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Mass. Ruling Clarifies Land Use Regs For Cannabis

By **Paul Feldman and Courtney Simmons** (April 23, 2020, 6:10 PM EDT)

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In 1966 the Massachusetts Constitution was amended to provide for Home Rule of the Massachusetts Constitution Article 89. That amendment granted general legislative power to local governments, provided that the exercise of that power was not inconsistent with the constitution or laws enacted by the legislature.[1]

With the Home Rule amendment, municipalities could address local concerns by adopting bylaws and ordinances. The subject matter of those bylaws and ordinances could be anything that the state legislature could lawfully delegate to local government to enact. In other words, cities and towns now had the ability to yield general police powers for the betterment of the health, safety and general welfare of their inhabitants.

Typically, general bylaws are adopted by majority vote of the town meeting,[2] and general ordinances are adopted by majority vote of the city council.[3]

When it comes to regulating land use, however, the exercise of police powers cannot be inconsistent with a state law known as the Zoning Enabling Act.[4] The Zoning Act prescribes a different procedure for adopting, amending or repealing land use regulations. That procedure includes a requirement that a zoning bylaw or ordinance may only be passed or altered by a two-thirds vote of a town meeting or vote of the members of city council, a more onerous requirement than for general bylaws.[5]

Exercising zoning powers through the adoption of a general bylaw has been found to be inconsistent with the Zoning Act and thus, not a valid exercise of Home Rule. As such, it becomes important to distinguish if a bylaw or ordinance is considered an exercise of zoning (the regulation of the use of land, buildings and structures)[6] or the exercise of another police power.

This article will look at the interplay between the exercise of zoning power and other police powers and how a recent decision arising from the regulation of the cannabis industry is helping to further delineate the circumstances when a municipality can validly implement or change a bylaw or ordinance as exercise of its general police powers rather than its zoning powers, which require a two-thirds vote.

When a Municipality Is Engaged in Zoning

The line dividing which matters a municipality can regulate through adoption of general bylaws and those it can regulate through zoning bylaws is not so clear-cut. Just because an ordinance or bylaw regulates the use of land does not necessarily classify it as a zoning concern. There are a few key decisions addressing the circumstances under which a general bylaw has been determined to be the exercise of zoning.

In Rayco Investment Corp. v. Board of Selectmen of Raynham[7] in 1975, the Supreme Judicial Court determined that a bylaw limiting the number of trailer park licenses a town could issue was not a proper exercise of the town's general police power, as the true nature and effect of the bylaw was an exercise of zoning power.[8]

Although the bylaw did not expressly prohibit or regulate the areas where trailer parks could be located, the court determined that it constituted a virtual prohibition on the use of the land since the license limitation impeded the use of land as a trailer park.[9] The court also based its decision on the fact that the town's previous zoning bylaw had dealt specifically with the subject of trailer parks.[10]

Four years later the Supreme Judicial Court came out the other way in Lovequist v. Conservation Comm'n of Dennis.[11] In that case, the court held that a local wetland bylaw was a valid exercise of the town's general police powers under the Home Rule amendment rather than as a zoning bylaw.[12]

The bylaw in Lovequist, as in Rayco, did not prohibit or comprehensively regulate any particular use. In contrast to Rayco, however, the court found that the impact on land use was merely incidental since its impact on land use came only from its purpose to protect wetlands values such as water supply and flood control, areas zoning does not typically concern.[13]

The court in Lovequist recognized that not all bylaws regulating land use are considered zoning laws, and that "municipal regulations that simply overlap with what may be the province of a local zoning authority" do not necessarily need to be "treated as zoning enactments which must be promulgated in accordance with the requirements of G. L. c. 40A."[14]

More recently, in Spenlinhauer v. Town of Barnstable,[15] the Appeals Court reached the opposite conclusion than in Lovequist, finding that an occupancy ordinance limiting off-street parking of vehicles was a subject that should be regulated through zoning. The bylaw at issue regulated parking on all land in single-family residence zoning districts.

Unlike in Lovequist, the bylaw comprehensively regulated parking in the town, creating more than an incidental impact on land use. Like in Rayco, the court determined that the town had historically regulated off-street parking through its zoning bylaws, and the purpose of the bylaw aimed to reduce parking density and its impact on the character of the town's neighborhoods — subject matters generally within the realm of zoning.[16] As such, the court held that the town's attempt to regulate off-street parking through its general police powers was impermissible.

While these cases provide some structure for determining the nature of a disputed bylaw or ordinance, they have also created confusion as to when it is permissible for a general bylaw to overlap with zoning and when such overlap is an exercise of zoning power.[17]

In short, because the above cases demonstrate that not all bylaws regulating land use are considered

zoning, and general bylaws can overlap with the subject matter of a zoning bylaw, they fail to provide clear articulation of when a municipality is engaging in zoning rather than exercising its general police powers. However, last year a decision from the Massachusetts Land Court regarding the regulation of marijuana, a topic that implicates both zoning and nonzoning concerns, provided additional guidance and insight into the regulatory authority of municipalities.

Regulating Marijuana Land Use

In 2016, residents in the commonwealth of Massachusetts voted in favor of legalizing adult use (recreational) marijuana. Since that vote, the commonwealth has established a commission known as the Cannabis Control Commission, that has promulgated regulations and is responsible for licensing marijuana establishments.

