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ATTORNEYS AT LAW

June 23, 2026

City Council
City of Malden
215 Pleasant Street
Malden, MA 02148

Re: Petition of DMS Trinity, LLC for 36 Charles Street (Assessor Par. No. 062 239 910)
Honorable Councilors:

We represent DMS Trinity, LLC ("Petitioner") and submit this response to the oppositions filed by Misty Mountain Shop, counsel Blake M. Mensing, and Mr. Gath's letter regarding the petition to amend the special permit for 36 Charles Street. The oppositions misstate the record, conflate zoning and licensing functions, and urge the Council to make unnecessary factual and legal determinations. In addition, the letter is testimony of a party, who lacks legal standing, and who seeks to influence this matter for the purpose of improperly stifling competition. The requested amendment updates the petitioner's name to Beach House Cannabis, LLC to facilitate a joint venture, while maintaining compliance with all conditions. The record demonstrates substantial progress and compliance. The Council should grant the amendment with appropriate conditions, or clarify that any factual disputes raised are not jurisdictional bars and can be addressed administratively.

Background

The Council granted a special permit for a marijuana retailer at 36 Charles Street in Case No. 202-22, later extended in Case No. 233-23, and further amended in Case No. 77-25, each subject to twenty conditions. On April 26, 2022, the City Council granted a special permit for use of the property as a marijuana retailer, subject to 20 conditions (Case No. 202-22). On June 6, 2023, the Council granted a 12-month extension of the special permit in Case No. 202-22,

subject to 20 conditions (Case No. 233-23). On February 11, 2025, the Council amended the special permit granted in Case No. 233-23 and issued a new special permit in Case No. 77-25, subject to 20 conditions. On May 8, 2024, the City issued a building permit for the approved project, and on March 12, 2025, all work under the building permit passed final inspections by the City. On December 11, 2025, the Massachusetts Cannabis Control Commission granted the Petitioner a Provisional Marijuana Retailer License.

The current petition seeks to amend the special permit solely to change the named petitioner to Beach House Cannabis, LLC, reflecting a joint venture in which DMS Trinity maintains an ongoing financial and operational interest. The Addendum states the amendment requests a single change: updating the “NAME OF PETITIONER” from DMS Trinity, LLC to Beach House Cannabis, LLC, a joint venture with new financial backers and cannabis operational specialists. It confirms that all 20 conditions have been met or will be met at certificate of occupancy, that a Host Community Agreement has been received, CLEC approval has been obtained, a CCC provisional license issued, and construction is largely completed under the Building Permit. The Planning Board’s June 10, 2026 report identifies the petition as a request to reissue and/or transfer rights by amending the name from DMS Trinity, LLC to Beach House Cannabis, LLC and recites the same twenty conditions from Case No. 77-25, including Condition 8 (non-transferability).

Argument

A. Procedural Issue of Standing

First, the opponents are competitors. While it is arguable whether the Council may consider their submissions, competitive harm is not a cognizable basis to deny a zoning name

amendment that preserves all conditions. A business competitor does not have standing as a "person aggrieved" under G.L. c. 40A, § 17 based solely on the prospect of increased economic competition. The purpose of zoning is not to protect businesses from competition. A challenger must demonstrate a particularized legal injury to a cognizable property or zoning interest. See *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 86 N.E.2d 920 (1949) (establishing the foundational rule that "It was no part of the purpose of the zoning regulations to protect business from competition" and that "We cannot believe that a person is aggrieved within the meaning of the statute here in question merely because a variance, even if improvidently granted, will increase competition in business"; a proprietor in a less restricted zone is not aggrieved by the introduction into a more restricted zone of any use permitted in the proprietor's own zone). Further, *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 536 N.E.2d 584 (1989) reaffirmed that "a business competitor does not have standing as an aggrieved party" under G.L. c. 40A, §§ 8, 13, and 17; only persons aggrieved "in the traditional sense"—that is, those whose legal rights have been infringed—may seek judicial review. The fundamental principle is that zoning laws are not designed to protect businesses from competition, and a person alleging injury solely from increased competition cannot establish standing as a "person aggrieved" under G.L. c. 40A, § 17. See *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594 (2018). Therefore, the Council must view challenges from a competitor who is not an abutter and has no direct interest, except competition, with skepticism to prevent the licensing authority from inadvertently interfering in private business.

