

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

(APPEALS COURT NO. 2021-P-0765)

Barnstable, ss.

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The Haven Center, Inc. and MacArthur Park Place LLC,  
Appellants

v.

Town of Bourne, Appellee

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On Appeal From Barnstable Superior Court

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**Appellant's Application for Direct Appellate Review**

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Date: 09/13/2021

Benjamin E. Zehnder  
8 Cardinal Lane P.O. Box 2300  
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BBO #556519  
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Now come Appellants **Haven Center, Inc.** and **MacArthur Park Place LLC** and hereby apply to the Supreme Judicial Court pursuant to M.R.A.P 11(a)(1) for direct appellate review and state that the questions presented are of first impression that should be submitted to the Supreme Judicial Court.

1. **Request for Direct Appellate Review**

Appellants hereby request direct appellate review.

2. **Statement of Prior Proceedings**

- a. On January 4, 2019 Appellants instituted an action in the Land Court (Land Court Docket No. 19 MISC 000009) seeking a declaration pursuant to G.L. c. 240 §14A and G.L. c. 231 that a general bylaw adopted by the Town of Bourne on October 1, 2018 prohibiting all non-medical cannabis uses in the Town was invalid.
- b. On March 17, 2019 the action was transferred to the Barnstable Superior Court (Barnstable Superior Court Docket No. 1972 CV 00164) by Order of the Chief Justice of the Trial Court.
- c. The parties orally argued Plaintiff's Motion for Summary Judgment and Defendant's Opposition on December 8, 2020.

- d. On April 13, 2021, the Superior Court issued its Memorandum and Order denying Plaintiffs' Motion for Summary Judgment.
- e. On May 11, 2021, Plaintiffs moved the Superior Court to reconsider its April 13, 2021 Order.
- f. On June 4, 2021, the Superior Court denied Plaintiffs' Motion for Reconsideration.
- g. On June 23, 2021 the Superior Court issued final Judgment that the Bourne general bylaw was valid.
- h. On June 28, 2021 Plaintiffs filed their Notice of Appeal with the Superior Court.
- i. On August 17, 2021 the Superior Court notified the Appeals Court and counsel of the assembly of the record.
- j. On August 23, 2021 this appeal was entered by the Appeals Court (Appeals Court Docket No. 2021-P-0765

**3. Short Statement of the Facts**

- a. Appellant The Haven Center, Inc. ("Haven") is a Massachusetts corporation with a principal place of business at 245 Route 6A, Orleans, Massachusetts 02653.
- b. Appellant MacArthur Park Place LLC ("MacArthur") is a Massachusetts limited liability company with a usual address of 10 Attucks Lane, P.O. Box W, Hyannis, Massachusetts 02601.

- c. MacArthur is a record title owner in fee of property at 340 MacArthur Boulevard, Bourne, Barnstable County, Massachusetts ("Locus").
- D. Haven is the holder of a leasehold interest in Locus with the intention of operating medical and adult use (recreational) marijuana retail sales and marijuana cultivation operations thereupon.
- E. Locus is within Bourne's B4 zoning district.
- F. Retail sales are permitted in the B4 zoning district upon the granting of a Planning Board Site Plan Review permit and, if more than 1,600 gross square feet of floor area or more than 200 vehicle trip ends per average business day, upon the additional granting of a Special Permit by the Planning Board.
- G. On August 28, 2015 Haven executed a binding option to lease Locus from MacArthur LLC.
- H. On October 7, 2015 the Bourne Board of Selectmen issued a letter of support to Haven for the location of a Registered Marijuana Dispensary (medical) at Locus.
- I. On June 7, 2016 the Bourne Board of Selectmen issued a letter to Haven confirming support for a Registered Marijuana Dispensary at Locus.

- J. On June 30, 2016 Haven Center received a so-called Registered Marijuana Dispensary Provisional Certificate of Registration from the Massachusetts Cannabis Control Commission for operation of a Registered Marijuana Dispensary in Brewster, MA (now known as a Medical Marijuana Treatment Center) and a Cultivation and Processing Facility for same at Locus.
- K. On June 30, 2016 Haven received a so-called Registered Marijuana Dispensary Provisional Certificate of Registration from the Massachusetts Cannabis Control Commission for operation of a Registered Marijuana Dispensary in Bourne (now known as a Medical Marijuana Treatment Center) and a Cultivation and Processing Facility at Locus.
- L. On November 8, 2016 the citizens of Bourne voted NO on a state referendum ballot question - Question 4 - authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts by a vote of 5,273 in favor of and 5,583 against the question.

