TOWN OF BROOKLINE, MASSACHUSETTS

ADVISORY COMMITTEE MEETING NOTICE

Tuesday, November 19, 2019 at 6:00 pm, Brookline High School, Room 235

AGENDA

Please note: All times are approximate and subject to change. People with an interest in being present for the discussion and vote on a particular item should arrive 15 minutes before the nominally scheduled time for that item.

6:00 pm  Possible vote to amend the previous vote on Article 5 Authorization for the disposal and sale of the real property at 15-19 Oak Street. (Mariah Nobrega, TMM, Pct. 4, petitioner)

6:10 pm  Possible vote to amend the previous vote on Article 25 Adoption of a new General By-law prohibiting the Town from using Face Surveillance. (Amy Hummel, TMM, Pct.12, petitioner)

6:20 pm  Possible vote to amend the previous vote on Article 26 Rename the Coolidge Corner School the “Florida Ruffin Ridley School” (School Committee, petitioner)

Possible vote to amend the previous vote on Article 27 Rename the Coolidge Corner School the “Ethel Weiss School” (Larry Ruttman, petitioner)

Possible vote to amend the previous vote on Article 28 Rename the Coolidge Corner School the “Robert I. Sperber School” (Lee Selwyn, TMM Pct. 13, petitioner)

6:30 pm  Possible reconsideration Special Town Meeting #3, Article 3 (Paul Warren, TMM, Pct. 1, petitioner) Resolution: moratorium on additional licenses for marijuana establishments and the establishment of a study committee to assess the effectiveness of Brookline’s marijuana by-laws and policies

6:40 pm  Possible vote to amend the previous vote on Article 4 Driscoll School and/or vote on a resolution regarding school construction costs

6:50 pm  Possible vote to amend the previous votes on the Committee’s recommendations on other Warrant Articles for the 2019 November Annual Town Meeting

The public is invited to attend however this meeting is not a public hearing so public comments will not be taken at the meeting. The Advisory Committee welcomes written comments, which will be circulated to members of the Committee if they are sent to lportscher@brooklinema.gov no later than 12:00 noon on the day of the meeting. Subcommittees of the Advisory Committee hold public hearings on any matter on which the Advisory Committee makes a recommendation to Town Meeting. Members of the public are encouraged to attend subcommittee public hearings if they wish to comment on any item under deliberation by the subcommittee.

Any member of the public may make an audio or video recording of an open session of a public meeting. They must first notify the chair and must comply with reasonable requirements regarding audio or video equipment established by the chair so as not to interfere with the meeting.

Michael Sandman, Chair 617-513-8908 msandman1943@gmail.com
Carla Benka, Vice-Chair 617-277-6102 rcvben@earthlink.net
**Town of Brookline**

**Advisory Committee Minutes**

**November 19, 2019**

**Present:** Vice-Chair Carla Benka, Ben Birnbaum, Harry Bohrs, Clifford Brown, Carol Caro, John Doggett, Dennis Doughty, Harry Friedman, Janet Gelbart, David-Marc Goldstein, Neil Gordon, Amy Hummel, Alisa Jonas, Janice Kahn, Steve Kanes, Bobbie Knable, David Lescohier, Carol Levin, Pamela Lodish, Mariah Nobrega, Carlos Ridruejo, Chair Michael Sandman, Lee Selwyn, Kim Smith, Claire Stampfer, Charles Swartz, John VanScyoc, Christine Westphal, Neil Wishinsky

**Absent:** Susan Granoff

**Also present:** Petitioner STM 3 WA 3 Paul Warner, Petitioner WA 4 David Gaioch.

**AGENDA**

6:00 pm Possible vote to amend the previous vote on Article 5 Authorization for the disposal and sale of the real property at 15-19 Oak Street. (Mariah Nobrega, TMM, Pct. 4, petitioner)

Discussion of proposed Advisory Committee Resolution encouraging the sale of 15-19 Oak Street

- Reason for purpose of purchase doesn’t exist anymore.
- The School Committee has dropped the idea of converting to office space.
- If properties are not sold, PSB should pay for the carrying costs, but should also get the net proceeds (if there are any) because they are assuming risk.
- How can we say the carrying costs will be borne by the PSB since they know they don’t have the money to do so.
- Cost should be borne by the schools because they are making a decision to defer spending the money on something else.
- Language doesn’t trouble Chair of the School Committee.
- Concern about 3 year time frame. It is not a process of negotiation. It will be an open process and sold to highest bidder.
- No problem with substance but to spring it on Town Meeting and ask them to endorse it is too much. This should be considered a policy statement from the Advisory Committee instead since they haven’t had a chance to review it.

A **MOTION** was made and seconded to propose the language drafted as a policy statement directed to the Select Board.

By a **VOTE** of 19 in favor, 3 opposed, 5 abstentions the Advisory Committee will make this resolution to the SB.

6:10 pm Possible vote to amend the previous vote on Article 25 Adoption of a new General By-law prohibiting the Town from using Face Surveillance. (Amy Hummel, TMM, Pct.12, petitioner)

The petitioner noted the article is in good shape and ready for prime time. This is not radical a concept; it is conservative and good process. Otherwise we will stumble into whatever a future law mandates. We are not in a position to responsibly make a policy about this. The Select Board supports this language. I hope you will support.

