101 Mass.App.Ct. 1108
Unpublished Disposition

Appeals Court of Massachusetts.

BELLINGHAM MASSACHUSETTS SELF STORAGE, LLC, & others[1]
v.
TOWN OF BELLINGHAM & others.[2]

21-P-870
|
Entered: June 9, 2022.

By the Court (Kinder, Sacks & D'Angelo, JJ.[3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** Defendant town of Bellingham (town) appeals from a Land Court judgment declaring, on cross motions for summary judgment, the town's 2019 zoning bylaw and zoning map amendment (collectively, zoning amendment) invalid because they were improperly adopted pursuant to G. L. c. 40A, § 5. Because the amendment was initiated by a town resident who was not statutorily authorized to initiate it, the zoning amendment was invalid. We therefore affirm.[4]

Background. We summarize the undisputed material facts. The town has adopted zoning bylaws dividing it into various districts. Two such districts are the suburban and industrial districts. The plaintiff and interveners own property in the affected area, which had been in an industrial district prior to the zoning amendment.

In January 2019 the defendant, Arturo G. Paturzo, a resident of Bellingham, filed a petition to rezone the parcels owned by the plaintiff and interveners from industrial to suburban and to amend the town's zoning map to reflect the change. Paturzo did not own any of the parcels identified in the zoning amendment that would be affected by the proposed change. The town's planning department coordinator contacted Paturzo and advised him of the requisite steps needed prior to the public hearing. Paturzo submitted a signed statement identifying himself as the proponent of the amendment and confirming that he would comply with all the requirements and pay for all the associated costs.

On April 25, 2019, the planning board held a public meeting to discuss the proposed zoning amendment and unanimously voted to recommend it at the upcoming annual town meeting. There was no opposition to the zoning amendment and no owner of any of the affected properties spoke at, or even attended, the hearing. On May 22, 2019, at the annual town meeting, the town approved the zoning amendment.[5]

Discussion. Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). "We review a decision to grant summary judgment de novo." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). On cross motions for summary judgment, we view "the evidence ... in the light most favorable to the party against whom judgment is to enter" (quotation omitted). Eaton v. Federal Nat'l Mtge. Ass'n, 93 Mass. App. Ct. 216, 218 (2018).

***2** This case presents a question of statutory interpretation, which we likewise review de novo. Water Dep't of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 744 (2010). "Where the words are 'plain and unambiguous' in their meaning, we view them as 'conclusive as to legislative intent.' " Id., quoting Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 839 (1986).

General Laws c. 40A, § 5, sets forth the statutory process by which the town may adopt or amend its zoning bylaw and zoning map and provides, in relevant part, as follows (emphasis added):

"Zoning ordinances or by-laws may be adopted and

> from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the ... board of selectmen of a proposed zoning ordinance or by-law by a ... board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter."

"[T]he legislature mandated a rule of strict compliance by the plain language, [Zoning] ordinances or by-laws may be adopted ... but only in the manner ... provided" (quotation omitted). Canton v. Bruno, 361 Mass. 598, 603 (1972). In interpreting similar language in a statutory predecessor to G. L. c. 40A, § 5, the Supreme Judicial Court recognized that "a court will consider 'whether an asserted minor noncompliance in fact is significantly inconsistent with, or prejudicial to, the apparent legislative objectives of the prescribed procedures [for adopting zoning by-laws].' " Id. at 604, quoting Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 517 (1971).

But just as in Canton, where the court could not say "that there was no important legislative purpose in the statutory provision concerning the manner of selecting a special zoning board," Canton, 361 Mass. at 604, here we cannot reasonably say there is no important legislative purpose served by the statutory language governing the manner in which zoning amendments can be initiated. By incorporating the requirements of G. L. c. 39, § 10, G. L. c. 40A, § 5, effectively requires, in most instances, ten registered voters to initiate an amendment. The purpose of this provision may be to ensure that any amendment proposed by registered voters has a modicum of support before it can be placed before a planning board. Cf. Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 556 (2012) (requirement that candidates for office file nomination papers signed by specified number of registered voters ensures that such candidates have "some modicum of support" before their names may be printed on ballot [quotation omitted]). In any event, permitting a single citizen with no property interest in the affected district to initiate a zoning amendment would be contrary to the clear language of the statute. Cf. Capezzuto v. State Ballot Law Comm'n, 407 Mass. 949, 954-956 (1990) (where only nine valid signatures appeared on petition for proposed state law, rather than required ten, proposal could not proceed); Putnam v. Bessom, 291 Mass. 217, 220 (1935) (petition with fewer than requisite 200 signatures of registered voters could not be basis for calling town meeting).[6]

***3** General Laws c. 40A, § 5, is explicit regarding who may initiate a zoning amendment. Here, although the planning board expressed support for the zoning amendment, the amendment was initiated by Paturzo.[7] Because Paturzo did not own land in the affected area, he was not authorized to initiate the zoning amendment as an individual. Accordingly, we discern no error in the judge's decision.

Judgment affirmed.

All Citations

101 Mass.App.Ct. 1108, 190 N.E.3d 1089 (Table), 2022 WL 2069244

Footnotes

1 Interveners Paul D. Doherty, as trustee of D&D Realty Trust, and J. Day Enterprises, LLC.

2 Arturo G. Paturzo. The plaintiff also identified Shirley A. French, as trustee of Gray Wall Realty Trust; Maple Tree Properties, LLC; and Bernon Land Trust, LLC, as "parties-in-interest." Neither Paturzo nor the "parties-in-interest" participated in this appeal.

3 The panelists are listed in order of seniority.

[4] Neither the town, interveners, nor other parties in interest appealed from so much of the judgment as declared that the zoning amendment was not invalid because of any failure of notice pursuant to the statute or the town's procedural rules. Accordingly, we express no view upon those questions.

[5] In their briefing the appellees reference a subsequent town meeting held on November 17, 2021, attach documents related to that meeting, and argue that we should take judicial notice as support for their arguments. The town moved to strike those portions of the appellees' brief and addendum. Because we are "limited to what is contained in the record of proceedings below," Police Comm'r of Boston v. Robinson, 47 Mass. App. Ct. 767, 770 (1999), we allow the town's motion and decline to consider any reference or materials related to the 2021 Fall Special Town Meeting in reaching our decision.

[6] The town's reliance on Hickey v. Zoning Bd. of Appeals of Dennis, 93 Mass. App. Ct. 390 (2018), is misplaced. That decision announced no general principle that strict compliance with zoning laws is not required. Its recognition that actual notice may sometimes suffice even where formal notice has not been given in no way suggests that a single registered voter may exercise the power that G. L. c. 40A, § 5, reserves for ten such voters.

[7] The uncontested record shows that Paturzo prepared and delivered the petition for rezoning to the town; that the planning board contacted Paturzo to advise him of the steps he needed to take in preparation for the public hearing related to the amendment; and that the planning board identified Paturzo as the amendment's "petitioner" on the town meeting warrant, and again on the form provided to the Attorney General's office in connection with a statutorily required request for approval of the amendment.

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