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**SJC NO.  
APPEALS COURT  
NO. 2021-P-0765**

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APPEALS COURT  
NO. 2021-P-0765**

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This case presents a novel issue of significant public interest. Prior to 2017, the sale of marijuana in the Commonwealth was a crime. The enactment of G.L. c. 94G in 2017 changed this by legalizing the sale of marijuana. This was a momentous change, but it was not completely laissez-faire. The Legislature expressly reserved to municipalities some authority to regulate recreational marijuana establishments. This dispute raises questions concerning the scope of this authority, and the manner in which such regulations must be adopted. Among the several issues presented by this case is the question whether a municipality has authority to regulate the sale of recreational marijuana pursuant to a General Bylaw adopted in accordance with the requirements of

the Home Rule Amendment, or whether such regulations must be enacted by way of a Zoning Bylaw approved by two-thirds vote of Town Meeting.

The decision of whether, and how, a town or city allows or prohibits the sale of recreational marijuana has proved to be a question of how a community defines itself. In the Town of Bourne, like several other towns, this resulted in contentious Town Meetings and several close votes.

The Supreme Judicial Court has recently addressed the Home Rule Amendment's effect on a local regulation regarding medical marijuana in its Decision on August 30, 2021 in West Street Associates, LLC vs. Planning Board of Mansfield & another, 488 Mass. 319. While this Decision provides valuable guidance, the instant case focuses on a different interaction between the Home Rule Amendment and municipal ordinances implementing the provisions of G.L. c. 94G: whether cities and towns are required to regulate recreational marijuana through zoning amendments or whether they may utilize the Home Rule Amendment to adopt ordinances that comport with the requirements of G.L. c. 94G § 3(a). Municipalities seek guidance from the Court on where they stand when a purveyor of recreational marijuana comes to town and wants to set up shop. Given the nature of the substance being regulated, and the public interests at stake, it would be appropriate that judicial guidance on this matter be promulgated by the Supreme Judicial Court.

### **Request for Direct Appellate Review**

Now comes the Town of Bourne, a municipal corporation organized under the laws of the Commonwealth of Massachusetts, with offices at 24 Perry Avenue, Buzzards Bay, MA, and respectfully petitions This Honorable Court to grant this Application for Direct Appellate Review of the Appeal filed by The Haven Center, Inc. and MacArthur Park Place LLC (hereinafter “Haven”) entered on the Docket of the Massachusetts Appeals Court on August 23, 2021.

In support of said Application, the Town of Bourne respectfully suggests that the Appeal of the Decision of the Barnstable Superior Court poses a question of first impression regarding recently enacted G.L. c. 94G, § 3(a) as well as a novel question of law that warrants a final determination by the Supreme Judicial Court. The Appeal of the Decision of the Barnstable Superior Court also poses questions of law concerning the Home Rule Amendment to the Massachusetts Constitution (Article LXXXIX) as well as questions of such public interest about the authority of a municipality to regulate issues, including marijuana, under the authority and within the strictures of the Home Rule Amendment.

### **Statement of Prior Proceedings**

On April 9, 2019, a Complaint was filed in Barnstable Superior Court by Haven after being transferred from the Massachusetts Land Court asserting that Bourne’s General Bylaw regarding non-medical cannabis facilities violates the Zoning Act. On September 17, 2000, Haven moved for Summary Judgment and the Town subsequently filed an Opposition to Haven’s Motion. After Hearing, the Superior Court (Perrino, J.), denied Haven’s Motion for Summary Judgment on April 13, 2021, thereafter denied a

Motion for Reconsideration on June 4, 2021 and the Superior Court entered Judgment on June 23, 2021 declaring that the General Bylaws of the Town of Bourne are valid.

### **Short Statement of Facts**

A municipality may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments. See G.L. c. 94G, § 3(a). On May 2, 2017, the Town of Bourne adopted an amendment to its Zoning Bylaw imposing a Temporary Moratorium on Recreational Marijuana Establishments in order “to consider amending the Zoning Bylaw regarding regulation of recreational Marijuana Establishments.” The Attorney General approved the Moratorium amendment on July 10, 2017. On March 26, 2018, the Bourne Town Meeting rejected an amendment to the Zoning Bylaw that would add “marijuana” to the Table of Uses as well as an amendment to the General Bylaw prohibiting any type of licensed marijuana-related businesses within the Town. On October 1, 2018, the Town Meeting approved a General Bylaw prohibiting commercial Recreational Marijuana Establishments and rejected proposed amendments to the Zoning Bylaw that would regulate recreational marijuana through zoning restrictions. On October 29, 2019, the Bourne Town Meeting voted to indefinitely postpone additional proposed amendments to the Zoning Bylaw and rejected an Article repealing the General Bylaw enacted in 2018 that is the subject matter of this litigation.

### **Statement of Issues of Law**

- 1) Whether a municipality may utilize the authority of the Home Rule Amendment to regulate the operation of recreational marijuana establishments?
- 2) Whether a municipality is required to utilize the provisions of G.L. Chapter 40A to regulate the operation of recreational marijuana establishments?
- 3) Whether G.L. c. 94G, § 3(a) permits municipalities to regulate operation of recreational marijuana establishments by general law even if there is previous regulation by zoning enactments?

