COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

WORCESTER, ss.

MISCELLANEOUS CASE
NO. 18 MISC 000483 (RBF)

VALLEY GREEN GROW, INC., CHARLTON ORCHARDS GROUP, LLC, NATHAN R. BENJAMIN, JR., and CATHERINE L. BENJAMIN,

Plaintiffs,

v.

TOWN OF CHARLTON and JOHN P. McGRATH, DEBORAH B. NOBLE, KAREN A. SPIEWAK, DAVID M. SINGER, JOSEPH J. SZAFAROWICZ, as are Members of the Board of Selectmen of the Town of Charlton,

Defendants,

GERARD F. RUSSELL,

Defendant-Intervenor.

MEMORANDUM AND ORDER ALLOWING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

On November 4, 2016, the voters of the Commonwealth voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts. Among those voting YES were a majority of the voters of the Town of Charlton (Town). After the ensuing enactment of G.L. c. 94G, regulating recreational marijuana in Massachusetts, the plaintiff Valley Green Grow, Inc. (VGG) entered an agreement

with plaintiffs Charlton Orchard Groups, LLC (COG) and Nathan R. Benjamin, Jr. and Catherine Benjamin to purchase their farm in Charlton. VGG wants to build a 1,000,000 square foot indoor marijuana growing and processing facility on the property, consisting of 860,000 square feet of greenhouses, a 130,000 square foot post-harvest processing facility, and 10,000 square foot cogeneration facility. VGG approached the Town in the spring of 2018, filed a preliminary subdivision plan, and began negotiations for a development agreement and a host community agreement. At its May 2018 annual town meeting, the Town adopted by a two-thirds vote Warrant Article 27, amending the Charlton Zoning Bylaw (zoning bylaw) to allow certain recreational marijuana uses in the agricultural, community business, industrial and business enterprise park use districts by special permit. A group of citizens including intervenor Gerard F. Russell and other neighbors of the property, unhappy with the zoning amendment, brought two warrant articles to a special town meeting in August 2018. Warrant Article 1 sought to rescind the previously adopted amendment to the zoning bylaw that allowed marijuana uses. Warrant Article 2 sought to adopt a general bylaw to ban all non-medical cannabis uses within the Town. While a majority voted for Warrant Article 1, it failed to obtain the two-thirds majority necessary for an amendment to the zoning bylaw. Warrant Article 2 passed by a majority vote.

The plaintiffs now seek a declaration under G.L. c. 240, § 14A, and G.L. c. 231A, §§ 1 et seq., that Warrant Article 2 is invalid, and have brought a motion for summary judgment. As set forth below, the motion is allowed. Because Warrant Article 2 was an improper attempt by the Town to exercise its zoning power through a general bylaw by regulating a use already regulated in its zoning bylaw, it is invalid and of no force and effect.[1]

[1] The court acknowledges the amicus briefs of Michael Pill; of Mark Albano, Denis Arruda, Holly Arruda, Thomas K. Bailey, Donna Beers, Charlene Emco Belsito, Mark Belsito, Karen Bodamer, Scott Bodamer, Christine Breault, Richard Breault, Jane Carbonneau, Kathleen Cristadoro, Ann Faille, Rob Faille, William Foster, Merilee Fowler, Howard Galusha, Patricia Gordo, Stephanie Hanyes, Anne M. Hassel, Carol Hassel, Don C. Hayward, Heidi

Procedural History

On September 21, 2018, VGG filed its complaint, naming as defendants the Town and John P. McGrath, Deborah B. Noble, Karen A. Spiewak, David M. Singer, and Joseph J. Szafarowicz as Members of the Board of Selectmen of the Town of Charlton (collectively, the Board). On October 9, 2018, Gerard F. Russell filed his Motion to Intervene as a Defendant, and on October 15, 2018, his Amended Brief and Affidavit in support of his Motion to Intervene. On October 30, 2018, Russell filed his Amended Answer of Gerard F. Russell, and on October 31, 2018, the Town and the Board filed their Answer. On November 5, 2018, VGG filed its Opposition to Gerard Russell's Motion to Intervene.

