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June 6, 2025

Joseph Rand, Mayor
Dennis D. Michaels, Village Attorney
Village of Nyack
9 North Broadway
Nyack Village Hall
Nyack, NY 10960

Re: Auxo Cap LLC—Permit for Retail Cannabis Dispensary

Gentlemen:

We represent Auxo Cap LLC ("Auxo Cap"). We write to you concerning the recent action by the Village of Nyack (the "Village") that purported to amend a Local Law modifying the proximity regulations for adult-use (recreational) and medical cannabis dispensaries within the Village, and which caused Auxo Cap's pending building permit application (the "Application") to be disapproved. As we discuss in this letter, the Village's action was unlawful for at least four reasons. The Local Law: (1) is contrary to (and thus preempted by) New York State law regulating proximity requirements for State licensed cannabis dispensaries; (2) was amended without providing Auxo Cap with adequate notice and thus must be annulled; (3) violates Auxo Cap's vested rights, meaning that the building application must be reinstated; and (4) being politically motivated, is arbitrary and capricious and thus violates Auxo Cap's civil rights. We are writing specifically in the hope of resolving this dispute amicably in a manner that best protects Auxo Cap's rights without having to resort to expensive litigation.

1. BACKGROUND

In October 2023, Auxo Cap entered into a contract to purchase a premises at 162 Main Street, Nyack for approximately $750,000, with the intention of operating a cannabis dispensary at that address. When selecting that location, Auxo Cap was aware of an impending change to a regulation of the New York Office of Cannabis Management, "Distance Requirements and Measurement of Distance Requirements," which went into effect on September 27, 2023. The regulation states in relevant part:

> No retail dispensary license or microbusiness license shall be granted for any premises which shall be … within a 2,000-foot radius of a registered organization, ROD, or any other premises for which a retail dispensary license or microbusiness license has been issued, in a municipality having a population of 20,000 or less,

> unless the Board has determined that issuing the license would promote public convenience and advantage; ***except that distance requirements between a retail dispensary or microbusiness and registered organization shall cease to be a requirement past December 2023***.

9 N.Y.C.R.R § 119.4(a)(2) (emphasis added).

In November 2023, Auxo Cap submitted written notice to the Village of its desire to operate a recreational cannabis dispensary at the property and made clear that it would begin immediately applying for the necessary permits. Auxo Cap closed on the purchase of the property in February 2024.

In the meantime, Auxo Cap had diligently worked on securing all the required architectural and engineering studies and permits, and submitted its Building Permit Application package to the Nyack Building Department on November 14, 2024. Auxo Cap's application for a retail cannabis license was delayed at the New York State level, however, because various parties (unrelated to Auxo Cap) had sought injunctions challenging aspects of the State's licensing process. This roadblock was cleared in early 2025 and Auxo Cap proceeded on the expectation that its Application would be approved by the Village without further delay.

a. The April 24 Board Meeting

The agenda for a meeting of the Village Board of Trustees (the "Board") scheduled for April 24, 2025 (the "April 24 Agenda") contained notice of a five-minute public hearing "concerning a proposed Local Law, which, if adopted by the Village Board, will amend the Village's Zoning Code so as to modify certain regulations regarding adult-use retail dispensaries (recreational cannabis)." Attachment B to the agenda contained the language of the proposed Local Law, which provided in relevant part that:

> A property lot, on which is sited a building or structure associated with an adult-use retail dispensary, shall be located a minimum distance of …. (iii) ***1000 feet away from a property lot***, on which is sited a building or structure used and occupied by any type of New York State licensed cannabis dispensary ("other dispensary"), ***so long as the other dispensary was legally operating*** as such prior to the date of the licensing of the adult-use retail dispensary.

April 24 Agenda, p. 1 (emphasis added). From Auxo Cap's perspective at that stage, the proposed Local Law appeared benign and would not have hindered final approval of its Application: although the prospective operator of a medical cannabis dispensary at 80 Main Street, Nyack had

had its application approved a couple of weeks earlier, that dispensary: (a) was located at a distance greater than 1,000 feet away from Auxo Cap's dispensary at 162 Main Street; and (b) is not yet operating.