**Brief Argument in Support of Application  
for Direct Appellate Review**

Plaintiffs claim that the Decision of the Barnstable Superior Court is erroneous because the Town of Bourne adopted a Moratorium to examine whether the Town should adopt Zoning Ordinances regulating recreational marijuana. Citing the Decisions in Rayco, Inv. Corp. v Selectmen of Raynham, 368 Mass. 385 (1975) and Spenlinhauer v. Town of Barnstable 80 Mass. App. Ct. 134 (2011), they assert that the Town was consequently precluded from regulating operation of marijuana establishments through a General Bylaw and that the Town was required to utilize G.L. Chapter 40A. The Town argues that the clear language of G.L. c. 94G, § 3(a) permits a municipality to regulate operation of recreational marijuana through adoption of a General Bylaw.

The Town maintains that the plenary scope of the language of the Home Rule Amendment to the Massachusetts Constitution imbues the Town Meeting with authority to regulate a variety of subjects, including marijuana. Section 6 of Article LXXXIX of the Constitution of the Commonwealth provides: “Any 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 in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.” Reading the Home Rule Amendment and G.L. c. 94G, § 3(a) together suggests that a municipality has the option to regulate recreational marijuana through a local ordinance.

The Supreme Judicial Court has formulated seminal interpretations describing the breadth of the Home Rule Amendment in Bloom vs. City of Worcester, 363 Mass. 136 (1973) and Lovequist vs. Conservation Commission of Dennis, 379 Mass. 7 (1979). These Decisions provide flexibility for municipalities to use local ordinances to address issues and be “free to adopt more stringent controls.” Golden v. Town of Falmouth, 358 Mass. 519, 526. (1970). Cities and towns are vested with authority under the Home Rule Amendment to use local ordinances to establish standards other than the minimum rules reflected in statutes. Haven’s argument here is similar to the arguments the Supreme Judicial Court rejected in Lovequist vs. Conservation Commission of Dennis, 279 Mass 7, (1979) that because the municipal ordinance regulated land use, “...it is by nature a

zoning enactment” and “...that all local wetland enactments are zoning measures and must comply with the procedural protections of G.L. c. 40A.” *Id* at 12.

In permitting municipalities to regulate activities that were previously unlawful, the General Court has enfranchised communities to regulate operation of recreational marijuana establishments through “ ... ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments ...” See G.L. c. 94G, § 3(a). Because this is a case of first impression, involving novel issues of law and implicating constitutional issues, the Supreme Judicial Court should interpret what best promotes the public interest in evaluating how to implement legislative intent.

#### **Statement of Reasons Why Direct Appellate Review is Appropriate**

It is respectfully suggested that Direct Appellate Review is appropriate because this is a novel question of law interpreting a recent significant statutory enactment that should be decided by the Supreme Judicial Court and because it relates to issues implicating public interest to cities and towns throughout of the Commonwealth of Massachusetts. Additionally, Direct Appellate Review is appropriate because the case invites application of the interpretation of the Home Rule Amendment that the Supreme Judicial Court promulgated in Bloom vs. City of Worcester, 363 Mass. 136, (1973) and Lovequist vs. Conservation Commission of Dennis, 379 Mass. 7 (1979).

The Town respectfully appends the following documents and incorporates them by reference: Memorandum of Decision and Order on Plaintiffs’ Motion for Summary Judgment; Endorsement on Motion for Reconsideration; Judgment of the Superior Court;

Docket Sheet 1972CV00164 The Haven Center, Inc. et al vs. Town of Bourne et al.



DATED: September 13, 2021

Respectfully submitted,  
For the Appellees, Town of Bourne  
And Members of Board of Selectmen  
of the Town of Bourne,  
By their Attorney,

/s/ Robert S. Troy  
Bourne Town Counsel  
BBO#503160  
Troy Wall Associates  
90 Route 6A  
Sandwich, MA 02563  
(508) 888-5700  
[rst@troywallassociates.com](mailto:rst@troywallassociates.com)

## CERTIFICATE OF SERVICE

I, Robert S. Troy, hereby certify that a true copy of the foregoing Application for Direct Appellate Review was served on this day by the efile system to:

Benjamin E. Zehnder, Esq.  
LaTanzi, Spaulding & Landreth  
8 Cardinal lane  
P.O. Box 2300  
Orleans, MA 02653  
[BZehnder@latanzi.com](mailto:BZehnder@latanzi.com)

DATED: September 13, 2021

/s/ Robert S. Troy  
Robert S. Troy

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 1972CV00164

THE HAVEN CENTER, INC., and another,<sup>1</sup>  
Plaintiff,

vs.