The court held the case management conference on November 6, 2018, where it took the Motion to Intervene under advisement and advised VGG to amend its complaint to add necessary plaintiffs. On November 8, 2018, the court issued its Order Allowing Motion of Gerard F. Russell to Intervene as a Defendant, and VGG filed its Assented-To Motion for Leave to File First Amended Complaint to add as plaintiffs COG and the Benjamins. The court allowed the motion that same day and deemed the First Amended Complaint (Complaint or Compl.) filed. On November 19, 2018, Russell filed his Answer to Plaintiffs' Amended Complaint and Cross-Complaint, bringing a cross-complaint against the Town (Russell Ans.). On December 17, 2018, the Town filed its Answer to Intervenor's Cross-Claim. Plaintiffs' Motion for Leave to Intervene as Defendants in Intervenor Gerard Russell's Cross Claim Under G.L. c. 240 Sec. 14A Against

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Heilman, Michele Henault, Josephine S. Hensley, Lester Hensley, Theresa Hoggins, Corinne Hogseth, Kent Howard, Moira Jacobs, Chris Kelly, Julie Kelly, Stephen Koronis, Brett Kustigian, Kristin Kustigian, Helen Labosier, Jesse LeBlanc, Ann Marie Locwin, Eric Locwin, Frank S. Locwin, Morgan Long, Brooke Lowe, Carla Lowe, Monique Manna, Denise MacFarlane, Patrick MacFarlane, Jill Martin, Marjorie McGuire, Roger Morgan, Christina Mullen, Cathleen Nikosey, Milissa Obara, John M. O'Halloran, Laurie Palepu, Antoinette D. Parvis, Lisa Pearson, Donna M. Peters, Karen Randall, Lori Robinson, Amy Ronshausen, Sue Rusche, Margaret M. Russell, Christine Saucier, Tim Saucier, Julie Schauer, Sally Schindel, George Seaver, Michael Shaw, Karen Sherman, Armando Sodano, Moira Starks, Maribeth Trembley, Tom Vega, Ann Washburn, Ed Wood, David Woodacre, Kathleen Woodacre, David Wolkowicz, Peter Wright, Tanya Wright, Alicia Zelenko, Andrey Zelenko, and Nataliya Zelenko; and of Cape Cod Grow Lab, LLC, Nature's Alternative, Inc., and The Haven Center, Inc.

the Town of Charlton was filed on February 1, 2019, and allowed without hearing on February 5, 2019.

On November 16, 2018, VGG, COG, and the Benjamins (plaintiffs) filed Plaintiffs' Motion for Summary Judgment (Summary Judgment Motion), Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment (Pl. SOF), their Appendix of Exhibits in Support of Plaintiffs' Motion for Summary Judgment (Pl. Exh.), and the Affidavit of Jeffrey Goldstein in Support of Plaintiffs' Motion for Summary Judgment (Goldstein Aff.).

On December 18, 2018, Russell filed (1) Defendant Gerard F. Russell's Opposition to Plaintiffs' Motion for Summary Judgment, (2) the Affidavit of Defendant Gerard F. Russell (Russell Aff.), (3), Notice to Attorney General Pursuant to G.L. c. 231A, § 8 and Mass.R.Civ.P. 24(d), (4) Russell's Document Appendix (Russell App.), (5) Defendant Russell's Response to Plaintiffs' Statement of Undisputed Material Facts in Support of His Opposition to Plaintiffs' Motion for Summary Judgment (Russell SOF Resp.), and (6) Defendant Russell's Statement of Undisputed Material Facts In Support of His Opposition to Plaintiffs' Motion for Summary Judgment (Russell SOF).

On December 10, 2018, Michael Pill's Motion for Leave to (1) File Amicus Curiae Brief and (2) Participate in Hearing on Plaintiffs' Summary Judgment as allowed in part and denied in part, allowing the filing of an amicus brief but denying leave to participate in the hearing, and attorney Pill's amicus brief was accepted for filing. On December 27, 2018, New Jersey attorney David G. Evans was admitted *pro hac vice* on the motion of attorney Pill, his motion to file an amicus brief was allowed, and his amicus brief on behalf of his clients was accepted for filing. The Motion of Benjamin E. Zehnder, Esq. for Leave to File an Amicus Curiae Brief in Support

of Plaintiff's Motion for Summary Judgment was allowed on December 27, 2018, and his amicus brief on behalf of his clients was accepted for filing.

On January 2, 2019, the plaintiffs filed (1) Plaintiffs' Reply to Defendant Russell's Opposition to Plaintiffs' Motion for Summary Judgment, (2) Plaintiffs' Response to Defendant Russell's Statement of Material Facts (Pl. SOF Resp.), and (3) Plaintiffs' Response to Brief of Amicus Curiae Michael Pill. On January 4, 2019, the court heard the Summary Judgment Motion, and took it under advisement. This Memorandum and Order follows.

Summary Judgment Standard

Generally, summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the court is to draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, '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 a matter of law.'" *Regis College v. Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

Undisputed Facts

The following facts are undisputed.

1. VGG is a Massachusetts corporation with a principal place of business at 1600 Osgood Street, North Andover, Massachusetts. Pl. SOF ¶ 1; Russell SOF Resp. ¶ 1.

