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TO: The Honorable City Council
FROM: Alicia A. McNeil, City Solicitor
DATE: 23, June 2026
SUBJECT: DMS Trinity - Special Permit

This memo is in response to the legal concerns raised in the memo from Attorney Mensing related to DMS Trinity's petition seeking an amendment to its special permit. In his memo, Attorney Mensing on behalf of Misty Mountain Shop LLC, addresses six grounds upon which he believes DMS Trinity's petition should be denied. I am addressing the first ground, which poses a legal issue; the recording requirement under G.L. c. 40A §§ 11 and 9.

A case that is relied upon related to this issue is McDermott v. Bd. of Appeals, 59 Mass. App. Ct. 457, 460-61. This case states "We recognize that G. L. c. 40A, § 11, requires that a special permit be recorded in order to 'take effect.' The courts rule that substantial use or substantial construction within the statutory period of the special permit is what it considers in determining whether a special permit has lapsed. Id. "General Laws c. 40A, § 9 provides that either substantial use or construction must commence within the applicable time period, to avoid lapse of the special permit." Lobisser Bldg. Corp. v. Planning Bd. of Bellingham, 454 Mass. 123, 129, 907 N.E.2d 1102, 1106 (2009). In these cases, failing to record the decisions is not fatal.

In this present case, the State Permit Extension Act (Chapter 238 of the Acts of 2024) allowed for a 2-year automatic extension for any special permits that were in effect between January 1, 2023 and January 1, 2025. This extension period is automatic as a matter of law, thus DMS Trinity was not required to seek further extension from the City. Within the 2 year automatic extension, (which extended the special permit to 2025), DMS Trinity has begun substantial construction and/or substantially used the special permit for its project.

I do not find this argument persuasive; and therefore, do not agree with the reasoning of Attorney Mensing on behalf of Misty Mountain that the City Council should not grant DMS Trinity's petition based on this ground.

My final point is related to the Benevolent Botanicals, LLC, et al v. City of Malden. In subsequent hearings to the Court's original decision, the Court determined that in addition to striking down MCC 12.12.190, it would strike down any other provisions that would require ***Benevolent*** to obtain a special permit. (See attached Decision). This ruling was specific to Benevolent Botanicals. The Court did not opine on whether the special permit provision was stricken for any other marijuana retailer.

Kindly contact me if you have any questions.

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT**

MIDDLESEX, ss.

Case No. 22 MISC 000076 (DRR)

BENEVOLENT BOTANICALS LLC and
926 EASTERN AVENUE, LLC,

Plaintiffs,

v.

CITY OF MALDEN, and NATHANIEL
CRAMER, WILLIAM SULLIVAN,
ADAM SHERWIN, JOHN KING, and
KATHRYN PAKENHAM BILGEN, as
Members of CITY OF MALDEN
BOARD OF APPEAL,

Defendants.

CLARIFIED JUDGMENT

This action commenced in the Land Court on February 14, 2022, with Plaintiff Benevolent Botanicals (“Benevolent”), of 926 Eastern Avenue, Malden (the “Property”), filing a three-count complaint against the City of Malden (“Malden”), and Nathaniel Cramer, William Sullivan, Adam Sherwin, John King, and Kathryn Pakenham Bilgen, as Members of the City of Malden Board of Appeal (collectively, the “Defendants”): (1) Count I appealing pursuant to G.L. c. 40A, § 17 of a decision by the Malden Board of Appeal denying Benevolent’s request for a variance of the residential buffer zone in Section 12.12.190(F)(1)(c); (2) Count II alleging a violation of the Open Meeting Law, G.L. c. 30A, § 20; and (3) Count III for declaratory judgment pursuant to G. L. c. 231A, § 1, seeking determination that Malden Municipal Code §

12.12.190, the local marijuana zoning bylaw, constitutes an ordinance that is unreasonably impracticable, in violation of G.L. c. 94G, § 3(a). On April 28, 2022, Benevolent filed an Amended Complaint omitting the Open Meeting claim (Count II) and proceeding with the other two counts.¹

On June 10, 2022, the Defendants filed a motion to dismiss both Counts I and II of the Amended Complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. On August 31, 2022, the Court issued its decision, dismissing the zoning count brought under G.L. c. 40A, § 17 (Count I), and otherwise denying the motion to dismiss.² Following the dismissal of Count I, Trial was held on Count II on October 7, 2024 through October 9, 2024. In accordance with the court's decision, it is hereby

ORDERED and ADJUDGED that Count I of the Second Amended Complaint, which appeals the Board of Appeal's denial of Benevolent's variance request pursuant to G.L. c. 40A, § 17, is **DISMISSED**. It is further

ORDERED, ADJUDGED and DECLARED on Count II of the Second Amended Complaint, judgment enters in favor of the Plaintiffs and against the Defendants. The court declares that Section 12.12.190 of the Malden Municipal Code is unreasonably impracticable in violation of Chapter 94G § 3(a) and § 3(a)(2)(ii) and hereby strikes 12.12.190 of Malden Municipal Code, as well as any other provisions of the Malden Municipal Code which reference Section 12.12.190 to the extent they would require Benevolent to obtain a special permit based upon Benevolent's proposed marijuana use, including without limitation, Sections 12.12.010 (A)

¹ In the First Amended Complaint, the declaratory judgment pursuant to G. L. c. 231A, § 1 became Count II following the omission of the Open Meeting Claim.

² On September 6, 2022, shortly after the Court issued its decision on the motion to dismiss, Benevolent, now joined by 926 Eastern Avenue, LLC (collectively, the "Plaintiffs") filed a Second Amended Complaint, with the same two counts.

& (B) (Special Permit Requirements, with respect to “Marijuana Retailer,” “Marijuana Cultivator,” and/or “Marijuana Product Manufacturer”), 12.12.030 (Table of Uses, with respect to “Marijuana Retailer,” “Marijuana Cultivator,” and/or “Marijuana Product Manufacturer”), and 12.32.060 (Zoning Definitions for “Marijuana Retailer,” “Marijuana Cultivator,” “Marijuana Product Manufacturer,” and/or “Marijuana Establishment”). With the above provisions no longer in place, Benevolent may proceed to seek any other local permits that may be necessary. It is further

ORDERED, ADJUDGED and DECLARED that the Northern Strand Community Trail constitutes an impassable barrier, physically and effectively separating the nearest residential lots from the Property, with no feasible path for a pedestrian to reach the Property within the 75-foot residential buffer zone in Section 12.12.190. It is further

ORDERED, ADJUDGED and DECLARED that Plaintiffs are awarded sanctions in the amount of eighteen thousand five hundred sixty-eight dollars (\$18,568.00) for Malden’s failure to comply with discovery obligations, as detailed in the Decision. It is further

ORDERED, ADJUDGED and DECLARED Plaintiffs are granted leave to file a post-judgment motion for attorneys’ fees detailing which fees would not have been incurred had Malden timely complied with its discovery obligations. It is further

ORDERED that the January 29, 2026, Decision and Judgment, together with this Clarified Judgment, dispose of this entire case; the court has adjudicated or dismissed all claims by all parties in this action and has not reserved decision on any claim or defense. It is further

ORDERED that upon payment of all required fees, this Clarified Judgment or a certified copy of this Clarified Judgment, may be recorded at the Middlesex County Registry of Deeds and marginally referenced on all relevant documents. It is further

ORDERED that this Clarified Judgment clarifies and supersedes the original Judgment issued on January 29, 2026.

So Ordered.

By the Court (Rubin, J.)

/s/ Diane R. Rubin

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: May 28, 2026