- M. On April 12, 2017 the Bourne Board of Health adopted regulations governing the licensing and operation of marijuana establishments.
- n. On May 2, 2017, the Bourne Town Meeting approved as Warrant Article 23 by a required two-thirds vote of 151 Ayes and 30 Nays an amendment to the Town of Bourne Zoning By-Law imposing a temporary moratorium on Recreational Marijuana Establishments through the earlier of November 30, 2018 or such time as the Town should adopt zoning bylaw regulations of so-called Recreational Marijuana Establishments. The exact language of the moratorium as printed in the Warrant is:

**4833. Temporary Moratorium:** For reasons set forth herein, notwithstanding any other provision of the Zoning Bylaw to the contrary, the Town hereby adopts a temporary moratorium on the use of land or structures for a recreational Marijuana Establishments and other uses related to recreational marijuana. The moratorium shall be in effect through November 30, 2018 or until such time as the Town adopts Zoning By-Law amendments that regulate recreational Marijuana Establishments, whichever occurs earlier. During the moratorium period, the Town shall undertake a planning process to address the potential impacts of recreational marijuana in the Town and consider the Cannabis Control Commission regulations regarding recreational Marijuana Establishments, which are to be finalized by July 1, 2018 and shall consider adopting new Zoning Bylaws in response to these issues on or before the expiration of the moratorium period.

- o. On January 1, 2019, Haven and MacArthur entered into a lease for Locus.

- P. On March 26, 2018, Bourne Town Meeting defeated by a vote of 155 Ayes and 207 Nays a proposed zoning bylaw amendment to ban all types of non-medical marijuana establishments (2/3 majority vote required).
- Q. Also on March 26, 2018, Bourne Town Meeting defeated by a vote of 112 Ayes and 215 Nays a proposed general bylaw amendment to ban all types of non-medical marijuana establishments (simple majority vote required).
- R. Between April 2, 2018 and November 28, 2018, Haven unsuccessfully negotiated with the Bourne Board of Selectmen through the Bourne Town Administrator for a proposed Host Community Agreement for medical and non-medical cannabis retail sales at Locus.
- S. On September 25, 2018, Haven filed with the Bourne Planning Board a so-called "Approval Not Required" perimeter plan of Locus pursuant to G.L. c. 41, §81P.
- T. On October 1, 2018, Bourne Town Meeting adopted by a simple majority vote of 415 Ayes and 321 Nays a citizens' petitioned Warrant Article to amend the Bourne Town Code general bylaws to

prohibit all non-medical marijuana uses in the Town.

- U. Also on October 1, 2018, Bourne Town Meeting, by a vote of 289 Ayes and 163 Nays, failed to adopt by a two-thirds vote a proposed Planning Board sponsored amendment of the Bourne zoning by-law to regulate medical and non-medical marijuana uses in the Town.
- v. On October 25, 2018, the Bourne Planning Board endorsed the Approval Not Required Plan for Locus, which was subsequently recorded with the Barnstable County Registry of Deeds with Plan Book 677, Page 6.
- w. On November 28, 2018 the Bourne Town Administrator informed Haven in writing that the Board of Selectmen would no longer work with Haven regarding non-medical cannabis retail sales in Bourne.
- x. On January 4, 2019 Appellants filed this action with the Land Court.

**4. Statement of Issues of Law Raised by the Appeal**



- a. Whether Bourne has elected to regulate recreational marijuana under its zoning power and cannot now use general bylaws for this purpose.
- b. Whether the general bylaw improperly circumvents G.L. c. 40A § 5 provisions for adoption of zoning bylaws and divests Haven and MacArthur of important G.L. c. 40A § 6 use-freeze protections.
- c. Whether the general bylaw is not of the statutorily authorized "reasonable safeguard on operation" type of bylaw permitted by M.G.L. c. 94G, §3, but rather must be enacted as a zoning regulation under c. 94G, §3.
- d. Whether the general bylaw unlawfully prohibits Haven's conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 to an adult use marijuana establishment in violation of G.L. c. 94G 3(a)(1)(i).

Each of said issues was raised and properly preserved in the Barnstable Superior Court.

## **5. Brief Argument**

Please see Brief attached hereto as Exhibit A.