2. COG is a Massachusetts company and record owner in fee of property at 44 Old Worcester Road, Charlton (COG property). Pl. SOF ¶ 2; Russell SOF Resp. ¶ 2; Pl. Exhs. 2-4.

3. The Benjamins are individuals and record title owners in fee of property located at 7 L Turner Road, Charlton (Benjamin property). Pl. SOF ¶¶ 3-4; Russell SOF Resp. ¶¶ 3-4; Pl. Exhs. 3-4. The COG property and the Benjamin property are hereinafter referred to as the "site."

4. On November 4, 2016, the citizens of Charlton voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts. Pl. SOF ¶ 5; Russell SOF Resp. ¶ 5; Pl. Exh. 5.

5. On or about March 9, 2018, VGG entered into an offer and subsequently a purchase and sale agreement with COG and the Benjamins for the acquisition and development of the site. The site was formerly operated by COG as a family-owned farm and winery. Goldstein Aff. ¶ 3.[2]

6. VGG proposed to develop the site to house a state of the art indoor cannabis cultivation facility, for the cultivation, manufacturing and processing of medical and recreational use cannabis (the project). VGG's Site Plan application for the project consists of three (3) major components totally approximately one million (1,000,000) square feet of new buildings:

a. 860,000 square foot Closed Greenhouse (6 "modules") and supporting functions;
b. 130,000 square foot Post-Harvest Processing Facility and supporting functions; and
c. 10,000 square foot Enclosed Cogeneration Facility (~18 MW) and supporting equipment.

Pl. SOF ¶ 7; Russell SOF Resp. ¶ 7; Russell Exhs. 8, 9.

[2] In his response to the Plaintiffs' Statement of Undisputed Material Facts, Russell denied this statement, referring to exhibit 10 in Russell's Document Appendix. Exhibit 10 does not support the denial or state any evidence that would dispute this fact.

7. In March 2018, VGG sought an advisory determination from Curtis Meskus, the Town's zoning enforcement officer and building inspector, addressing whether VGG's proposed project would be permitted as of right in the Town agricultural zoning district. Opponents to the Project have argued that cannabis uses cannot be approved as agricultural uses. Pl. SOF ¶ 8; Russell SOF Resp. ¶ 8; Pl. Exh. 6.

8. Mr. Meskus responded in a March 20, 2018, email, in an opinion that was "advisory only," that the project "would be allowed as of right." Pl. Exh. 6.

9. On April 25, 2018, recognizing that the Town was contemplating adopting a zoning bylaw to authorize and regulate recreational cannabis uses within the Town, VGG engaged a civil engineer and filed a preliminary subdivision plan for approval. VGG's subdivision plan submission triggered a zoning freeze for the Property, pursuant to G.L. 40A, § 6. Pl. SOF ¶ 11; Russell SOF Resp. ¶ 11.

10. At that time, § 200-3.2.B of the Charlton Zoning Bylaw (zoning bylaw) did not explicitly list "marijuana" as part of any principal use. It did provide that "[i]ndoor commercial horticulture/floriculture establishments (e.g., greenhouses)" are permitted as of right in every zoning district. Russell App. Exh. 2.

11. During the spring of 2018, VGG negotiated with Robin Craver, Town Manager for the Town of Charlton, with respect to a Development Agreement and Host Community Agreement for the project and related activities. Pl. SOF ¶ 12; Russell SOF Resp. ¶ 12.

12. At its May 15, 2018 public meeting, the Board of Selectmen voted to approve the proposed Development Agreement and Host Community Agreement with VGG. Pl. Exh. 8.

13. At its annual town meeting on May 21, 2018, the Town adopted by more than a two-thirds vote Warrant Article 27, amending the zoning bylaw to allow certain recreational

marijuana uses in the agricultural, community business, industrial and business enterprise park use districts by special permit (Warrant Article 27). Pl. SOF ¶ 14; Russell SOF Resp. ¶ 14; Pl. Exh. 9.

14. After the VGG Development Agreement and Host Community Agreement were approved by the Board of Selectmen, a group of abutters objected to the manner in which the meeting agenda items were noticed, claiming that it was not clearly identified on the agenda for the hearing at which it was approved. Certain residents filed complaints challenging the zoning amendment process and actions of Town officials. Pl. SOF ¶ 15; Russell' SOF Resp. ¶ 15; Pl. Exh. 10.

15. As a result, the Board of Selectmen suspended any further action on the VGG Development and Host Community Agreements, rescheduled a public hearing, and asked VGG to attend the public meeting to describe the Project and answer questions of the public. VGG agreed to do so and attended a public meeting held on May 29, 2018, at which more than 400 residents and officials were in attendance. Pl. SOF ¶ 16; Russell SOF Resp. ¶ 16; Pl. Exh. 10; Goldstein Aff. at ¶¶ 10 and 11.