The proposed Local Law was not approved on April 24, however. Auxo Cap's CEO was informed the following day by someone was present that there had been "uproar" at the Board meeting, instigated by persons opposed to Auxo Cap's dispensary.

b. The May 8 Board Meeting

The agenda for a subsequent meeting scheduled for May 8, 2025 (the "May 8 Agenda"), contained notice of a public hearing, continued from April 24, to discuss the cannabis dispensary zoning amendment. The amendment was described in language substantially identical to the description in April 24 Agenda. That is to say, the May 8 Agenda conveyed the impression that the amendment being considered at the May Board meeting was substantially the same as what had been considered but not voted on at the April meeting.

A revised Attachment B (the "May 8 Proposed Amendment") however, substantially altered the language of the proposed amended Local Law by: (1) distinguishing between medicinal dispensaries and "other adult-use" dispensaries; (2) imposing a 2,000 feet proximity requirement with respect to the latter; and (3) replacing the former requirement that, in order to block a new application, an earlier dispensary had to be "legally operating" prior to the new licensing, with a requirement that the earlier dispensary had simply to be "licensed" prior to new applicant.

Yet, although this version of the amendment, if adopted by the Board, would have protected the medicinal dispensary at 80 Main Street from some competition, the amended language did not necessarily imply that Auxo Cap's Application would be denied. Auxo Cap's 162 Main Street dispensary is about 1,200 feet from 80 Main Street, and thus is more than 1,000 feet "away from … a building or structure used and occupied by New York State licensed medicinal cannabis dispensary." Moreover, there is ***no*** "other adult-use dispensary" within 2,000 feet of Auxo Cap's premises—unless, contrary to a plain reading of the language of the Local Law, the term "other adult-use dispensary" was somehow understood to incorporate medicinal dispensaries.

c. The Denial of Auxo Cap's Application

Apparently, this potential ambiguity was noticed by persons opposed to permitting the operation of Auxo Cap's dispensary. The Local Law was amended again, this time seemingly behind the scenes, and in a manner that barred approval of Auxo Cap's Application. On May 20,

2025, Auxo Cap's CEO was shocked to receive a letter from Manny A. Carmona, Chief Building Inspector, informing Auxo Cap that the Application had been disapproved, specifically because of the Local Law amendment adopted by the Board on May 8, 2025. However, the language of the Local Law cited by Mr. Carmona differed materially not only from the original April 24 proposed amendment but also from the language of May 8 Proposed Amendment that had been considered at the Board meeting. According to Mr. Carmona's letter, the Local Law now provides:

> A property lot, on which is sited a building or structure associated with an adult-use retail dispensary, shall be located a minimum distance of: … (iii) 2,000 feet away from a property lot on which is sited a building or structure used and occupied any other New York State licensed dispensary.

We have searched the Village's websites in an effort to clarify what the Local Law actually provides at this stage but could find no answer. Although it has been invoked to deny Auxo Cap's Application, it appears not yet to have been officially published!

Ironically, not only did Mr. Carmona's May 2020 letter explicitly attribute his decision to deny Auxo Cap's Application to the enactment of the new Local Law, an entry in the Auxo Cap Building Permit Application file, *dated on the very same day*, stated:

> I have examined this application, plans and plot plans that are part of this application and find that they are substantially in compliance with the Codes of the Village of Nyack and the New York State Uniform Fire Prevention and Building Codes, and approve the same for issuance of a building permit.

This was signed by Manny A. Carmona!

Obviously, if the decision of the Village and its Planning Board denying Auxo Cap's Application were to stand, the impact on Auxo Cap would be catastrophic. Auxo Cap paid $750,000 to acquire the property and, as evidenced by the November 14, 2024 Application package, expended a further $350,000 in construction costs. With professional fees and other expenses, Auxo Cap has invested approximately $1.3 million in the project to date. Auxo Cap's losses if the project is cancelled, however, will not be limited to the amounts spent out of pocket. Auxo Cap has invested almost two years of its time in the project, in anticipation of the profits to be earned once its State-licensed dispensary is up and running. In short, Auxo Cap's damages, were it forced to litigate to vindicate its rights, would amount to tens of millions of dollars.

