as persuasive authority.

6. Does such an extension put the City in jeopardy of legal action by other parties?
and
7. If yes to question 6, what is the potential liability to the city if such parties are successful in their legal challenge?

It is possible that there could be a challenge to the preference period if the proposed amendment is adopted and the preference period is extended by an additional two years. We cannot say for certain what the outcome of such a challenge would be, and whether a plaintiff would assert additional claims concerning the extended duration of the preference period. However, we would, of course, continue to defend the City against any challenge as before, and we believe we have strong arguments to make as set forth above.

Very truly yours,



Nancy E. Glowa
City Solicitor