16. At its June 19, 2018 public meeting, the Board of Selectmen voted to reaffirm and ratify its prior vote in favor the Development Agreement and Host Community Agreement. Pl. App. Exh. 10.

17. At a special town meeting held on August 1, 2018, citizens of Charlton (including Russell and other abutters to the site) advanced two warrant articles: (1) Warrant Article 1, seeking to rescind the previously adopted zoning bylaw amendment, Warrant Article 27; and (2) Warrant Article 2, seeking to adopt a general bylaw to ban all non-medical cannabis uses within the Town. Warrant Article 1 failed to obtain the necessary two-thirds majority vote and therefore

failed. Warrant Article 2 passed by a majority vote. Pl. SOF ¶ 18; Russell SOF Resp. ¶ 18; Pl. Exh. 11.

18. Warrant Article 2 states as follows:

> Citizen Petition-Prohibition of Non-Medical Marijuana-General Bylaw. To see if the Town will vote to amend the Town's General Bylaw by adding a new Chapter and Section that would provide as follows, and further to amend the Table of Contents to add said Chapter and Section.
>
> **Chapter 157 Marijuana**
>
> **Section 157-3 Marijuana Establishments**
> Consistent with G.L. c.94G, § 3(a)(2), all types of non-medical "marijuana establishments" as defined in G.L. c.94G, §1, including marijuana cultivators, independent testing laboratory, marijuana product manufacturers, marijuana retailers or any other types of licensed marijuana-related businesses, shall be prohibited within the Town.
> Or take any action relative thereto.

Pl. Exh. 11.

19. At its regular Board meeting on August 28, 2018, the Board of Selectmen voted to put Warrant Article 2 on the ballot at the Annual Town Meeting election in May 2019. Pl. SOF ¶ 21; Russell SOF Resp. ¶ 21; Pl. Exh. 13.

20. On September 13, 2018, the Office of the Attorney General issued a letter approving the zoning bylaw amendments Charlton adopted under Warrant Article 27, with the exception of limited language. In the letter, the Attorney General disapproved of certain text added to the Warrant Article during town meeting, which would prohibit marijuana establishments from storing or holding money during non-business hours, reasoning that such language posed an unreasonable and impracticable business risk to operators. Pl. SOF ¶ 24; Russell SOF Resp. ¶ 24; Pl. Exh. 16.

21. The Attorney General's letter also reviewed correspondence from Attorney Francis Fennessey (representing certain of the abutters) urging disapproval of Warrant Article 27

in its entirety on claims of supposed corruption in the zoning amendment process, misleading statements at town meeting, and violation of the uniformity provision of G.L. c. 40A, § 4. The Attorney General's Office found in its review that none of the arguments advanced "furnishe[d] a basis for disapproval of the by-law...." The Attorney General's Office determined that the Town's vote had a "legitimate planning purpose" and was not "Arbitrary and unreasonable, or substantially unrelated to the public health, safety morals, or general welfare," but was rather a "classic exercise of the Town's zoning powers" Pl. SOF ¶ 25; Russell SOF Resp. ¶ 25; Pl. Exh. 16.

22. On September 13, 2018, the Attorney General's Office issued a letter approving the Town's proposed Warrant Article 2, imposing the general by-law ban, with the proviso that the by-law will not have effect until it is submitted for approval at a municipal election as required under chapter 94G. Pl. Exh. 17; Pl. SOF ¶ 26; Russell SOF Resp. ¶ 26.

23. The Attorney General concluded that "[t]he statute governing the Attorney General's by-law review does not authorize a disapproval based upon a by-law's alleged conflict with other bylaws of the town. *See* G.L. ch. 40, § 32." Pl. SOF ¶ 29; Russell SOF Resp. ¶ 29; Pl. Exh. 17.

24. In accordance with the terms and conditions of the Development Agreement and Host Community Agreement, VGG must make a $500,000.00 deposit 30 days after the issuance of the Host Community Agreement. The Host Community Agreement was issued on August 14, 2018 and, therefore, the $500,000.00 payment would have been due on September 13, 2018. Pl. SOF ¶ 35; Russell SOF Resp. ¶ 35; Goldstein Aff. at ¶ 16.

25. By letter dated September 11, 2018, VGG wrote to the Town advising it of VGG's intention to file this action and requesting the Town to extend the date by which the

$500,000 payment must be paid until such time as this court provides guidance on the legal issues presented herein. Pl. SOF ¶ 36; Russell SOF Resp. ¶ 36; Pl. Exh. 18.

26. The Town agreed to extend the due date of such payment pending the outcome of this action. Pl. SOF ¶ 37; Russell SOF Resp. ¶ 37; Goldstein Aff. ¶ 16.

