SJC-13198

THE HAVEN CENTER, INC., & another[1] vs. TOWN OF BOURNE & another.[2]

Barnstable. March 9, 2022. – July 28, 2022.

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

Marijuana, Recreational. Municipal Corporations, Marijuana, By-laws and ordinances, Home rule. Constitutional Law, Home Rule Amendment.

Civil action commenced in the Land Court Department on January 4, 2019.

Following transfer to the Superior Court Department, the case was heard by Thomas J. Perrino, J., on a motion for summary judgment, and a motion for reconsideration was considered by him.

The Supreme Judicial Court granted applications for direct appellate review.

Benjamin E. Zehnder for the plaintiffs.
Robert S. Troy for the defendants.

[1] MacArthur Park Place LLC.

[2] Board of selectmen of Bourne.

BUDD, C.J. Chapter 94G of the General Laws, which codifies portions of the 2016 ballot initiative that legalized the sale and use of recreational marijuana in the Commonwealth,[3] gives individual cities and towns the power to ban recreational marijuana establishments from the community. See G. L. c. 94G, § 3 (a) (2). In the present case, the town of Bourne (town) adopted such a ban, and the plaintiffs, The Haven Center, Inc. (Haven), and MacArthur Place LLC (MacArthur) (collectively, plaintiffs),[4] contend that this ban was adopted improperly. For the reasons that follow, we conclude that the town's ban is valid.

Background. The following facts are drawn from the parties' statements of material facts, which were filed jointly and are undisputed. In June 2016, the town issued a letter indicating its continuing support for Haven's operation of a medical marijuana treatment center (MMTC).[5] Shortly thereafter, Haven received a provisional certificate of registration from

[3] See Regulation and Taxation of Marijuana Act, St. 2016, c. 334, § 5, codified at G. L. c. 94G, §§ 1 et seq.; CommCan, Inc. v. Mansfield, 488 Mass. 291, 292 (2021). See also St. 2017, c. 55, §§ 20-43 (amending G. L. c. 94G).

[4] Haven is a company seeking to operate a retail recreational marijuana establishment in the town, and MacArthur is the entity that has leased Haven space to do so.

[5] The town first issued a letter of support in October 2015.

the Cannabis Control Commission (commission) to operate an MMTC in the town.

In November 2016, a ballot measure authorizing the legalization of adult-use recreational marijuana, Question 4, passed Statewide; however, a majority of the town's voters voted "no." Six months later, in May 2017, the town meeting[6] voted to impose a temporary moratorium on recreational marijuana establishments either until November 30, 2018, or until the town adopted zoning bylaw amendments to regulate such establishments, whichever occurred first.

In October 2018, two bylaw amendments were presented at another town meeting.[7] The first, article 14, was a proposal to amend section 3.1 ("Public Safety and Good Order") of the town's general bylaws by prohibiting all commercial recreational

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[6] A town meeting is a "gathering of a town's eligible voters" to vote to matters of town business. Citizens Guide to Town Meetings, at 1, https://www.sec.state.ma.us/cis/cispdf/Guide_to_Town_Meetings.pdf [https://perma.cc/ECZ4-WWT6]. The town has a quorum requirement of 125 registered voters to begin any annual or special town meeting, and 100 registered voters to maintain the meeting after a quorum has been established. Town of Bourne Bylaws, at x, https://www.townofbourne.com/sites/g/files/vyhlif7346/f/uploads/21_town_bylaw_thru_2021_stmatm.pdf [https://perma.cc/3KRZ-GAZA].

[7] Previously, two bylaw amendments, one amending the zoning bylaw and one amending the general bylaws, had been presented to the voters at a town meeting in March 2018. Both of these proposed bylaw amendments would have banned all commercial recreational marijuana establishments from the town. Each bylaw amendment failed to garner the necessary votes to pass.

marijuana establishments within the town. The second, article 15, proposed amendments to the town's zoning bylaw that would regulate recreational marijuana use and establishments. As a proposed amendment to a general bylaw, article 14 required a simple majority vote and was passed. As a proposed amendment to a zoning bylaw, article 15 required a two-thirds majority vote and, having failed to receive the necessary votes, did not pass.[8,9]

Beginning in April 2018, and during the time that articles 14 and 15 were presented and voted on, Haven was negotiating a proposed host community agreement for a medical and recreational marijuana establishment and cultivation and processing center with the town administrator. Haven also signed a lease with MacArthur to rent property located in the town. However, one month after article 14 was adopted, in November 2018, the town administrator informed Haven that the town could no longer work with Haven to establish a recreational marijuana establishment.

