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December 5, 2013

Ronald A. Fucile, Town Clerk
Town of Walpole
135 School Street
Walpole, MA 02081

**RE: Walpole Fall Annual Town Meeting of October 21, 2013 - Case # 6988
Warrant Article # 13 (Zoning)
Warrant Article #14 (General)**

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TOWN OF WALPOLE
TOWN CLERK

Dear Mr. Fucile:

Article 13 - We approve the amendments to the Walpole by-laws adopted under Article 13 (Medical Marijuana Treatment Center zoning bylaw) at the October 21, 2013 Fall Annual Town Meeting. However, the Town should take care to apply the amendments in a manner that does not conflict or interfere with the operation of 105 CMR 725.000. In particular, when considering an application for a special permit for a Medical Marijuana Treatment Center (or Registered Marijuana Dispensary-RMD), the Town should review the Operational Requirements for Registered Marijuana Dispensaries contained in 105 CMR 725.105, and the Security Requirements for Registered Marijuana Dispensaries contained in 105 CMR 725.110. We encourage the Town to consult with Town Counsel on this issue.

We also note that Article 13 amends the by-law definition of "Agriculture, Floriculture, and Horticulture, Viticulture and Silviculture" in Section 14, Definitions, to add the following text:

Agriculture shall not include any uses or activities associated with a Medical Marijuana Treatment Center as defined elsewhere in this section.

We approve this text but remind the Town that certain agricultural uses enjoy protections from regulation by way of G.L. c. 40A, §3. The Town has no power to eliminate this statutory protection by way of a by-law amendment. See *Schiffenhaus v. Kline*, 79 Mass.App.Ct. 600, 605 (2011) ("[I]t is axiomatic that [a] by-law cannot conflict with the statute").

General Laws Chapter 40A, Section 3, extends certain protections to agricultural uses and provides in pertinent part as follows:

No zoning . . . by-law . . . shall . . . prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products....

General Laws Chapter 128, Section 1A, defines agriculture and provides in pertinent part as follows:

“Farming” or “agriculture” shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

These statutes together establish that all commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture uses must be allowed as of right (1) on land zoned for such uses; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from such uses generates \$1,000 per acre or more of gross sales. If a use qualifies under any one of these three categories, the use enjoys the protections accorded under G.L. c. 40A, § 3, and a municipality cannot restrict such uses in those areas. Therefore, (despite the by-law definition of “Agriculture”), to the extent that an RMD’s cultivation of marijuana and associated activities covered by G.L. c. 128A, § 1A, constitute “commercial agriculture,” the Town cannot require a special permit for, unreasonably regulate, or prohibit such activities: (1) on land zoned for agriculture; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates \$1,000 per acre or more of gross sales. We suggest the Town consult with Town Counsel on this issue.¹

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.

¹ We retain Article 14 for further review. We will issue our decision on Article 14 on or before our original deadline of February 13, 2014.

Very truly yours,
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cc: Town Counsel Ilana M. Quirk