Independently, communities have been working to determine the best approach for regulating such establishments at the local level. Such local exercise is not inconsistent with state law because the statute regulating adult use marijuana specifically allows cities and towns to "adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments."[18]

Section 3(a) does not require that such bylaws be passed as zoning or general bylaws. The statute permits marijuana to be regulated by general law or by zoning, or both. Recently, in Valley Green Grow Inc. v. Town of Charlton,[19][20] the Land Court considered a municipality's ability to regulate the use of recreational marijuana through a general bylaw.

In May 2018, the town of Charlton adopted, by two-thirds vote, an amendment to the town's zoning bylaw allowing marijuana establishments by special permit in certain zoning districts.[21] In August 2018, a group of town residents brought two warrant articles to a special town meeting to eliminate the permitted recreational marijuana use.

Warrant Article 1 sought to repeal the prior enacted zoning bylaw and Warrant Article 2 sought to adopt a general bylaw banning recreational marijuana. Warrant Article 1 failed to garner the necessary two-thirds vote to rescind the zoning bylaw, but Warrant Article 2, the general bylaw, passed by majority vote.

On appeal, the Land Court concluded that because Charlton chose to regulate recreational marijuana use through its zoning bylaw, Warrant Article 2 "was an improper attempt by the Town to exercise its zoning power through a general bylaw by regulating a use already regulated in its zoning bylaw."[22]

In so holding, the Land Court surveyed the decisions in Rayco, Lovequist and Spenlinhauer, and from those cases provided a framework to determine whether a general bylaw intrudes on a subject that is or should be regulated by a zoning bylaw.[23]

The first step in the analysis is to "examine the subject matter of the challenged general bylaw" and determine if the general bylaw seeks to regulate the use of land, buildings or structures.[24] The purported rationale of the general bylaw must also be reviewed to ascertain whether, in actuality, it serves a purpose outside of the zoning context.

Further, consideration must be given to whether the subject has previously been regulated through zoning. If such a history exists, the subject matter may only be changed through a zoning bylaw, "not by using a general bylaw to change what is allowed by the zoning bylaw."[25]

Finally, even if the subject has been regulated through zoning, a general bylaw may be permissible so long as it does not conflict with the zoning law. For example, a general bylaw setting the terms of particular uses on individual applications for marijuana licenses does not violate the Home Rule amendment just because there is also a zoning bylaw in place limiting the number of licenses for marijuana establishments. A general bylaw may serve to supplement the zoning bylaw so long as it does not restrict or contradict it.[26]

While the ultimate holding in Valley Green Grow was straightforward, the detailed analysis has far-reaching implications both in and outside of the cannabis context. For those operating in the industry, it makes clear that adult-use marijuana establishments can still be regulated through general bylaws pursuant to General Law Chapter 94G Section 3(a).

But where the town has chosen to regulate marijuana through traditional zoning mechanisms, that regulation cannot be changed or repealed using the more lenient adoption requirements of a general bylaw. The Massachusetts attorney general has already relied on the holding in Valley Green Grow in disapproving a similar General Bylaw passed by the town of Brewster attempting to ban recreational marijuana previously permitted in Brewster pursuant to a zoning bylaw.

On a broader scale, the decision more clearly delineates principles derived from Rayco, Lovequist and Spenlinhauer to specify the circumstances where a municipality is prohibited from regulating a zoning matter pursuant to its general police power. It provides useful guidance to cities and towns contemplating regulatory changes and is a cautionary warning of the significance of reviewing regulatory history and carefully considering the means and methods of enacting or amending local regulations.

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[1] Mass. Const. art. 89, § 6.

[2] General Law Chapter 43B Section 10.

[3] General Law Chapter 43 Section 18.

[4] M.G.L. c. 40A.

[5] G.L. c. 40A, § 5.

[6] G.L. c. 40A, § 1A.

[7] Rayco Inv. Corp. v. Bd. of Selectmen of Raynham, 368 Mass. 385 (1975).

[8] Id. at 386, 392-393.

[9] Id. at 389-390.

[10] Id. at 392-393.

[11] Lovequist v. Conservation Comm'n of Dennis, 379 Mass. 7 (1979).

[12] Id. at 13.

[13] Id.

[14] Id. at 13-14.

[15] Spenlinhauer v. Town of Barnstable, 80 Mass. App. Ct. 134 (2011).

[16] Id. at 140-141.

[17] See American Sign & Indicator Corp. v. Framingham, 9 Mass. App. Ct. 66, 69 (1980) (sign bylaw overlapped with province of zoning, but did not require approval pursuant to c. 40A where it did not involve typical zoning concerns); Hamel v. Bd. of Health of Edgartown, 40 Mass. App. Ct. 420, 422 (1996) (sewage flow regulation overlapped with zoning use regulation did not require enactment as a zoning regulation where "the maintenance of safe drinking water in the geographical area" was the concern); Hancock Village I, LLC v. Town of Brookline, 2019 WL 4189357, at *8 (Mass. Land Ct. Sept. 4, 2019) (finding that the neighborhood conservation district bylaw does more than incidentally overlap with the domain of zoning).

[18] G.L. c. 94G, § 3(a).

[19] Valley Green Grow Inc. v. Town of Charlton, 2019 WL 1087930 (Land Court March 7, 2019).

[20] The decision has been appealed to the Massachusetts Appeals Court where it is presently pending.

[21] Valley Green Grow, Inc., 2019 WL 1087930, at *1.

[22] Id.

[23] Id. at *7-9.

[24] Id. at *9.

[25] Id.

[26] Id.