27. At the October 15, 2018, special town meeting, Warrant Article 11 was advanced, seeking to amend the portions of the zoning bylaw enacted in Warrant Article 27 by striking marijuana establishments as special permit uses in the A, CB, and BEP districts, leaving them as special permit uses only in the IG district. Although the record does not reflect this, the parties report that Warrant Article 11 passed by a two-thirds majority vote. Russell Exh. ¶ 7.

Discussion

The Complaint has two counts. Count I is a petition for judicial determination of the validity of Warrant Article 2, brought pursuant to G.L. c. 240, § 14A. Count II seeks a declaratory judgment, pursuant to G.L. c. 231A, § 1, et seq., that Warrant Article 2 is invalid. Both counts and the Summary Judgment Motion present the same issue: Was Warrant Article 2 an attempted annulment of the zoning bylaw, as amended by Warrant Article 27, and therefore invalid because it was enacted as a general bylaw pursuant to G.L. c. 40, § 21, and not as a zoning bylaw following the process required under G.L. c. 40A, § 5? Or, rather, was Warrant Article 2 a valid exercise of the Town's police power and authority under G.L. c. 94G, § 3(a), to regulate recreational marijuana use, merely supplementing the zoning bylaw as amended by Warrant Article 27?

G.L. c. 240, §14A and G.L. c. 231A. The first question is whether Counts I and II state valid claims under their respective statutes, G.L. c. 240, § 14A, and G.L. c. 231A, § 1, et seq. Section 14A provides:

> 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, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter forty A 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 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.

G.L. c. 240, § 14A. The Land Court has exclusive jurisdiction over actions brought under § 14A. *Id.*; G.L. c. 185, § 1(j ½).

It is undisputed that COG and the Benjamins are the respective owners in possession of the COG and Turner properties, which together constitute the site that is the subject of this action. It is further undisputed that they are seeking a determination as to the validity of Warrant Article 2 as it affects the use of the site for the project. It is a more difficult question as to whether COG and the Benjamins seek a determination as to the validity of a zoning bylaw. Warrant Article 2 is explicitly not a zoning bylaw; it was enacted as a general bylaw. It would therefore seem that Count I does not seek to "resolve doubts relating to by-law restrictions or the requirements of a *zoning* ordinance." *Whitinsville Retirement Soc'y, Inc. v. Northbridge*, 394 Mass. 757, 762-763 (1985) (emphasis supplied). To dismiss Count I on this ground, however, would decide the very issue that Count I seeks to resolve: whether Warrant Article 2 acted, in effect, as a zoning bylaw amendment, and is invalid because it was not enacted pursuant to G.L. c. 40A, § 5. The court sees little distinction between determining the validity of a bylaw enacted under c. 40A and the validity of a bylaw that the plaintiffs claim should have been enacted under c. 40A. COG and the Benjamins have stated a claim under § 14A in Count I.

VGG, COG, and the Benjamins have also stated a claim for a declaratory judgment in Count II. Under the familiar standard, "the land court . . . within [its] . . . jurisdiction[], may on

appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby . . . in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." G.L. c. 231A, § 1. For the same reasons that COG and the Benjamins have stated a claim under §14A, the declaration sought by the plaintiffs—that Warrant Article 2 invalidly interferes with the zoning bylaw as amended by Warrant Article 27—is within the jurisdiction of the Land Court. "A landowner who seeks to challenge the validity of a zoning by-law where there is an actual controversy may bring a proceeding in the Land Court under G.L. c. 231A or under G.L. c. 240, § 14A." *Mantoni v. Board of Appeals of Harwich*, 34 Mass. App. Ct. 273, 275 (1993); *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 222-223 (1982).

VGG, COG, and the Benjamins have also demonstrated that an actual controversy has arisen between them, on the one hand, and the Town and Russell on the other, regarding whether VGG will be able to undertake the project on the site, or whether Warrant Article 2 bars the project. "The requirement that there be an 'actual controversy' should be construed liberally." *Peterborough Oil Co. v. Department of Envtl. Protection*, 474 Mass. 443, 445 (2016), citing *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 436 Mass. 132, 134 (2002). A declaratory judgment may be sought to interpret the validity of a municipal bylaw. G.L. c. 231A, § 2; *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 124 (2012). It is not necessary that a violation of a bylaw have already occurred for there to be an actual controversy as to the validity of the bylaw. See G.L. c. 231A, § 1 (declaratory judgment action may be brought "before or after a breach or violation . . . has occurred"). Rather, an actual controversy exists if the plaintiff alleges and shows that enforcement of the challenged bylaw "has caused, or will cause, injury to the plaintiff." *Entergy Nuclear Generation Co. v. Department of Envtl. Protection*, 459 Mass. 319, 324 (2011). Warrant Article 2, if valid, would