Hopefully, it will not be necessary for matters to go that far. We are optimistic that once the Village comes to understand the multiple reasons why the amended Local Law is invalid and

unenforceable against Auxo Cap, the company's Application will be approved without further delay and it can begin operating its dispensary business to the benefit of itself and the Village.

2. LEGAL ANALYSIS

a. The Local Law at Issue Is Preempted by State Law

As a threshold matter, the Local Law, as amended, is preempted by New York State law regulating proximity requirements for State licensed cannabis dispensaries. As discussed, prior to 2023, New York State prohibited the licensing of cannabis dispensaries whose premises were located within 2,000 feet of an existing dispensary. *See* 9 N.Y.C.R.R § 119.4(a)(2). In September 2023, however, the State law was amended such that the 2,000-feet limitation ceased to apply as the end of that year. Cognizant of the fact that the Village did not have a proximity restriction at that time, Auxo Cap applied to the State for its cannabis dispensary license; acquired and began to develop the property at 162 Main Street; and prepared and submitted its Building Permit Application.

N.Y. Const. art. 9, § 2(c) provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government…." The powers of local government are not unlimited, however:

> A local law will be preempted … where there is a direct conflict with a state statute (conflict preemption)" …. Under the doctrine of conflict preemption, a local law is preempted by a state law when a "right or benefit is expressly given ... by ... State law which has then been curtailed or taken away by the local law" …. "[C]onflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows." The crux of conflict preemption is whether there is "a head-on collision between the ... ordinance as it is applied" and a state statute.

N.Y. State Ass'n for Affordable Housing v. Council of City of N.Y., 141 A.D.2d 208, 213-15 (1st Dep't 2016) (internal citations omitted). Here, the conflict between the Local Law and the New York State statute could not be clearer. The statute explicitly allows a State-licensed operator of a cannabis dispensary to operate without proximity restrictions. The Local Law, as amended, imposes a 2,000-feet restriction on Auxo Cap's exercise of that right at its premises at 126 Main Street. That is, a right or benefit expressly given to Auxo Cap by State law has "been curtailed or taken away by the local law." Therefore, because "there is 'a head-on collision between the ...

ordinance as it is applied' and a state statute," the Nyack Local Law is preempted and the Application should be reinstated and approved.

b. The Amendment Must Be Annulled Because the Village Failed to Provide Adequate Notice

The public—including Auxo Cap—was entitled to notice of the proposed amendment to the Local Law. The Village failed woefully in its duty to provide the required notice and thus the purported amendment must be annulled. *See Jones v. Zoning Board of Appeals of Town of Oneonta,* 879 N.Y.S.2d 592, 593 (3d Dep't 2009).

The Code of Village of Nyack, § 54-1, Notice of Public Hearing, provides as follows:

> Before voting upon the proposed enactment of a local law, the Board of Trustees shall fix a day, within 30 days after the presentation of a local law to it, for a public hearing thereon, and within 20 days after such local law shall have been presented to it, shall cause a notice of the time and place of such hearing to be given**. *Such public notice shall be given by the Village Clerk by causing the same to be published once in the official newspaper at least three days prior to the day fixed for such hearing*.** …

(emphasis added).

In the May 8 Agenda and minutes, the Board described in detail how notice of the proposed amendment was provided *in advance of the April 24 Board meeting*, in accordance with§ 54-1 above. But we have seen no indication that any notice was provided in advance of the May 8 meeting that made the public specifically aware that the proposed language of the amendment was substantially modified since the prior meeting. On the contrary, the May 8 Agenda gave the impression that the language was essentially similar to what had been considered by the Board on April 24. (May 8 Agenda, pp. 1, 14.)