**Comments**
Concern there is surveillance and technology. There is a difference between facial recognition technology and surveillance. This bans a technology that has usages beyond surveillance. We are going too far – accept a moratorium until we put some guidelines in place. There is a lot to look at and needs more analysis.

Select Board doesn’t need a by-law to accomplish what this proposal proposes. Should sit down with the Police Chief and figure out all of the details of this.

This does not prevent the Police for sending a photograph out to be recognized.

There is an equity issue. The technology errs in flagging African Americans and Latin Americans. This needs to be part of the conversation.

If you refer it to a committee, there still is no law.

A MOTION was made and seconded to amend prior vote for referral. By a VOTE of 8 in favor, 14 opposed, 1 abstention the Advisory Committee will not amend previous vote.

6:20 pm Possible vote to amend the previous vote on Article 26 Rename the Coolidge Corner School the “Florida Ruffin Ridley School” (School Committee, petitioner)

Possible vote to amend the previous vote on Article 27 Rename the Coolidge Corner School the “Ethel Weiss School” (Larry Ruttman, petitioner)

Possible vote to amend the previous vote on Article 28 Rename the Coolidge Corner School the “Robert I. Sperber School” (Lee Selwyn, TMM Pct. 13, petitioner)

A MOTION was made and seconded for favorable action on the substitute motion offered by Beth Kates and Lee Selwyn. By a VOTE of 8 in favor, 14 opposed, and 4 abstentions the motion fails.

6:30 pm Possible reconsideration Special Town Meeting #3, Article 3 (Paul Warren, TMM, Pct. 1, petitioner) Resolution: moratorium on additional licenses for marijuana establishments and the establishment of a study committee to assess the effectiveness of Brookline’s marijuana by-laws and policies

The petitioner does not want a moratorium. The Select Board referred the entire subject to WA 3 to license review committee. We changed it to Moderator’s Committee with a November 1st 2020 report date.

The Petitioner amended WA 3 that eliminates the moratorium – we would like to offer Town Meeting the opportunity to vote the article without the moratorium. If we could amend that and be on the same page, that would be ideal.

A MOTION was made and seconded to remove language referencing the moratorium from what the Advisory Committee originally recommended.

Comments

- Why have petitioners removed the moratorium? The original intent of the original was a 4 month pause, then we got into changing dates but never intended a moratorium of a year. Once we saw dates being pushed out and adding language for sunsets for Boston to bring their shops on line, moratorium is not a word we wanted to use.
- The Moderator’s Committee would just look at the bylaws and what other towns have done.
The point of this was to just slow the process down so it doesn’t overwhelm neighborhoods and there is validity in the moratorium.

How long does it take from request to open to time of licensing? I don’t know with respect to marijuana businesses as it is related to the State process. One of the Commonwealth Avenue establishments is ready to put a sign up. Sanctuary will not open until March or April. If moratorium were to March, it would have no effect, if November then it might. One is more ahead in the process than the other.

Purpose of moratorium was to see if we needed to change anything in the process – give the Moderator’s Committee sufficient time to do the study. It is part of the process and we should not change it.

The Select Board is the licensing authority and they have the authority to change the license however they wish.

By a VOTE of 17 in favor, 7 opposed, and 3 abstentions the Advisory Committee will remove the language concerning a moratorium so their motion aligns with the petitioner’s motion and Select Board’s motion.

6:40 pm Possible vote to amend the previous vote on Article 4 Driscoll School and/or vote on a resolution regarding school construction costs

Are the Select Board and Advisory Committee in alignment about the language of our motion? $108.8 is what is out there among the voting public. It would honor our commitment to the voters to hold the line.

Petitioner David Gaioch commented that $119.7 number was the very same project with the figure inflated to the current time. Petitioners have amended the motion to $115.3 to still reflect inflation’s reality while also trying to show respect for tax payers. They would cut structured parking ($3.4m-$3.8m) for example if we don’t find savings elsewhere.

A MOTION was made and seconded to amend the number to $98M. By a VOTE of 10 in favor, 13 opposed, and 3 abstentions the motion fails.

A MOTION was made and seconded to amend the number to the figure the petitioners have offered, $115.3M. By a VOTE of 5 in favor, 19 opposed, and 1 abstention the motion fails. The Advisory Committee recommendation remains unchanged.

Didn’t we include a fossil free clause? No intent to delete and it is still in there. It was included as part of schematic design.

If it is $108 they will have to redesign the building and take the opportunity to look into the efficiency of the building and have a peer review by another first which would add 2 weeks and $50K to the project. With that you can make a decision about this.

Other figures were shared regarding other schools.

$98M cuts about 20% - a very large reduction for small gain in terms of individual tax bills.

We have four of these coming and each couple of bucks a month adds up and by override #3 or #4, voters will say no.

Cutting the budget doesn’t mean you change the educational program, just the design of the building. Need to ask architects to spec the most efficient design to build to budget. It doesn’t follow that it changes the school’s educational program/intent.

6:50 pm Possible vote to amend the previous votes on the Committee’s recommendations on other Warrant Articles for the 2019 November Annual Town Meeting
Next Meeting: November 20th at the High School, Room 235

Upon a MOTION made and seconded to adjourn, and voted unanimously, the meeting was adjourned at 7 pm.