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[8] See G. L. c. 40A, § 5.

[9] In October 2019, the issue of recreational marijuana arose again. Another bylaw amendment, article 10, which proposed to amend the zoning bylaw and regulate recreational marijuana by adopting zoning restrictions on recreational marijuana and requiring approval by special permit, was presented before the town meeting. A motion was made to postpone indefinitely the vote on article 10. That motion passed. At another town meeting, a motion was brought to repeal article 14. The motion failed.

The plaintiffs commenced this action in the Land Court seeking, among other remedies, a declaratory judgment that article 14 was invalid. The action was transferred to the Superior Court, and the plaintiffs filed a motion for summary judgment. A judge in the Superior Court denied the motion for summary judgment, denied the plaintiffs' motion for reconsideration, and subsequently entered summary judgment in favor of the defendants. The plaintiffs appealed from the judgment, and we granted the parties' applications for direct appellate review before this court.

Discussion. General Laws c. 94G, § 3 (a) (2), permits cities and towns to adopt ordinances and bylaws that limit or ban recreational marijuana establishments within the city or town, subject to certain voting and other procedural requirements that vary depending on whether a majority of the municipality's voters voted "yes" or "no" on Question 4, and whether the ban is adopted before or after December 31, 2019. See G. L. c. 94G, § 3 (e). According to guidance issued by the commission, under this provision of the statute, "[i]f a municipality voted no on [Question 4], then the governing body [could] limit or ban the number of marijuana establishment[s] . . . by passing a bylaw or ordinance prior to December 31,

2019."[10] Cannabis Control Commission, Guidance for Municipalities Regarding Marijuana for Adult Use, at 9 (January 2018). Citing the commission's guidance, the town contends that article 14 was authorized by G. L. c. 94G, § 3 (a) (2), because the town previously had voted "no" on Question 4 and, therefore, article 14 was properly adopted by a majority vote at the October 2018 town meeting.

The plaintiffs posit, however, that article 14 is void under the Home Rule Amendment, which grants municipalities broad authority to enact local ordinances as long as such action is "not inconsistent" with Massachusetts laws or the Declaration of Rights.[11] See West St. Assocs. LLC v. Planning Bd. of Mansfield, 488 Mass. 319, 321-322 (2021). The plaintiffs argue that article 14 should be treated as a zoning bylaw and that, as such, article 14 is inconsistent with the requirements under the

[10] "The interpretation of a statute by the agency charged with primary responsibility for administering it is entitled to substantial deference" (citation omitted). Mendes's Case, 486 Mass. 139, 143 (2020). Here, the commission's guidance is a reasonable interpretation of G. L. c. 94G, § 3 (a) (2), and the plaintiffs do not challenge it.

[11] As codified, the Home Rule Amendment provides in relevant 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." Art. 2, § 6, of the Amendments to the Massachusetts Constitution, as amended by art. 89 of the Amendments.

Zoning Enabling Act, G. L. c. 40A, §§ 5-6. The plaintiffs also argue that article 14 is inconsistent with other provisions in G. L. c. 94G, § 3 (a), in particular, those that prohibit "unreasonably impractical" bylaws and municipalities from using zoning bylaws to prevent the conversion of an MMTC to a recreational marijuana establishment.

We review the plaintiffs' claims on a de novo basis. See Casseus v. Eastern Bus Co., 478 Mass. 786, 792 (2018), quoting Kiribati Seafood Co. v. Dechert LLP, 478 Mass. 111, 116 (2017).

1. Treatment of article as zoning bylaw. The plaintiffs contend that, although the town characterizes article 14 as an amendment to a general bylaw, it is instead an amendment to the zoning bylaw because it prohibits a particular use of land, specifically for recreational marijuana establishments. The adoption and amendment of zoning ordinances are governed by G. L. c. 40A, §§ 5-6, which provide certain protections to preexisting land uses and establishes procedural requirements for voting on zoning bylaws.[12] According to the plaintiffs, because the town did not adopt article 14 pursuant to these

[12] Among other things, G. L. c. 40A, § 5, requires that a municipality seeking to adopt or amend a zoning bylaw hold a public hearing prior to a vote and adopt the bylaw by a two-thirds majority vote rather than a simple majority. Moreover, § 5 prohibits the reconsideration of a zoning bylaw that has been acted on unfavorably within two years, unless recommended by the planning board.

procedural requirements,[13] it is inconsistent with these provisions and therefore violates the Home Rule Amendment. We disagree.