More critically, irrespective of whether adequate notice had been provided regarding the dramatic differences between the April 24 and May 8 versions of the amendment, there can be no question that there was no advance notice of what now purports to be the final version of the Public Law—that is, the version cited in the Planning Board's May 20 letter to Auxo Cap. There is a cryptic reference at page 16 of the record of the May 8 meeting that "the Village Board hereby adopts the Local Law in the form and substance as appended hereto as 'ATTACHMENT B,' ***and as same may have been amended 'by-hand' during the Public Hearing.***" (emphasis added). If that means—as appears to be the case—that the final, operative language of the Local Law was

amended on the fly at the meeting, then Auxo Cap (or the public generally) could not have received the minimum three days' notice required by the Village Code.

This was not a trivial matter: the real-world effect of the amendment as adopted "'by-hand' during the Public Hearing" was to deprive Auxo Cap of the value of its investment in the 126 Main Street dispensary. It scarcely needs to be pointed out that Auxo Cap was entitled to the notice required by law before the Board made such a radical switch to Auxo Cap's detriment. *See Benson Point Realty Corp. v. Town of East Hampton*, 62 A.D.3d 989, 991 (2d Dep't 2009) (where changes are made to a proposed zoning amendment at a properly-noticed public hearing, new notice may be required if the amendment as adopted is substantially different from the amendment as noticed); *Callanan Rd. Imp. Co. v. Town of Newburgh*, 167 N.Y.S.2d 780, 783 (Sup. Ct. Ulster Cnty. 1957) ("A slavish and technical adherence to the notice is not required. On the other hand there cannot be substantial and extensive deviations from the expressed objectives of the public hearing.").

In *Jones v. Zoning Board of Appeals of Town of Oneonta*, 879 N.Y.S.2d 592 (3d Dep't 2009), the Appellate Division found "merit in petitioners' assertion that the failure to provide proper notice of the hearing to both the general public … and to petitioners personally … require[d] annulment of the use variance." The court explained:

> [W]hen a municipality has enacted its own notice provisions, those provisions must be followed …. As the Town Code required notice '[a]t least 10 days' before the hearing, the two hours' notice to Rodney Jones and wholesale failure of notice to Bonnie Jones deprived petitioners of the opportunity to meaningfully participate in the hearing and frustrated the purpose and intent of the notice requirement."

879 N.Y.S.2d at 595 (internal citations omitted). The analysis is no different here, where Auxo Cap received no notice of the final, dispositive change to the Local Law and thus the amendment must be annulled.

c. The Amendment Deprived Auxo Cap of Its Vested Rights and the Application Must Be Reinstated

New York's vested rights doctrine allows a property owner to continue a development that has become nonconforming due to a change in zoning laws, provided the owner: (1) had a legally valid permit, and (2) made substantial changes and incurred substantial expenses in reliance on the permit before the law changed. A party deprived of its vested rights may seek and obtain an injunction permitting it to continue with the development.

A discussion of vested rights by the New York Court of Appeals in *Town of Orangetown v. Magee*, 643 N.Y.S. 2d 21, 47-48 (1996), is particularly instructive here. In that case, after defendants had spent substantial sums in developing a site under a legally issued building permit, the town amended its zoning laws causing the revocation of the permit. The court noted that:

> [A] vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development …. Neither the issuance of a permit …. nor the landowner's substantial improvements and expenditures, standing alone, will establish the right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.

643 N.Y.S. 2d at 47-48 (internal citations omitted).

The Court of Appeals found that the defendants had a vested right where their permit was legally issued and their commitment to the land use authorized by the permit prior to revocation was supported by evidence in the record. Moreover, the court rejected the town's argument that the permit was limited to "land clearings, footings and foundations" and did not authorize full completion of the project, as long as the subsequent plans comported with the town's building requirements generally. *Id*. at 46. Accordingly, defendants were entitled to reinstatement of their permit "in conformity with the zoning ordinances in effect at the time of the revocation."

