



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

MAURA HEALEY
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

November 14, 2019

Terry L. Walker, Town Clerk
Town of Monterey
P.O. Box 277
Monterey, MA 01245

**Re: Monterey Annual Town Meeting of May 4, 2019 -- Case # 9399
Warrant Article # 22 (Zoning)
Warrant Articles # 21, 23 and 25 (General)**

Dear Ms. Walker:

Article 25 - Article 25 amends the Town's general by-laws to impose a ban on recreational marijuana establishments. As explained herein, we approve Article 25 from the May 4, 2019 Monterey Annual Town Meeting.¹

I. Summary of Article 25

Article 25 amends the general by-laws to adopt the following new bylaw:

The Town of Monterey prohibits all recreational marijuana establishments, including but not limited to recreational marijuana establishments for the cultivation, manufacturing, transportation, testing and/or retails sales of recreational marijuana.

Article 25 indicates that it is subject to a ballot vote.² Town Counsel's summary of Article 25, as provided in the Warrant, stated as follows:

¹ In a decision issued August 14, 2019, we: (1) approved Articles 21 and 23; (2) placed Article 22 on 299 hold in accordance with Chapter 299 of the Acts of 2000; and (3) extended our deadline for a decision on Article 25 for an additional 60-days until October 15, 2019. In a decision issued October 10, 2019, we approved Article 22. On October 15, 2019, we extended our deadline for a decision on Article 25 for an additional 30 days until November 14, 2019.

² General Laws Chapter 94G, Section 3 establishes the following procedures in order to *prohibit* or *limit the number* of establishments (as opposed to by-laws and ordinances that would reasonably regulate their operation, which will continue to be adopted by Town Meeting or City Council):

(a) Through December 31, 2019, towns/cities in which a majority of voters voted no on Question 4 on the 2016 state election ballot, entitled "Legalization, Regulation, and Taxation of Marijuana" ("Question 4") may adopt a by-law or ordinance at Town Meeting or City Council;

The foregoing by-law would ban any recreational marijuana establishments in the Town of Monterey to the extent such a ban is allowed under the General Laws of Massachusetts, and particularly G.L. c. 94G, Section 3, including any marijuana establishments legalized in the future for recreational marijuana.

II. Attorney General’s Standard of Review

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155.

III. General Versus Zoning

In reviewing Article 25, we have considered the question whether a by-law amendment such as this one that prohibits or limits the number or type of marijuana establishments in the town should be adopted as a zoning by-law rather than as a general by-law. Zoning by-laws are those “by-laws, adopted by...towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of...towns to protect the health, safety and general welfare of their present and future inhabitants.” G.L. c. 40A, § 1A. An argument could be made that Article 25’s prohibition is better suited to regulation as a matter of zoning. The term “recreational marijuana establishments,” as used in Article 25, is broadly defined in G.L. c. 94G, § 1 (j), and includes many uses that may be more appropriately regulated by way of a zoning by-law amendment. *See* Spenlinhauer v. Town of Barnstable, 80 Mass. App. Ct. 134, 141-42 (2011) (comprehensive bylaw regulating parking should have been adopted as a zoning by-law because

(b) After December 31, 2019, towns/cities in which a majority of voters voted no on Question 4 may adopt a by-law/ordinance at Town Meeting/City Council *and* must have the by-law/ordinance approved at a municipal election; and

(c) Towns/cities in which a majority of voters voted yes on Question 4 may adopt a by-law/ordinance at Town Meeting/City Council *and* must have the by-law/ordinance approved at a municipal election.

It appears that the Town voted in favor of Question 4 in November 2016. *See* https://electionstats.state.ma.us/ballot_questions/view/7297/filter_by_county:Berkshire. According to the Town’s website, the by-law adopted under Article 25 passed at a local ballot vote on May 7, 2019 by a vote of 91 in favor and 68 opposed. *See* https://www.montereyma.gov/sites/montereyma/files/uploads/2019electionresults_20190508132039.pdf

town had historically regulated parking through its zoning by-law and the record reflected no public health concerns that would justify use of the general by-law police power).

The distinction between a general by-law and a zoning by-law is an important one. “[V]alid zoning measures can be implemented only by following the procedures spelled out in G.L. c. 40A,” Spenlinhauer, 80 Mass. App. Ct. at 137. These procedural protections include a report by the planning board after a duly noticed public hearing with notice to the Town’s residents, abutting cities and towns, the regional planning agency (if any), and the state Department of Housing and Community Development. *See* G.L. c. 40A, § 5. “Moreover, changes in zoning [by-laws] protect some prior existing uses, *see* G.L. c. 40A, § 6, but general [by-laws] typically do not.” Spenlinhauer, 80 Mass. App. Ct. at 137.

However, Chapter 94G permits towns to regulate commercial marijuana businesses through by-laws, provided those by-laws are not “unreasonably impracticable” or in conflict with that chapter. *See* G.L. c. 94G, § 3(a). Nothing in the text of Chapter 94G requires that such local regulation be effectuated through zoning -- as opposed to general -- bylaws. Nonetheless, a general by-law may not be effective to change earlier zoning by-law provisions governing a particular subject matter where the procedural requirements of Chapter 40, the state Zoning Act, have not been observed. *See* Rayco Investment Corp. v. Board of Selectmen of Rayham, 368 Mass. 385, 394 (1975) (concluding that by-law limiting trailer-park operator licenses was insufficient to amend town’s previous zoning by-law regulating such parks where record did not demonstrate that license limitation had been enacted in accordance with the procedural requirements of Chapter 40A).

Depending on the town’s history of regulation, its comprehensive zoning treatment of a particular subject matter may not be susceptible to subsequent change by way of a general by-law. *See* *id.* at 393; Spenlinhauer, 80 Mass. App. Ct. at 139-140 (town’s comprehensive regulation of off-street parking by zoning by-laws could not be amended through enactment of a general by-law). In the recent case of Valley Green Grow, Inc. v. Town of Charlton, Land Court No. 18-MISC-000483 (March 7, 2019) (VGG), the Land Court concluded that a town may not adopt a general by-law to restrict a use that the town has historically regulated by zoning by-law. Therefore, in reviewing the by-law adopted under Article 25, we must review the Town’s previous regulation of marijuana-related uses.³

Here, the Town of Monterey has not previously adopted any zoning or general by-laws regulating marijuana establishments. Moreover, the Town has not previously adopted any zoning or general by-laws regulating medical marijuana treatment centers. Thus, this vote at the May 4, 2019 Annual Town Meeting under Article 25 to prohibit recreational marijuana establishments represents the Town’s first substantive by-law regulating recreational marijuana establishments.

Based on our limited standard of review of town by-laws, and because the Town of Monterey has not previously regulated marijuana establishments under its zoning by-laws, we

³ *See* for example, the Attorney General’s decision to the Town of Brewster, issued April 1, 2019 in Case # 9273, disapproving a general by-law prohibiting marijuana establishments where the Town had already regulated such establishments through its zoning by-laws.

approve Article 25. However, we encourage the Town to consult with Town Counsel to determine whether the Town should consider a zoning by-law amendment at a future Town Meeting to propose the same prohibition as adopted in Article 25.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 x 4402

cc: Town Counsel Jeremia Pollard