# Marijuana businesses closely watching Land Court judge

*Asked to resolve conflict between bylaw and zoning*

By: Kris Olson January 17, 2019

Plaintiffs Valley Green Grow and owners of land in Charlton are proposing to build a state-of-the-art indoor cannabis cultivation facility.

A summary judgment motion being mulled by a Land Court judge has the potential to shake the foundations of the state's burgeoning recreational marijuana industry, attorneys say.

On Jan. 4, Judge Robert B. Foster heard oral arguments in a case brought by Valley Green Grow and the owners of land in Charlton on which VGG proposes to build a state-of-the-art, 1-million-square-foot indoor cannabis cultivation facility.

According to the plaintiffs, the "purely legal question" the case poses is whether a municipality can amend or repeal a zoning bylaw through the enactment of a conflicting general bylaw.

Among those watching closely are entrepreneurs hoping to cultivate and offer retail sales of marijuana in Brewster and Bourne, who are embroiled in a strikingly similar dispute.

The attorney for the Cape Cod developers said he is not surprised that the issue is recurring as the recreational marijuana industry builds out.

"It's that second look," said Benjamin E. Zehnder, referring to opposition that suddenly arises when a cannabis-related business is no longer a theoretical concept but rather a potential next-door neighbor.

Foster is believed to be the first judge asked to discern how much power the Legislature intended to give such objectors under Chapter 94G, the state's new recreational marijuana law. And the stakes could not be higher, said Boston attorney Michael D. Rosen, one of the Charlton plaintiffs' attorneys.

If the Land Court allows a general bylaw to trump Charlton's previously approved zoning bylaw, at risk will be the investments in cannabis businesses across the state, Rosen said. All that aggrieved people will need to do is rally enough support to get a majority vote at a Town Meeting to undo long-laid plans.

Zehnder agreed that if the courts hold that a general bylaw can wipe out any grandfathering protection a business might enjoy, such bylaws will "become a significant weapon in the arsenal" of those seeking to scuttle certain cannabis-related uses in a community.

**Controlling precedent?**

According to the plaintiffs in *Valley Green Grow, Inc., et al. v. Town of Charlton, et al.*, the Supreme Judicial Court and Appeals Court have already "squarely addressed and answered" the key question in the case.

In its 1975 decision *Rayco Investment Corp. v. Selectmen of Raynham*, the SJC ruled on the validity of a general bylaw seeking to limit the number of licenses for mobile home parks in Raynham. The SJC determined that the town was actually seeking to exercise its zoning power by enacting the bylaw and had historically regulated mobile home parks under its zoning bylaw.

A municipality's "independent police powers … cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature," the SJC wrote.

In 2011, the Appeals Court in *Spenlinhauer v. Town of Barnstable* "further elucidated and reaffirmed" the *Rayco* decision, according to the plaintiffs. In *Spenlinhauer*, a plaintiff who had been fined for violating a general bylaw limiting overnight parking successfully challenged the validity of the bylaw.

Guided by *Rayco*, the Appeals Court found that Barnstable was now trying to use a general bylaw to regulate that which had historically been governed by its zoning bylaw. Moreover, off-street parking was traditionally a land use and zoning concern.

Quoting from *Rayco*, the Appeals Court ruled that Barnstable could not use its general ordinance power to frustrate the purposes of the Zoning Act, Chapter 40A.

*Rayco* and *Spenlinhauer* "control the outcome of this case," the plaintiffs in *Valley Green Grow* claim. Charlton indisputably chose to regulate recreational cannabis uses under its zoning power and now can validly amend its zoning bylaw only by complying with the provisions of G.L.c. 40A, which require a two-thirds vote, they argue.

"If zoning bylaws can be disturbed through subsequent enactment of general bylaws (which only require a simple majority), it would render the two-thirds requirement meaningless," the plaintiffs write.

Boston real estate attorney Jesse H. Alderman agrees. Enabling opponents to go through the "back door" and obtain a majority vote to effectively undo a zoning amendment passed with a two-thirds vote "seems to not pass the common-sense test," he said.

**Dissenting view**

But at least one attorney disagrees. In an amicus brief, Northampton attorney Michael Pill argues that *Rayco* and *Spenlinhauer* can be distinguished from *Valley Green Grow* on the basis that neither of the previous cases dealt with legislation specifically authorizing non-zoning regulation of land use, as he argues Chapter 94G does.

The plaintiffs are now lobbying for the court to "abrogate that legislatively granted referendum right" to protect their financial investment, according to Pill.

"The prospect of a private person losing money, in a risky venture that proves unsuccessful, cannot be a proper basis for judicial interference with a legislatively mandated democratic process," he writes.

The situation in Charlton places in stark relief the import of the distinction between general and zoning bylaw. At its May 21, 2018, annual Town Meeting, Charlton adopted by a two-thirds vote a zoning bylaw allowing certain recreational marijuana uses by special permit in non-residential districts.

Abutters objecting to Valley Green Grow's massive proposed facility went to an Aug. 1, 2018, special Town Meeting seeking support for both a general bylaw banning all non-medical cannabis uses within the town and repeal of a previously adopted zoning bylaw.

They were able to muster majority support for the general bylaw, but attaining a two-thirds vote to repeal the zoning bylaw proved insurmountable. Before going into effect, that general bylaw must also be approved by a majority in a town-wide vote, which has been scheduled for May.