B. There Is a Valid, Narrow Amendment Before the Council That Maintains Continuity and Does Not Alter the Approved Use, Site Plan, or Conditions

The petition does not seek to expand use, alter plans, or dilute prior conditions. It seeks only to substitute the name of the petitioner to align with a financing and operations structure that includes experienced operators while preserving DMS Trinity's stake. The Addendum specifies the amendment is limited to the petitioner name change, with DMS Trinity retaining a financial and operational interest, and confirms compliance with conditions at the time of certificate of occupancy. The Planning Board's June 10, 2026 report acknowledges no changes to approved plans were proposed with the name-change petition. Given the Council's prior findings on detriment, traffic, and neighborhood compatibility, and the unchanged physical and operational scope, the narrow amendment preserves all prior protections. In fact, such amendments, which do not involve challenges to the prior findings, are typically not considered substantive. *See Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 832 N.E.2d 1161 (2005).

C. Opposition Argument I (Recording/Lapse): The Record Does Not Establish a Jurisdictional Defect; Any Recording Issue Is Curable and, in Any Event, the Council Retains Authority to Act Prospectively With Conditions

Opponents assert that none of the special permit decisions were recorded and therefore never took effect, rendering the chain void. They reference a search of the Registry and City archival pages. Attorney Mensing's memorandum contends Cases 202-22, 233-23, and 77-25 were never recorded at the Middlesex South Registry of Deeds and therefore did not take legal effect, relying on City archive references and a CCC document link. This argument overstates the consequence of any alleged recording issue. Massachusetts appellate authority distinguishes the recording requirement from the lapse requirement: a delay in recording does not itself void a

special permit, and the lapse analysis turns on whether substantial use commenced within the applicable statutory period, not whether recording occurred within that period. In *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003), the Appeals Court held that a special permit recorded nine years after issuance was not rendered void by the delay, recognizing that while G.L. c. 40A, § 11 provides that recording is required before a permit takes effect, § 9 focuses on commencement of substantial use to avoid lapse. *Id.* at 461. The Appeals Court reaffirmed that principle in *Ware Real Estate, LLC v. Town of Ware*, 81 Mass. App. Ct. 1120 (Table) (2012), quoting *McDermott* for the rule that “it is use that must commence within two years to prevent lapse, rather than recording.”

The Supreme Judicial Court has also noted this distinction approvingly. In *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123 (2009), the Court cited *McDermott* in recognizing that a special permit that did not contemplate construction did not lapse where substantial use was made within the statutory period, notwithstanding the recording issue. Likewise, in *Cohasset Heights, Ltd. v. Zoning Board of Appeals of Cohasset*, 53 Mass. App. Ct. 116 (2001), a permit granted in 1976 was recorded decades later when the omission came to light, and the late recording was not treated as an independent bar. These cases support the practical remedy proposed here: if a recording gap exists, it can be cured by prompt recording with the proper clerk’s certification, while the Council may condition any relief on submission of certified recording evidence before final occupancy.

In any event, the municipal record reflects substantial steps consistent with active and continued use of the approvals: the Planning Board’s June 10, 2026 procedural chronology recognizes the Council’s 2025 amendment in Case No. 77-25, the issuance of a building permit

on May 8, 2024, and final City inspections passed on March 12, 2025. These municipal actions undermine the premise that the permits were treated as void or that the Council lacks authority to act. If the Council prefers a belt-and-suspenders approach, it may approve the amendment contingent on submission of certified recording information for all applicable decisions by a date certain, and clarify that no certificate of occupancy shall issue absent such proof.

