COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 1877CV01878

MEDERI, INC.

vs.

CITY OF SALEM & another[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS (Paper Nos. 39 and 39.6)

Plaintiff Mederi, Inc. ("Mederi"), like many entities, seeks to obtain a license to operate a retail marijuana establishment ("RME") in Salem, Massachusetts under the recently enacted "Regulation of the Use and Distribution of Marijuana Not Medically Prescribed" at G.L. c. 94G, §§ 1, *et seq*. ("Act"). Such licenses are granted by the Cannabis Control Commission ("CCC"). See *generally* G.L. c. 94G, §§ 3 and 5.

Mederi commenced this action on December 21, 2018, after defendants City of Salem ("City") and Salem Mayor Kimberley l. Driscoll ("Mayor") notified it that it had not been selected as one of the entities with which the City would execute a host community agreement ("HCA"). The City's refusal to execute an HCA with Mederi effectively precludes Mederi from being able to obtain a license to operate an RME in the City because an HCA is a required part of the state-level application for the licensure of RMEs by the CCC.

On October 10 and 30, 2019, the parties were before the Court for a hearing on Plaintiff's Motion For Judgment On The Pleadings (Paper No. 39) and Defendants City

[1] Kimberley L. Driscoll, in her capacity as Mayor of the City of Salem.

Of Salem And Mayor Kimberley L. Driscoll's Cross Motion For Judgment On The Pleadings (Paper No. 39.6).[2] The parties seek judgment on the pleadings on Count II of Mederi's First Amended Verified Complaint (Paper No. 16), which requests relief in the nature of certiorari under G. L. c. 249, § 4.[3]

As is fully stated below, Mederi's motion for judgment on the pleadings is **DENIED** and the defendants' cross-motion for judgment on the pleadings is **ALLOWED**.

I. OVERVIEW

As stated, in Count II of the First Amended Verified Complaint Mederi seeks certiorari review of the defendants' refusal to enter into an HCA with it. Mederi claims that the defendants acted arbitrarily or capriciously in declining to enter into an HCA with it, and that without an HCA, it cannot apply to the CCC for an RME. Mederi further argues that the defendants' decision to execute HCAs with other applicants over it was based on impermissible grounds and not supported by substantial evidence. Also, Mederi alleges that the defendants exceeded their authority in refusing to enter into an HCA because the CCC has the sole authority under the Act to determine which applicants may be awarded RMEs.

[2] At the hearing on October 30, Mederi submitted two chalks, which were marked as Exhibits (for identification only) A and B.

[3] Count II is the sole remaining count of the First Amended Verified Complaint (Paper No. 16). Count I requested relief by writ of mandamus under G. L. c. 249, § 5, and asked the Court to order the defendants to execute an HCA with Mederi and the accompanying certification thereof. Count III sought injunctive relief against the CCC. The Court (Feeley, J.) previously allowed the defendants' motions to dismiss Counts I and III pursuant to Mass. R. Civ. P. 12(b)(6), but denied the motion with respect to Count II. (See Paper Nos. 18 and 29).

II. REGULATORY FRAMEWORK OF THE ACT

A. Introduction

At the heart of this dispute is the division of authority over the licensing of RMEs between local municipalities and the CCC, the state agency tasked with regulating the sale of recreational marijuana in the Commonwealth. As a result, the Court will examine in detail the applicable statutory and regulatory scheme.

On December 15, 2016, the "Regulation and Taxation of Marijuana Act," St. 2016, c. 334, §§ 1 – 12 ("Marijuana Act"), became effective after having been approved by voters in November 2016. Generally speaking, the Marijuana Act, codified at G.L. c. 94G, §1 et. seq., authorized, *inter alia*, the sale of marijuana to adults for recreational use.[4]

On July 28, 2017, the Governor signed into law Chapter 55 of the Acts of 2017, "An Act to Ensure Safe Access to Marijuana," which amended the Marijuana Act, at Chapter 94G ("Act").

B. The Role of Municipalities

Section 3 of the Act, entitled "Local Control," permits a city or town to, among other things, "adopt ordinances and zoning by-laws that impose reasonable safeguards on the operation of marijuana establishments [including RMEs] provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter." Such ordinances and by-laws may "govern the time,

[4] Chapter 94G Is entitled "Regulation of the Use and Distribution of Marijuana Not Medically Prescribed."

place and manner of [RME] operations" and "limit the number of [RMEs] in the city or town." G.L. c. 94G, § 3(a).

Section 3 also includes the following provision regarding HCAs (in pertinent part):

> A marijuana establishment[5] . . . seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community[6] setting forth the conditions to have a marijuana establishment . . . located within the host community which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment or a medical marijuana treatment center. An agreement between a marijuana establishment . . . and a host community may include a community impact fee for the host community; provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment or medical marijuana treatment center and shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years. . . .