Valley Green Grow also submitted a subdivision plan last April 25, 2018, which it claims triggered a zoning freeze for the property under G.L. 40A, §6, which arguably shields VGG's proposal from subsequent zoning changes. However, if the general bylaw is deemed valid, it would wipe away VGG's grandfathering protection.

But Rosen said Pill cannot point to a case in which a general bylaw in direct conflict with a zoning bylaw has been allowed to stand. For example, in one case Pill cited, *Lovequist v. Conservation Comm. of Town of Dennis*, the court makes clear that there is nothing wrong with zoning and general bylaws that complement one another, or "overlap."

"If the town wanted to adopt a general bylaw for the Board of Health to have a right to annually review the cannabis permit to ensure that [the marijuana] is not being diverted into the underage marketplace, it could adopt that regulation, Rosen said. "That's not inconsistent with the zoning bylaw."

But here, the general bylaw and zoning bylaw are in direct opposition, he added.

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**Guidance from AG murky**

Since Massachusetts legalized recreational marijuana in the 2016 state election, cities and towns have taken widely varying approaches to regulating cannabis businesses.

To the extent that the Attorney General's Office has offered guidance on the topic, it has told cities and towns that either zoning or general bylaws are acceptable under Chapter 94G, while gently nudging them down the zoning path.

A case in point is Assistant Attorney General Margaret J. Hurley's Sept. 13, 2018, letter to Charlton's town clerk. Asked to weigh in on the passage of the general bylaw as Article 2 at the Aug. 1 special Town Meeting, Hurley wrote that it "does not present clear conflict with the local control procedures set forth in G.L.c. 94G, §3."

But, she continued, "an argument could be made that the Article 2 prohibition is better suited to regulation as a matter of zoning."

Referencing *Spenlinhauer*, Hurley said "[s]uch an argument might carry enhanced weight in Charlton, where the Town has historically chosen to regulate marijuana establishments by way of a zoning by-law, rather than a general by-law."

Yet Hurley steered clear of the issue now before Judge Foster, the purported conflict between the general bylaw and previously adopted zoning bylaw. Such a determination is beyond the scope of the AG's authority under G.L.c. 40, §32, Hurley said. The AG can disapprove a bylaw only when it presents a clear conflict with state law or the Constitution, not other bylaws of the town, she explained.

Hurley did not call for a halt of Charlton's May vote on the general bylaw. Indeed, she offered a reminder that because Charlton voters voted "yes" on Question 4 in the 2016 state election, the bylaw amendments "must be approved at a municipal election before they have legal effect."

**Ancillary issues**

The fiercest opposition to Valley Green Grow's summary judgment motion has come from Charlton attorney Francis B. Fennessey, representing intervenor Gerard F. Russell.

Fennessey believes there are other issues to resolve before even getting to the conflict between the zoning and general bylaws, though he was not encouraged that Foster will grapple with them, given the tenor of the oral arguments.

For one thing, Valley Green Grow is looking to vindicate its rights under a host community agreement that may not be valid, according to Fennessey, given that Charlton Town Meeting never authorized the selectmen to make that contract.

"If you don't have an enforceable contract, you don't have rights," he said.

Foster said he needed to be convinced to address that issue, indicating he was inclined to "leave some work for other judges."

Fennessey and fellow residents took their disenchantment over the host community agreement to a special Town Meeting on Oct. 15, winning approval for amendments to the town's general bylaws requiring that Town Meeting

approve any community host agreements regarding marijuana establishments. The proposed bylaw also declares "null and void" any previously signed agreements that do not comply with Chapter 94G.

But on Jan. 15, the AG's Office rejected the amendments, saying they interfere with the selectmen's contracting authority and violate G.L.c. 94G, §3, by imposing "unreasonably impracticable" requirements on cannabis businesses.

"A reasonably prudent business person would not likely be able to expend time and money negotiating the terms of a detailed host community agreement with a town if all the terms are then contingent on a town meeting vote, the outcome of which is entirely unforeseeable," Hurley wrote.

Fennessey added that the terms of Charlton's host community agreement are not consistent with the provisions of 94G, which he said authorize cities and towns to recoup expenses associated with hosting cannabis businesses, such as increased police patrols. The Legislature capped such payments at 3 percent of the business's gross sales.

But by Fennessey's estimation, Valley Green Grow has promised to pay the town far more: an initial $500,000 payment and a minimum annual development fee of another $400,000. Charlton's selectmen — like city and town officials elsewhere in the state — could not resist the money grab, even though the statute does not authorize it, he said.

Valley Green Grow now must also appeal a controversial adverse vote taken by the Charlton Planning Board on Jan. 2, denying its site plan approval. According to press reports, the board appeared to take that vote in defiance of the advice of its own legal counsel.

At the hearing before Foster two days later, Rosen explained that Charlton's bylaw requires the Planning Board decision to be appealed in Superior Court, but Foster indicated the matter might soon end up before him instead.

"We might accept a transfer of that," he said.

Foster, however, seemed disinclined to engage with a sweeping argument made by Pill and adopted by Fennessey: that Chapter 94G is entirely invalid under the Supremacy Clause of the U.S. Constitution because marijuana is still illegal under the federal Controlled Substances Act.

"There's a limit to my subject matter jurisdiction," Foster said.

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