Documents Presented:
- WA 5 Oak Street Budget memo from Charlie Simmons
- WA 5AC Resolution on Oak Street Properties
- Substitute Motion on Warrant Articles 26-28
- Letter regarding STM 3 Warrant Articles 1-3 from attorneys for Comm Ave Canna, Inc.
- Public Comment STM 3 WA 3 Edleson
- Advisory Committee Speakers List for Town Meeting
<table>
<thead>
<tr>
<th>Temp. WA #</th>
<th>Title</th>
<th>Petitioner(s)</th>
<th>Subcommittee</th>
<th>Speaker</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Approval of unpaid bills.</td>
<td>Select Board</td>
<td>Admin &amp; Finance</td>
<td>Dennis Doughty</td>
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<tr>
<td>2</td>
<td>Approval of collective bargaining agreements.</td>
<td>Human Resources</td>
<td>Personnel</td>
<td>Janet Gelbart (no report)</td>
</tr>
<tr>
<td>3</td>
<td>FY2020 budget amendments</td>
<td>Select Board</td>
<td>Capital</td>
<td>Carla Benka</td>
</tr>
<tr>
<td>4</td>
<td>Appropriation for a four section Driscoll School</td>
<td>Ananian TMM10, et al</td>
<td>Joint Capital &amp; Schools</td>
<td>John VanScoyac</td>
</tr>
<tr>
<td>5</td>
<td>Authorization for the disposal and sale of the real property at 15‐19 Oak Street</td>
<td>Select Board</td>
<td>Joint Capital &amp; Schools</td>
<td>John Doggett (change from C Brown)</td>
</tr>
<tr>
<td>6</td>
<td>Resolution pertaining to the annual stipends received by members of the Select Board and other committees.</td>
<td>McClelland TMM11, et al</td>
<td>Admin &amp; Finance</td>
<td>Dennis Doughty</td>
</tr>
<tr>
<td>7</td>
<td>34. Resolution pertaining to the maintenance of pavement markings</td>
<td>Miller</td>
<td>Capital</td>
<td>Amy Hummel</td>
</tr>
<tr>
<td>8</td>
<td>Legislation authorizing the Select Board to offer a senior discount program for water and sewer rates.</td>
<td>Select Board</td>
<td>Human Services</td>
<td>Kim Smith (not David‐Marc Goldstein)</td>
</tr>
<tr>
<td>9</td>
<td>Resolution pertaining to the establishment of a real estate transfer fee</td>
<td>MacMillan,TMM4, et al</td>
<td>Admin &amp; Finance</td>
<td>Dennis Doughty</td>
</tr>
<tr>
<td>10</td>
<td>Amend Article 4.9 of the Town's General By‐laws to dissolve the Committee on Campaigns</td>
<td>Select Board</td>
<td>Human Services</td>
<td>Neil Gordon</td>
</tr>
<tr>
<td>11</td>
<td>Authorization for the termination and relocation of certain sewer and drainage easements at Kerrigan Place</td>
<td>DPW</td>
<td>Capital</td>
<td>Harry Friedman</td>
</tr>
<tr>
<td>12</td>
<td>Authorization to enter into Solar Power Purchase Agreements (PPAs) for rooftop solar photovoltaic installations on certain Town properties</td>
<td>Select Board</td>
<td>Capital</td>
<td>John Doggett</td>
</tr>
<tr>
<td>13</td>
<td>Amend Section 4.07 of the Town’s Zoning By-Law to allow Accessory Ground-Mounted Solar Photovoltaic Installations</td>
<td>Planning Department, et al</td>
<td>Planning &amp; Regulation</td>
<td>Carlos Ridruejo</td>
</tr>
<tr>
<td>14</td>
<td>Amend Section 6.04 of the Zoning By-law pertaining to electric vehicle parking.</td>
<td>Ananian TMM10), et al</td>
<td>Planning &amp; Regulation</td>
<td>Lee Selwyn</td>
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<tr>
<td>15</td>
<td>Amend Section 6.02 of the Zoning By-law to adjust parking requirements and establish maximum parking ratios within the Transit Parking Overlay District (TPOD)</td>
<td>Pehlake, TMM2, et al</td>
<td>Planning &amp; Regulation</td>
<td>Steve Kanes or Neil Wishinsky</td>
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<tr>
<td>16</td>
<td>Resolution pertaining to E-Scooters and other micro-mobility devices</td>
<td>Warren, TMM1, et al</td>
<td>Public Safety</td>
<td>Susan Granoff</td>
</tr>
<tr>
<td>17</td>
<td>Resolution pertaining to Open-Air Parking Licenses and Electric Vehicle Charging Outlets</td>
<td>Ananian TMM10), et al</td>
<td>Public Safety</td>
<td>Janice Kahn</td>
</tr>
<tr>
<td>18</td>
<td>Amend the Town's Zoning By-laws to change the definition of &quot;lodger&quot; and permit certain short term lodging</td>
<td>Gladstone, TMM16, et al</td>
<td>Planning &amp; Regulation</td>
<td>Lee Selwyn</td>
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<tr>
<td>19</td>
<td>Amend the Town's Zoning By-law to allow Accessory Dwelling Units</td>
<td>Blood</td>
<td>Planning &amp; Regulation</td>
<td>Carol Levin</td>
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<td></td>
<td>Resolution/pertaining to an Economic-Advancement Fund</td>
<td>O’Neal, TMM4</td>
<td>Admin &amp; Finance</td>
<td>Neil Gordon</td>
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<td>30</td>
<td>Adoption of a new General By-Law pertaining to the establishment of a Brookline Community Engagement Plan</td>
<td>Brown, TMM1, et al</td>
<td>Personnel</td>
<td>Carol Caro</td>
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<tr>
<td>31</td>
<td>Resolution pertaining to the Town’s response to Climate Change.</td>
<td>Milner-Brage TMM12, et al</td>
<td>Public Safety</td>
<td>Janice Kahn</td>
</tr>
<tr>
<td>32</td>
<td>Amend the Town’s General By-laws to replace “Chairman” and “Chairperson” with “Chair”</td>
<td>Gordon, TMM1, et al</td>
<td>Personnel</td>
<td>Carol Caro</td>
</tr>
<tr>
<td>33</td>
<td>Amend the Town’s General By-laws to replace references to “inhabitants” and “Citizens”.</td>
<td>Gordon, TMM1</td>
<td>Personnel</td>
<td>Chuck Swartz (Carol Caro if 4th night)</td>
</tr>
<tr>
<td>34</td>
<td>Amend the Town’s General By-laws regarding eligibility for membership on boards, commissions and committees</td>
<td>Gordon, TMM1</td>
<td>Personnel</td>
<td>Chuck Swartz (Carol Caro if 4th night)</td>
</tr>
<tr>
<td>35</td>
<td>Reports of Town Officers and Committees</td>
<td>Select Board</td>
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Advisory Committee

