

ZONING COMMISSION MEETING
MONDAY, AUGUST 24, 2015
TOWN HALL 7:00 P.M.

Present: Chairman Don Truskauskas, Anne Marie Buonocore, Joseph Marzullo, Alternate Members Lynne Steincamp, Michelle Rewenko, Daniel Thurston (arriving at 7:07 p.m.) and Land Use Coordinator Polly Redmond
Also Present: Town Atty. Michael D. Rybak
Absent: David Mathes and Todd Ouellette

PLEDGE OF ALLEGIANCE

1. OPEN MEETING – ESTABLISH QUORUM.

Chairman Truskauskas called the meeting to order at 7:00 p.m. All regular members present are seated with Alternate Lynne Steincamp seated for Dave Mathes and Alternate Michelle Rewenko seated for Todd Ouellette.

2. APPROVE MINUTES OF PREVIOUS MEETING: 7/27/15

A. Buonocore **motioned** to approve the minutes of the previous meeting, seconded by L. Steincamp. Motion passed unanimously.

3. PUBLIC COMMENT.

None.

4. BEN BROCHU – APPLICATION FOR 20' X 30' SHED, 49 ROCKY ROAD EAST. REQUEST FOR WAIVER OF ENGINEERED PLAN.

Mr. Brochu is present. A written waiver request for an engineered plan is on file and a sketch of the proposed location for the shed is shown using a 1996 site plan of the property prepared by Robert Green Associates. IWWC and TAHD approvals have been received. A. Buonocore **motioned** to accept the request for waiver of an engineered plan, seconded by J. Marzullo. J. Marzullo **motioned** to approve the application, seconded by M. Rewenko. Both motions passed unanimously.

5. MIKE BUTLER – APPLICATION FOR ADDITION TO GARAGE, 12' X 25' BAY, 12 LAKE DRIVE. REQUEST FOR WAIVER OF ENGINEERED PLAN.

Mr. Butler is present. A written waiver request for an engineered plan is on file and a sketch of the proposed addition is shown using a 2005 site plan of the property prepared by Berkshire Engineering. IWWC approval has been received. TAHD approval is outstanding. A. Buonocore **motioned** to accept the request for waiver of an engineered plan, seconded by L. Steincamp. A. Buonocore **motioned** to approve the application with the condition that TAHD approval is received, seconded by J. Marzullo. Both motions passed unanimously.

6. DISCUSSION/POSSIBLE DECISION - COMMISSION-INITIATED PROPOSED ZONING REGULATION AMENDMENTS ADDING DEFINITIONS OF MEDICAL MARIJUANA DISPENSARY FACILITY AND MEDICAL MARIJUANA PRODUCTION FACILITY TO SECTION 2.3 AND TO PROHIBIT THE USE OF MEDICAL MARIJUANA DISPENSARIES AND MEDICAL MARIJUANA PRODUCTION FACILITIES IN ANY ZONE UNDER SECTION 4.

(PUBLIC HEARING CLOSED 6/8/15.)

Chairman Truskauskas submits a newspaper article from the 8/8/15 Republican American newspaper with a heading titled "Pot plant worker charged" which will remain on file. All Commissioners have a copy of Town Atty. Michael Rybak's draft resolution of the proposed amendment with findings and reasons for the amendment attached.

Atty. Rybak refers to a legal question that was asked by Chairman Truskauskas at the last meeting concerning what is the required vote in this case due to the Planning Commission's report. He states that the Zoning Commission needs to decide and clearly state on record the number of members voting. State Statute 8-3a *Findings of consistency of proposed regulations or boundaries with the plan of development. Referral of proposed regulations or boundaries to planning commission* is referred to and read by Atty. Rybak. The Statute reads in part, "A proposal disapproved by the planning commission may be adopted by the zoning commission by a vote of not less than two-thirds of all the members of the zoning commission." Atty. Rybak reads the Planning Commission's referral of the proposed regulation found in the minutes of their April 8, 2015 meeting (Exhibit L). The Planning Commission's referral was against the adoption of the proposed regulation changes at that time until 1. The proposed language is reviewed by Town Atty. Michael Rybak for any future potential legal issues. 2. The Zoning Commission has read and understood the 76 pages of regulations. 3. The Zoning Commission can demonstrate that the changes are in keeping with Harwinton's current Plan of Conservation and Development. 4. That the Zoning Commission can defend that the prohibition protects the health and safety of the citizens of Harwinton. 5. The Zoning Commission investigates any current issues with towns that presently have processing facilities and dispensaries. Atty. Rybak states that the question now is was the Planning Commission's referral a disapproval or a disapproval with conditions with those conditions having been satisfied? In answer, (1) the language has been reviewed by the Town Attorney. (2) The Zoning Commission has read and understands the State licensing regulations. (3) The Zoning Commission is addressing consistency with the Plan of Conservation and Development in the drafted motion. Atty. Rybak states that Point (4) of the Planning Commission's referral on whether the Zoning Commission can defend that the prohibition protects the health and safety of the citizens of Harwinton can be concluded by the Zoning Commission members themselves. Regarding Point (5) on whether the Zoning Commission has investigated any current issues with towns that presently have processing facilities and dispensaries, the record shows that there has been correspondence from South Windsor and Watertown. It is Atty. Rybak's opinion that at this point, under the State Statute, the Zoning Commission is not facing disapproval from the Planning Commission. L. Steincamp refers to Point (5) of the Planning Commission's referral where it states they would like the Zoning Commission to investigate all towns with medical marijuana facilities and notes that this Commission has only contacted two towns.

