SJC-13029

COMMCAN, INC., & another[1] vs. TOWN OF MANSFIELD.

Suffolk. February 3, 2021. - August 30, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Marijuana. Municipal Corporations, Marijuana, By-laws and ordinances. Zoning, Validity of by-law or ordinance.

Civil action commenced in the Land Court Department on July 18, 2019.

The case was heard by Howard P. Speicher, J., on a motion for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Noemi Kawamoto for the defendant.
Jason R. Talerman for the plaintiffs.
Valerio G. Romano, pro se, amicus curiae, submitted a brief.
Adam D. Fine & Brandon R. Kurtzman, for Vicente Sederberg LLP, amicus curiae, submitted a brief.

[1] Ellen Rosenfeld, as trustee of the Ellen Realty Trust.

BUDD, C.J. The recent legalization of the sale of marijuana for recreational use has led to predictable disputes over the proper application of G. L. c. 94G (act). Here the plaintiffs and the town of Mansfield (town) have differing interpretations of G. L. c. 94G, § 3 (a) (1) (§ 3 [a] [1]), which, with some exceptions, exempts medical marijuana dispensaries from zoning ordinances that would prohibit them from converting to retail marijuana sales.

In 2016 Ellen Rosenfeld, in her roles as trustee of the Ellen Realty Trust (Rosenfeld) and president of CommCan, Inc. (CommCan), had taken all of the necessary steps and received authorization from the town to construct a building that would house a medical marijuana dispensary on an unimproved lot owned by the Ellen Realty Trust. Before construction began, the act legalized the sale of recreational marijuana. Rosenfeld and CommCan (collectively, plaintiffs) thereafter sought a determination from the Land Court that, pursuant to § 3 (a) (1), the town may not prevent CommCan from converting to a retail marijuana establishment. A judge allowed the plaintiffs' motion for summary judgment, and the town appealed. We affirm.[2]

Background. We summarize the pertinent facts, which are undisputed and are supported by the record. The property is a

[2] We acknowledge the amicus briefs submitted by Valerio Romano and Vicente Sederberg LLP.

parcel of land located in a planned business district zone where the dispensing of medical marijuana is allowed by special permit.

In July 2016, CommCan was granted a provisional certificate of registration to operate a medical marijuana dispensary at the property by the Department of Public Health. In the following months, CommCan and the town executed a host community agreement,[3] and the town planning board granted Rosenfeld a special permit to construct the dispensary. Before construction commenced, an abutting landowner brought a lawsuit challenging the grant of the special permit.[4] Construction of the dispensary was halted pending the outcome of the litigation.

In November 2016, voters approved the legalization of the sale and use of recreational marijuana in the Commonwealth. See Regulation and Taxation of Marijuana Act, St. 2016, c. 334, §§ 1-12, codified at G. L. c. 94G, §§ 1 et seq. The next year,

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[3] A host community agreement is an agreement between the prospective marijuana establishment and the host community "setting forth the conditions to have a marijuana establishment . . . located within the host community." G. L. c. 94G, § 3 (d). Although such agreements were not mandated by the State at the time CommCan and the town executed the agreement, the Legislature since has altered the statutory framework to require that prospective establishments must execute an agreement with the host community before applying for licensure with the State. See St. 2017, c. 55, § 25, codified at G. L. c. 94G, § (3) (d).

[4] See West St. Assocs. LLC v. Planning Bd. of Mansfield, 488 Mass. (2021).

amendments to the act went into effect, implementing a procedure for the retail sale of marijuana for adult recreational use. See St. 2017, c. 55, §§ 20-43 (amending G. L. c. 94G).

In June 2019, CommCan sent a letter to the town requesting a meeting to discuss conversion of the property to a recreational marijuana retail establishment. The town declined to meet with CommCan, referencing the fact that the property's location was not zoned for retail recreational marijuana sales. The plaintiffs thereafter filed a complaint in the Land Court pursuant to G. L. c. 240, § 14A, seeking a determination that the town's zoning bylaw could not operate to prevent CommCan from converting to a retail marijuana establishment. See G. L. c. 94G, § 3 (a) (1). The motion judge allowed the plaintiffs' motion for summary judgment; the town appealed. We transferred the case to this court on our own motion.

Discussion. As an initial matter, the town argues that the plaintiffs are not authorized to bring a claim under G. L. c. 240, § 14A, which allows a landowner to obtain a declaratory judgment from the Land Court regarding the validity of a zoning ordinance or bylaw as it pertains to the property at issue.[5] The statute provides:

[5] The town frames the issue as one of standing; however, whether a party has a cause of action under G. L. c. 240, § 14A, is not a question of standing. See Hansen & Donahue, Inc. v. Norwood, 61 Mass. App. Ct. 292, 295 n.8 (2004), citing

> "The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, . . . for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of [G. L. c. 40A] or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, or for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. . . . The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not."

G. L. c. 240, § 14A. Thus, to bring a claim under G. L. c. 240, § 14A, the party must (1) own the property in question and (2) allege that the zoning bylaw or ordinance in question "restrict[s] or limit[s] the present or future use, enjoyment, improvement or development" of that property.