Resolution Pertaining to Oak Street Property Disposition

WHEREAS, on February 1st, 2019 the Town of Brookline purchased the properties 15, 17 and 19 Oak St (the “Properties”) for municipal purposes and more specifically in anticipation of a successful debt exclusion vote to construct a school commonly referred to as The Baldwin School, and;

WHEREAS, such debt exclusion vote failed and there are no existing plans to construct The Baldwin School or any facility that would require the land or the properties list above, and;

WHEREAS, the Town paid a total of $4.7 million for the Properties which were assessed to contribute combined real estate taxes of $33,548 in FY 19 which were instead absorbed by all other taxpayers in Town, and;

WHEREAS, the Properties are neither designed nor constructed for economical use for any purpose other than residential use, and;

WHEREAS, the Properties cannot be rented at levels that would enable the Town to substantially mitigate the implicit and explicit costs of carrying and maintaining the properties, particularly once the Town begins to amortize the debt used to buy the properties, which the Town is required to do in FY21, and;

WHEREAS, putting the Properties back on the tax rolls would be considered new growth, thereby adding approximately an additional $43,000-$45,000 property tax revenue to the Town, and;

WHEREAS, the estimated implicit and explicit negative cost of carry to the Town currently approximate $124,000 per year and will increase to as much as $315,000 per year when the acquisition debt begins to amortize in 2021, and;

WHEREAS, explicit negative net ‘cost of carry’ incurred by the Town has an immediate and direct impact on the Town’s Capital Improvement Program, and;

WHEREAS, Town Meeting has provided the Select Board with the authority to sell the Properties,

THEREFORE, BE IT RESOLVED that in consideration of the budgetary impact of maintaining Town ownership the Oak St properties, the current cost of rebuilding the Driscoll school and the possible $10+m increase in that appropriation, the Advisory Committee calls upon the Select Board to dispose of the Properties as soon as possible, with the following conditions and alternatives:

1. If the School Committee and School Department wish to carry the cost of the Properties and to absorb the entire explicit net ‘cost of carry’ they may do so. If they so choose, the School Department will also be the beneficiary of any positive net proceeds if, and, when the School Committee requests that the Select Board sell the Properties.

2. The Select Board determines, through consultation with realtors, that the sale of the Properties would generate a total loss (defined as the sale price less any negative net cost of carry less any outstanding debt) that could be avoided or materially reduced by maintaining ownership for a period of not more than three years from the original date of purchase.
I was originally told that condos would be torn down, then sold, so I have to be prudent with spending money. This budget is based on actual costs with estimated costs if we keep them.

<table>
<thead>
<tr>
<th>SPENDING ON OAK STREET PROPERTIES THUS FAR 11.13.19</th>
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<tbody>
<tr>
<td>UTILITIES</td>
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<tr>
<td>TOWN OF BROOKLINE-TREASURE</td>
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<td>TOWN OF BROOKLINE-TREASURE</td>
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<tr>
<td>OAK-XXX- WATER</td>
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<tr>
<td>OAK-XXX- REFUSE</td>
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<tr>
<td>$6,848.96</td>
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<tr>
<td>$2,236.60</td>
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<tr>
<td>$9,085.56</td>
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| INSURANCE                                           |
| PURCHASING                                          |
| INSURANCE                                           |
| $7,500.00                                           |

| DPW                                                |
| THROUGH TENANT                                     |
| SNOW REMOVAL                                       |
| LANDSCAPING                                        |
| LEAVES, GRASS                                      |
| $4,000.00                                           |
| $2,500.00                                           |
| $6,500.00                                           |

| R&M                                                |
| ENCORE HOLDINGS, LLC                               |
| OAK-FR10-FIRE ALARM MONITORING-P1721               |
| $600.00                                             |
| $500.00                                             |
| $3,000.00                                           |
| $1,500.00                                           |
| $1,000.00                                           |
| $6,600.00                                           |
| HVAC                                               |
| HVAC YEARLY                                        |
| ROOF                                               |
| GUTTER CLEANING/REPAIRS                            |
| ELECTRICAL REPAIRS                                 |
| MISC. REPAIRS                                      |
| $1,000.00                                           |
| $1,000.00                                           |
| $1,000.00                                           |

| TOTAL                                              |
| $29,685.56                                         |
SUBSTITUTE MOTION
offered by Beth Kates (TMM/9) and Lee Selwyn (TMM/13)
under Warrant Articles 26, 27 and 28