**6. Statement of Reasons Why Direct Appellate Review is Appropriate.**

Direct Appellate Review is appropriate since the legal issues have not been addressed by the Supreme Judicial Court in the context of the relationship between G.L. c. 94G and G.L. c. 40A. In the rapidly evolving and contentious arena of adult use marijuana permitting in the Commonwealth, SJC interpretation of these statutes will reduce unnecessary litigation and provide necessary guidance to communities and developers.

Appellants have attached hereto true copies of the following:

1. Docket Entries for Barnstable Superior Court and Appeals Court;
2. Memorandum of Decision and Order on Plaintiffs' Motion for Summary Judgment dated April 13, 2021
3. Clerk's Notice of Endorsement on Motion for Reconsideration dated June 7, 2021.
4. Judgment dated June 23, 2021



Date: 09/13/2021

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**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on September 13, 2021, I have made service of this Application with attached Brief and Addenda upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System, on:

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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The Haven Center, Inc. and MacArthur Park Place LLC, Appellants

v.

Town of Bourne, Appellee

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On Appeal From Barnstable Superior Court

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**EXHIBIT A - Appellant's Brief in Support of Their Application  
for Direct Appellate Review**

---

Date: 09/13/2021

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**A. Bourne has elected to regulate recreational marijuana under its zoning power and cannot now use general bylaws for this purpose.**

The Supreme Judicial Court addressed this question in Rayco, Inv. Corp. v. Selectmen of Raynham, 368 Mass. 385 (1975), and the Appeals Court in Spenlinhauer v. Town of Barnstable, 80 Mass. App. Ct. 134 (2011). In both instances, the courts held that once a community elected to regulate a use via zoning bylaws, it may not prohibit or limit the use via other bylaws. The Appeals Court in Spenlinhauer held that *"the town's attempt to use its general ordinance power to regulate off-street parking undercuts 'the assorted protections contained in' c. 40A, in the process frustrating the purposes for which c. 40A was enacted."* Spenlinhauer, supra at 141, quoting Rayco, supra at 393-394. The instant matter poses the further question of what degree of zoning regulation precludes non-zoning regulation.

The Appellants will argue that where the Town of Bourne adopted a zoning moratorium for the express purpose of adopting zoning regulations for adult use marijuana, any prohibition or location limitations must be by zoning bylaw.

**B. The general bylaw improperly circumvents G.L. c. 40A § 5 provisions for adoption of zoning bylaws and divests Haven and MacArthur of important G.L. c. 40A § 6 use-freeze protections.**

Underlying the Rayco and Spenlinhauer decisions is the idea that zoning regulations provide legislatively intended protections to landowners and developers that are not present in non-zoning regulations. In invalidating a general bylaw limiting mobile home park licenses adopted by the Town of Raynham four days after a developer obtained Approval Not Required plan endorsement for a park, the Supreme Judicial Court stated:

*"A further consideration which leads us to this conclusion is that were we to adopt the defendant's theory the assorted protections contained in The Zoning Enabling Act could in many instances be circumvented, thereby defeating the purpose of the statute. For example, just as the town purports to limit the number of mobile home parks within its borders under its police power, so another town might want to limit the number of apartment buildings in the town, perhaps as a health regulation to protect the town's water supply or sanitation facilities. Under the theory advanced by the defendants, the latter measure could be viewed as outside the scope of The Zoning Enabling Act if not adopted strictly as a zoning regulation. The problem with this approach is that it views the municipal police power in a vacuum, whereas the law is clear that 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 in accordance with ..[art. 89, § 8, of the Amendments to the Constitution]." Rayco, Inv. Corp., supra at 393-394.*

The protections alluded to include the three year use-freeze protection of G.L. c. 40A, § 6 that the Appellants availed themselves of in seeking Approval Not Required plan endorsement in September 2018.