bar VGG from undertaking the project. This is a sufficient demonstration of injury to VGG resulting from the bylaw. Russell's argument that there is not yet any actual controversy because VGG has not yet made a formal application rings hollow given that Russell was one of the sponsors of Warrant Article 2 and sought to intervene in this case to ensure that the validity of Warrant Article 2 was fully defended. Further, the deadline by which VGG is obligated pay $500,000 to the Town under the Development Agreement and Host Community Agreement has been extended pending the outcome of this action and VGG's rights and obligations under those agreements are, to some extent, implicated by the resolution of this controversy.

Analysis. The court turns now to the question raised by the plaintiffs. The interplay of zoning and general bylaws and the circumstances under which a general bylaw impermissibly intrudes upon a subject regulated by a zoning bylaw are addressed in three major cases: *Rayco Inv. Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385 (1975) (*Rayco*); *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7 (1979); and *Spenlinhauer v. Town of Barnstable*, 80 Mass. App. Ct. 134 (2011).

In *Rayco*, the Supreme Judicial Court (SJC) considered the validity of a bylaw of the Town of Raynham which purported to restrict the number of trailer parks in the town. *Rayco*, 368 Mass. at 386-387. The bylaw provided that "[t]he maximum number of outstanding trailer park licenses issued under G.L. Chapter 140, shall not exceed at any time the number of said licenses issued by the Board of Health, and in conformity with applicable Zoning By-Laws, as of October 1, 1971." *Id.* at 386. In the Superior Court the plaintiff sought a declaration under G.L. c. 231A of the effect of the bylaw on the plaintiff's right to operate a mobile home park on property in the town. *Id.* The record before the SJC did not indicate whether the disputed bylaw was enacted pursuant to the procedures for a zoning bylaw or a general bylaw and the court

considered its applicability under both circumstances. *Id.* at 388. The Court, for reasons not relevant here, found that the plaintiff was not subject to the bylaw if it was enacted as a zoning bylaw and moved on to the bylaw's applicability to the plaintiff's proposed use of its land as a general bylaw. *Id.* at 388-390.

The Court concluded "that the nature and effect of the 1971 by-law is that of an exercise of the zoning power," which, if not enacted through the statutory requirements of G.L. c. 40A, has no effect on the "existing zoning regulations." *Id.* at 392, 394. The Court's conclusion was based on "the fact that similar by-laws have been adopted in the past by municipalities as zoning by-laws," and also "that prior to the adoption of the 1971 by-law the town's *zoning* by-law dealt specifically with the subject of trailer parks." *Id.* at 392-393. The Court noted that a "further consideration which leads us to this conclusion is that were we to adopt the defendant's theory [that the by-law was a proper exercise of the town's general police power] the assorted protections contained in the Zoning Enabling Act could in many cases be circumvented, thereby defeating the purposes of the statute." *Id.*

Subsequently in *Lovequist*, the SJC considered whether the wetland protection by-law of the Town of Dennis was "void under the Home Rule Amendment because it is inconsistent with both the Zoning Enabling Act, c. 40A, and the Commonwealth's Wetlands Protection Act." *Lovequist*, 379 Mass. at 11. The town's wetland protection by-law, article 15, provided, in part, that:

> The Conservation Commission is empowered to deny permission for any removal, dredging, filling, or altering of subject lands within the town if, in its judgment, such denial is necessary to preserve environmental quality of either or both the subject lands and contiguous lands. Due consideration shall be given to possible effects of the proposal on all values to be protected under this by-law and to any demonstrated hardship on the petitioner by reason of a denial, as brought forth at the public hearing.

Id. at 9 n.3. The *Lovequist* court stated that "[w]e do not consider all ordinances or by-laws that regulate land use to be zoning laws, and we do not view art. 15 to be a zoning enactment." *Id.* at 12. The court concluded that "[i]n its present form, and particularly as applied in this case, art. 15 is comparable to an earth removal enactment, a kind of general by-law expressly permitted by statute." *Id.* at 13. The court further stated that "we should be reluctant to classify the instant by-law as a zoning measure for the reason that art. 15 manifests neither the purpose nor the effects of a zoning regulation." *Id.* The court explained that the "Dennis by-law does not prohibit or permit any particular uses of land or the construction of buildings or the location of businesses or residences in a comprehensive fashion. On its face it does not deny or invite permission to build any structure. It does not regulate density. Instead, it specifies that permission be obtained from the commission based on factual circumstances surrounding individual applications." *Id.*

The SJC distinguished the facts in *Lovequist* from those in *Rayco* stating that in "the case presently before us, no evidence has been introduced that there is or ever has been a comprehensive zoning by-law governing the wetland activities proposed by the plaintiffs. *Rayco*, moreover, nowhere suggests that municipal regulations that simply overlap with what may be the province of a local zoning authority are to be treated as zoning enactments which must be promulgated in accordance with the requirements of G.L. c. 40A." *Id.* at 14.