D. Opposition Argument II (Non-Transferability/Assignment): A Name Amendment With Retained Petitioner Interest Is Not a Prohibited Transfer and May Be Approved With Safeguards

Opponents rely on Condition 8's non-transferability to argue the Council cannot approve any change in the named petitioner and assert the Building Commissioner has already denied transferability. The Planning Board's June 10, 2026 report confirms Condition 8 in prior and recommended conditions: "The special permit is non-transferable and non-assignable," and notes the Building Commissioner/Zoning Enforcement Officer denied an application to amend based on non-transferability. However, the petition seeks a ministerial name update to reflect a joint venture while maintaining DMS Trinity's financial and operational role, not a wholesale transfer of the use right. The Addendum explains DMS Trinity executed an Asset Purchase Agreement to transfer assets, including the CCC provisional license, "to Beach House, subject to receipt of all necessary state and City approvals," and that DMS Trinity "maintains a financial and operational interest in the business." The Council can approve a name amendment that expressly preserves Condition 8 by: (1) confirming the special permit remains non-transferable and non-assignable; (2) limiting the amendment to recognition of the operating entity's name while binding DMS Trinity as a responsible party; and (3) requiring that any future ownership or control changes obtain prior CLEC and Council approvals.

The City Council may amend a personal special permit to add or substitute a permittee, or may approve an assignment of a non-transferable permit to a successor, where the amendment is consistent with the original permit's intent and does not constitute a substantive change in use or conditions. *See Johenning v. Planning Board of Milton*, 98 Mass. App. Ct. 1109 (2020) (unpublished) (affirming board's amendment of a personal special permit to run to the original permittees' children as co-permittees, where the board found the original intent was to prevent transfer to unrelated parties; the amendment was within the board's authority and did not require a new special permit proceeding) and *R.D. Matthews Construction Co. v. Board of Appeals of Duxbury*, 2009 WL 650737 (Mass. Land Ct. 2009). The Council has broad statutory authority under G.L. c. 40A, § 9 to impose conditions, safeguards, and limitations on time or use when granting or amending a special permit, including conditions that reserve ongoing supervisory authority to the board. *See Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123 (2009).

This approach aligns the permittee caption with actual operations without authorizing transfer of land-use rights to an unrelated or unvetted third party.

Alternatively, if the Council deems the requested form to exceed a “name-only” amendment, it may approve a new special permit on identical conditions naming both DMS Trinity and Beach House as co-permittees, preserving enforcement leverage and compliance continuity.

E. Opposition Argument III (CLEC Vetting): The CLEC Process Is Preserved; The Petition Does Not Bypass CLEC, and CLEC Approvals Will Remain Preconditions to Operation

Opponents argue Beach House never participated in CLEC's competitive process and therefore cannot be substituted. The record shows the project cleared CLEC for zoning and has maintained required local licensing prerequisites to proceed, and any final operational authorization remains contingent on CLEC action. The Planning Board reports that the proposal was approved by the CLEC to proceed to the zoning process, that after the CCC issues a final license the CLEC may issue a local license, and that the petitioner has a CCC provisional license. The June 10, 2026 Planning Board report again recites the CLEC step as the gateway to zoning and maintains Condition 16, which requires, before any final occupancy, a valid CCC license, a fully executed Host Community Agreement, and "any required license and/or approvals issued by the Malden Cannabis Licensing and Enforcement Commission." *See Davidson v. Board of Selectmen of Duxbury*, 358 Mass. 64 (1970) (SJC holding that the zoning board and the selectmen were each required to conduct public hearings and reach independent decisions on the special permit and the operating license, respectively; the licensing matter was sufficiently separate from the zoning controversy that the court's order requiring grant of the special permit did not, on principles of stare decisis, collateral estoppel, or law of the case, require grant of the license). Thus, granting a name amendment does not confer CLEC licensing or waive competitive vetting; it simply maintains the zoning entitlement while leaving CLEC to exercise its independent licensing authority. To the extent opponents cite a CLEC agenda noting forthcoming discussion of transferability, the Planning Board report acknowledges CLEC's role and preserves it through recommended conditions. The Council can and should reaffirm that no

operation may commence until CLEC issues any required local approvals under current standards.

F. Opposition Argument IV (HCA Compliance): The Record Reflects an Executed HCA and City-Approval Prerequisites; Any HCA Assignability Questions Are Addressed by Conditioning Final Occupancy on City-Approved HCA Documentation

Opponents assert that no HCA binds Beach House and that the HCA's non-assignment provisions bar relief. The Planning Board's June 10, 2026 recommendation includes Condition 16(b) requiring, prior to any final occupancy, "a fully executed Community Host Agreement with the City of Malden." The Addendum affirms the Petitioner "has received a Host Community Agreement from the City" and is in communication with the Mayor's Office, City Solicitor, and CLEC regarding other necessary City approvals. These facts support a practical path: approve the zoning name amendment while conditioning any certificate of occupancy on submission of an HCA that either (a) remains in force for DMS Trinity with an approved amendment recognizing Beach House's role, or (b) is newly executed with the appropriate party or parties, as determined by the City in its licensing/HCA capacity. This approach addresses assignability concerns without denying narrowly framed zoning relief.