In Heritage Park Dev. Corp. v. Town of Southbridge, 424 Mass. 71, 75-76 (1997), the Supreme Judicial Court discussed the importance of the use-freeze in protecting property rights:

*"The purpose of the statutory zoning freeze also supports our conclusion. That purpose is to protect landowners from "the practice in some communities of adopting onerous amendments to the zoning by-law after submission of a preliminary plan which is opposed by segments within the community." 1972 House Doc. No. 5009, at 38, Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act. This practice has been of sufficient concern to the Legislature that the protection of a statutory zoning freeze has been extended from an initial three-year period to five years then to seven years ... and finally to the current eight-year period. G. L. c. 40A, § 6. We have recognized that G. L. c. 40A, § 6, and its predecessors afford broad protection to developers. [...] The Appeals Court has held that developers can invoke a zoning freeze with inconsistent subdivision filings, or with plans filed with no intent other than to invoke the freeze. ... There is a common thread among these decisions. The statutory zoning freeze provides landowners with protection from amendments to zoning laws that would unpredictably and unfairly burden the development of their land. We recognize the responsibility of a town planning board to respond to community concerns about development and its impact on the quality of a town or neighborhood, but under our system of law a board cannot act at the expense of a vested property right created by the Legislature."* Heritage Park Dev. Corp., supra. Internal citations omitted.

The Lower Court record will show that in order to develop the Bourne project, Haven obtained Approval Not Required use freeze protections, then leased the subject property at great cost and invested significant sums of money in the enterprise,

including the instant litigation. The record will show also that the Bourne growing operation was central to the development of Haven's retail locations in Bourne, Brewster and Provincetown. These are exactly the activities protected by G.L. c. 40A and its important policies.

Similarly, under G.L. c. 40A, § 5, zoning bylaws may be enacted only by a two-thirds vote of town meeting whereas general bylaws may be enacted by a simple majority vote under G.L. c. 40, § 21. The instant matter reveals that the differing vote thresholds for zoning vs. general bylaws drove Town Meeting actions in Bourne. The town was closely divided on the question of marijuana regulation, and there were simply not enough votes to adopt zoning regulations. The simple majority vote requirement for general bylaws allowed marijuana opponents to make an end-run around and subvert G.L. c. 40A requirements and protections.

**C. The general bylaw is not of the statutorily authorized "reasonable safeguard on operation" type of bylaw permitted by M.G.L. c. 94G, §3, but rather must be enacted as a zoning regulation under c. 94G, §3.**

G.L. c. 94G § 3 provides for local adoption of ordinances and bylaws that "*impose reasonable safeguards on the operation of marijuana establishments*" G.L. c. 94G § 3(a) and that "*govern the time, place and manner of marijuana establishment operations*" G.L. c. 94G § 3(a)(1). For example, the Bourne Board of Health adopted



Regulations Restricting the Sale of Marijuana in April of 2017 shortly after the zoning moratorium was passed. The Health Regulations create a licensing scheme and set conditions for safe operations. These health regulations comport with G.L. 94G § 3(a)(1) and with the Spenlinhauer holding that: "A general bylaw can only treat the subject matter of a zoning bylaw through regulations that supplement the terms of the zoning bylaw, through, for example, setting the terms of particular uses on individual applications through a licensing process." Spenlinhauer, supra at 142.

More importantly, G.L. c. 94G § 3(a)(1) goes on to provide: "except that **zoning ordinances or by-laws** shall not operate to: (i) prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment engaged in the same type of activity under this chapter; or (ii) limit the number of marijuana establishments below the limits established pursuant to clause (2)." G.L. 94G § 3(a)(1) (bold added). The statute recognizes a second class of regulations that would not reasonably regulate the incidents of adult use, but rather would prohibit or limit the use of land generally. The specific reference in 3(a)(1) to zoning bylaws or ordinances evidences a

statutory intent that regulations that would prevent medical conversion or limit the number of marijuana establishments must be in the nature of zoning bylaws.

It stands to reason that the use of general bylaws to avoid G.L. c. 40A zoning requirements and protections violates the public policies underlying those protections. In the instant matter, the use of the general bylaw also violates the public policies underlying the adoption of G.L. c. 94G legalizing and regulating adult use marijuana. In the preamble to 2015 House Bill 4326 the Legislature stated:

*"Whereas, The deferred operation of this act would tend to defeat its purpose, which is to ensure the safe implementation of marijuana legalization, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health."* 2016 Mass. ALS 351 | 2016 Mass. Ch. 351 | 2015 Mass. HB 4326 | 2016 Mass. Acts 351.

A close reading of G.L. c. 94G also reveals that it is intended to provide a safe haven for incubation of the adult use marijuana industry in the various communities. This statute cannot reasonably be interpreted to provide municipalities the right to abrogate G.L. 40A protections through the choice of general bylaws rather than zoning bylaw.

