



*City of New Bedford*  
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January 23, 2019

Ms. Ericca Kennedy  
Whisk & Jane, LLC  
P.O. Box 757  
Wareham, MA

Dear Ms. Kennedy:

Thank you for your letter of January 15, 2019. We appreciate your effort to establish a dialogue with the City of New Bedford and your taking the time to recognize the "quality of engagement and genuine interest" that City officials demonstrated at the January 14, 2019 meeting. Know that the City remains committed to treating all prospective recreational marijuana facility developers, including Whisk & Jane LLC ("Whisk & Jane"), fairly and impartially.

We write because we think it important to address for the record several legal matters discussed at the recent meeting (and raised previously in your December 13, 20, and 27, 2018 letters to the Mayor and/or City Council). Of core concern to the City are your assertion that your legal rights have been impinged and your demand that the Mayor issue an Executive Order or otherwise waive the City's zoning requirements and immediately execute a Host Community Agreement ("HCA") with Whisk & Jane, LLC. This letter is intended to assist you in understanding the City's legal position and to clarify misunderstandings that might have arisen.

Background

You submitted a request regarding zoning compliance to the Building Commissioner for a facility to be located at 161 Pope's Island and indicated that this facility would offer on-site consumption of marijuana.

The Building Commissioner subsequently issued a determination that the proposed facility does not comply with the City's marijuana zoning ordinance because the proposed facility is located closer than 500 feet to a park.

The type of marijuana establishment being proposed (on-site consumption) is also specifically prohibited in the City of New Bedford, irrespective of location, under the City's marijuana zoning ordinance. Further, state law prohibits the consumption of marijuana on the premises where it is sold unless the voters of a municipality have approved such on-site consumption through a referendum at a biennial state election. G.L. c. 94G, § 3(b). New Bedford has not had such a referendum, and the next biennial state election is in November 2020.

Finally, the proposed facility must comply with the Designated Port Area (DPA) use restriction established by the Commonwealth of Massachusetts.

In response to your being informed of the Building Commissioner's zoning determination and the other state and local use restrictions, you have demanded that the Mayor issue an Executive Order or take other action to waive these requirements. You have further demanded that the City immediately enter into a Host Community Agreement with Whisk & Jane, notwithstanding City guidelines that require a favorable zoning compliance determination as a prerequisite.

#### Legal Conclusion

It is the determination of the Solicitor's Office that the Mayor's acquiescence to Whisk & Jane's demands is not legally permissible. There is no provision in Massachusetts law that would allow the Mayor to waive the requirements of the City's marijuana zoning ordinance or state law, whether by an Executive Order or otherwise. Because the Mayor has no ability to *immediately* change the zoning ordinance or state law, and because marijuana establishments of your preferred type, and at your preferred location, are not permitted under the current zoning ordinance or state law, the Mayor cannot legally enter into an HCA with Whisk & Jane at this time.

For Whisk & Jane's current proposal to be permitted at the proposed location, the following, at a minimum, would have to occur at the local level:

- (1) Assuming Whisk and Jane wishes to permit on-site consumption of marijuana sold on the premises, New Bedford voters would have to approve such on-site consumption through a referendum at a state biennial election. Under state law, this New Bedford referendum would need to occur even if the Cannabis Control Commission ("CCC") issued social consumption licenses elsewhere. Note that the CCC is currently in the process of deciding whether to establish a social consumption license. No determination has yet been made by the CCC.
- (2) If Whisk & Jane wishes to permit on-site consumption of marijuana sold elsewhere, the New Bedford City Council would have to amend the zoning ordinance to make such social consumption permissible.
- (3) Relief from the zoning ordinance's requirement that marijuana establishments not be within 500 feet from a park would have to be obtained. This could happen in one of

two ways. First, Whisk & Jane could seek a dimensional variance from the Zoning Board of Appeals. Second, the City Council could amend the zoning ordinance.

We note that under Massachusetts law, zoning ordinances can only be enacted, modified, or repealed by the City pursuant to a long and very public process outlined in G.L. c. 40A, §5. As you know, the existing marijuana ordinance was enacted over a period of many months with numerous public meetings and opportunities for public input.

Additional Information Regarding Designated Port Areas

In your correspondence you also take issue with “New Bedford’s 25% business directive” regarding support of the “fishing industry.” Other than the marijuana zoning ordinance, there is no city-level “directive” as to the use of the land or building in your preferred location.

The restriction to which we believe you are referring is the Designated Port Area (DPA). As was noted in our recent meeting, the DPA is a state-run program designed to “preserve and enhance the capacity of the DPA to accommodate water-dependent industrial use and measures to prevent substantial exclusion of such use by any other use eligible for licensing in a DPA.”

The Massachusetts Department of Environmental Protection implements DPA policy at the project level through the General Law Chapter 91 regulations, which govern the licensing of structures and uses in DPAs. The Chapter 91 regulations have specific standards and requirements for projects in DPAs geared toward protection of water-dependent industry. The state DPA regulations can be found in 301 CMR 25.00 and 310 CMR 9.0.

As was discussed at the recent meeting, any questions you may have about the DPA and its applicability to your proposed operation should be directed to the appropriate state entities. A municipal Zoning Board of Appeals cannot provide relief from state DPA use restrictions established by state law.

Be advised that compliance with the state DPA regulatory framework can be lengthy and complex; for this reason commercial enterprises undertaking development within a DPA typically enlist expert counsel to assist in engaging the appropriate state entities.

Please know that the City respects your freedom to continue to voice a differing opinion regarding the merits of the policy framework governing HCAs and the related zoning. As we stated earlier, we hope this communication assists you in understanding the City’s legal position and clarifies any misunderstandings that might have arisen.

Sincerely,



Mikaela A. McDermott  
City Solicitor

cc: Mayor Jon Mitchell  
New Bedford City Council  
David Gerwatowski, Legislative Counsel