VOTED: That Warrant Articles 26, 27 and 28 shall be REFERRED to a Moderator's Committee whose membership shall include, but not be limited to, one (1) Petitioner or the Petitioner's designee for each of the three Articles, one member of the School Committee, one member of the Naming Committee, one member of the Advisory Committee, and such other members as the Moderator at his discretion may appoint. The Committee shall develop an open public process to solicit nominations from the entire Brookline community, hold public hearings and meetings all of which are duly noticed and open to the public, and shall issue a Report and Recommendation to Town Meeting for consideration at the November 2020 Special Town Meeting. The Coolidge Corner School shall continue to bear that name until such time as Town Meeting, in consideration of the Moderator's Committee Report and Recommendation, adopts an alternate name.

Why this Motion should be adopted

The renaming of the Edward Devotion School has polarized our community. It has been a divisive force that has driven us to question our neighbors’ values. Discussions have become ugly, filled with personal accusations and threats to reputation and even livelihood. We need to reconcile our differences and come together as a community.

This MOTION would apply to all three of the renaming warrant articles – 26, 27 and 28. It would retain the Coolidge Corner School name in the interim, while creating a new opportunity for an inclusive and transparent renaming process that would allow for meaningful public participation and discussion.

The concept of "diversity and inclusion" means just that -- diversity of views and inclusion of all segments of the Brookline community. Getting it done right is far more important than getting it done quickly. There is no harm in retaining the Coolidge Corner School name until the process that is proposed in this Motion can be successfully completed.
November 13, 2019

**Via Fed Ex Overnight**

Joslin Ham Murphy, Esq.
Office of Town Counsel
Town of Brookline
333 Washington Street, 6th Floor
Brookline, MA 02445

Re: November 19, 2019 Third Special Town Meeting Warrant

Dear Attorney Murphy:

I write on behalf of Comm Ave Canna, Inc. ("CAC") relative to the Third Special Town Meeting Warrant currently scheduled to be heard by Town Meeting on Tuesday, November 19, 2019. As you are aware, CAC is a pending applicant with the Town of Brookline for a proposed Marijuana Retailer license on a second floor location at 1030 Commonwealth Avenue, Brookline, Massachusetts 02215.

The following analysis is supported by Massachusetts case law and recent decisions of the Attorney General relative to the commercial cannabis industry. Under any objective examination, it is clear that the proposed Warrant Articles 1, 2, and 3 for the Third Special Town Meeting: (i) violate precedents set forth in Massachusetts case law and recent decisions of the Office of the Attorney General regarding municipal overreach in the legalized cannabis industry; (ii) attempt to regulate zoning regulations through the amendment of a general bylaw; and (iii) attempt to unlawfully extend and/or renew a recreational marijuana moratorium in the Town of Brookline. As a consequence, if approved by Town Meeting, such articles are likely to be rejected by the Office of the Attorney General upon review or reversed in subsequent litigation.

For the reasons stated herein, CAC respectfully requests the Town, through its boards, commissions, and Office of Town Counsel, take this analysis under advisement in regards to Warrant Articles 1, 2, and 3 at the November 19, 2019 Third Special Town Meeting Warrant.

**Warrant Article 1**

Warrant Article 1 seeks to amend the Town of Brookline General By-Laws Section 8.37.5, Paragraph B.5 to limit the hours of operation of Marijuana Retailers to a “maximum range of hours for Marijuana Retailers being 10 a.m. to 7 p.m. on Mondays through Saturdays, and 12 p.m. to 6 p.m. on Sundays.”

Warrant Article 1 attempts to regulate zoning regulations through the amendment of a general bylaw, in violation of both recent and longstanding precedents set forth in Massachusetts
Letter to J. Murphy, Esq,
November 13, 2019
Page 2

case law. See generally, Decision of the Commonwealth of Massachusetts Office of the Attorney General, Case Number 9273 (dated April 1, 2019), citing Valley Green Grow, Inc. v. Town of Charlton, Land Court No. 18-MISC-000483 (March 7, 2019); Rayco Investment Corp. v. Board of Selectmen of Raynham, 368 Mass. 385 (1975). A town may not amend its earlier zoning regulation of commercial marijuana establishments through a general by-law. Id. As detailed herein, the regulation of hours, which is authorized through Section 4.13 of the Town of Brookline Zoning Bylaws (the “Zoning Bylaws”) can only be amended through a zoning change, which requires a two-thirds favorable vote at a duly noticed town meeting, as opposed to a simple majority for general bylaws. See G.L. c. 40A, § 5, ¶ 5.

Further, the Town’s history of cannabis regulation is an important factor in evaluating the validity of the general by-law adopted under Article 1. Rayco at 393 (where the town’s prior history of regulating trailer parks through zoning was deemed “significant”). Depending on the town’s history of regulation, its comprehensive zoning treatment of a particular subject matter may not be susceptible to subsequent change by way of a general by-law. Spenlinhauer at 139-140 (2011). A general bylaw may only regulate a subject if there is no history in the municipality of the subject being treated under zoning. Id. To provide context to the proposed Warrant Article 1 and the Town’s already comprehensive marijuana permitting and licensing structure, it is important to review the history of the Town’s zoning regulation of commercial (i.e. “adult use”) marijuana establishments.