TOWN OF BOURNE and others,<sup>2</sup>  
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The Haven Center, Inc. ("Haven") seeks to operate a medical and adult-use marijuana retail sales and cultivation business on a property it leases from MacArthur Park Place LLC ("MacArthur"), located within the town of Bourne (the "Town"). After a town meeting, voters adopted an amendment to the Town's Zoning Bylaws (the "Zoning Bylaws") imposing a temporary moratorium on recreational (nonmedical) marijuana facilities and approved a General Bylaw prohibiting the operation of all nonmedical marijuana establishments within the Town of Bourne. Haven then filed this action seeking a Judicial Determination of Validity of General Bylaw Pursuant to G. L. c. 240, § 14A (Count I) and a Declaratory Judgment of Invalidity of General Bylaw Pursuant to G. L. c. 231A, § 1 (Count II).<sup>3</sup> The plaintiffs move for summary judgment, which the defendants oppose. For the reasons discussed below, the plaintiffs' Motion for Summary Judgment is **DENIED**.

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<sup>1</sup> MacArthur Park Place LLC.

<sup>2</sup> Peter J. Meier, Judith MacLeod-Froman, James L. Potter, George G. Slade, and Jared P. MacDonald as Members of the Board of Selectmen for the Town of Bourne.

<sup>3</sup> Two additional counts, Counts III and IV, related to approval of a Host Community Agreement, were previously dismissed.

## **BACKGROUND**

Haven leases property owned by MacArthur, located at 340 MacArthur Boulevard, in Bourne (the “property”).<sup>4</sup> Haven planned to operate a medical marijuana dispensary and adult-use recreational marijuana retail sales and cultivation business at that location. The property is located within a B4 zoning district, which allows retail sales by special permit issued by the Planning Board.

On October 7, 2015, the Bourne Board of Selectmen issued a letter of “support” indicating that they “verified with the appropriate local officials that the proposed facility was located within a zoning district that allows such use by right or pursuant to local permitting.” The letter referred only to a “Registered Marijuana Dispensary (medical).” In June of 2016, Haven received a Provisional Certificate from the Cannabis Control Commission to operate a medical dispensary at the property.

On May 2, 2017, the voters at a Bourne Town Meeting approved, by more than the two-thirds required, Warrant Article 23, an amendment to the Zoning Bylaws that imposed a temporary moratorium (the “Moratorium”) on Recreational Marijuana Establishments. The express purpose of the Moratorium was to provide the Town,

“...time to examine the legal, planning and public safety issues attendant to regulation of recreational marijuana as well as to address the potential impact of State regulations on local zoning and to undertake a planning process *to consider amending the Zoning Bylaw* regarding regulation of recreational Marijuana Establishments.”

(Emphasis added). By its terms, the Moratorium remained in place until either November 30, 2018, or until the Town adopted Zoning Bylaw regulations concerning Recreational Marijuana Establishments, whichever event occurred earlier. During the period of the Moratorium, the

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<sup>4</sup> The undisputed facts are drawn from the summary judgment record, including the parties’ agreed-upon facts, with certain additional facts reserved for discussion below.

Town was to “consider adopting new Zoning Bylaws in response to these issues on or before the expiration of the moratorium.” The Office of the Attorney General issued a by-law approval letter approving Article 23, the Moratorium, on July 10, 2017.

A March 26, 2018 Bourne Town Meeting presented voters with two articles relevant here. The first article proposed amending Section 2220 of the Bourne Zoning Bylaws to add “Marijuana Establishment” to the Commercial Uses zoning table, and specifically include nonmedical marijuana in Section 2240, Accessory Scientific Uses, which authorizes certain listed uses by special permit. Article 2, a proposed General Bylaw, sought to prohibit any type of licensed marijuana-related businesses within the Town. Neither garnered the necessary votes to pass.

The issue was apparently not yet settled, and two additional warrant articles were presented to Town Meeting voters on October 1, 2018.<sup>5</sup> First came Article 14, a proposed General Bylaw that sought to amend Section 3.1, Public Safety and Good Order, of the Town’s General Bylaws to prohibit commercial Recreational Marijuana Establishments. By majority vote, Article 14 was adopted. The next item on the Warrant, Article 15, proposed several amendments to the Zoning Bylaws that generally sought to regulate recreational marijuana use through zoning restrictions and approval of such uses by special permit. Article 15, which immediately followed the General Bylaw article and required a two-third vote, did not pass.

On October 29, 2019, a town meeting again debated the issue. This Article, Article 10, proposed to regulate recreational marijuana by amending the Zoning Bylaws to adopt certain zoning restrictions on recreational marijuana and approval by special permit. A duly made

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<sup>5</sup> In the interim, in August of 2018, the Bourne Board of Health enacted Regulations Restricting the Sale of Marijuana that, among other things, implemented a process by which recreational marijuana use and distribution operations could obtain a permit from the Board of Health so long as the facility complied with regulations within the Board’s jurisdiction.

motion to indefinitely postpone Article 10 passed. Also, at that town meeting, an article repealing the General Bylaw prohibiting recreational (nonmedical) marijuana uses did not pass.

Aside from the Moratorium, the Town never adopted an amendment to the Zoning Bylaws regulating marijuana. The table of allowable uses in the Town Zoning Bylaw does not include a retail establishment use for the sale of recreational marijuana in any Zoning District of the Town.

