

Executive Session Meeting Minutes regarding Paper 316-23
Benevolent Botanicals et al v. City of Malden
September 12, 2023

Order: That the City Council will vote to go into Executive Session with legal counsel for the City regarding the matter of Benevolent Botanicals and 926 Eastern Avenue v. The City of Malden for the purposes of Exemption Three Massachusetts General Laws Chapter 30A Section 21(a)(3) to discuss strategy with respect to litigation, where such discussion in open meeting may have a detrimental effect on the litigation position of the City, if so declared by the chair. And if so allowed by the Body, to admit Maria Luise, Special Assistant to the Mayor.
(Roll Call Required)

During the Committee of the Whole on September 12, 2023, a motion was made by Councillor Crowe, seconded by Councillor Simonelli to enter into Executive Session, order was approved by a 10-0 roll call vote.

Yea- Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Simonelli, Spadafora, Winslow, and Murphy.

Nea- Zero

Absent- O'Malley

In attendance were Councillors Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Simonelli, Spadafora, Winslow, and Murphy. Councillor O'Malley was absent.

Also in attendance was City Clerk Carol Ann Desiderio, Clerk of Committees Lisa Cagno, Special Assistant to the Mayor Maria Luise, and Acting City Solicitor Alicia McNeil.

The meeting opened with Acting City Solicitor Alicia McNeil giving a reminder to all parties present that Executive Session (ES) must remain in confidence only between the parties who are in attendance. What is discussed in this session may not be shared with staff, spouse, or anybody for that matter. The City of Malden is in active litigation, and nothing should be done that would risk leaking the City's position, for any reason at all. Attorney McNeil offered an opportunity to those present to ask further questions on ES or the laws pertaining to ES; no one responded so she proceeded.

The reason for this evening's meeting is because the Legal Department received communication from Benevolent Botanicals and 926 Eastern Avenue (BB) on August 30 with an offer of compromise to resolve the matter. As a means to offer context to this communication there are a few points to consider:

1. The first lawsuit alleges the City's buffer zone ordinance is too restrictive and it violates State statute. This is a very clear-cut suit.
2. The second lawsuit involves the Special Permit process. BB alleges they provided all necessary information to the Building Commissioner to begin their application process and Council action was not taken within the allotted time frame as required to grant or deny the Special Permit. This assumption is what led BB to file a Constructive Approval. The City's argument against this allegation is that our ordinance is very clear that in order to get an application before the City Council, it must be a proper application approved by the Building

- Commissioner. This application is not proper because it does not contain the buffer zone variance needed. BB went to the Board of Appeal (BOA) to get a variance, but it was denied.
3. BB has three licenses they are allowed from Cannabis Licensing and Enforcement Commission (CLEC); a retail license, a cultivation license, and a manufacturing license.
 4. At this point, Constructive Approval has already been argued, awaiting decision. The first case has not been argued and the briefs are not in yet; expecting a date by the end of the year.

Attorney McNeil then read, in part, from an email received from BB which states, “Benevolent Botanicals and 926 Eastern Avenue seek to resolve the two matters before land court with the City of Malden. As an offer of compromise and in an effort to resolve these two matters, BB is willing to forgo pursuit of a cultivation special permit for a four-year period beginning from the effective date of any settlement agreement. In exchange BB asks that it be heard by the City Council on its application for the remaining special permit, and the City of Malden grant the special permit and enter into community host agreement with BB by the end of the calendar year, December 31, 2023. Additionally, as discussed BB and 926 Eastern Avenue agree to have this settlement and the subsequent approvals be based either on the special permit action or the constructive approval action. We are amenable to discussing the details of this process should the City agree to these terms. If the City agrees to these terms and should the land court enter judgement in BB’s favor while the parties finalize the terms of the settlement agreement, BB agrees to honor the settlement agreement. We, of course, ask that the City would do the same should a judgement enter into it’s favor during the interim period. We believe that this proposal is mutually beneficial as it negates any of the concerns about BB being located near residential properties since there would be no risk of any odor from cultivation and would allow BB to operate and support the Malden economy. That said, we are willing to consider any counter offer the City may propose.”

Other points that were brought up by BB to Attorney McNeil are that if BB did receive their other two licenses and not the cultivation license, they would be doing a build out. After four years, it would not make sense for them to then go back and do another build out to include cultivation, so realistically, they probably would not apply for a cultivation license in the future. Once BB receives the host agreement, they would dismiss their lawsuit. And to reiterate they want a hearing on the special permit by the end of the year and it must be approved per this agreement. They remain open to hearing any counter offers.

Councillor Sica reminded the room that a judge has already upheld the Board of Appeal decision denying the variance, so the City really has no room to accept this offer because the application is still not complete, and doing so would set a precedent for future entities who may wish to forego the process.

Councillor Spadafora noted this offer is asking for a guarantee of an affirmative Council vote and no one can guarantee the vote of the Council.