1. At the November 2016 biennial statewide election, state voters approved Question 4 (“Legalization, Regulation and Taxation of Marijuana”).

2. The Town of Brookline voted in favor of Question 4 with 61.7% of voters supporting the initiative.

3. The new state law permitted, among other things, the operation of a variety of types of marijuana establishments and included provisions under which cities and towns could regulate those establishments.

4. At the Annual Town Meeting held on May 22, 24, and 29, 2018, the Town voted on the following articles: (i) Article 17 (amendment of the Zoning Bylaw Sections 2.13 “definitions” and Section 4.07 “Table of Use Regulations,” and creating a new Section 4.13 for commercial Marijuana Establishments); (ii) Article 18 (creation of a new Article 8.37.1 regarding “Marijuana Establishments); and (iii) Article 19 (amendment of Article 8.37.4 of the General By-Laws regarding caps on marijuana licenses).

As part of Warrant Article 17 passed at the 2018 Annual Town Meeting, Section 4.13 of the Zoning Bylaws was enacted to regulate the following facets of adult-use marijuana establishments: compliance with state laws, maintenance of licenses, general operations, siting,

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1 In Spenlinhauer, the town’s comprehensive regulation of off-street parking by zoning by-laws could not be amended through enactment of a general by-law. Id. at 139-140
visibility of operations, security, hours, methods of transportation, nuisance, traffic, odors, pesticides, service displays, consumption of marijuana on-site, inventory, along with various other limitations on siting, procedure, and applications. Zoning Bylaw Section 4.13(B)(4) regulates and references hours of operation for marijuana retailers, which is the subject matter if the proposed Warrant 1. Specifically, Section 4.13(B)(4) states:

“The hours of operation of Marijuana Establishments shall be those that are set by the Marijuana Establishment’s host community agreement with the Town or a Select Board-issued license.”

Here, the proposed Warrant Article 1 seeks to amend a use through a General Bylaw which has been historically regulated by the Zoning Bylaw. A general by-law may not be effective to change earlier zoning by-law provisions governing a particular subject matter where, as here, the procedural requirements of Chapter 40A, the state Zoning Act, have not been observed. Spenlinhauer at 139-140 (concluding that by-law limiting trailer-park operator licenses was insufficient to amend town’s previous zoning by-law regulating such parks where record did not demonstrate that license limitation had been enacted in accordance with the procedural requirements of Chapter 40A). In the instant case, like in Spenlinhauer, the Town has a history of regulation and its comprehensive zoning treatment of a particular subject matter is not susceptible to subsequent change by way of a general by-law. Id.

Further, while a town may supplement a comprehensive zoning scheme through the adoption of a general by-law, a town may not use a general by-law to “…restrict the use that is controlled by the zoning bylaw.” Valley Green Grow at 18. Here, the Warrant’s attempt to confine all marijuana retailers’ hours of operation through a General Bylaw would be a restriction on the parameters set forth in Section 4.13 of the Zoning Bylaw, which allows hours of operation to be set forth in a Host Community Agreement (negotiated by the Town Administrator’s Office and Office of Town Counsel and approved by the Select Board) or by the Select Board in the licensing process. This restriction is invalid and would, like similar cases regarding municipal overreach, be rejected by the Attorney General’s office upon review.

Setting aside the legal implications of attempting to pass a general bylaw which usurps the authority and control of the zoning bylaw, Warrant 1 is both flawed in its attempt to regulate traffic and unlawful pursuant to G.L.c. 94G. Chapter 94G permits towns to regulate commercial marijuana businesses through by-laws, provided those by-laws are not “unreasonably impracticable, stating the following in subsection 3(a).

“A city or town may adopt ordinances 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…”

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2 To date, each Host Community Agreement executed between the Town of Brookline and each proposed or operational marijuana retailer echo the requirements of the Zoning Bylaw, stating, “The [marijuana retailer]’s hours of operation must be approved by the Select Board. The [marijuana retailer] shall not change its hours of operation without Select Board approval.”
Not only is the proposed General Bylaw amended unreasonable in its scope, it is not practical in its application. The net effect of Warrant Article 1, in the event of passage, will likely be an exponential increase in customers, traffic, and congestion during peak traffic in rush hour (between 4:00PM to 7:00PM). A reduction in hours will not reduce customer demand, however common-sense metrics demonstrate an anticipated increase in the amount of customers visiting marijuana establishments on a per hour basis if operational hours are further restricted. It is clear that the passage of Warrant Article 1 will have the opposite effect of its intention, and any further restriction on hours of operation will add to traffic and pedestrian congestion in the Town. Such congestion will likely not only affect those living in the areas immediately adjacent to marijuana retailers, but any residents on main roads during rush-hour traffic between 4PM and 7:00PM.

For the reasons stated above, CAC respectfully opposes Warrant Article 1 and asks that the Town take this analysis under advisement.