- D. The general bylaw unlawfully prohibits Haven's conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 to an adult use marijuana establishment in violation of G.L. c. 94G 3(a)(1)(i).**

In CommCan, Inc. v. Mansfield, 488 Mass. 291 (2021), the Supreme Judicial Court examined the term "engaged" in the context of G.L. c. 93G3(a)(1)(i) conversion of a medical marijuana treatment center to an adult use marijuana establishment. In determining that Mansfield could not prevent CommCan from converting to adult use, the Court stated:

*"It is undisputed that the plaintiffs applied for and obtained the requisite provisional State license, executed a host community agreement with the town, and procured a special permit from the town's planning board. Although construction has not begun at the property, the plaintiffs vigorously have litigated the abutter's appeal of the special permit authorizing the dispensary. It hardly can be said that the plaintiffs were not "involved in" and "occupied" by the sale of marijuana, even though the dispensary is not yet operational." CommCan, Inc., supra at 295.*

This is similar to the instant matter in which Haven Center applied for and received medical marijuana treatment center provisional registrations from the Cannabis Control Commission in June of 2016, received letters of non-opposition from the Bourne Selectmen in 2015 and 2016, executed a lease for Locus, solicited investors and expended large sums of money, obtained Approval Not Required plan endorsement and attempted to obtain a Host Community Agreement from the Town.

Importantly, the Supreme Judicial Court also noted in CommCan that:

"Further, it is plain from the statutory language that the purpose of the provision is to make it easier for medical marijuana dispensaries to convert to retail marijuana sales. See *Commonwealth v. LeBlanc*, 475 Mass. 820, 821, 62 N.E.3d 34 (2016) ("Clear and unambiguous language is conclusive as to legislative intent"). The only condition of consequence set by § 3(a)(1) is that the medical marijuana dispensary must have been "licensed or registered not later than July 1, 2017." *CommCan, Inc.*, supra at 296.

If the purpose of the statute is to facilitate such conversions, a general bylaw prohibition of such conversion is as invalid as a zoning bylaw prohibition.

Finally, in its Memorandum of Decision and Order dated April 13, 2021, the Superior Court ruled that Bourne's adoption of the general bylaw constitutes "a valid exercise of municipal authority under the Home Rule Amendment." This was in fact the prime argument advanced by Bourne in opposition to Appellants' Motion for Summary Judgment.

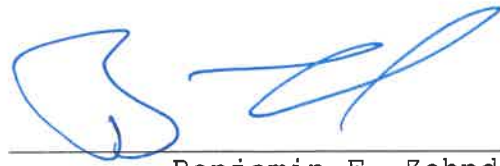
The Appellants will argue that the general bylaw as implemented by Bourne frustrates the express legislative purpose of G.L. c. 94G 3(a)(1)(i) that medical marijuana licensees be permitted to convert to adult use, and thus is preempted by the General Law. The Supreme Judicial Court addressed this issue in West Street Associates, LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021), holding that Mansfield's requirement that a permit to operate a medical marijuana dispensary be held by a nonprofit entity was preempted by the General Law's express

right to convert from a non-profit corporation to a domestic business corporation:

*"By retaining the requirement that medical marijuana dispensaries be nonprofit, the town bylaw 'frustrate[s] [one of] the purpose[s]' of the 2017 act. Fafard, 432 Mass. at 200. In repealing the 2012 act, see St. 2017, c. 55, § 47, and replacing it with a provision permitting for-profit entities to operate marijuana treatment centers, see St. 2017, c. 55, § 72, the Legislature evinced its clear intent to allow for-profit entities to distribute medical marijuana. This legislative purpose cannot 'be achieved in the face of [the town's] ... by-law on the same subject.'" See Bloom, 363 Mass. at 156. As the trial judge explained in her ruling, "By limiting medical marijuana facilities to nonprofit entities, the bylaw while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited." Accordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations, and the board cannot be forced to revoke the special permit at issue because CommCan appropriately exercised its statutory right to convert to a for-profit entity." West St. Assocs. LLC, supra at 323-324.*

Other than the nature of the respective bylaws, there is no legal difference between the Mansfield case and the instant matter. Bourne's general bylaw prohibits the conversion of medical marijuana treatment facilities to adult use operations, and thus directly conflicts with the statutory intent of G.L. c. 94G 3(a)(1)(i). Therefore Bourne's Home Rule Amendment rights are preempted.

