Brooks v. City of Haverhill, 2021 Mass. App. Unpub. LEXIS 579

Appeals Court of Massachusetts
August 16, 2021, Entered
20-P-1008

Reporter
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J. BRADFORD BROOKS**1** & others**2** *vs*. CITY OF HAVERHILL & others.**3**

Notice:

Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace* v. *Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

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Prior History: Brooks v. City of Haverhill, 2020 Mass. LCR LEXIS 105, 2020 WL 2847542 (June 2, 2020)

Disposition:

Judgment affirmed.

Core Terms

zone, establishments, marijuana, ordinance, licensed, retail, adult, use marijuana, spot zoning, downtown, overlay, buffer zone, purposes, siting, bylaw

Judges: SHIN, DITKOFF & WALSH, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, various entities involved in businesses in the downtown Waterfront District in Haverhill, appeal from an order of a Land Court judge granting summary judgment to the City of Haverhill (city) and Haverhill Stem, LLC; Pineau Projects, LLC; and The Westland Group, LLC (collectively, Stem) on the plaintiffs' challenge to the city's zoning bylaw regarding licensed marijuana establishments. Concluding that permitting a retail marijuana store in the busy, downtown Waterfront District regardless of its proximity to public parks and schools bears a rational relation to a legitimate zoning purpose and is not spot zoning, we affirm.

1. *Standard of review*. In evaluating the allowance of a motion for summary judgment, "we review de novo whether there were genuine issues of material fact." *Cellco Partnership* v. *Peabody*, 98 Mass. App. Ct. 496, 500, 157 N.E.3d 609 (2020). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Molina* v. *State Garden, Inc.*, 88 Mass. App. Ct. 173, 177, 37 N.E.3d 39 (2015), quoting *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991). "In order to defeat summary judgment, the [opposing party is] required to 'set [*2] forth specific facts showing that there is a genuine issue for trial.'" *Athanasiou* v. *Selectmen of Westhampton*, 92 Mass. App. Ct. 94, 98, 82 N.E.3d 436 (2017), quoting Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974).

2. *Zoning amendment*.**4** "[D]ue process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose." *Zuckerman* v. *Hadley*, 442 Mass. 511, 516, 813 N.E.2d 843 (2004). "[A] strong presumption of validity is to be afforded to [a] challenged bylaw or ordinance." *DiRico* v. *Kingston*, 458 Mass. 83, 95, 934 N.E.2d 208 (2010). This "presumption 'will not normally be undone unless the plaintiff can demonstrate "by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety … or general welfare."'" *Id.*, quoting *Durand* v. *IDC Bellingham, LLC*, 440 Mass. 45, 51, 793 N.E.2d 359 (2003). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" *DiRico*, *supra*, quoting *Durand*, *supra*.

In 2018, the city amended its zoning ordinance to create the Licensed Marijuana Establishments Overlay Zone (overlay zone). See *Valley Green Grow, Inc.* v. *Charlton*, 99 Mass. App. Ct. 670, 674 (2021) ("a city or town may impose reasonable local control over the time, place, and manner of marijuana establishment operations"). The purposes of the overlay zone are set out as the following:

"A. To provide for the placement of adult use marijuana establishments in appropriate [*3] places and under specific conditions in accordance with the provisions

of MGL c. 94G, Regulation of the Use and Distribution of Marijuana Not Medically Prescribed.

"B. To minimize any adverse impacts of adult use marijuana establishments on adjacent properties, dense or concentrated residential areas, school [*sic*] and other places where children congregate, and other sensitive land uses.

"C. To regulate the siting, design, placement, access, security, safety, monitoring, modification and discontinuance of adult use marijuana establishments.

"D. To provide applicants, owners and operators with clear guidance regarding adult use marijuana establishments siting, design, placement, access, security, safety, monitoring, modification and discontinuance."

Ordinances, § 255-196, of the city of Haverhill.

The overlay zone created four different zoning areas designating various permissible locations for retail and medical marijuana establishments. One such zoning area, the "Licensed Marijuana Establishments - Retail Sales Only" zone (retail marijuana zone), includes the store at issue. Section 255-199(B) of the ordinance, the "[b]uffer zone" provision, states the following:

"No [licensed marijuana [*4] establishment] outside the Waterfront District Area (WDA) shall be located within 500 feet of the following preexisting structures or uses: any school attended by children under the age of 18, licensed childcare facility, municipally owned and operated park or recreational facilities (not including bikeways, boardwalks, pedestrian paths, or other facilities primarily used for nonvehicular modes of travel), churches or places of worship, libraries, playground or play field, or youth center."