**Warrant Article 2**

**Warrant Article 2 seeks to amend the Town of Brookline General By-Laws Section 8.37.5, Paragraph B to require reservation only sales for Marijuana Retailers.**

Similar to Warrant Article 1, Warrant Article 2 attempts to regulate zoning regulations through the amendment of a general bylaw, which is prohibited by law. *See* generally, Decision of the Commonwealth of Massachusetts Office of the Attorney General, Case Number 9273 (dated April 1, 2019), citing *Valley Green Grow, Inc. v. Town of Charlton*, Land Court No. 18-MISC-000483 (March 7, 2019); *Rayco Investment Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385 (1975). Warrant Article 2 – through an effective restriction against walk-in retail transactions – attempts to regulate traffic, congestion, and alleged nuisance, which is already specifically regulated by Section 4.13(B)(8) of the Zoning Bylaws. As such, the any change to the regulation can only be amended through a zoning change, which requires a two-thirds favorable vote (as opposed to a simple majority for general bylaws) at a duly noticed town meeting. *See* G.L. c. 40A, § 5, ¶ 5.

More particularly, in the context of Warrant Article 2, it should be emphasized that zoning by-laws, as opposed to general bylaws, regulate, among other things, “the character of the community and the compatibility of nearby land uses.” *See* *Lovequist v. Conservation Comm’n of Dennis*, 379 Mass. 7, 13-14 (1979); see also *Spenlinhauer* at 141 (“character and quality of the town’s neighborhoods” was the focus of discussion leading to enactment of off-street parking regulations that were, in effect, zoning regulations). Section 4.13(B)(8) of the Zoning Bylaws is a quintessential “character and quality of life” regulation dealing with traffic, parking, and general nuisance. The zoning regulation states:

“Marijuana Establishment operations shall not create nuisance conditions in parking areas, sidewalks, streets and areas surrounding its premises and adjacent properties. “Nuisance” includes, but is not limited to, disturbances of the peace,
Letter to J. Murphy, Esq,
November 13, 2019
Page 5

open public consumption of Marijuana, excessive pedestrian or vehicular traffic, odors emanating from the Marijuana Establishment’s premises, electrical lighting, illegal drug activity under State or local law, harassment of passersby, excessive littering, excessive loitering, illegal parking, excessive loud noises, excessive citation for violations of State traffic laws and regulations and/or Transportation Division Rules and Regulations, queuing of patrons (vehicular or pedestrian) in or other obstructions of the public way (sidewalks and streets), collisions between vehicles, bicyclists, and pedestrians, lewd conduct or police detentions and arrests.”

See Section 4.13(B)(8) of the Zoning Bylaws. In fact, the citizen petitioners of Warrant Article 2, in their “Petitioner Article Description,” included in the Reports of Select Board and Advisory Committee, plainly state the intent of the proposed Articles:

“The two by-law amendments are intended to address the issues that are principally contributing to unacceptable conditions that are overwhelming the Brookline Village neighborhood from a nuisance and quality of life perspective and which will likely have similar effects on other neighborhoods as more retail establishments are opened.” [emphasis added]

While Warrant Article 2 attempts to regulate marijuana establishments through “nuisance and quality of life” issues in a general bylaw, Section 4.13(B)(8) of the Zoning Bylaws explicitly regulates such “nuisance” elements already, specifically citing “excessive pedestrian or vehicular traffic,” “harassment of passersby,” “excessive loitering,” “illegal parking,” among others within the regulation. The restrictions proposed by Warrant Article 2 are clearly made with the intent of regulating (through a general bylaw) the facets already explicitly regulated through a zoning bylaw. See generally Lovequist at 13-14. Further, as judicially observed, “the distinction between zoning and [general by-laws] is not an empty formality, for valid zoning measures can be implemented only by following the procedures set forth in G.L. c. 40A.” Spenlinhauer at 137. These procedural protections include a report by the local planning board after a duly noticed public hearing (or the expiration of 21 days from the date of the hearing). G.L. c. 40A, § 5. Moreover, changes in zoning by-laws protect some prior existing uses, while general by-laws typically do not. Spenlinhauer at 137-138. As noted above, local zoning by-laws require a two-thirds majority vote of Town Meeting to approve, see G.L. c. 40A, § 5, ¶ 5, while general by-laws can be adopted by a simple majority vote. The facts preceding the adoption of Warrant Article 2 demonstrate its unsuitability as a general by-law to change previous Town zoning enactments governing marijuana-related businesses. Spenlinhauer at 138.

For the reasons stated above, CAC respectfully opposes Warrant Article 2 and asks that the Town take this analysis under advisement.

Warrant Article 3

Warrant Article 3 seeks to create a moratorium on issuance of Retail Marijuana Establishment licenses until the Select Board appoint a study committee to assess the
effectiveness of the Town’s bylaws and submit findings to the Select Board no later than March 1, 2019.

Warrant Article 3 seeks to extend a moratorium on recreational marijuana establishments, which, pursuant to recent decisions issued by the Office of the Attorney General of Massachusetts, exceeds the Town’s zoning authority, as (i) the extended moratorium period is longer than is reasonably necessary and (2) the moratorium does not continue to have a discernible legitimate zoning purpose as the Town has already actively engaged in a lengthy planning process regarding the content thereof. See generally, Decision of the Commonwealth of Massachusetts Office of the Attorney General, Case Number 9166 (dated April 18, 2019).