## **DISCUSSION**

### **A. Standard of Review**

The standard of review for 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 a judgment as matter of law. Mass. R. Civ. P. 56; *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991) (quotations omitted). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of her case at trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

### **B. Analysis**

Pursuant to G. L. c. 94G, § 3(a), "a city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments...." Specifically, municipalities may enact bylaws that (1) "govern the time, place and manner of marijuana establishment operations" and (2) "limit the number of marijuana establishments in the city or town," and (3) "restrict the licensed cultivation, processing and manufacturing of marijuana that is a public nuisance." G. L. c. 94G, § 3(a)(1)-(3). A municipality may do so by enacting a

zoning or general bylaw. *Id.* Additionally, a municipality whose voters rejected the 2016 statewide ballot initiative to legalize marijuana, as the voters did in Bourne, could limit or ban the number of marijuana establishments by “passing a bylaw or ordinance prior to December 31, 2019.” See Cannabis Control Commission January 2018 “Guidance for Municipalities Regarding Marijuana for Adult Use.” That the statute or the Guidance authorizes a municipality to limit or ban recreational adult marijuana establishments does not appear disputed. The dispute here is the way Bourne did so.

Haven argues that the Town regulated recreational marijuana facilities through the Zoning Bylaws by enacting the temporary Moratorium as a Zoning Bylaw. Therefore, the plaintiffs argue that the General Bylaw prohibiting recreational marijuana facilities is invalid because it impermissibly attempts to regulate an area controlled by a Zoning Bylaw, the Moratorium. The Town argues it never previously regulated marijuana uses through zoning, except for the temporary Moratorium, and enacting the General Bylaw is a valid exercise of its authority under the Home Rule Amendment.<sup>6</sup>

As noted above, Haven asserts that once a municipality chooses to regulate recreational marijuana, or other matters, through a zoning bylaw, it may only continue to do so by amending the zoning bylaw; it may not use a general bylaw to change what is regulated by the zoning bylaw. *Spenlinhauer v. Town of Barnstable*, 80 Mass. App. Ct. 134, 141 (2011) (zoning bylaw requirements of G. L. c. 40A, § 5 cannot be circumvented by passing a general bylaw). A general bylaw, however, may supplement the terms of the zoning bylaw, such as by

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<sup>6</sup> The Home Rule Amendment amended Article II of the State Constitution and confirms “the right of the people of every city and town the right of self-government in local matters” “by the adoption . . . of local ordinances or bylaws . . . not inconsistent with the constitution or laws enacted by the general court . . . .”

implementing a licensing process. *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 13-14 (1979).

Evaluating the General Bylaw at issue involves an analysis of its subject matter and whether the municipality has a history of regulating that subject matter through its Zoning Bylaws, if so, it may be further regulated through the zoning bylaw, not through a general municipal bylaw. *Spentlinhauer*, 80 Mass. App. Ct. at 139-140 (a general bylaw may only regulate a subject if there is no history in the municipality of the subject being treated under zoning).

The General Bylaw at issue here prohibits recreational (nonmedical) marijuana establishments. The subject matter is recreational marijuana establishments within Bourne. Except for the Moratorium, Bourne did not previously enact comprehensive zoning regulations, controls, or a permitting process through its zoning bylaws. The Town approved Article 23, an amendment to the Town's Zoning Bylaws, which imposed the Moratorium on Recreational Marijuana Establishments. Article 23 did not regulate Recreational Marijuana Establishments; it did not define recreational marijuana uses or establishments, nor did it establish zoning districts for such uses, or regulate whether such use or establishments could be allowed as of right or by special permit. Rather, the Moratorium specifically refrained from establishing any regulatory or zoning criteria for recreational marijuana establishments or uses. Furthermore, the Moratorium's express purpose was to "undertake a planning process to *consider amending the Zoning Bylaw*." Additionally, it is undisputed that prior to the Moratorium, Bourne had never adopted a zoning bylaw dealing with marijuana uses. The adoption of the Moratorium did not establish a comprehensive zoning bylaw. Cf. *Spentlinhauer*, 80 Mass. App. Ct. at 142 (comprehensive zoning bylaw regulating parking invalidates general bylaw imposing restrictions on overnight



parking). There being no history of zoning control or regulation in this area, the adoption of the Moratorium and the subsequent general by law banning adult recreational marijuana use in the town of Bourne was a valid exercise of municipal authority.

The cases addressing this issue upon which Haven relies are distinguishable. In each case, the municipality involved had existing comprehensive zoning bylaws regulating the subject matter: mobile homes in *Rayco, Inv. Corp. v. Selectman of Raynham*, and residential off-street parking in *Spenlinhauer*. Here, at the time of the Moratorium and later when the town meeting affirmatively voted the General Bylaw, the Town had no such comprehensive zoning in place regulating recreational adult marijuana use.