Stem's store is located in the Waterfront District Area, and thus is not subject to the buffer zone provision.**5**

Contrary to the plaintiffs' contention, the retail marijuana zone, including the absence of a buffer zone in the Waterfront District, is substantially related to several purposes of the adoption of the ordinance.**6** The retail marijuana zone allows for the "provi[sion] [of] the placement of adult use marijuana establishments in appropriate places and under specific conditions." The city could reasonably conclude that the Waterfront District is a particularly well-suited location for a retail marijuana store. According to § 255-124(C) of the ordinance, the Waterfront District allows, "as of right," [*5] "[r]etail, business and consumer service establishments." A main objective of the Waterfront District is to "create a retail and restaurant base that downtown residents can utilize." The Waterfront District is "best viewed as the heart of Haverhill's downtown," consisting of "art galleries; the sale of food, groceries, clothing, dry goods, books, art, flowers, paint, hardware, and appliances; coffee shops, bars; cocktail lounges; banks; offices; and consumer services." As "pedestrian activity in the downtown is encouraged," the elimination of a buffer zone in this area is rationally related to a legitimate zoning purpose: generating foot traffic and promoting retail development. See *Durand*, 440 Mass. at 56 (rezoning that allowed building of power plant neither arbitrary nor unreasonable where abutted land zoned for industrial use and town-appointed task

force recommended rezoning after studying town's tax base and need for economic development).**7**

Although one of the purposes of the ordinance is to "minimize any adverse impacts of adult use marijuana establishments on adjacent properties, dense or concentrated residential areas, school [*sic*] and other places where children congregate," the ordinance has [*6] other measures in place to ensure that this purpose is furthered and to allow the city to regulate the siting, design, and operation of any marijuana store. Ordinances, § 255-196. These measures consist of special permitting and site plan review requirements, limitations on hours and operations, specific design requirements, licensing requirements, proof of site control, a traffic study, odor control, and a security plan, among others. Ordinances, §§ 255-201, 202, 203, 204, 205. Not only does the ordinance allow the city to regulate marijuana establishments, but it also permits the city to "provide applicants, owners and operators with clear guidance regarding adult use marijuana establishments." Ordinances, § 255-196. The absence of a buffer zone in a busy, downtown area, in light of other requirements allowing for the regulation of a marijuana store, is neither arbitrary nor unreasonable.
See *Sturges* v. *Chilmark*, 380 Mass. 246, 256-257, 402 N.E.2d 1346 (1980) ("any possible permissible legislative goal which may rationally be furthered by the regulation will support a measure's constitutionality").**8**

3. *Spot zoning*. "Spot zoning does not occur unless it is shown that a parcel has been singled out from similar surrounding parcels 'all for the economic [*7] benefit of the owner of that lot'" (footnote omitted). *W.R. Grace & Co. - Conn.* v. *City Council of Cambridge*, 56 Mass. App. Ct. 559, 570 (2002), quoting *Lamarre* v. *Commissioner of Pub. Works of Fall River*, 324 Mass. 542, 545, 87 N.E.2d 211 (1949). "The party challenging an amendment as spot zoning has the heavy burden of showing that it conflicts with the enabling act." *Andrews* v. *Amherst*, 68 Mass. App. Ct. 365, 369, 862 N.E.2d 65 (2007). A legislative decision of a town will not be invalidated "based upon the alleged motive the town had in enacting the legislation." *Id.* at 368.

The plaintiffs suggest that spot zoning is occurring because § 255-199(D) of the ordinance states that "[n]o [licensed marijuana establishment] shall be located within 1/2 mile of another licensed LME," and this restriction would not allow another marijuana shop in the Waterfront District. Even putting aside the fact that the section also states that "[t]he City Council may modify or waive this requirement," this is no way establishes that any particular parcel "has been singled out from similar surrounding parcels." *W.R. Grace & Co. - Conn.*, 56 Mass. App. Ct. at 570. This requirement applies to all zones which permit licensed marijuana establishments, and not just the Waterfront District. Furthermore, restrictions on the number of establishments that may be in proximity are familiar and proper zoning tools. Cf. G. L. c. 40A, § 9A ("zoning ordinance or by-law … may provide that the proposed use be a specific distance [*8] … from any other adult bookstore or adult motion picture theatre or from any establishment licensed under the provisions of section twelve of chapter one hundred and thirty-eight"); *Arno* v. *Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 88, 384 N.E.2d 1223 (1979), quoting *Connolly* v. *Alcoholic Beverages Control Comm'n*, 334 Mass. 613, 619, 138 N.E.2d 131 (1956) (with respect to alcohol, "[i]n dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers"). As the retail marijuana zone amendment is neither arbitrary nor

unreasonable and does not conflict with the purposes of the enactment of the overlay zone, we need not speculate about "the alleged motive the town had in enacting the legislation." *Andrews*, 68 Mass. App. Ct. at 368. Accord *W.R. Grace & Co. - Conn.*, *supra* at 570 ("Once it is established … that the amendments have a substantive relationship to the promotion of the public welfare, the amendments are not, by definition, spot zoning, irrespective of the subjective purposes of the sponsors").