Councillor Condon asked for confirmation that the variance is governed by where the land ends, not the building. It was confirmed that the buffer zone is based on the property lines. With this being the case, there is not much BB can do even without the cultivation being done in the rear of the building. Even with the back of the building not in use, it does not change the requirements written in City ordinances. Councillor Crowe commented that not having a cultivation license may open BB up to being able to appear again in front of BOA as this is a significant change in their original petition and whereas the cultivation piece of the plan was the BOA's biggest sticking point, originally.

Councillor Winslow asked Attorney McNeil to explain the City's position against the first lawsuit that alleges the City's buffer zone ordinance is too restrictive and it violates State statute. Attorney McNeil believes this is a novel case because marijuana is novel. The argument is that as a City, Malden has a right to zone our city. We know our city and its needs better than the State does; the State has no mandate that we can't have a buffer zone and it doesn't matter that our ordinance is stricter than another city or town because we are uniquely Malden.

Councillor McDonald asked if the Council has the ability to overrule the BOA? If not, then the Council isn't even in the position to have a conversation with BB unless and until they are able to get approved by BOA. Attorney McNeil responded that a court of law can overrule the BOA's decision. Also, that BB had an opportunity to appeal the land court's decision but chose not to. The body is not going to debate whether the BOA decision was correct or not because its already been decided by a court of law. When asked about the standard the land court uses in determining cases such as this, Attorney McNeil explained they look at whether the decision was arbitrary and capricious or if BOA followed what the ordinance states. It is rare for the land court to override the BOA if the ordinance was correctly followed. Functionally, there is no mechanism to overturn a reasonable judgment by a BOA unless it were ordered by the court. With all of this being established, Councillor McDonald stated he does not see how the Body can entertain this proposal by BB.

Councillor Colón Hayes asked if the Council would be in a better position to consider this proposal if BB agreed to take out the four-year cultivation contingency. The response was no because that still doesn't account for the lack of buffer zone variance. BB went through CLEC to obtain licenses in 2022. If this case goes to trial, it won't be until 2024, making them two years into this process. This proposal likely is an attempt to control lawyer fees for a case they originally expected to be settled within 90 days.

Councillor Murphy summed up where she understands the process to be as of right now so far as BB is concerned. BB would have to revise their application to remove cultivation and reapply to BOA with this significantly different plan if it is deemed to be significantly different. But if the time frame for the four-year stipulation begins at the time of a settlement agreement, it still may take them two years to build out and get up and running. Even if the Council was willing and/or able to entertain the special permit guarantee, BB would not have been in business long enough to consider if they are good neighbors or a successful business to be then considering the additional cultivation aspect.

Councillor Spadafora stated there is no clear path for the Council to consider this proposal. His biggest concern from what he is hearing in the room right now is that some Councillors agree with BOA for their decision and others do not, but he doesn't wish to set precedent on this issue. The Body cannot support the BOA only when rulings are to their liking and then overrule BOA when their decisions go against what the Body was hoping to hear. We might as well not even have rules for zoning if we aren't going to adhere to them.

Attorney McNeil was given instructions to respond back to this offer with an explanation that the Council cannot agree to this proposal as the ordinance is clear that a variance is needed for a proper application to be considered. The Body cannot make a promise for a guaranteed affirmative Council vote on a special permit and acceptance into a community host agreement, sight unseen. It is not within the Body's jurisdiction to consider this offer. No instruction was given for a counteroffer.

With the close of discussion, a motion was made by Councillor Spadafora, seconded by Councillor Sica to exit Executive Session, motion passed by a 10-0 roll call vote.

Yea- Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Simonelli, Spadafora, Winslow, and Murphy.

Nea- Zero

Absent- Councillor O'Malley was absent.

Executive Session was adjourned at 9:11 PM.

Minutes compiled by City Clerk Carol Ann Desiderio.

Pursuant to M.G.L. c. 30A, s. 22(g)(1), and with the approval of Council President Winslow and City Solicitor McNeil, on August 26, 2024 eleven members of the Malden City Council were offered a one month period of time to review fourteen sets of executive session minutes dating back to April 2021 in the privacy of the City Clerk's Office. It was explained that any questions or amendments may be submitted to the City Clerk and a date would be set to meet in Executive Session for further discussion. Otherwise, if there were no objections, on behalf of the Body, Council President Winslow would be tasked with the approval of said minutes.

After the one-month review period had expired, on September 29, 2024, Council President Winslow authorized the approval of all draft executive session minutes. Among those fourteen drafts, this set was included.

Approval process organized and overseen by City Clerk Carol Ann Desiderio.

At a duly posted Executive Session on February 10, 2026, a motion was made by Councillor Sica, seconded by Councillor Simonelli, to retain the above noted minutes in continued non-disclosure until the City Solicitor has determined the time frame for the appeal process has been exhausted, motion passed by a 10-1 roll call vote.

Yea- Colón Hayes, Condon, Crowe, Linehan, Luong, McDonald, Sica, Simonelli, Taylor, and Winslow

Nea- O'Malley

Absent- Zero

Minutes released from non-disclosure March 11, 2026.