We begin by observing that G. L. c. 94G, § 3 (a), permits cities and towns to "adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments," that limit the number of such establishments, or that even prohibit them altogether, without specifying that these provisions must take the form of zoning ordinances or bylaws. The only reference to zoning ordinances or bylaws in this section of the statute appears in § 3 (a) (1), which provides that zoning ordinances or bylaws shall not operate to prevent conversion of MMTCs to recreational marijuana establishments or to limit the number of recreational marijuana establishments to less than the minimum number set out in the statute. The fact that the Legislature specifically referred to zoning ordinances or bylaws in this one instance, but not elsewhere, indicates that municipalities may otherwise properly regulate or prohibit recreational marijuana establishments through general bylaws as well as zoning bylaws. See CommCan, Inc. v. Mansfield, 488 Mass. 291, 296-297 (2021), quoting Commonwealth v. Gagnon, 439 Mass. 826, 833 (2003) ("where the

[13] It is undisputed that the town did not treat article 14 as an amendment to the zoning bylaw.

[L]egislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded" [alteration omitted]). Therefore, to the degree that the town was acting pursuant to this power to prohibit recreational marijuana establishments by means of a general bylaw amendment when it adopted article 14, the article presumptively is valid and the plaintiffs "bear a heavy burden in demonstrating that [the town exceeded its] statutory authority" (citation omitted). Springfield Preservation Trust, Inc. v. Springfield Library & Museums Ass'n, 447 Mass. 408, 418 (2006).

Nevertheless, even where a municipality properly exercised its police powers to regulate a local activity through its general bylaws, a particular ordinance may still be deemed to be a zoning regulation subject to the requirements of G. L. c. 40A in light of its "nature and effect," Rayco Inv. Corp. v. Selectmen of Raynham, 368 Mass. 385, 392 (1975), and "the historical context in which it [has] been enacted," Lovequist v. Conservation Comm'n of Dennis, 379 Mass. 7, 14 (1979). The mere fact that a bylaw regulates land use does not automatically mean that it is a zoning bylaw. See id. at 12. Rather, in determining whether a bylaw should be viewed as a zoning bylaw, we consider factors such as whether other municipalities have adopted similar bylaws as zoning bylaws, and whether the municipality whose bylaw is being scrutinized previously has

regulated the topic at hand through "comprehensive" zoning ordinances.[14] Rayco Inv. Corp., supra at 392-393. Lovequist, supra at 13-14. Other factors include whether the bylaw is intended to "prohibit or permit any particular listed uses of land," and whether the dominant purpose of the bylaw pertains to interests typically addressed by the zoning process, including, but not limited to, "the character of the community and the compatibility of nearby land uses." Lovequist, supra.

With regard to the first factor, the parties have not presented any evidence concerning what other municipalities have done in similar circumstances. In any event, this factor has little significance here because G. L. c. 94G, § 3 (a) (2), authorizes municipalities to ban recreational marijuana establishments by either a general or a zoning bylaw, as we have discussed supra.

Addressing the second factor (i.e., whether the town previously adopted a comprehensive zoning scheme involving the same subject matter), the plaintiffs point to the temporary moratorium on the use of land or structures for recreational

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[14] In certain circumstances, whether the municipality previously has regulated the topic at hand through "comprehensive" zoning ordinances independently may determine whether a bylaw has the "nature and effect" of a zoning bylaw. Rayco Inv. Corp., 368 Mass. at 392-394 (discussing circumstance in which viewing bylaw as exercise of "municipal police power" would frustrate Zoning Enabling Act).

marijuana establishments that the town adopted as a zoning bylaw in May 2017. However, standing alone, a single eighteen-month moratorium that merely postponed such uses and provided neither conditions nor requirements for approval of recreational marijuana establishments can hardly be said to be a comprehensive zoning scheme on this subject. Compare Rayco Inv. Corp., 368 Mass. at 392-393 (town bylaw limiting maximum number of trailer park licenses should be viewed as zoning regulation where previous zoning bylaw "cover[ed] this subject in a comprehensive fashion," including setting "conditions and requirements for approval" of trailer parks); Spenlinhauer v. Barnstable, 80 Mass. App. Ct. 134, 139-142 (2011) (general ordinance limiting off-street parking in single-family residence zones was invalid because it was not promulgated in accord with G. L. c. 40A, where town already had adopted "comprehensive" zoning bylaw that "regulate[d] off-street parking at almost any conceivable location and use"). We therefore conclude that the town did not have a history of comprehensively regulating recreational marijuana establishments through zoning bylaws.

