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PART 3: MASSACHUSETTS MARIJUANA RETAIL ESTABLISHMENT LICENSING APPLICATION PROCESS: SJC UPDATE

Under the Massachusetts "recreational marijuana law," General Laws, chapter 94G, sections 1, et. seq., those seeking to operate a Marijuana Retail Establishment ("MRE") must obtain "local" approval from the municipality in which their business will operate, which includes negotiating and entering a Host Community Agreement ("HCA") with the municipality, setting forth the conditions under which the MRE can operate. The second step of the process is to secure a license to operate from the Cannabis Control Commission ("CCC"), which in part requires that the applicant have an HCA with the municipality where it intends to operate.

On July 30th the Supreme Judicial Court ("SJC") issued a decision in Mederi, Inc. v. City of Salem and the Mayor of Salem. Mederi was one of eight enterprises seeking to operate one of four then-available MREs authorized by the City of Salem ("City"). Even though Mederi had furnished all required documentation and demonstrated its intention to accept all conditions set by the City, the City declined to enter the HCA with Mederi, thereby preventing it from seeking a license from the CCC. Mederi filed suit in the Superior Court, making two claims: for mandamus relief (seeking a court order that Salem officials had a "clear legal duty" to enter an HCA with Mederi); and for certiorari (judicial review of the municipality's administrative proceedings). Upon dismissal of the suit in the Superior Court, Mederi appealed. The primary basis of the appeal was whether the City could decide with which qualified MRE applicants it will enter HCAs and thereby effectively pre-determine which applicants might obtain licensure from the CCC. Mederi's appeal failed.

The SJC rejected Mederi's claim for mandamus relief, holding that "a municipality may use its discretion in determining whether to enter into an HCA with a prospective MRE." Because nothing in the recreational marijuana law imposes a duty on a municipality to enter into an HCA with a prospective MRE "simply because that establishment is able to fulfill the municipality's HCA requirements," and no city ordinance required Salem to enter into an HCA with every applicant that met its conditions for operating an MRE in the City, mandamus relief was not available to Mederi.

Mederi's certiorari claim also failed. In reviewing a decision, such as Salem's, that implicates the exercise of administrative discretion, the court determines if it was "arbitrary or capricious" (having "no ground which 'reasonable [persons] might deem proper to support it'") or if there was a rational basis for the decision. In this case, the SJC held that the City made a rational choice to enter HCAs with four applicants which the City concluded had stronger proposals than Mederi. The City acknowledged that Mederi's application was not without merit but, as the SJC noted, the City concluded that the four successful applicants had stronger capitalization, detailed business plans for conservative and reasonable revenue growth, strong endorsement by the local police department of their security plans, and/or more direct experience in the cannabis industry. Furthermore, in an effort to achieve geographic diversity, the City had selected two of the four applicants (including Mederi) which intended to site their establishments on the same street.

The decision makes clear that municipalities have discretion in choosing with which MRE establishments they will enter HCAs, and that those decisions will be upheld so long as they have a *rational basis and are not arbitrary or capricious.*

Even though not helpful to Mederi's position, it is noteworthy that the SJC included language in this decision to stress that potential inconsistencies between G. L. c. 94G and regulations promulgated to implement its provisions leave a "gap" in achieving an important goal of the legislation: to make the Massachusetts' cannabis industry equitable. The SJC noted that the recreational marijuana law requires the CCC to prioritize so-called economic empowerment applicants and to adopt "policies and procedures to promote and encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities."[1] Because, the HCA process does not require that municipalities ("the de facto gatekeepers") consider if an MRE applicant is an economic empowerment priority applicant, prioritization may be more fanciful than real as those applications may never reach the CCC. As the SJC noted, "it is the CCC's position that, under the current statutory scheme, its role is limited to reviewing license applications after an HCA has been executed," and, to date, attempts by the legislature to change the statute have not succeeded.

Furthermore, as the SJC acknowledged, the fact that some municipalities require that their HCA partners make payments in addition to statutorily permitted community impact fees can create an unfair advantage for better-funded applicants and a barrier to entry for prospective economic empowerment applicants. The final sentence the SJC's decision sends a clear message to the legislature and the CCC: "Closing those gaps would provide much-needed clarity."

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[1] See G. L. c. 94G, sec. 4 (a ½)(iv).