J. Marzullo questions whether four affirmative votes from a five-member commission (2/3) would be required with Chairman Truskauskas stating his belief that a simple majority of voting commissioners will pass a motion because the Planning Commission's five points have been satisfied.

J. Marzullo **motioned** to approve and adopt the proposed amendments to the Harwinton Zoning Regulations dated 9/17/12 to add the definitions of Medical Marijuana Dispensary Facility and Medical Marijuana Production Facility to Section 2.3 as follows:

Medical Marijuana Dispensary Facility means a place of business where medical marijuana may be dispensed or sold at retail to qualifying patients and primary caregivers and for which the Connecticut Department of Consumer Protection has issued a dispensary facility permit under Public Act 12-155, Connecticut General Statutes, Chapter 420f, and Sections 21a-408-1 to 21a-408-70, inclusive, of the Regulations of Connecticut State Agencies.

Medical Marijuana Production Facility means a secure, indoor facility where the production of medical marijuana occurs and is operated by a person to whom the Connecticut Department of Consumer Protection has issued a production facility permit under Public Act 12-155, Connecticut General Statutes, Chapter 420f, and Sections 21a-408-1 to 21a-408-70, inclusive, of the Regulations of Connecticut State Agencies.

and to prohibit the use of medical marijuana dispensaries and medical marijuana production facilities in any zone under Section 4 with the following wording to be added:

PROHIBITED USES: MEDICAL MARIJUANA DISPENSARY FACILITIES AND MEDICAL MARIJUANA PRODUCTION FACILITIES ARE NOT ALLOWED IN ANY ZONE.

J. Marzullo states the reasons for this proposal, drafted by Town Attorney Michael Rybak and reviewed by the Zoning Commission, is as follows:

Findings and Reasons:

The Zoning Commission has debated this issue since last September, starting with the concept of a moratorium on the adoption of regulations and proceeding to a prohibition of medical marijuana retail facilities and medical marijuana production facilities in Harwinton. The Commission opened the public hearing on May 11, 2015 and concluded the hearing on June 9, 2015. The Commission has reviewed and considered Connecticut General Statutes, ("C.G.S.") Chapter 420f, concerning the Palliative Use of Marijuana, and the Regulations adopted thereunder by the Department of Consumer Protection, and other information published on the DCP's website. The Commission has heard and considered the Planning Commission's unfavorable report under the Plan of Conservation and Development and public testimony at three public hearing sessions. The Commission has considered legal opinions from Attorney Byrne, Attorney Rybak and the West Hartford Corporation Counsel on the issue of state and federal pre-exemption of municipal zoning regulation of this type of use. Finally, the Commission has reviewed numerous exhibits consisting of other town's regulations, news articles, website information and legal authorities found on the Exhibit List below.

Zoning Public Hearing: May 11, 2015

Prohibiting Medical Marijuana Dispensaries and Medical Marijuana Production Facilities

Exhibit List

- A. Harwinton Zoning Regulations dated 9-17-2012.
- B. Harwinton Plan of Conservation and Development dated January 2010.
- C. Proposed Zoning Regulation, including Statement of Purpose.
- D. Notices to RPAs and neighboring municipalities.
- E. Notice to Planning Commission (CGS 8-3a(b)).
- F. Copy of Public Act No. 12-55 An Act Concerning the Palliative Use of Marijuana.
- G. Copy of Chapter 420f Palliative Use of Marijuana.
- H. State of CT Regulation of the Department of Consumer Protection concerning Palliative Use of Marijuana.
- I. Legal Opinion from the West Hartford Corporation Counsel dated 3-20-2014
Re: West Hartford's proposed Medical Marijuana Ordinance.
- J. Legal Notice (4/30/15 & 5/8/15).
- K. Acknowledgement receipt from Naugatuck Valley Council of Governments.
(States that proposed amendment is "Reasonable use of the Commission's authority to regulate the use of land.").
- L. Harwinton Planning Commission's report (unfavorable at this time).