G.L. c. 94G, § 3(d).

C. <u>The Cannabis Control Commission</u>

Section 4 of the Act sets forth the various responsibilities of the CCC, the five-member commission tasked with overseeing the use and distribution of recreational marijuana pursuant to the Act.[7] Under that section, the CCC:

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[5] "Marijuana establishment" is defined in the Act as "a marijuana cultivator, independent testing laboratory, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business." G.L. c. 94G, § 1. Thus, an RME is a type of "marijuana establishment" under the Act.

[6] "Host community" is defined in the Act as "a municipality in which a marijuana establishment or a medical marijuana treatment center is located or in which an applicant has proposed locating a marijuana establishment or a medical marijuana treatment center." G.L. c. 94G, § 1.

[7] The Marijuana Act established the CCC by adding G.L. c. 10, § 76, and G.L. 94G. As a result, § 76(a) stated that the CCC would "have general supervision and **sole regulatory authority** over the conduct of the business of marijuana establishments as defined in chapter 94G." G.L.

> [S]hall have all the powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to: . . .
>
> (ix) require an applicant for licensure under this chapter to apply for such licensure and approve or disapprove any such application or other transactions, events and processes as provided in this chapter;
>
> (x) determine which applicants shall be awarded licenses;
>
> (xi) deny an application or limit, condition, restrict, revoke or suspend a license. . . .

G.L. c. 94G, § 4(a).

Section 5 of the Act, entitled "Licensing of Marijuana Establishments," provides,

> (a) Upon receipt of a complete marijuana establishment license application and the application fee, the commission shall forward a copy of the application to the city or town in which the marijuana establishment is to be located, determine whether the applicant and the premises qualify for the license and has complied with this chapter and shall, within 90 days:
>
> (1) issue the appropriate license; or
>
> (2) send to the applicant a notice of rejection setting forth specific reasons why the commission did not approve the license application.
>
> (b) The commission shall approve a marijuana establishment license application and issue a license if:
>
> (1) the prospective marijuana establishment has submitted an application in compliance with regulations made by the commission, the applicant satisfies the requirements established by the commission, the applicant is in compliance with this chapter and the regulations made by the commission and the applicant has paid the required fee;

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c. 10, § 76(a) (2016) (emphasis added); St. 2016, c. 334, § 3. However, the Act amended G.L. c. 10, § 76(a), by striking the quoted portion in its entirety. The Court is uncertain of the reason for the amendment and observes that the Act does not appear to have allocated any portion of that "sole regulatory authority" elsewhere. An argument can be made that by striking the aforementioned language, the legislature intended to acknowledge that the CCC shares some regulatory authority with municipalities via the HCA requirement and other provisions of § 3 of the Act.

> (2) the commission is not notified by the city or town in which the proposed marijuana establishment will be located that the proposed marijuana establishment is not in compliance with an ordinance or by-law consistent with section 3 of this chapter and in effect at the time of application;
>
> (3) the property where the proposed marijuana establishment is to be located, at the time the license application is received by the commission, is not located within 500 feet of a pre-existing public or private school providing education in kindergarten or any of grades 1 through 12, unless a city or town adopts an ordinance or by-law that reduces the distance requirement; and
>
> (4) an individual who will be a controlling person of the proposed marijuana establishment has not been convicted of a felony or convicted of an offense in another state that would be a felony in the commonwealth, except a prior conviction solely for a marijuana offense or solely for a violation of section 34 of chapter 94C of the General Laws, unless the offense involved distribution of a controlled substance, including marijuana, to a minor.

G. L. c. 94G, § 5(a) – (b).

D. <u>The Regulations Regarding Applicants For RMEs</u>

Section 4 of the Act tasks the CCC with "adopt[ing] regulations consistent with this chapter for the administration, clarification and enforcement of laws regulating and licensing marijuana establishments." G.L. c. 94G, § 4(a½). The CCC has promulgated the regulations at 935 Code Mass. Regs. ("CMR") § 500.001, et seq. ("Cannabis Regulations"), which became effective on March 29, 2018.[8]

The Cannabis Regulations go into detail regarding the requirements for RME license applications. New applicants, like Mederi, are required to file an application

[8] On November 1, 2019, two days after the last hearing in this matter, the CCC issued updated Cannabis Regulations. The Court quotes from the version in effect at the time of the parties' briefing and argument, as the relevant sections do not materially differ from one version to the other.

consisting of three packets: an Application of Intent packet; a Background Check packet; and, a Management and Operations Profile packet. 935 CMR § 500.101(1).