First, the petitioner’s proposed moratorium, through March 1, 2020, would allow a delay longer than is reasonably necessary considering the Town’s previous studies and deliberations prior to the passage of a comprehensive commercial marijuana regulation through Town Meeting in May 2018. Further, the final Cannabis Control Commission regulations for commercial marijuana were issued on March 9, 2018, meaning that this proposed moratorium would delay licensure nearly two (2) years after the final state regulation date. The Office of the Attorney General opined on this very issue in a decision date April 18, 2019, stating, in relevant part:

“...[W]e believe that it is reasonable to expect towns to complete the planning process for the new use of Recreational Marijuana Establishments by December 31, 2018, nine months after publication of the final regulations. Beyond that time period, a moratorium on Recreational Marijuana Establishments could be viewed as unconstitutional because it is not tied to current legitimate planning needs. See Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004)”

Moreover, towns must actively engage in the planning process in order to justify the need for a temporary moratorium. See Zuckerman, 442 Mass. at 518 n. 16 (“Our holding in [Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980)], and our holding today, should make clear that bylaws restraining growth pass constitutional muster only where they...are enacted to assist a particular planning process. Where the needs of a town to plan for an aspect of growth prove to exceed the time limits of a bylaw, the town may extend the restriction for such limited time as is reasonably necessary to effect its specific purpose.”). Here, the Town already has a wide-ranging commercial marijuana regulation. Warrant Article 3 sets aside the comprehensive nature of the Town’s General Bylaws, Zoning Bylaws, and Select Board Rules and Regulations which collectively regulate all operational aspects of Marijuana Retailers in the Town. Section 4.13(6) of the Zoning Bylaws details the requirements for a Marijuana Retailer to engage in the Site Plan Review process. Prior to filing for a building permit, seeking relief from the Zoning Board of Appeals, or applying for a license with the Select Board (in that order), a Marijuana Retail must first obtain a “Notice of Completion of Marijuana Establishment Site Plan Review” from the Planning Director and Building Commissioner. Receipt of such notice requires months of process, submission and review of plans, and numerous meetings (including on-site visits) with members of the Town’s planning department, building department, transportation department, fire department, police department, and health department. Only after pre-site plan review is completed, can a marijuana establishment begin the approval process with the Planning Board,
Zoning Board of Appeals, and Select Board. It is further worth noting that at the beginning of the pre-site plan review process, a marijuana establishment must first submit a copy of its completed state application with the Cannabis Control Commission. Such local procedure requires a prospective marijuana establishment to already have, through its state application, comprehensive policies in place at the outset of engagement with the Town. The comprehensive regulations of the Town and review and approvals required of Town staff, departments, Planning Board, Zoning Board of Appeals, and Select Board, allow the Town significant time and authority to adequately regulate (and restrict or condition where so required) commercial marijuana businesses in the Town.

As the proposed moratorium exceeds the Town’s zoning authority, is longer than is reasonably necessary, and does not continue to have a discernible legitimate zoning purpose as the Town has already actively engaged in a lengthy planning process regarding the content thereof, For the reasons stated above, CAC respectfully opposes Warrant Article 3 and asks that the Town take this analysis under advisement.

Thank you for your attention to this matter.

Very truly yours

COMM AVE CANNA, INC.

By Its Attorneys:
RUBERTO, ISRAEL & WEINER, P.C.

By:

Adam R. Barnosky, Esq.

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For reference, a completed state application for a Marijuana Retailer includes the following individually crafted policies and procedures, among other requisite submission: Security plans and procedures; plans to prevent the diversion of marijuana products; plans to store marijuana products; transportation plans; inventory procedures; quality control and contaminant testing procedures, as applicable under license type; personnel policies; dispensing procedures; record-keeping procedures; policies and procedures for maintaining financial records; and diversity plans to promote equity among women, minorities, veterans, people with disabilities, and people of all gender identities and sexual orientation; and operational plan. See generally, 935 CMR 500.
cc: Bernard Greene, Chair, Brookline Select Board  
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Mel Kleckner, Brookline Town Administrator  
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John-Bryant Hauck, President, Comm Ave Canna, Inc.  
(fed ex and email)
I am coming in cold. I haven’t yet found the source material referenced. However, I am concerned that because some individuals have organized that their voices appear louder than the representation they actually have.

In particular, concerning

   6:30 pm Possible reconsideration Special Town Meeting #3, Article 3 (Paul Warren, TMM, Pct. 1, petitioner) Resolution: moratorium on additional licenses for marijuana establishments and the establishment of a study committee to assess the effectiveness of Brookline’s marijuana by-laws and policies

I do not want to see more ways to delay licensing of marijuana establishments or restrict the length of licenses solely to obstruct the will of the voters. The majority of Brookline residents voted in favor of allowing marijuana establishments. The rules and regulations as I understand them from attending one of the public meetings are devised to answer practically every real issue. And from what I can tell, our problem now is insufficient marijuana establishments to support existing demand.

Just because some individuals have loud voices and are organizing does not mean they represent the majority. If our votes mean anything, they do not. So while I have no gripe if regulations need tweaking due to actual issues that arise in the administration of the practices of marijuana establishments. I absolutely do not agree with using a moratorium or reduced license term or other means to transparently restrict or eliminate marijuana establishments in Brookline in contravention of the will of the majority of voters. Study the situation? Sure. Stop marijuana establishments? No, that battle is over. Let’s get beyond prohibition. We know that doesn’t work.

Thanks.

Glenn Edelson
43 Carlton Street, Brookline