It is undisputed that Ellen Realty Trust, of which Rosenfeld is the trustee, is the owner of the property. Moreover, the fact that the zoning bylaw does not allow for the retail sale of marijuana for recreational use in the area where the property is located plainly restricts the use of the property. Therefore, G. L. c. 240, § 14A, authorizes Rosenfeld

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Bobrowski, Massachusetts Land Use & Planning Law § 3.05[B], at 111 (2d ed. 2002) ("Standing is something of a misnomer in evaluating the right to bring a c. 240, § 14A, petition").

to pursue the claim. See Woods v. Newton, 349 Mass. 373, 376 (1965) ("Owners of freehold estates in possession are expressly authorized by G. L. c. 240, § 14A[,] . . . to petition the Land Court for a determination of the validity of zoning enactments affecting their land or structures thereon"). Moreover, as Rosenfeld is the president of CommCan and CommCan has a provisional registration to operate a dispensary on the property, it is a proper coplaintiff.

Turning to the substance of the appeal, "[o]ur review of a motion judge's decision on summary judgment is de novo, because we examine the same record and decide the same questions of law." Casseus v. Eastern Bus Co., 478 Mass. 786, 792 (2018), quoting Kiribati Seafood Co. v. Dechert LLP, 478 Mass. 111, 116 (2017). Here, the single issue raised is the interpretation of § 3 (a) (1).

Section 3 (a) gives municipalities the power to regulate the number and location of retail marijuana establishments within their borders with certain exceptions. One such exception is that "zoning ordinances or by-laws shall not operate to . . . 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 [retail facility]." § 3 (a) (1). The town argues that the plaintiffs

do not qualify for a zoning exemption because they are not "engaged in the . . . sale of marijuana or marijuana products" (emphasis added).

"Our primary duty is to interpret a statute in accordance with the intent of the Legislature." Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285 (1996). "[C]onsistent with our general practice of statutory interpretation, we look first to the language of the statute because it is the 'principal source of insight' into the intent of the legislature." Sisson v. Lhowe, 460 Mass. 705, 708 (2011), quoting Bishop v. TES Realty Trust, 459 Mass. 9, 12 (2011). See Commonwealth v. Morgan, 476 Mass. 768, 777 (2017), citing Commonwealth v. Peterson, 476 Mass. 163, 167 (2017) ("The plain language of the statute, read as a whole, provides the primary insight into that intent").

Because the statute does not define "engaged," "we give the term its 'usual and accepted meaning[],' as long as it is 'consistent with the statutory purpose.'" Commonwealth v. Matta, 483 Mass. 357, 372 (2019), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). To be "engaged" in something is to be "involved in activity; occupied; busy." Merriam Webster's Collegiate Dictionary 413 (11th ed. 2003). See Zone Book, Inc., supra ("We derive the words' usual and accepted meaning from sources presumably known to the statute's

enactors, such as their use in other legal contexts and dictionary definitions").

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.[6] 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. See, e.g., Commonwealth v. Sovrensky, 269 Mass. 460, 462 (1929) ("one may be engaged in the business of selling although he [or she] has made no sale"). Cf. Green v. Zoning Bd. of Appeals of Southborough, 96 Mass. App. Ct. 126, 131-132 (2019) (developer "exercised" its use variance by taking necessary legal and conceptual steps to prepare property for construction).

The town argues that the phrase "engaged in" means "actually being 'engaged in'" an activity (emphasis added). Thus, according to the town, to qualify for the zoning

[6] The town argues that the judge improperly took judicial notice that it is impractical to begin construction when a zoning permit is being appealed. Putting aside whether this was a proper use of judicial notice, we will not penalize the plaintiffs for waiting to begin construction until the permitting issue is resolved.

exemption, the plaintiffs actually must have been distributing marijuana from the property in order to be covered by the statute.[7] To begin, the town's interpretation ignores the plain meaning of the term "engaged" and requires the addition of the word "actually" into the text of the statute. See Commonwealth v. Hamilton, 459 Mass. 422, 435 (2011) ("as a matter of statutory construction, we cannot supply words the Legislature chose not to include").

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 (2016) ("Clear and unambiguous language is conclusive as to legislative intent"). The only condition of consequence set by § 3 (a) (1)

[7] The town argues that revisions made to G. L. c. 94G, § 3, in 2017 supports this argument; we disagree. The original version of the statute states that zoning ordinances "shall not prohibit placing a marijuana establishment . . . in any area in which a medical marijuana treatment center is registered to engage in the same type of activity" (emphasis added). See St. 2016, c. 334, § 5. As discussed supra, the current version of the statute states that municipalities may not "prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017[,] engaged in the . . . sale of marijuana" (emphasis added). G. L. c. 94G, § 3 (a) (1), as amended through St. 2017, c. 55, § 23. Although both versions of § 3 (a) (1) bar zoning ordinances from unduly restricting the location of retail marijuana establishments, only the amended version provides a benefit to medical marijuana dispensaries seeking to convert to retail sales. We see nothing to suggest that the Legislature intended also to narrow the definition of the verb "to engage" with this change.

is that the medical marijuana dispensary must have been "licensed or registered not later than July 1, 2017."

Elsewhere in the act the Legislature calls upon the Cannabis Control Commission to "prioritize the review and licensing decisions for applicants for retail . . . licenses who . . . are registered marijuana dispensaries with a final or a provisional certificate of registration in good standing with the department of public health . . . that are operational and dispensing to qualifying patients" (emphasis added). St. 2017, c. 55, § 56 (a). Thus, it is obvious that the Legislature knew how to narrow the set of dispensaries qualifying for particular benefits when it saw fit to do so. See Commonwealth v. Gagnon, 439 Mass. 826, 833 (2003), quoting 2A N.J. Singer, Statutes and Statutory Construction § 46.06, at 194 (6th ed. rev. 2000) ("[W]here the [L]egislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded").

Judgment affirmed.