More recently in *Spenlinhauer*, the Appeals Court considered a "Comprehensive Occupancy" ordinance of the Town of Barnstable which, in part, "limit[s] the number of motor vehicles that may be parked overnight, offstreet and in the open outside a single-family dwelling to two motor vehicles for the first bedroom...and one motor vehicle per bedroom thereafter." *Spenlinhauer*, 80 Mass. App. Ct. at 135 (internal quotations omitted). The Appeals Court concluded that "[a]pplication of the analysis contained in *Rayco*[] leads us to conclude that at

least the parking component of the challenged ordinance is a matter for regulation through the town's zoning power, not through its use of a general ordinance." *Id.* at 139. This conclusion was based on the fact that "before adopting the ordinance, the town regulated off-street parking through its zoning bylaws," *id.* at 140, and further that discussion of the parking provisions of the ordinance at the meetings on the adoption of the ordinance centered "on the impact that dense parking had on the character and quality of the town's neighborhoods, precisely the target at which the town's zoning ordinance is so thoroughly and comprehensively aimed." *Id.* at 141. The court stated that "[a]gainst that backdrop, 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." *Id.* at 141, quoting *Rayco*, 368 Mass. at 393-394.

The *Spenlinhauer* court distinguished the instant facts from *Lovequist*, stating that unlike the wetlands bylaw at issue in *Lovequist*,

> [h]ere, by contrast, there is a comprehensive bylaw regulating parking in the town. The subject of parking has not been committed by statute or regulation to another town board or agency. The bylaw does not simply focus on individual applications for activities in which a landowner wishes to engage but instead regulates parking on all land in single-family residence zones. Finally, although the town claims that the ordinance was enacted as a health measure pursuant to the town's general police power, there is on this record no nexus between public health and overnight off-street parking. Indeed, it is difficult to conjure a menace to public health that arises as the sun sets over unoccupied vehicles parked on the grounds of the house where their owners reside.

Id. at 142.

Rayco, *Lovequist*, and *Spenlinhauer*, read together, provide the principles for analyzing when a general bylaw impermissibly intrudes on a subject that is or should be regulated by the zoning bylaw. The first step is to examine the subject matter of the challenged general bylaw. A general bylaw may only regulate a subject if there is no history in the municipality of the subject being treated under zoning. *Spenlinhauer*, 80 Mass. App. Ct. at 139-140. If the municipality has

a history of regulating that subject matter through its zoning bylaw, then it can only be further regulated through the zoning bylaw, not through a general municipal bylaw. *Id.* 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. *Lovequist*, 379 Mass. at 13-14. The general bylaw may not, however, contradict or restrict the use that is controlled by the zoning bylaw. *Id.*; *Spenlinhauer*, 80 Mass. App. Ct. at 142.

The reason for this is that zoning bylaws have different, stricter requirements for enactment than general bylaws. See *Rayco*, 368 Mass. at 394. A zoning bylaw must be reviewed by the planning board in a public hearing and then reported on by the board, and, crucially, may only be enacted by a two-thirds vote of town meeting. G.L. c. 40A, § 5. General bylaws have no such requirements—they may be enacted by a majority vote. See Pl. Exh. 11; G.L. c. 40, § 21. Moreover, even if enacted, a zoning bylaw change does not apply to pre-existing nonconforming structures or uses or to land for which a preliminary subdivision plan has been filed. G.L. c. 40A, § 6. General bylaws, on the other hand, are not subject to such a "zoning freeze." See *Spenlinhauer*, 80 Mass. App. Ct. at 137-138. If a municipality were to use a general bylaw to change or override a zoning bylaw, it would avoid these limits on its power to enact zoning bylaws and the scope of those bylaws. *Rayco*, 368 Mass. at 393.

General Laws c. 94G, § 3(a), does not change these principles. Section 3(a) allows cities and towns to "adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments." *Id.* Specifically, municipalities may enact bylaws that "govern the time, place and manner of marijuana establishment operations," *id.* at §3(a)(1), "limit the number of marijuana establishments in the city or town," *id.* at § 3(a)(2), "restrict the licensed

cultivation, processing and manufacturing of marijuana that is a public nuisance," *id.* at § 3(a)(3), regulate signs, *id.* at § 3(a)(4), and establish civil penalties for violations, *id.* at § 3(a)(5). Nothing in § 3(a) requires that these bylaws be enacted either as zoning or general bylaws; the municipality has the option of using either regulatory regime. Therefore, once a municipality chooses to regulate recreational marijuana use under its § 3(a) authority by way of a zoning bylaw, it is subject to the rule of *Rayco* and *Spenlinhauer* that it may only change that regulation by amending the zoning bylaw, not by using a general bylaw to change what is allowed under the zoning bylaw. *Spenlinhauer*, 80 Mass. App. Ct. at 139-140. A general bylaw may only provide supplemental regulation of the marijuana use allowed under the zoning bylaw.