Date: 09/13/2021



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**Certificate of Compliance**

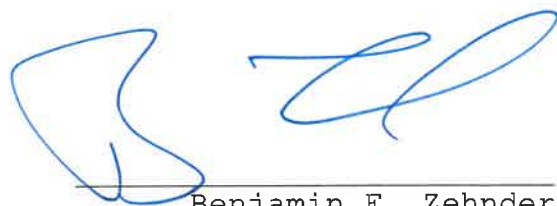
**Pursuant to Rule 16(k) of the  
Massachusetts Rules of Appellate Procedure**

I, Benjamin E. Zehnder, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16 (a)(13) (addendum);  
Mass. R.A.P. 16 (e) (references to the record);  
Mass. R.A.P. 18 (appendix to the briefs);  
Mass. R.A.P. 20 (form and length of briefs,  
appendices, and other documents); and  
Mass. R.A.P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, twelve characters per inch, and contains ten (10) total non-excluded pages.

Date - September 13, 2021



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## 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

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**Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/10/2019 09:30 AM	Second Session	Courtroom 2	Rule 16 Conference	Cannone, Hon. Beverly J	Held as Scheduled
11/05/2019 02:15 PM	Second Session	Courtroom 2	Rule 56 Hearing	Perrino, Hon. Thomas J	Rescheduled
08/13/2020 02:45 PM	Second Session	Courtroom 2	Motion Hearing	Gildea, Hon. Mark	Held as Scheduled
10/22/2020 03:00 PM	Second Session	Courtroom 2	Rule 56 Hearing	Perrino, Hon. Thomas J	Rescheduled
10/29/2020 03:00 PM	Second Session	Courtroom 2	Rule 56 Hearing	Perrino, Hon. Thomas J	Rescheduled-Covid-19 emergency
12/08/2020 03:00 PM	Second Session	Courtroom 2	Rule 56 Hearing	Perrino, Hon. Thomas J	Held - Under advisement
09/24/2021 12:30 PM	Second Session	Courtroom 2	Final Pre-Trial Conference	Perrino, Hon. Thomas J	Not Held

**Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	04/09/2019	07/08/2019	90	04/09/2019
Answer	04/09/2019	08/07/2019	120	04/09/2019
Rule 12/19/20 Served By	04/09/2019	08/07/2019	120	08/07/2019
Rule 12/19/20 Filed By	04/09/2019	09/06/2019	150	09/06/2019
Rule 12/19/20 Heard By	04/09/2019	10/07/2019	181	10/07/2019
Rule 15 Served By	04/09/2019	06/02/2020	420	06/02/2020
Rule 15 Filed By	04/09/2019	07/02/2020	450	07/02/2020
Rule 15 Heard By	04/09/2019	07/02/2020	450	07/02/2020
Discovery	05/10/2019	09/12/2019	125	09/12/2019
Rule 56 Served By	04/09/2019	04/28/2021	750	04/28/2021
Rule 56 Filed By	04/09/2019	05/28/2021	780	05/28/2021
Final Pre-Trial Conference	04/09/2019	09/27/2021	902	06/23/2021
Judgment	04/09/2019	04/08/2022	1095	06/23/2021
Status Review	04/10/2019	04/22/2019	12	04/10/2019
Under Advisement	12/08/2020	01/07/2021	30	04/13/2021
Appeal - No Transcript	07/14/2021	07/28/2021	14	08/17/2021

**Docket Information**

<b><u>Docket Date</u></b>	<b><u>Docket Text</u></b>	<b><u>File Ref Nbr.</u></b>	<b><u>Image Avail.</u></b>
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>
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>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/09/2019	<p>MEMORANDUM &amp; ORDER:</p> <p>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.</p> <p>Judge: Vhay, Hon. Michael D</p> <p>(No document received from Land Court as of 04/09/2019)</p> <p>(Land Court reports that no independent document was created for the order. The docket entry is the order).</p>		
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	<p>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.</p> <p>Judge: Nickerson, Scott W</p>	13	<a href="#">Image</a>
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>
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	<p>Rule 9A list of documents filed.</p> <p>Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)</p> <p>eFile#277868</p>	16	<a href="#">Image</a>
07/14/2020	<p>Plaintiffs The Haven Center, Inc.'s Motion to Transfer Matter to Land Court</p> <p>Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)</p>	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	<p>Affidavit of compliance with Superior Court Rule 9A</p> <p>Applies To: Zehnder, Esq., Benjamin E (Attorney) on behalf of The Haven Center, Inc. (Plaintiff)</p>	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.		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
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		
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>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
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	