4. *Judicial notice*. The plaintiffs argue that the judge erred in not taking judicial notice of the Federal and state schoo1 zone statutes. See G. L. c. 94C, § 32J (enhanced penalty for violating controlled substances **law** within three hundred feet of a school under [*9] certain circumstances); 21 U.S.C. § 860(a) (enhanced penalty for violating controlled substances **law** within, inter alia, one thousand feet of a school or playground). Putting aside the dearth of evidence in the summary judgment record suggesting that a school or playground is near the establishment, G. L. c. 94G, § 5 (*b*) (3) provides that a **municipality** may allow a licensed medical establishment to be located near a school, notwithstanding G. L. c. 94C, § 32J or 21 U.S.C. § 860(a). Similarly, the entire licensing scheme reflects that compliance with Federal controlled substances **law** is not a requirement of marijuana establishment licensing or zoning. Nothing in these school zone statutes suggests that the creation of the overlay zone, including the elimination of the buffer zone in the Waterfront District, was either arbitrary or unreasonable.

Judgment affirmed.

By the Court (Shin, Ditkoff & Walsh, JJ.**9**),

Entered: August 16, 2021.

Footnotes

- **1**

  As a trustee of the L&B Realty Trust.

- **2**

  Lloyd Jennings, as a trustee of the L&B Realty Trust; Stavros Dimakis doing business as Mark's Deli; and Stavros Dimakis, as trustee of the Evthokia Realty Trust.

- **3**

  Haverhill Stem, LLC; Pineau Projects, LLC; and The Westland Group LLC.

- **4**

The **city** and Stem do not contest that the plaintiffs have standing. See *Van Renselaar* v. *Springfield*, 58 Mass. App. Ct. 104, 107, 787 N.E.2d 1148 (2003) ("for purposes of … standing to challenge local legislation that adopts or amends a zoning ordinance or by-**law**, it is sufficient for … plaintiffs to have established that they will suffer an adverse impact from the legislative zoning action, without establishing, in addition, that their injury is special and different from the concerns of the rest of the community").

- **5**

  Although there are two small parks in the Waterfront District, they do not have playground equipment or other amenities particularly likely to attract children, and there are no preexisting schools near the store.

- **6**
  It is of no matter that the **city**'s Medical Marijuana Zoning Amendment incorporated a buffer zone in the Waterfront District. There is no reason that the proper siting of a medical facility and a retail store must be the same. Cf. *Rogers* v. *Norfolk*, 432 Mass. 374, 379, 734 N.E.2d 1143 (2000) ("a court should not stray from the mandates of settled **law** and strip a zoning provision of its presumption of validity because the provision imposes greater restrictions on child care facilities than on other uses"). Similarly, the Downtown Smart Growth Overlay District, which shares a subzone with the Waterfront District, permits, in the subzone where the store is located, mixed-use development, and expressly permits "[r]etail, business and consumer service establishments." Ordinances, § 255-124.
- **7**
  The notice provision, set out in § 255-199(C) of the ordinance, states, "Applicants seeking to establish an [*sic*] [licensed marijuana establishment] within the Waterfront District Area (WDA) must notify adjacent property owners, as well as any preexisting licensed childcare facility for children under the age of 18, church or place of worship, or youth center, within 300 feet of the proposed site of the initial application for a special permit." Contrary to the plaintiffs' complaint that the notice provision is arbitrary and unreasonable, the notice requirement reasonably provides for the protection of those who may have concerns about a marijuana establishment to receive early notice and enables them to bring their concerns forward in a timely manner before any establishment is permitted and licensed.
- **8**
  The retail marijuana zone does not violate G. L. c. 40A, § 4, which states, "Any zoning ordinance or by-**law** which
  divides **cities** and **towns** into districts shall be uniform within the

district for each class or kind of structures or uses permitted." The requirements are the same for any marijuana store in the Waterfront District. Moreover, "[t]here is no requirement of a comprehensive plan under our zoning enabling act." *Noonan* v. *Moulton*, 348 Mass. 633, 639, 204 N.E.2d 897 (1965); *Rando* v. *North Attleborough*, 44 Mass. App. Ct. 603, 612, 692 N.E.2d 544 (1998) ("The most that can be thought required is an analysis by town officials before the zoning decision of land use planning considerations"). Nonetheless, according to the principal author of the zoning ordinance which established the Waterfront District in 2014, "[e]xtensive planning studies were conducted by the Haverhill Department of Economic Development & Planning." Contrast *National Amusements, Inc.* v. *Boston*, 29 Mass. App. Ct. 305, 312, 560 N.E.2d 138 (1990) (in light of "lack of land use study and the illogic of the ostensible reasons for the rezoning," where "no better purpose than to torpedo a specific development on a specific parcel," zone change arbitrary and unreasonable).

- **9**

  The panelists are listed in order of seniority.