The Application of Intent packet must include a single-page certification signed by the municipality evidencing that the applicant and host municipality have executed an HCA. 935 CMR § 500.101(1)(a)(8). It must also include documentation that the applicant has conducted a community outreach meeting within six months before the application, 935 CMR § 500.101(1)(a)(9); and, a description of plans to ensure that the RME will be compliant with local codes, ordinances, and bylaws. 935 CMR § 500.101(1)(a)(10).

Moreover, generally speaking, the Application of Intent packet must also include information about: all persons and entities involved in running the RME or providing ten percent or more of the initial capital for the RME; whether the RME and its owners have past or present business interests in other states; the amounts and sources of capital resources available to the applicant; a bond or other resources in an amount sufficient to support the dismantling of the RME; the proposed address for the license and the applicant's property interest in that address; a plan by the RME to positively impact areas of disproportionate impact; the requisite application fee; and, any other information required by the CCC. See *generally* 935 CMR § 500.101(1)(a).

The Background Check packet must include detailed information about: each executive, manager, person, and entity having direct or indirect authority over the management, policies, security operations or cultivation operations of the RME; close associates and members of the applicant; and, all persons or entities contributing ten percent or more of the initial capital to operate the RME. 935 CMR § 500.101(1)(b). The

Background Check packet must also include authorization to obtain CORI reports and fingerprints, 935 CMR § 500.101(1)(b)(2)(e)-(f); and, disclosure of information regarding any involvement in criminal, civil, or administrative matters. 935 CMR §500.101(1)(b)(3).

The Management and Operations Profile packet must include information regarding the applicant's business registration with the Commonwealth; certificates of good standing with the Corporations Division of the Secretary of the Commonwealth and the Department of Revenue; the applicant's plan for separating medical and recreational operations; information regarding the proposed timeline for achieving operation of the RME; a summary of the business plan for the RME; information regarding the applicant's plans for security, prevention of diversion, marijuana storage and transportation, inventory procedures, quality control procedures, dispensing procedures, personnel policies, record-keeping procedures, maintenance of financial records, and diversity plans; information about qualifications and intended trainings for employees; and, a proposed plan for obtaining marijuana products from a licensed cultivator. 935 CMR § 500.101(1)(c)-(d).

E. <u>The Regulations Regarding The CCC's Action On RME Applications</u>

The Cannabis Regulations include the following pertinent language regarding the CCC's action on applications for RMEs:

> (1) Action on Each Packet. The Commission shall grant licenses with the goal of ensuring that the needs of the Commonwealth are met regarding access, quality, and community safety.
>
> (a) Packets comprising the license application shall be evaluated based on the Applicant's:
>
> 1. demonstrated compliance with the laws and regulations of the Commonwealth;

> 2. suitability for licensure based on the provisions of 935 CMR 500.101(1), 935 CMR 500.800 and 935 CMR 500.801; and
>
> 3. evaluation of the thoroughness of the applicant's responses to the required criteria.
>
> The Commission shall consider each license application submitted by an applicant on a rolling basis.
>
> . . .
>
> (d) Upon determination that the application is complete, a copy of the completed application, to the extent permitted by law, will be forwarded to the municipality in which the Marijuana Establishment will be located. The Commission shall request that the municipality respond within 60 days of the date of the correspondence that the applicant's proposed Marijuana Establishment is in compliance with municipal bylaws or ordinances.

935 CMR § 500.102(1)(a) and (d).

Other than the requirement that an applicant's Application of Intent packet include a single-page certification evidencing that the applicant and host municipality have executed an HCA, the Cannabis Regulations say nothing about the process of negotiating an HCA and what factors a municipality may or may not consider when deciding whether to enter into an HCA. However, around the same time it issued the Cannabis Regulations, the CCC issued a "guidance document" entitled, "Municipal Guidance." (See Paper No. 41.1).

Of note, in a section regarding HCAs, the Municipal Guidance states: "The Commission encourages municipalities to carefully consider the impact of the particular marijuana establishment proposed for a community, as well as benefits it may bring in

local revenue and employment, when negotiating [an HCA]." Municipal Guidance, p. 14.[9]

III. REJECTION OF MEDERI'S APPLICATION FOR HCA

The following facts are taken from the judgment on the pleadings record.[10,11]

As authorized by G.L. c. 94G, § 3(a), the City passed a zoning bylaw permitting RMEs in only certain zoning districts ("Bylaw"), and an ordinance ("Ordinance") that limits the number of RMEs to five ("Ordinance").[12] Mederi does not challenge either the Bylaw or Ordinance.

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[9] On March 5, 2019, the CCC issued a document entitled "Guidance for Municipalities." See http://mass-cannabis-control.com/wp-content/uploads/2019/03/Final-Draft-Municipal-Guidance-Update-02.25.19_1.pdf (last accessed December 17, 2019). The above-cited quotations from the Municipal Guidance remain unchanged in the updated Guidance for Municipalities.

