SJC-13069

WEST STREET ASSOCIATES LLC vs. PLANNING BOARD OF MANSFIELD & another.[1]

Bristol. May 3, 2021. - August 30, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Marijuana. Municipal Corporations, Marijuana, By-laws and ordinances, Home rule. Zoning, Validity of by-law or ordinance, Special permit. Corporation, Non-profit corporation.

Civil action commenced in the Superior Court Department on January 3, 2017.

The case was heard by Jackie A. Cowin, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Benjamin B. Tymann for the plaintiff.
Jason R. Talerman for Ellen Rosenfeld.
Valerio G. Romano, pro se, amicus curiae, submitted a brief.

[1] Ellen Rosenfeld, as trustee of the Ellen Realty Trust.

BUDD, C.J. When marijuana initially was legalized for medical use in 2012, the licensing of medical marijuana dispensaries was limited to nonprofit entities. See St. 2012, c. 369, An Act for the humanitarian medical use of marijuana (2012 act). The marijuana laws thereafter were amended to allow for-profit entities to dispense medical marijuana.[2] See St. 2017, c. 55, § 72. Here we are asked to determine whether a previously enacted municipal bylaw that permits only nonprofit entities to operate medical marijuana dispensaries is preempted by a statutory provision specifically eliminating that restriction. We conclude that the answer is yes.[3]

Background. We summarize the relevant facts which are undisputed and taken from the record. In 2016, Ellen Rosenfeld sought and received from the planning board (board) of the town of Mansfield (town) a special permit to construct a medical marijuana dispensary on West Street. The site was purchased by Rosenfeld as trustee of the Ellen Realty Trust, and the proposed operator of the dispensary was CommCan, Inc. (CommCan), of which Rosenfeld is president. The plaintiff, West Street Associates LLC (WSA), an abutting landowner, challenged the issuance of the

[2] See Commonwealth v. Long, 482 Mass. 804, 809-811 (2019), for a chronology of marijuana legislation in the Commonwealth.

[3] We acknowledge the amicus brief submitted by Valerio Romano.

permit pursuant to G. L. c. 40A, § 17, arguing that the board failed properly to consider the decisional criteria for such permits as required by the town's bylaws.

Consistent with the 2012 act, the town required any applicant seeking a permit to operate a medical marijuana dispensary to be a nonprofit entity. See St. 2012, c. 369, § 9 (C); Mansfield Bylaws § 230-3.4(K)(3)(c). As CommCan was a nonprofit at the time the permit was granted, its corporate status was not an issue when the lawsuit was filed.

Before the matter was tried, voters approved the legalization of recreational marijuana use, see St. 2016, c. 334, and comprehensive legislation thereafter was enacted to govern the distribution and sale of both medical and recreational marijuana. See St. 2017, c. 55 (2017 act). The 2012 act was repealed and replaced by the 2017 act. See St. 2017, c. 55, § 47. Among other things, there is no longer a requirement that medical marijuana dispensaries be nonprofit entities. See St. 2017, c. 55, § 72. In fact, the 2017 act contains a provision that expressly allows nonprofit dispensaries to convert to for-profit entities:

> "Notwithstanding any general or special law to the contrary, any person with a provisional or final certification of registration as of July 1, 2017[,] to dispense medical use marijuana . . . shall be entitled to convert from a non-profit corporation . . . into a domestic business corporation . . . ."

Id. Soon after the 2017 act was passed, the Department of Public Health repealed its regulations governing medical marijuana, see 1380 Mass. Reg. 35 (Dec. 14, 2018), and the newly created Cannabis Control Commission (commission) promulgated new regulations implementing the 2017 act. See 935 Code Mass. Regs. §§ 501.000 (2021). As most recently amended, the commission's regulations require only that marijuana treatment centers "be registered to do business in the Commonwealth as a domestic business corporation or another domestic business entity." 935 Code Mass. Regs. § 501.050(1)(a) (2021). The commission and Secretary of the Commonwealth also issued guidance to dispensaries seeking to convert to for-profit entities.

After the passage of the 2017 act, CommCan converted from a nonprofit to a for-profit corporation.[4] CommCan's change in corporate status since the filing of WSA's lawsuit came to light during the bench trial held in November 2019. The judge directed the parties to brief what, if any, impact the conversion had on Rosenfeld's eligibility for the special permit issued by the board and challenged by WSA.

After reviewing the briefs and hearing argument, the judge found no error in the board's decision to grant Rosenfeld a

[4] CommCan also seeks to convert from a medical marijuana dispensary to a retail marijuana establishment, which is the subject of a separate appeal. See CommCan, Inc. v. Mansfield, 488 Mass. (2021).

special permit and concluded that the bylaw that required medical marijuana dispensaries to be operated by nonprofit entities was preempted by the 2017 act. WSA appealed, challenging the preemption decision, and we transferred the case to this court on our own motion.

Discussion. 1. Home rule. Since the earliest days of the Commonwealth, the Legislature has provided cities and towns with the power to self-govern. See Commonwealth v. Baronas, 285 Mass. 321, 322 (1934); Cox v. Segee, 206 Mass. 380, 381 (1910). General Laws c. 40, § 21, the original version of which was enacted in 1692, states in relevant part: "Towns may, for the purposes hereinafter named,[5] make such ordinances and by-laws, not repugnant to law, as they may judge most conducive to their welfare, which shall be binding upon all inhabitants thereof and all persons within their limits."