A chronology of relevant events is helpful:

1. November 2016, town-wide ballot vote rejecting the statewide measure legalizing marijuana;
2. May 2, 2017, a town meeting adopts Article 23, a temporary Moratorium on recreational marijuana;
3. March 26, 2018, a town meeting defeats Article 1, a Zoning Bylaw amendment to prohibit recreational (nonmedical) marijuana;
4. March 26, 2018, a town meeting defeats Article 2, a General Bylaw prohibiting recreational (nonmedical) marijuana;
5. October 1, 2018 a town meeting passes Article 14, a General Bylaw prohibiting recreational (nonmedical) marijuana and allowing medical marijuana;
6. October 1, 2018 a town meeting defeats Article 15, a Zoning Bylaw amendment allowing and regulating recreational and medical marijuana use, two thirds vote not achieved;
7. Attorney General letter dated December 21, 2018 approving the above bylaw;

8. October 29, 2019, a town meeting defeats Article 10, a Zoning Bylaw amendment allowing and regulating recreational (nonmedical) marijuana;

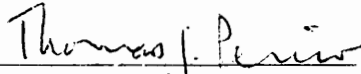
9. October 29, 2019 a town meeting defeats Article 14, a repeal of the General Bylaw prohibiting recreational (nonmedical) marijuana.

As can be seen, each attempt to enact a comprehensive zoning bylaw failed. The fact that amendments to the Zoning Bylaws were proposed demonstrates that Bourne previously did not regulate marijuana through its zoning code or bylaw. This is not surprising as state law prohibited medical and nonmedical marijuana use prior to 2016. The statute, G. L. c. 94G § 3 and the guidance issued by the cannabis control commission authorizes municipalities to limit or ban marijuana use by ordinance or bylaw. Here, Bourne, acting through its legislative body, town meeting, rejected several proposed zoning bylaw amendments that would have created a comprehensive zoning scheme permitting and regulating marijuana uses. Instead, town meeting voters enacted a general municipal bylaw prohibiting nonmedical marijuana use. Doing so constitutes a valid exercise of municipal authority under the Home Rule Amendment, as the General Bylaw is not inconsistent with state law.

### **ORDER**

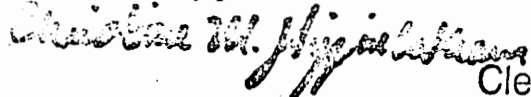
For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' Motion for Summary Judgment be **DENIED**.

So ordered,

  
Thomas J. Perrino  
Justice of the Superior Court

DATED: April 13, 2021

A true copy, Attest:

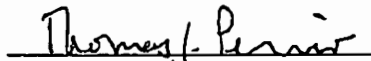
  
Clerk

**Endorsement on Motion for Reconsideration: No. 1972CV00164**


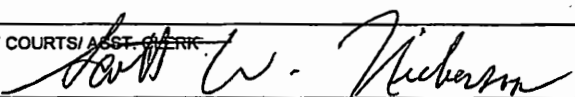
The plaintiffs' motion to reconsider is **DENIED** as the decision resolved all remaining counts of the complaint.

Additionally, the motion for reconsideration itself fails to allege (1) changed circumstances such as newly discovered evidence or information, or a development of relevant law, or (2) a particular and demonstrable error in the original ruling or decision. *Audubon Hill S. Condo Ass'n v. Community Ass'n Underwriters of Am.*, 82 Mass. App. Ct. 461, 470 (2012). "The moving party should specify the appropriate ground or grounds at the outset of the motion. In the absence of that preface, the judge may exercise his or her discretion to refuse to entertain motion." *Id.*

So ordered,

  
Thomas J. Perrino  
Justice of the Superior Court

DATED: June 4, 2021

<b>JUDGMENT</b>		<b>Trial Court of Massachusetts</b> <b>The Superior Court</b> 
DOCKET NUMBER 1972CV00164		Scott W. Nickerson, Clerk of Court Barnstable County
CASE NAME The Haven Center, Inc. et al vs. TOWN OF BOURNE et al		COURT NAME & ADDRESS Barnstable County Superior Court 3195 Main Street Barnstable, MA 02630
<p>This action came before the Court, Hon. Thomas J Perrino, presiding, and upon consideration thereof,</p> <p>It is ORDERED, ADJUDGED and DECLARED</p> <p>that after hearing on Plaintiffs' Motion for Summary Judgment, pursuant to Mass.R.Civ.P. 56, the Bylaws of the Town of Bourne are declared Valid.</p>		
DATE JUDGMENT ENTERED 06/23/2021	CLERK OF COURTS/ ASST. CLERK X 	

# 1972CV00164 The Haven Center, Inc. et al vs. TOWN OF BOURNE et al

- Case Type:  
Equitable Remedies
- Case Status:  
Open
- File Date  
04/09/2019
- DCM Track:  
A - Average
- Initiating Action:  
Declaratory Judgment G.L. c. 231A
- Status Date:  
04/09/2019
- Case Judge:
- Next Event:

[All Information](#) [Party](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

