

2019 LAWYERS OF THE YEAR

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MICHAEL D. ROSEN

Ruberto, Israel & Weiner

Michael D. Rosen has been experiencing a bit of déjà vu from his work on behalf of developers hoping to convert a former apple orchard in Charlton into a state-of-the-art, 1-million-square-foot indoor cannabis cultivation facility.

The wariness toward the new industry reminds him of the chilly welcome given to cell towers after passage of the Telecommunications Act, Rosen says.

Fast forward a decade or two, and local residents are now far more concerned with their cellphone coverage than any perceived health effects of the towers that make that reception possible, he notes.

Rosen figures marijuana's day of near-universal acceptance will eventually arrive, too. But in the meantime, he is proud that, with support from colleagues Bradley L. Croft and Michael J. Duffy, he has been able to make new law and help ensure the fledgling industry has a fair opportunity to get its footing.

"At some point we have to embrace the fact that we adopted this set of laws and recognize that [cannabis] is here to stay."

They did so by getting Land Court Judge Robert B. Foster to agree that a Charlton Town Meeting vote purporting to pass a general bylaw to thwart their client, Valley Green Grow, was an improper attempt to exercise the town's zoning power.

Last August, Foster also agreed that Valley Green Grow's proposal constitutes a type of use — a greenhouse — allowed by right under the Charlton zoning bylaw. Moreover, because VGG proposes to process only the marijuana plants it grows on the property, its processing activities are also permissible accessory uses.

Those favorable decisions have not only brought VGG's vision closer to reality but have provided a helpful blueprint for other cannabis businesses to follow.

NIMBY, or "Not in My Backyard," is a term that gets thrown around a lot in the zoning context. In what ways was this like other cases in which neighbors get upset, and in what ways was it different?

This reminds me of the Federal Telecommunications Act. When that first came out, nobody wanted a cell tower built near them because of the fear of potential dangers.

Whenever you have new laws, there's not a lot of case history that you can base your arguments on. What I see in cannabis is this concept we argued in the telecommunication cases, which was effective



prohibition.

What would have been the implications if what Charlton tried to do by passing a general bylaw had worked?

One of the tried and true principles is that when a zoning law is adopted, you can't undo that zoning law with some other type of law. If you think about it, if you could undo with a 51 percent vote something that you had to adopt with a two-thirds vote, you would essentially be putting every permit or approval at risk, and that would cause fear within the development community.

Judge Foster's initial decision in your case was cited in a subsequent decision invalidating Brookline's "neighborhood conservation district bylaw." Does that suggest the decision will have impact beyond the marijuana context?

I think the law generally existed. This just reaffirms it and takes a fresh look at it.

Not only have courts cited it, but [so has] the Municipal Law Division of the Attorney General's Office. There was another community, Brewster, where they took the principles in our case and they declined a general bylaw.

In our case, because no one had tested this issue when it came to cannabis, the attorney general issued a warning but didn't reject the bylaw. Now, the attorney general has a tool with which it can reject bylaws.

Then there was another decision in your case in August on whether this was a greenhouse or agricultural use. How close of an issue was that?

That's probably more important than the general bylaw ruling, in that this truly is something that is cannabis centric.

We have General Laws 40A, §3, what everyone refers to as the Dover Act. Within the commonwealth, we choose certain things, and we give them certain exemptions or favored rights because we want to promote them. Solar is a good example; education is a good example; agriculture is a good example.

When it came to cannabis, after the original laws were adopted, there was a modification that

said, "Cannabis does not get the benefit of the Dover Act." The language that was chosen was "for purposes of this section, 40A, section 3, cannabis shall not be agriculture."

It didn't say anywhere in the laws anywhere else that cannabis wasn't agriculture. It just said "for the purposes of Section 3." But I think that emboldened communities to argue that cannabis isn't agriculture.

Are cities and towns becoming less resistant to cannabis businesses?

I think in 10 years, cannabis stores and cannabis cultivation are going to be no different than alcohol beverages. We embrace microbreweries right now. Everybody loves Trillium and Treehouse and Nightshift and all of the local breweries. They want them manufacturing in their communities. They want these outdoor beer gardens in their neighborhoods.

Cannabis still has that stigma to it. I don't think that stigma will be there in 15 or 20 years. But for now, anyone that's trying to get into that industry, just like cell tower carriers, is going to have to deal with that stigma.

Where does Valley Green Grow's project stand?

The determinations so far have been appealed. That will wind its way through the courts. I expect that will take six to nine months. Then the last portion of the trial that's in front of Judge Foster is the subdivision itself. That probably has another six months to go as well. I would say, in the most optimistic of scenarios, breaking ground in Charlton is a year away.

If your client can eventually begin its operations, it seems like there are plenty of potential customers.

Roughly 25 percent of the country admits to being regular cannabis users. If 25 percent admit it, what's the real number? At some point we have to embrace the fact that we adopted this set of laws and recognize that it is here to stay. We have to find a way to work cooperatively to get the benefits out of it that it was intended to produce.

— Kris Olson