- M. Email from Town Atty. Michael Rybak with attachment of Editorial on CT Viewpoints that states CT should be cautious about any further legalization of medical marijuana or recreational use until THC has been reclassified. (Editorial is Exhibit M.)
- N. A letter from Zoning Commissioner Anne Marie Buonocore.
- O. A letter submitted by Zoning Commissioner Anne Marie Buonocore from Matthew D. Reed, Chief of Police, South Windsor, CT, dated 5/11/15, to A. Buonocore that states Prime Wellness of Connecticut has operated a cannabis dispensing facility in South Windsor since August 2014 with no negative effects of the business being there.
- P. An article from the Hartford Courant, dated 4/20/15, submitted by Zoning Commissioner A. Buonocore, titled *A Slow Start* by Kenneth R. Gosselin. The article speaks of the benefits of medical marijuana and the growing methods and end product. The article also mentions that “Harwinton is among some towns that are opposing medical marijuana outlets within their borders.”
- Q. Copies of pages 21, 22 and 27 from the Plan of Conservation and Development, submitted by Town Atty. M. Rybak, that outlines acreage information for commercial and industrial zones found in the POCD. He also submits a copy of the Zoning map found in the POCD.
- R. Atty. Rybak submits a copy of American Land Planning Law, State Statute 103:6.50 *Particular uses – Medical marijuana*.
- S. Atty. Rybak submits a copy of American Land Planning Law, State Statute 4:9.50 *Medical marijuana shops*.
- T. Report from NHCOC (Northwest Hills Council of Governments) that states “No inter-municipal impact expected” on this proposed Zoning Regulation.
- U. A report from the Marijuana Policy Report titled “Medical Marijuana Dispensaries and Their Effect on Crime” submitted by resident/Planning Commission member Roland Perreault.
- V. A report from the NIH (National Institutes of Health) titled “Evaluating Medical Marijuana Dispensary Policies: Spatial Methods for the Study of Environmentally-Based Interventions” submitted by resident/Planning Commission Member Roland Perreault.
- W. An article titled “Number of Legal Medical Marijuana Patients (as of Oct. 27, 2014)” which estimates the number of medical marijuana patients in the United States submitted by Commissioner Joe Marzullo.
- X. An article submitted by Commissioner Michelle Rewenko titled “Riverside: Guard shoots driver outside marijuana dispensary.”
- Y. Legal Opinion of Atty. Steven Byrne, Byrne & Byrne, LLC, dated 6/8/15).
- Z. Email from Michelle Rewenko dated 6/5/15 stating she is opposed to allowing medical marijuana facilities in Harwinton.
- A1 Email from Corey Rewenko dated 6/5/15 stating he is opposed to allowing medical marijuana facilities in Harwinton.
- A2 Information from Zoning Commissioner Lynne Steincamp taken from the internet; a Report titled “Study: Marijuana legalization doesn’t increase crime.”
- A3 6/8/15 Republican American news article submitted by Atty. Michael Rybak titled “We’re not Colorado” CT responds cautiously to Medical Marijuana.
- A4 Dept. of Consumer Protection Medical Marijuana Statistics as of 4-15-15 submitted by Atty. Michael Rybak.
- A5 Copy from the Department of Consumer Protection website pertaining to Dispensary Facility Questions & Answers for Applications (new FAQ material).
- A6 Town of Shelton Planning & Zoning Commission minutes dated 6/10/2014 adopting Shelton’s Prohibition following its original moratorium.

A7 Second Circuit Court decision pertaining to exercising prosecutorial discretion. A conclusion of the case *United States of America v. Eric Canori* is that a U.S. Attorney's decision to exercise prosecutorial discretion by not prosecuting uses of marijuana consistent with state law, in the circumstances presented in this case, does not conflict with the principles of federalism, preemption, or the supremacy of federal law.

A8 The Zoning Commission's proposed Regulation, with Atty. Rybak's addition of Findings and Reasons for the decision on the proposed amendment.

A prohibition of such uses in Harwinton is for the following reasons:

1. The Zoning Commission is authorized to regulate the uses of buildings and land, to divide the town into zones by type of use, to adopt regulations governing such uses in accordance with a comprehensive plan, to protect public health, safety, convenience and property values, to promote the general welfare and to conserve the value of buildings and encourage the most appropriate use of land throughout the town. Harwinton has very little land zoned for retail service uses, most of which is within close proximity to the town's three churches, the Consolidated School, and the Town Hall. Harwinton has very little land zoned for industrial uses, most of which is adjacent to the towns of Burlington and Torrington, or parcels classified as such by pre-zoning usage since 1955.