Ratified in 1966, the Home Rule Amendment expanded this local power by granting municipalities the authority to undertake any action "not inconsistent" with the Constitution or laws of the Commonwealth. See art. 89, § 6, of the Amendments to the Massachusetts Constitution. "The purpose of the Home Rule Amendment is to preserve the right of municipalities to

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[5] There are twenty-six categories listed covering a range of topics including "directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police." G. L. c. 40, § 21 (1).

self-government in essentially 'local matters' by allowing them to adopt and amend their own charters, while preserving the Commonwealth's right to legislate with respect to State, regional, and general matters." Gordon v. Sheriff of Suffolk County, 411 Mass. 238, 244 (1991). General Laws c. 43B, § 13, the codification of the Home Rule Amendment, provides in pertinent part that "[a]ny city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court."

2. Standard for preemption. Municipalities generally are afforded "considerable latitude" in self-government in matters of local concern. Bloom v. Worcester, 363 Mass. 136, 154 (1973). In determining whether local action is inconsistent with State law, similar to the Federal preemption analysis, "the touchstone of the analysis is whether the State Legislature intended to preempt the city's authority to act." Connors v. Boston, 430 Mass. 31, 35 (1999). Cf. Boston v. Commonwealth Employment Relations Bd., 453 Mass. 389, 396 (2009) ("A Federal statute may preempt State law when it explicitly or by implication defines such an intent, or when a State statute actually conflicts with Federal law or stands as an obstacle to the accomplishment of Federal objectives").

Although legislative intent to preclude local action need not be stated expressly, it nevertheless must be clear. Bloom, 363 Mass. at 155. Such intent "may be inferred where 'the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject.'" Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 200 (2000), quoting Boston Gas Co. v. Newton, 425 Mass. 697, 699 (1997). See Bloom, supra at 154 (State preemption of local bylaw requires "sharp conflict between the local and State provisions").

3. Application. We review the preemption decision made by the judge de novo. See Doe v. Lynn, 472 Mass. 521, 527 (2015). For the reasons that follow, we agree that the local bylaw is preempted to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.

The town bylaw at issue states in pertinent part:

> "[A]ll registered nonprofit medical marijuana dispensary special permit applications shall include proof of registration with the Massachusetts Department of Public Health under the provisions of Chapter 369 of the Acts of 2012 and 105 [Code Mass. Regs. §] 725.100."

Mansfield Bylaws § 230-3.4(K)(3)(c). The bylaw references the 2012 act and the Department of Public Health regulations, both of which required medical dispensaries to be nonprofit entities. St. 2012, c. 369, § 9 (C); 105 Code Mass. Regs. § 725.100(A)(1) (2016) (registered marijuana dispensaries "must operate on a

non-profit basis for the benefit of registered qualifying patients").

However, the Legislature disavowed these statutory and regulatory provisions when it repealed and replaced the 2012 act in 2017 and expressly allowed medical marijuana establishments to be for-profit. The new marijuana law states in relevant part:

> "Notwithstanding any general or special law to the contrary, any person with a provisional or final certification of registration as of July 1, 2017[,] to dispense medical use marijuana . . . shall be entitled to convert from a non-profit corporation . . . into a domestic business corporation . . . ."

St. 2017, c. 55, § 72.[6] Soon thereafter, the Department of Public Health regulations were repealed, see 1380 Mass. Reg. 35 (Dec. 14, 2018), and the commission issued new regulations to implement the 2017 act. See 935 Code Mass. Regs. §§ 501.000 (2021). The commission's regulations now require only that marijuana treatment centers "be registered to do business in the Commonwealth as a domestic business corporation or another domestic business entity." 935 Code Mass. Regs. § 501.050(1)(a) (2021).

[6] The judge found that Rosenfeld obtained a provisional registration from the Department of Public Health. Neither party contests that Rosenfeld held the provisional registration as of July 1, 2017.

By retaining the requirement that medical marijuana dispensaries be nonprofit, the town bylaw "frustrate[s] [one of] the purpose[s]" of the 2017 act. Fafard, 432 Mass. at 200. In repealing the 2012 act, see St. 2017, c. 55, § 47, and replacing it with a provision permitting for-profit entities to operate marijuana treatment centers, see St. 2017, c. 55, § 72, the Legislature evinced its clear intent to allow for-profit entities to distribute medical marijuana. This legislative purpose cannot "be achieved in the face of [the town's] . . . by-law on the same subject." See Bloom, 363 Mass. at 156. As the trial judge explained in her ruling, "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited." Accordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations, and the board cannot be forced to revoke the special permit at issue because CommCan appropriately exercised its statutory right to convert to a for-profit entity.[7]

[7] Because we uphold the judge's ruling that State law preempts the local bylaw limiting medical marijuana dispensaries to nonprofit entities, we need not reach Rosenfeld's alternative argument that CommCan's corporate conversion is not relevant to the planning board's decision because CommCan was a nonprofit entity when the planning board issued the special permit. Nor do we reach Rosenfeld's argument that local zoning bylaws may not regulate corporate forms.

Judgment affirmed.