Here, Charlton chose to regulate recreational marijuana use in the Town through its zoning bylaw. It enacted Warrant Article 27, which amended the zoning bylaw to provide that certain recreational marijuana uses are allowed in the agricultural, community business, industrial and business enterprise park use districts by special permit. Given the relative newness of G.L. c. 94G, added by St. 2016, c. 334, § 5, Warrant Article 27 is the kind of "history" of regulating marijuana use by zoning that is contemplated in *Rayco* and *Spenlinhauer*. See *Rayco*, 368 Mass. at 393 (before enactment of general bylaw, zoning bylaw had dealt specifically with the subject of trailer parks); *Spenlinhauer*, 80 Mass. App. Ct. at 139-140 (before general bylaw enacted, zoning bylaw contained chapter of detailed parking regulations). Faced with the question put before it under c. 94G of how to regulate recreational marijuana use, the Town could have chosen to adopt a general bylaw. Instead, it chose to enact a zoning bylaw amendment, Warrant Article 27, which regulated recreational marijuana use through the traditional mechanisms of zoning, namely use districts and special permits. Having permitted marijuana use through its zoning bylaw, Charlton could only change or bar that use by amending

the zoning bylaw. It could not do what it did here—bar the previously allowed zoning use by Warrant Article 2, a general bylaw.

Indeed, the circumstances of the enactment of Warrant Article 2 demonstrate why it was improper. At the August 1, 2018, special town meeting, Russell and the other citizen proponents advanced two warrant articles: (1) Warrant Article 1, seeking to rescind the previously adopted zoning bylaw, Warrant Article 27; and (2) Warrant Article 2, seeking to adopt a general bylaw to ban all non-medical cannabis uses within the Town. Warrant Article 1 and Warrant Article 2 had the identical purpose: to bar the recreational marijuana use allowed by special permit under Warrant Article 27. Warrant Article 1 got a majority vote but failed to obtain the necessary two-thirds majority vote and therefore failed. Warrant Article 2 passed by a majority vote. In effect, town meeting evaded the strict two-thirds vote requirement of G.L. c. 40A, § 5, for amending a zoning bylaw by enacting a general bylaw instead. Therefore, Warrant Article 2 is invalid. It was an attempt to amend the Charlton zoning bylaw, and it did not obtain a two-thirds vote.

Russell and the amici have raised other issues. In his opposition, Russell challenges the validity of the Development Agreement and Host Community Agreement. These agreements are not the subject of the Summary Judgment Motion, and Russell has not brought a cross-motion for summary judgment. The validity of these agreements is not before the court in this motion, and the court does not address them.

Russell and two of the amici have also challenged the constitutionality of G.L. c. 94G. Specifically, they argue that c. 94G is barred by article VI of the United States Constitution, the Supremacy Clause, because federal regulation of marijuana as a controlled substance preempts state authority to enact c. 94G. The question of the constitutionality of c. 94G, at least on these grounds, is outside the subject matter jurisdiction of the Land Court. It is not a zoning issue

properly brought under G.L. c. 240, § 14A, or G.L. c. 40A, §§ 7 or 17, or a question "cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved." G.L. c. 185, §§ 1(j ½), 1(k), 1(p). The court declines to address this issue. See *Towermarc Canton Ltd. P'ship v. Town of Canton*, Land Ct., Misc. Case No. 13197, 1989 WL 1183021 (Oct. 26, 1989) ("Moreover, in a proceeding such as this brought under G.L. c. 240, 14A where the Court has subject matter jurisdiction to determine '...the validity of a municipal ordinance...' it would appear to be without subject matter jurisdiction to determine the constitutionality of G.L. c. 40A, § 6.").

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment is **ALLOWED**. Warrant Article 2 is beyond the scope of the Town's power and authority, and is invalid and of no force and effect. Judgment shall not enter at this time as Russell's cross-claim against the Town was not considered in the Plaintiffs' Motion for Summary Judgment. Pursuant to Mass. R. Civ. P. 54(b), any party may move for entry of separate and final judgment on Counts I and II of the Complaint.

SO ORDERED

By the Court, (Foster, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: March 7, 2019