Here, aside from whether the Local Law is preempted as discussed in section 2(a) above, and/or must be annulled as discussed in 2(b), Auxo Cap's Application should be reinstated under the vested rights doctrine and approved in conformity with the Local Law as in effect when the Application was made. Auxo Cap has evidenced its commitment to the project by, among other things, its expenditure of approximately $1.3 million on acquiring the land and on work performed to date. The fact that it has not received final approval does not preclude application of its vested rights, when its work to date comported with the Village's requirements and the interim work Auxo Cap performed was approved. *See Orangetown*, 643 N.Y.S. 2d at 46; *see also Ellington Const. Corp. v. Zoning Bd. of Appeals of Inc. Village of New Hempstead*, 564 N.Y.S.2d 1001, 1005-07 (1990). There is no doubt final approval would have been granted but for the last-minute adoption of the Local Law amendment: as noted above, *on the very same day that the Village notified Auxo Cap that the Application was disapproved*, the Building Department also certified that Auxo Cap's applications and plans were in compliance with City and New York State codes and requirements, and "approve[d] the same for issuance of a building permit."

d. Auxo Cap Is Entitled to Substantial Damages for the Village's Violation of Its Civil Rights

Under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State … , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Orangetown*, the Court of Appeals held that "Municipalities are 'persons' subject to suit under section 1983 for the deprivation of constitutionally protected rights caused by actions which 'implement[ ] or execute[ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [its] officers.'" 643 N.Y.S. at 48-55. Moreover, the court affirmed "[i]n the context of land use, section 1983 provides protection against municipal actions which violate a landowner's rights under the Just Compensation Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* at 25.

The court also noted, however, that the *Orangetown* "trial court rested its decision on a third ground—that the acts of the Town in revoking defendants' permit denied them substantive due process of law because the revocation and subsequent zoning change were arbitrary and capricious." *Id*. at 25-26. According to the evidence in the case, "organized resistance to [the project] developed within the community" and "became so intense that the Town Supervisor directed the Building Inspector to revoke the defendants' permit." *Id*. at 46. He did so and the Town subsequently amended its Zoning Code to preclude construction of commercial buildings on defendants' land. *Id* at 46-47. In the circumstances, the Court of Appeals did not hesitate to uphold "the trial court's conclusion that the Building Inspector's revocation of defendants' permit was arbitrary and capricious … because it was without legal justification and motivated entirely by political concerns." *Id*. at 53.

Ultimately, not only did the courts in the *Orangetown* case require that the developer's permit be reinstated, they awarded him damages of over $5.1 million plus attorney's fees and costs.

Here, a similar outcome should be expected if Auxo Cap is forced to sue to vindicate its rights under 42 U.S.C. § 1983. Just as the town officials in *Orangetown* lacked legal justification for their conduct in revoking the developer's permit, being motivated "entirely by political concerns," the conduct of the Board here was similarly politically motivated, and therefore

arbitrary and capricious—as evidenced by the "uproar" at the April 24 Meeting and the subsequent serial efforts to amend the Local Law in a way that blocked Auxo Cap's Application. Nor does it matter that, unlike in *Orangetown*, the amendment to the Local Law here is superficially one of general application. In *Upstate Land & Prop., LLC v. Town of Bethel*, 74 A.D.3d 1450, 1453 (3d Dep't 2010), the Appellate Division upheld a 42 U.S.C. § 1983 claim based on a facially blanket prohibition, in light of the "petitioner's allegations that the denial was due to the complaints of neighbors and political pressure on the Town Board … supported by the record [that met] the pleading requirement that the governmental action was wholly without legal justification." Here, although the amendment to the Local Law might superficially be of general application, the history of the amendment efforts following the April 24 meeting leave no doubt that it was crafted with Auxo Cap specifically in mind.

* * *

We believe that we have demonstrated that the Village is on a very dangerous footing because of the manner in which the amendment to the Local Law was handled here. As the *Orangetown* case illustrates, not only are there several legal pathways that will lead to having the Local Law struck down and/or Auxo Cap's Application reinstated and approved, but the Village also has potentially very large damages exposure for civil rights violations under § 1983. That said, our client would greatly prefer to resolve this dispute amicably, without resort to litigation. He wants only to be awarded the permit that Auxo Cap is entitled to under the pre-May 8 version of the Local Law and to be given the opportunity to become a good neighbor to the Nyack business community. We and our client request the opportunity of discussing this matter with you.

Very truly yours,

BLANK ROME LLP

/s/Craig Weiner

Craig Weiner
Partner

Copy to Board of Trustees