The Commission's policy is to ensure that this limited amount of land and buildings is reserved for essential retail stores and services while preserving the historic, rural character of Harwinton. A marijuana retail or production facility is not an essential service or industry, and is not in keeping with the rural character of Harwinton or its Plan of Conservation and Development. Such uses do not promote public health, safety or the general welfare, do not conserve property values and are not, in the opinion of a majority of the Commission, the most appropriate use of the town's limited retail or industrially zoned land.

2. The manufacture, distribution, sale and possession of marijuana is a crime under the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* Congress has classified marijuana as a Schedule 1 substance under the Act. Although the Department of Justice has issued various memoranda (10/19/2009, 6/29/2011, 8/29/2013) detailing its policy of prosecutorial discretion in states which have legalized medical marijuana, such memoranda do not have the force of law, and according to the United States Second Circuit Court of Appeals, in *United States v. Canori*, 737 F.3d 181 (CCA 2, 2013), do not have the effect of reclassifying or rescheduling medical marijuana under the Act. Although 23 states and the District of Columbia have some form of legalized medical marijuana, the Zoning Commission does not intend to violate federal law by authorizing an activity which federal law currently prohibits as a crime.

3. The Zoning Commission does not believe that C.G.S. Chapter 420f and the Regulations adopted thereunder have the effect of pre-empting the municipality's authority under the general police power of C.G.S. § 7-148(c), and the zoning authority in particular under C.G.S. Chapter 124, based on the Commission's reading of the law and its understanding of pre-emption analysis in various decisions of the Connecticut Supreme Court. C.G.S. §21a-408h (b)(F) adopts the same criteria for locating a medical marijuana retail facility as set forth in the Liquor Control Act, C.G.S. §30-46(a) with respect to the detrimental effect on any church, school, charitable institution, hospital, etc. A site plan is required along with documentation of local zoning compliance

for the state permit application. See DCP Regulations §21-408-14 and §21a-408-20. The Zoning Commission has wide discretion under the Liquor Control Act and its authority to zone such facilities is not pre-empted by that Act. Furthermore, the state has licensed a medical marijuana retail facility in Bristol which is within a short driving distance from Harwinton. Therefore the Zoning Commission is not materially interfering with its residents' ability to obtain such drugs within a short driving distance. It is noted that Harwinton lost its only pharmacy several years ago and now residents must drive to surrounding towns to receive their prescription medications.

4. The Zoning Commission is concerned that if a medical marijuana retail facility is allowed to locate in town today, it could become a recreational marijuana retail facility tomorrow, if the legislature enacts such a law as other states have done. The Zoning Commission is concerned that a specially permitted use could grow into a protected non-conforming use which the town would not otherwise permit. Therefore, the Zoning Commission wishes to "draw the line" today by not allowing any such use to gain a foot hold in Harwinton.

5. Finally the Harwinton Zoning Regulations are "permissive type" zoning regulations and clearly state: "Any use which is not specifically permitted in a zone is prohibited in the entire Town." (§1.31) "Uses of land, buildings, or structures not clearly permitted in the various zones are prohibited." (§2.2) "Uses of land or structures not clearly permitted in the various zones are prohibited." (§4) Therefore, if a court strikes down the medical marijuana facility regulation amendments, these general provisions would continue in effect and act as a moratorium on such use until such time as the Zoning Commission determines it is in the best interest of the Town of Harwinton to amend its regulations to allow such use by special permit procedures in designated zones with appropriate protections for churches, schools, nonprofit organizations and residential areas.

M. Rewenko seconded the motion. L. Steincamp states that she would like to have a separate vote of the types of facilities with Atty. Rybak stating that it could be done if it is the will of the Zoning Commission. No motion to do so is made. After a vote is taken, the motion passes 3-2 with J. Marzullo, M. Rewenko and Chairman Truskauskas voting in favor of the motion and A. Bunocore and L. Steincamp voting against the motion. Revised Zoning Regulations will become effective upon date of publication.

A. Buonocore states that Atty. Steve Byrne was consulted on this matter and made an unbiased recommendation in his opinion letter. She believes that allowing medical marijuana facilities in town would be in keeping with the rural character of the town and that these facilities would not be scary or become an eyesore. She states that the questioning on whether medical marijuana will become recreational in the future, leads her to believe this to be an inappropriate rationale in not permitting medical marijuana facilities.

7. COMPLAINTS/ENFORCEMENT ACTIONS.

None.

8. ANY OTHER BUSINESS.

None.

9. CORRESPONDENCE.

None.

10. INVOICES.

None.

11. ADJOURN.

J. Marzullo **motioned** to adjourn the meeting at 7:35 p.m., seconded by A. Buonocore. Motion passed unanimously.

Respectfully submitted,

Polly Redmond
Land Use Coordinator

RECEIVED FOR RECORD AT HARWINTON CT
ON 08/27/15 AT 10:43 AM
ATTEST NANCY E. ELDRIDGE TOWN CLERK