## Docket Information

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
04/09/2019	ORDER: Order of Transfer and Assignment of Land Court Case No. 19 MISC 000009 to Barnstable Superior Court (See image for full text). [Awaiting pleadings from Land Court]	1	<a href="#">Image</a>
04/09/2019	COMPLAINT FILED	2	<a href="#">Image</a>
04/09/2019	ORDER: For Notice By Publication  Judge: Vhay, Hon. Michael D	3	<a href="#">Image</a>
04/09/2019	The Haven Center, Inc.'s Memorandum Joint Case Management Conference Statement	4	<a href="#">Image</a>
04/09/2019	Order of Notice by Publication, returned SERVED  Applies To: TOWN OF BOURNE (Defendant); Town of Bourne Member or alternate member of Board of Selectmen (Defendant)	5	<a href="#">Image</a>
04/09/2019	ORDER: After case management conference and initial intervention held. All parties appeared through counsel. Plaintiffs contend that (1) Bourne's general bylaw regarding non-medical cannabis facilities violates the Zoning Act, and (2) the Town's selectmen improperly have refused to negotiate a "host community agreement" (the "HCA") with Plaintiffs. The Town argues that its general bylaw is lawful and that, in fact, one of the Plaintiffs terminated negotiations over the HCA issue. Accordingly, unless Plaintiffs sooner dismiss their HCA-related claims, the Court ORDERS Plaintiffs to file by February 14, 2019 a memorandum explaining why the Land Court has subject-matter jurisdiction to over Plaintiffs' HCA issues. The Court ORDERS the Town to file within fourteen days of receipt of Plaintiffs' memorandum any responsive memorandum. All parties assent to receiving notice from the Court via electronic mail instead of regular mail. SO ORDERED. (Michael D. Vhay, Justice) (No document received from Land Court as of 04/09/2019) (Land Court reports that no independent document was created for the order. The docket entry is the order).	6	
04/09/2019	ANSWER FILED by Robert S. Troy, Esq., for TOWN OF BOURNE and for Town of Bourne Member or alternate member of Board of Selectmen	7	<a href="#">Image</a>
04/09/2019	Plaintiffs The Haven Center, Inc., MacArthur Park Place LLC's Motion to dismiss certain counts (Counts III and IV)	8	<a href="#">Image</a>
04/09/2019	Plaintiffs(s) The Haven Center, Inc., MacArthur Park Place LLC motion filed for protective order	9	<a href="#">Image</a>