G. Opposition Argument V (Benevolent Botanicals): The Petition Properly Proceeds Under Current Framework While Preserving CLEC Licensing; It Does Not Invoke Zoning Siting Relief or Seek to Circumvent Licensing

Opponents argue Benevolent Botanicals is inapposite and that the petition relies on it to bypass CLEC. The Addendum notes that MCC § 12.12.190 was invalidated by the Land Court and explains the Petitioner has applied general ordinance provisions on transfers to move forward, "not delayed by the current lack of the cannabis ordinance." This petition, however, does not request relief from CLEC standards or licensing; it requests a ministerial amendment to

reflect the operating name while expressly acknowledging the need for all state and City approvals. Nothing in the requested amendment undercuts CLEC's authority preserved by Condition 16.

H. Opposition Argument VI (Alleged Ownership Changes/Disclosure): The Allegations Do Not Establish a Zoning Bar; The Council Can Safeguard Disclosure Through Conditions and Defer to CLEC on Licensing-Level Ownership Review

Opponents compile Secretary of the Commonwealth filings and purport to show undisclosed changes. The opposition materials include 2023, 2024, 2025, and 2026 annual reports for DMS Trinity reflecting management and signatory information over time. These filings pertain to corporate governance and are within CLEC/CCC purview for licensing and change-of-ownership review. Zoning approval can proceed with conditions requiring: (1) prompt notice to the City of any ownership or control changes; (2) proof of any required CLEC/CCC approvals for ownership changes before issuance of a certificate of occupancy; and (3) maintenance of DMS Trinity's responsible-party status on the permit unless and until the Council affirmatively approves any future substitution. Condition 16 already requires CLEC approvals prior to final occupancy, and Condition 9 requires a Security Plan approved by the Malden Police Chief and CLEC. These mechanisms address the opponents' concerns without transforming licensing disputes into zoning disqualifications.

I. Alternative Grounds and Preservation

If the Council determines a pure substitution would implicate Condition 8 beyond a ministerial name update, Petitioner alternatively requests issuance of a successor special permit on the same twenty conditions, expressly naming both DMS Trinity, LLC and Beach House Cannabis, LLC as co-permittees, maintaining non-transferability, and conditioning any operation

on: (a) submission of a certified recording of the decision; (b) submission of a fully executed HCA encompassing the operating structure; (c) proof of all required CLEC approvals; and (d) proof of CCC licensure. This alternative preserves all safeguards cited by opponents while facilitating orderly completion of a project that has obtained a building permit, passed City final inspections, and secured a CCC provisional license. The Planning Board has recommended approval subject to the same twenty conditions, including non-transferability, CLEC approvals, traffic and parking mitigations, hours limits, and operational controls.

Petitioner preserves all arguments that any recording defect, if later substantiated, is curable and non-jurisdictional; that Condition 8 does not prohibit a ministerial name amendment preserving Petitioner's interest; and that CLEC/HCA issues are licensing matters to be satisfied as conditions precedent to occupancy rather than grounds to deny a zoning caption update.

Conclusion

The requested amendment is narrow, maintains all existing protections, and leaves licensing prerequisites to the bodies charged with them. The record establishes substantial municipal approvals and milestones, and the Planning Board has recommended approval with the same robust conditions. The Council should grant the amendment with conditions reaffirming non-transferability, requiring submission of certified recordings, confirming HCA and CLEC approvals prior to any occupancy, and maintaining DMS Trinity's responsible-party status. Alternatively, the Council should issue a successor special permit on identical conditions naming DMS Trinity and Beach House as co-permittees and conditioning operation on proof of all licensing and HCA requirements.

Please let us know if you have any further questions.

Very truly yours,
Foster, Walker & Di Marco, P.C.

A handwritten signature in blue ink, appearing to read 'Roberto L. Di Marco', with a long horizontal flourish extending to the right.

Roberto L. Di Marco, Esq.