**Case Disposition**

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Disposed by Court Finding	06/23/2021	

APPEALS COURT  
Full Court Panel Case  
Case Docket

THE HAVEN CENTER, INC. & another vs. TOWN OF BOURNE & another  
2021-P-0765

CASE HEADER

Case Status	No briefs yet	Status Date	08/23/2021
Nature	Governmental/municipal	Entry Date	08/23/2021
Appellant	Plaintiff	SJ Number	
Brief Status	Awaiting blue brief	Case Type	Civil
Panel		Brief Due	10/04/2021
Citation		Argued/Submitted	
Lower Court	Barnstable Superior Court	Decision Date	
Lower Ct Judge		TC Entry Date	04/09/2019
FAR Number		SJC Number	

INVOLVED PARTY

The Haven Center, Inc.  
Plaintiff/Appellant  
Awaiting blue brief  
Due 10/04/2021

MacArthur Park Place LLC  
Plaintiff/Appellant  
Awaiting blue brief  
Due 10/04/2021

Town of Bourne  
Defendant/Appellee  
Awaiting red brief  
Due 11/03/2021

Town of Bourne Member or alternate member of Board of  
Selectmen  
Defendant/Appellee  
Awaiting red brief  
Due 11/03/2021

ATTORNEY APPEARANCE

Benjamin E. Zehnder, Esquire

Benjamin E. Zehnder, Esquire

Robert S. Troy, Esquire

Robert S. Troy, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
08/23/2021	#1	Lower Court Assembly of the Record Package
08/23/2021		Notice of entry sent.
08/23/2021	#2	Civil Appeal Entry Form filed for The Haven Center, Inc. by Attorney Benjamin Zehnder.
08/24/2021	#3	Civil Appeal Entry Form filed for MacArthur Park Place LLC by Attorney Benjamin Zehnder.

As of 08/26/2021 11:15am

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. *Spenlinhauer*, 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. *Spenlinhauer*, 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 *Spenninhauer*. 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;

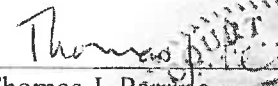
9. October 29, 2019 a town meeting defeats Article 14, a repeal of the General Bylaw prohibiting recreational (nonmedical) marijuana.

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


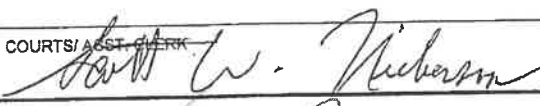
DATED: April 13, 2021

A true copy, Attest:

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Clerk

<p align="center"><b>CLERK'S NOTICE</b></p>	<p>DOCKET NUMBER</p> <p align="center"><b>1972CV00164</b></p>	<p><b>Trial Court of Massachusetts</b></p> <p><b>The Superior Court</b></p> 
<p>CASE NAME:</p> <p>The Haven Center, Inc. et al vs. TOWN OF BOURNE et al</p>		<p>Scott W. Nickerson, Clerk of Court</p> <p>Barnstable County</p>
<p>TO:</p> <p>Benjamin E Zehnder, Esq.</p> <p>La Tanzi, Spaulding and Landreth LLP</p> <p>PO Box 2300</p> <p>Orleans, MA 02653</p>		<p>COURT NAME &amp; ADDRESS</p> <p>Barnstable County Superior Court</p> <p>3195 Main Street</p> <p>Barnstable, MA 02630</p>
<p>You are hereby notified that on 06/04/2021 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion for Reconsideration (#19.0): DENIED</p> <p>The Plaintiffs' motion to reconsider is DENIED as the decision resolved all remaining counts of the complaint.</p> <p>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.</p> <p>Clerk's Notice emailed on 06/07/2021 to BEZ and RST.</p> <p>Judge: Perrino, Hon. Thomas J</p>		
<p>DATE ISSUED</p> <p align="center"><b>06/07/2021</b></p>	<p>ASSOCIATE JUSTICE/ ASSISTANT CLERK</p> <p align="center"><b>Hon. Thomas J Perrino</b></p>	<p>SESSION PHONE#</p> <p align="center"><b>(508)375-6684</b></p>

<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	CLERK OF COURTS/ ASST. CLERK X 	
06/23/2021		

Date/Time Printed: 06-23-2021 09:38:46

SCV131: 05/2016

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