<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/09/2019	Endorsement on Motion to dismiss certain counts (#7.0): Other action taken The Court has received Plaintiffs' Motion to Dismiss Counts III and IV of their Complaint. The Court ORDERS any party who opposes that motion to file its opposition no later than 03/01/2019. The Court also has received Plaintiffs' Motion for Protective Order. The Court DENIES that motion, without prejudice, as the motion doesn't comply with Land Court Rule 7. Plaintiffs may renew the motion once they have filed the certificate described in Rule 7. SO ORDERED. (No document received from Land Court as of 04/09/2019) (Land Court reports that no independent document was created for the order. The docket entry is the order).		
04/09/2019	Plaintiffs(s) The Haven Center, Inc., MacArthur Park Place LLC motion filed for protective order (Renewed)	10	<a href="#">Image</a>
04/09/2019	Endorsement on motion for protective order (#9.0): (Renewed) Other action taken The Court has received Plaintiffs' Renewed Motion for Protective Order. The Court ORDERS any party who opposes that motion to file its opposition no later than 03/01/2019. SO ORDERED. (No document received from Land Court as of 04/09/2019) (Land Court reports that no independent document was created for the order. The docket entry is the order).		
04/09/2019	Opposition to P#7, Plaintiffs' Motion to Dismiss Counts III and IV filed by Robert S. Troy, Esq., for defendants	11	<a href="#">Image</a>
04/09/2019	Opposition to P#8, Plaintiffs' Motion for Protective Order filed by Robert S. Troy, Esq., for defendants	12	<a href="#">Image</a>
04/09/2019	MEMORANDUM & ORDER:  The Court has received Plaintiffs' Motion to Dismiss Counts III and IV of their complaint. The Court DENIES the motion. Counts III and IV seek a declaratory judgment and a writ of mandamus in connection with an alleged refusal by the defendant Bourne Selectmen to enter into a "host community agreement" with Plaintiffs under G.L. c. 94G, sec. 3. At the case-management conference in this matter, the Court questioned its subject matter jurisdiction over Counts III and IV. The Court gave Plaintiffs until February 14, 2019 to either dismiss the Counts or submit a memorandum explaining why the Court had subject-matter jurisdiction over them. Plaintiffs chose the former course, and asked that the Court dismiss Counts III and IV without prejudice. The Bourne Selectmen oppose the motion: having answered Plaintiffs' complaint, the Selectmen want their day in court or a dismissal with prejudice. See Rule 41(a)(2), under Mass. R. Civ. P. Where a complaint in the Land Court presents some claims that are within the Court's jurisdiction (for example, Counts I and II of Plaintiffs' complaint), and others that aren't (like Counts III and IV), "the court should not dismiss the case out of hand; rather, 'the proper procedure is for the judge to ask the Chief Administrative Justice to transfer the case, or the judge, or both, to the appropriate department of the Trial Court.'" Arno v. Commonwealth, 457 Mass. 434, 446 (2010), quoting Konstantopoulos v. Whately, 384 Mass. 123, 129 (1981). See also Sullivan v. Lawlis, 93 Mass. App. Ct. 409, 416 (2018) (same). Since the Selectmen demand a resolution of Counts III and IV on the merits, this Court will request either a transfer of this case to the Barnstable Superior Court (with a justice of the Superior Court being designated a justice of this Court for purposes of deciding Count I, which is within this Court's exclusive jurisdiction) or designation of a justice of this Court as a justice of the Superior Court for purposes of hearing Counts III and IV. Pending a ruling on this Court's request for transfer or interdepartmental assignment, the Court STAYS all action on Counts III and IV of the Complaint, including any discovery relating solely to Counts III and IV. The Court otherwise ORDERS the parties to complete all discovery (fact and expert) on Plaintiffs' claims in Counts I and II by May 3, 2019. (Plaintiffs also have filed a motion for a protective order. To the extent that the motion seeks to prevent discovery on issues relating to Counts I and II, the motion is DENIED, but any discovery relating solely to Counts III and IV is nonetheless stayed.) SO ORDERED.  Judge: Vhay, Hon. Michael D  (No document received from Land Court as of 04/09/2019)  (Land Court reports that no independent document was created for the order. The docket entry is the order).		
04/10/2019	NOTICE TO APPEAR FOR Rule 16 Scheduling Conference on 05/10/2019 at 9:30 AM, mailed on 04/10/2019 to BEZ and RST.		
05/10/2019	ORDER: After a Rule 16 conference, IT IS ORDERED; Discovery completed by 9/12/19, Hearing on Summary Judgment Motions 11/5/19 @ 2:15 p.m. copy to: BZ,RT 5/14/19.	13	<a href="#">Image</a>
	Judge: Nickerson, Scott W		
05/14/2019	Notice to Appear for Rule 56 Motion 11/5/2019 at 2:15pm. Copy mailed to BZ, RT		
08/29/2019	Plaintiff The Haven Center, Inc., MacArthur Park Place LLC's Assented to Motion to dismiss certain counts Counts III and IV of plaintiff's complaint	14	<a href="#">Image</a>
09/03/2019	Endorsement on Motion to dismiss certain counts (#14.0): Counts III and IV ALLOWED Notice to RST, BEZ on 9/4/19		<a href="#">Image</a>
10/28/2019	Plaintiff, Defendant The Haven Center, Inc., MacArthur Park Place LLC, TOWN OF BOURNE, Town of Bourne Member or alternate member of Board of Selectmen's Joint Motion to continue / reschedule an event 11/05/2019 02:15 PM Rule 56 Hearing	15	<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/28/2019	Endorsement on Motion to continue / reschedule an event (#15.0): Other action taken Hearing off the list, when the motion filed a date will be selected.		<a href="#">Image</a>
07/14/2020	Rule 9A list of documents filed.  Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)  efile#277868	16	<a href="#">Image</a>
07/14/2020	Plaintiffs The Haven Center, Inc.'s Motion to Transfer Matter to Land Court  Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)	16.1	<a href="#">Image</a>
07/14/2020	Opposition to p#16.1 filed by TOWN OF BOURNE, Town of Bourne Member or alternate member of Board of Selectmen	16.2	<a href="#">Image</a>
07/14/2020	Affidavit of compliance with Superior Court Rule 9A  Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)	16.3	<a href="#">Image</a>
07/28/2020	Notice to Appear for Hearing on Motion to Transfer Case to land Court 8/13/2020 at 2:45pm. Copy w/zoom instructions mailed to Benjamin E Zehnder, Esq., Robert Sweeney Troy, Esq.		
08/13/2020	Motion Hearing scheduled on 08/13/2020: Held as Scheduled Appeared: Plaintiff - Benjamin E Zehnder, Esq. Defendant - Robert Sweeney Troy, Esq.		
08/14/2020	Endorsement on Motion to transfer matter to Land Court. After hearing motion is (#16.1): DENIED (copy mailed to BEZ, RST)		<a href="#">Image</a>
09/17/2020	Rule 9A list of documents filed.	17	<a href="#">Image</a>
09/17/2020	Plaintiffs The Haven Center, Inc., MacArthur Park Place LLC's Motion for summary judgment, MRCP 56	17.1	<a href="#">Image</a>
09/17/2020	The Haven Center, Inc., MacArthur Park Place LLC's Memorandum in support of P #17.1	17.2	<a href="#">Image</a>
09/17/2020	Opposition to #17.1 filed by TOWN OF BOURNE, Town of Bourne Member or alternate member of Board of Selectmen	17.3	<a href="#">Image</a>
09/17/2020	Statement of Undisputed Facts	17.4	<a href="#">Image</a>
09/17/2020	Exhibits/Appendix	17.5	<a href="#">Image</a>
09/17/2020	Exhibits/Appendix  Defendants' Supplemental Appendix	17.6	<a href="#">Image</a>
09/17/2020	Plaintiffs The Haven Center, Inc., MacArthur Park Place LLC's Submission of Legal Authorities	17.7	<a href="#">Image</a>
09/17/2020	Defendants TOWN OF BOURNE, Town of Bourne Member or alternate member of Board of Selectmen's Submission of Table of Authorities	17.8	<a href="#">Image</a>
09/17/2020	Affidavit of compliance with Superior Court Rule 9A  Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of MacArthur Park Place LLC, The Haven Center, Inc. (Plaintiff)	17.9	<a href="#">Image</a>
09/21/2020	Notice to Appear for hearing on Motion for Summary Judgment on October 22, 2020, at 3:00 p.m. with Zoom Instructions Sent On: 09/21/2020 Notice Sent To: Benjamin E Zehnder, Esq. La Tanzi, Spaulding & Landreth LLP PO Box 2300, Orleans, MA 02653 Notice Sent To: Robert Sweeney Troy, Esq. Troy Wall Associates 90 Old Kings Highway, Sandwich, MA 02563		
09/24/2020	Event Result:: Rule 56 Hearing scheduled on: 10/22/2020 03:00 PM, Has been: Rescheduled. For the following reason: By Court prior to date		
09/24/2020	Notice to Appear for Rule 56 Hearing 10/29/2020 at 3:00pm. Copy w/zoom Instructions mailed to Benjamin E Zehnder, Esq. La Tanzi, Spaulding & Landreth LLP PO Box 2300, Orleans, MA 02653, Robert Sweeney Troy, Esq. Troy Wall Associates 90 Old Kings Highway, Sandwich, MA 02563		
10/29/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Rule 56 Hearing scheduled on: 10/29/2020 03:00 PM		