Finally, with regard to the remaining factors, the dominant purpose of article 14, as stated therein, was to exercise the power to ban all recreational marijuana establishments from the town pursuant to G. L. c. 94G, § 3 (a) (2). The bylaw says nothing about the use of land for such establishments, the

compatibility with nearby uses, or the character of the community. Certainly, article 14 indirectly had the effect of prohibiting the use of land in the town for recreational marijuana establishments, and the character of the community may well have figured in the decisions of town meeting members who voted for article 14. But the fact that article 14 "simply overlap[s] with what may be the province of a local zoning authority" does not mean that this bylaw must "be treated as [a] zoning enactment[] which must be promulgated in accordance with the requirements of G. L. c. 40A." Lovequist, 379 Mass. at 14.

In sum, our analysis of the foregoing factors does not demonstrate that article 14 must be treated as a zoning bylaw. In light of that conclusion, as well as our conclusion that G. L. c. 94G, § 3 (a) (2), permits municipalities to prohibit recreational marijuana establishments through general bylaws as well as zoning bylaws, we hold that article 14 is not a zoning bylaw and that it is not subject to the requirements of G. L. c. 40A.

2. Consistency of article with G. L. c. 94G, § 3 (a). The plaintiffs argue further that article 14 is void under the Home Rule Amendment because it is inconsistent with a provision in G. L. c. 94G, § 3 (a) (1), prohibiting zoning ordinances that prevent MMTCs from converting to recreational marijuana

establishments. Specifically, the statute states that a city or town may adopt ordinances and bylaws that

> "govern the time, place and manner of marijuana establishment operations and of any business dealing in marijuana accessories, except that zoning ordinances or by-laws shall not operate to: (i) prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment engaged in the same type of activity under this chapter" (emphases added).

G. L. c. 94G, § 3 (a) (1). We previously have observed that "the purpose of th[is] provision is to make it easier for medical marijuana dispensaries to convert to retail marijuana sales." CommCan, Inc., 488 Mass. at 296.

As an initial matter, we note that the provision cited by the plaintiffs only prohibits zoning bylaws that prevent conversion of MMTCs to recreational marijuana establishments, and it does not apply to article 14 because we have concluded that article 14 is not a zoning bylaw. But more fundamentally, it is important to recognize that G. L. c. 94G, § 3 (a) (1) and (a) (2), concern two different types of bylaws. Section 3 (a) (1) authorizes municipalities to adopt bylaws that "govern the time, place and manner of marijuana establishment operations." G. L. c. 94G, § 3 (a) (1). Section 3 (a) (2) authorizes municipalities to adopt bylaws that "limit the number of marijuana establishments," G. L. c. 94G, § 3 (a) (2), or "prohibit the operation of [one] or more types of marijuana

establishments within the city or town," G. L. c. 94G, § 3 (a) (2) (i). Because article 14 does not merely regulate the time, place, and manner of recreational marijuana establishment operations, but bans them entirely, it is subject to the requirements of § 3 (a) (2) rather than those of § 3 (a) (1).

Finally, the plaintiffs assert that article 14 violates the requirement in G. L. c. 94G, § 3 (a), that the bylaws adopted by cities and towns must not be "unreasonably impracticable." Specifically, the plaintiffs contend that article 14's outright ban on recreational marijuana establishments, without the protections for existing structures, uses, or permits that would otherwise be required for zoning bylaws under G. L. c. 40A, § 6, is impracticable because it has created an unreasonable risk for investors. But as we already have discussed at length, G. L. c. 94G, § 3 (a) (2) (i), explicitly authorizes municipalities to adopt such a ban. This specific authorization supersedes any contrary interpretation that might be drawn from the more general requirement that bylaws must not be unreasonably impracticable. See TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 18 (2000), quoting Risk Mgt. Found. of Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 505 (1990) ("It is a basic canon of statutory interpretation that 'general statutory language must yield to that which is more specific'").

Conclusion. For the reasons stated, we hold that article 14 is valid.

Judgment affirmed.