

AGENDA
ORDINANCE COMMITTEE MEETING

Wednesday, January 10, 2024 – 6:00 p.m.
Hybrid Meeting

TO VIEW THE ORDINANCE COMMITTEE MEETING & OFFER PUBLIC COMMENT:

<https://scarboroughmaine.zoom.us/j/89869478285>

TO VIEW THE ORDINANCE MEETING ONLY:

<https://www.youtube.com/watch?v=MmsudOtPxgM>

Item 1. Call to Order.

Item 2. Roll Call.

Item 3. Approval of Minutes from October 12, 2023.

Item 4. Public Comment.

Item 5. 2024 Ordinance Committee – Future Agendas.

Item 6. Chapter 1018 – Cannabis Establishment Licensing Ordinance.

Item 7. Future Agenda Items.

Item 8. Adjournment.

Memorandum

To: Scarborough Town Council Ordinance Committee

From: Philip R. Saucier, Esq.

Date: January 9, 2024

Re: Municipal regulation of cannabis establishments

You have asked me to briefly summarize the Council's authority to regulate both medical and adult use cannabis establishments in the Town of Scarborough under Maine law.

I. State Law

Cannabis is regulated under state law by the Maine Medical Use of Cannabis Act (22 M.R.S. ch. 558-C) and the Cannabis Legalization Act (28-B M.R.S. ch. 1). The Legislature has given municipalities broad discretion on whether to allow cannabis establishments to operate within their boundaries and to regulate such uses.

A. Cannabis Establishments

Both laws recognize and regulate four types of cannabis establishments:

- Medical cannabis establishments: caregiver retail stores, registered dispensaries, cannabis testing facilities, and manufacturing facilities.
 - Many municipalities also regulate “medical cannabis cultivation facilities” – a use that is not defined under state law but is defined under Scarborough’s ordinance as “a medical cannabis cultivation area used or occupied by one or more medical cannabis registered caregivers and a facility licensed under this ordinance to cultivate, prepare and package medical cannabis at a location that is not the residence of the Registered Caregiver or Qualifying Patient.”
- Adult use cannabis establishments: cannabis stores, cultivation facilities, testing facilities, and products manufacturing facility.

B. Opt-In and Regulatory Options

Under both laws, cannabis establishments are prohibited from operating in a municipality unless the legislative body votes to allow such uses to operate within the municipality.

- Medical cannabis exceptions:
 - Municipalities cannot prohibit caregiver retail stores, registered dispensaries, cannabis testing facilities and manufacturing facilities that were operating with municipal approval prior to December 13, 2018. “Municipal approval” means an examination and approval of the type of medical cannabis establishment, not simply the issuance of a building permit or other approval that does not address the use of the facility or structure. 22 M.R.S. § 2429-D(2).
 - Municipalities can regulate registered caregivers but cannot prohibit or limit the number of registered caregivers. Cannabis cultivation facilities are not one of the “opt-in” establishments, but municipalities do have the authority to regulate such uses.
- Adult use cannabis: This law does not contain any “grandfathering” provisions for establishments operating prior to a certain date. 28-A M.R.S. §§ 401, 402.

Municipalities are given broad discretion and have a wide variety of options to regulate cannabis establishments:

1. Prohibit such establishments by choosing not to opt-in.
2. Allow some, but not all, categories of cannabis establishments to operate in the municipality.
3. Limit the number of cannabis establishments that can operate.
4. Adopt land use regulations (such as zoning, performance standards, and space and bulk requirements).
5. Adopt licensing requirements and associated reasonable fees.

The Town currently allows the following cannabis establishments to operate, subject to licensing and zoning requirements: adult use and medical cultivation facilities, adult use and medical manufacturing facilities, adult use and medical testing facilities, and medical cannabis dispensaries. Adult use and caregiver retail stores are not permitted to operate in the Town.

II. Nonconformance

A. Scarborough Zoning Ordinance.

In the event the Council decides to “opt-out” and not allow certain types of cannabis establishments that are currently permitted to operate in the Town, such establishments would be subject to the nonconforming use provisions in the Zoning Ordinance. Once a nonconforming use is established, the right to continue the use is considered to be a vested property right, and such provisions are thus included in land use ordinances to avoid any constitutional issues. While nonconforming uses are allowed to continue to operate, they can be restricted from being

enlarged, increased, or extended to occupy a greater area of land. Under the Town's Zoning Ordinance, once a nonconforming use is abandoned for more than one year, it loses its legal nonconforming status and the land and structure can only be used for conforming uses, which is consistent with the goal to eventually eliminate nonconforming uses.

The following are the relevant nonconforming use provisions in Section III of the Zoning Ordinance:

A. Continuation of Non-Conformance

Any lawful use of buildings, structures, land, or parts thereof existing at the time of adoption or amendment of this Ordinance, and made non-conforming by the provisions of this Ordinance or any amendments thereto, may be continued, subject to the provisions of this Section.

B. Non-Conforming Use of Land

1. No non-conforming use of land shall be enlarged or increased nor extended to occupy a greater area of land than that occupied at the effective date of adoption or amendment of this Ordinance.
2. No non-conforming use of land shall be moved in whole or in part to any portion of the lot, which was not occupied by such use at the effective date of adoption of this Ordinance.
3. If any non-conforming use of land ceases for any reason for a period of more than one year, any subsequent use of such land shall conform to the regulations specified by this Ordinance for the district in which such land is located.

C. Non-Conforming Uses of Structure

1. No existing structure devoted to a non-conforming use shall be enlarged, extended, or expanded except in changing the use of the structure to conforming use.
2. Any non-conforming use may be extended throughout any parts of a building, which were manifestly in existence and arranged or designed for such use at the time of the adoption or amendment of this Ordinance, but no such use shall be extended to occupy any land outside such building.
3. If a non-conforming use of a structure is superseded by a permitted use, the non-conforming use shall not thereafter be resumed.
4. If any non-conforming use of a structure ceases for any reason for a period of more than one year, any subsequent use of such structure shall conform to the regulations specified by this Ordinance for the District in which such structure is located.

B. Amortization

You have also asked if the Council could gradually phase out a legally nonconforming use, notwithstanding the nonconformance provisions in the Zoning Ordinance. The phasing out of a legally nonconforming use over time is called “amortization.” The legal justification is that because the phasing out of the nonconforming use has been set over a period of time, it is not an unconstitutional taking of property and no compensation is payable at the expiration of the period, as the operator of the use is given a grace period to recoup any funds spent on a particular use before it is terminated.

There is legal support for a phasing out/amortization program in Maine, articulated in a case from the 1970s that upheld the gradual phasing out of billboards. *See State v. National Advertising Co.*, 409 A.2d 1277 (Me. 1979). In that case, the Maine Supreme Judicial Court concluded that the use of an amortization period to eliminate nonconforming billboard signs was a legislative object of the exercise of the police power and was not an unconstitutional taking of property – and concluded that a five-year amortization period was sufficient for that program.

If the Council chooses to move forward with a phasing out of certain cannabis establishments, it should determine a phasing out period that is sufficient and reasonable to allow for a change of use and for the operator of the business to recoup its investment. Under the *National Advertising* case, we have some guidance that a five-year period may be sufficient, but it will depend on the particular circumstances of these uses. Finally, given the explicit restriction in 22 M.R.S. § 2429-D(2), the Town cannot gradually phase out any medical cannabis establishment operating with municipal approval prior to December 13, 2018.

PRS/jm