<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/04/2020	Notice to Appear for Rule 56 Hearing 12/8/2020 at 3:00pm. Copy mailed w/both zoom info to Benjamin E Zehnder, Esq. La Tanzi, Spaulding & Landreth LLP PO Box 2300, Orleans, MA 02653, Robert Sweeney Troy, Esq. Troy Wall Associates 90 Old Kings Highway, Sandwich, MA 02563		
12/08/2020	Rule 56 Hearing scheduled on 12/08/2020 Has been: Held - Under advisement Comments: 2nd Session: FTR Zoom (REM) Appeared: Plaintiff - Benjamin E Zehnder, Esq. Defendant - Robert Sweeney Troy, Esq.		
04/13/2021	MEMORANDUM & ORDER:  and DECISION on Plaintiffs' motion for summary judgment: ORDER For the foregoing reasons, it is hereby ORDERED that the plaintiffs' Motion for Summary Judgment be DENIED.  Judge: Perrino, Hon. Thomas J  (copy mailed to BEZ, RST)	18	<a href="#">Image</a>
05/11/2021	Plaintiffs The Haven Center, Inc., MacArthur Park Place LLC's Motion for Reconsideration of P #18 Scanned to Perrino, J., on 5/12/21	19	<a href="#">Image</a>
05/11/2021	TOWN OF BOURNE, Town of Bourne Member or alternate member of Board of Selectmen's Memorandum in opposition to P #19.0	19.1	<a href="#">Image</a>
05/11/2021	Affidavit of compliance with Superior Court Rule 9A  Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of MacArthur Park Place LLC, The Haven Center, Inc. (Plaintiff)	19.2	<a href="#">Image</a>
06/04/2021	Endorsement on Motion for Reconsideration (#19.0): DENIED The Plaintiffs' motion to reconsider is DENIED as the decision resolved all remaining counts of the complaint. Additionally, the motion for reconsideration itself fails to allege (1) changed circumstances such as newly discovered evidence or information, or a development of relevant law, or (2) a particular and demonstrable error in the original ruling or decision. Audubon Hill S. Condo Ass'n v. Community Ass'n Underwriters of Am., 82 Mass. App. Ct. 461, 470 (2021). "The moving party should specify the appropriate ground or grounds at the outset of the motion. In the absence of that preface, the judge may exercise his or her discretion to refuse to entertain motion." Id. Clerk's Notice emailed on 06/07/2021 to BEZ and RST.  Judge: Perrino, Hon. Thomas J		<a href="#">Image</a>
06/07/2021	NOTICE OF HEARING ON Final Pre-Trial Conference to be held on 09/24/2021 at 12:30 p.m. by Zoom, mailed on 06/07/2021, with Zoom instructions stapled to notice, including both links, to BEZ and RST.	20	
06/17/2021	Notice of appeal filed. (premature)  Applies To: The Haven Center, Inc. (Plaintiff)	21	<a href="#">Image</a>
06/23/2021	Summary Judgment. It is ORDERED, ADJUDGED and DECLARED: that after hearing on Plaintiffs' Motion for Summary Judgment, pursuant to Mass.R.Civ.P. 56, the Bylaws of the Town of Bourne are declared Valid. Certified copy to BEZ, RST on 6/23/21	22	<a href="#">Image</a>
06/28/2021	Notice of appeal filed.  Copy mailed to RST, Cert re Transcript mailed to BEZ  Applies To: The Haven Center, Inc. (Plaintiff); MacArthur Park Place LLC (Plaintiff)	23	<a href="#">Image</a>
07/14/2021	Notice to Court RE: NO transcript ordered	24	<a href="#">Image</a>
08/17/2021	Notice to Clerk of the Appeals Court of Assembly of Record	25	
08/17/2021	Notice of assembly of record sent to Counsel	26	<a href="#">Image</a>
08/17/2021	Appeal: Statement of the Case on Appeal (Cover Sheet).	27	<a href="#">Image</a>
08/27/2021	Appeal entered in Appeals Court on 08/24/2021 docket number 2021-P-0765	28	