[10] For purposes of the cross-motions for judgment on the pleadings, the parties have stipulated (see Paper No. 44) that the record for the Court's consideration consists of the following: (1) the Exhibits to the First Amended Verified Complaint (Paper No. 16); (2) Exhibits A through G filed with the Court as Paper No. 45; (3) Record Appendix, Vols. 1 through 9 ("Redacted HCA Applicant Submissions") (Paper No. 42); (4) Impounded Record Appendix, Vols. 1 through 8 ("Unredacted HCA Applicant Submissions") (Paper No. 43); and, (5) a document entitled "Municipal Guidance, Updated March, 2018" prepared by the CCC (Paper No. 41.1).

The Redacted HCA Applicant Submissions consist of redacted versions of the HCA application materials of Mederi and the seven other applicants considered by the Review Committee (hereinafter defined). The Unredacted HCA Applicant Submissions consist of unredacted versions of the HCA application materials of Mederi and the seven other applicants considered by the Review Committee, which have been impounded by the Court because they contain, *inter alia*, CORI information.

The Record Appendix, Volume 9 (i.e., Volume 9 of the Redacted HCA Applicant Submissions) consists of documents generated by the defendants during the HCA application review process at issue here. Thus, it may be said that Volume 9 is the "administrative record." However, as will be discussed by the Court, there is no record of the Mayor's deliberative process in ultimately deciding not to select Mederi, and selecting other applicants, for an opportunity to enter into an HCA with the City.

[11] Additional facts are set forth in the Discussion section, *infra*.

[12] The Ordinance and the Bylaw limit the number of RMEs within the City to no more than twenty percent of the number of retail licenses for the sale of alcoholic beverages in the City. The parties agree this works out to a maximum of five RMEs. See Ordinance, Sec. 24-30, at Exhibit A of the First Amended Verified Complaint; see Bylaw, Arts. 6, 10, and 12, at Exhibit C of the First Amended Verified Complaint.

A. City's Framework For Consideration Of Applications – In General

One of the City's five available RME licenses was issued to a previously licensed medical marijuana facility under a priority recognized by the Act. Accordingly, four licenses for RMEs within the City remained. Before entertaining requests for HCAs for the four remaining RME licenses, the City published a document entitled, "Process and Application for Marijuana Establishment Host Community Agreement" ("City Guidelines"), along with an application form, to provide some guidance to applicants. See Volume 9, pp. 1 – 9.

The City Guidelines also listed the materials that must be submitted with an application, which include: a copy of the special permit issued by the City's zoning board of appeals ("ZBA") and/or evidence of site control; a completed copy of the applicant's application to the CCC; a traffic plan; resumes for every manager, director, or officer of the applicant; CORI acknowledgment forms for every manager, director, officer, or investor; copies of the applicant's business and security plans; and, copies of financial records demonstrating capitalization or investment to ensure the applicant's solvency.

The City Guidelines included the following pertinent provisions regarding the City's evaluation of applications for HCAs:

> **Basis for review.** The basis for the City's review and consideration of HCAs is a desire to ensure the highest quality operators, with locations that minimally impact surrounding neighbors or the community at large. An operator lacking sufficient experience or capitalization, or other factors could result in a negative impact to the community.
>
> **Favorable criteria.** Favorable criteria that may be reviewed and considered by the review committee include, but are not limited to, the following: (a) demonstrated direct experience

> in the cannabis industry or a similar industry; (b) managers, directors, officers, investors, and others related to the establishment are free of any disqualifying criminal convictions; (c) minimal traffic impacts and appropriate mitigation for impacts is offered; (d) approval of security plan by Chief of Police; (e) financial records, business plan, and other documentation demonstrates strong capitalization or access to financing to ensure success of business; (f) geographical diversity of the establishment in relation to other established or permitted marijuana retail establishments.

Volume 9, pp. 1 – 2, §§ 2 and 6.

B. <u>Review Committee- In General</u>

The City Guidelines established an application review committee made up of six City officials and one mayoral designee with a background in finance, business, or banking ("Review Committee"). The Review Committee was charged with reviewing a certain number of applications and making recommendations thereon for the Mayor's consideration regarding whether the City should enter into an HCA.

The City Guidelines provided that, for those applicants who "satisfy the favorable criteria for consideration and receive a recommendation from the review committee that the Mayor consider entering into an HCA with the applicant," any HCA shall include twenty-one particular conditions regarding, among other things, the community impact fee to be paid to the City, donations to be made to Salem-based nonprofit organizations and a transit enhancement fund, policies regarding the hiring and training of employees, and information about security. <u>See</u> e.g. Volume 9, p. 2, § 7(d).

C. Mederi's Application

Mederi obtained site control of 250 Highland Avenue (Highland Avenue is also known as Route 107), Salem, Massachusetts, a location within one of the approved zoning districts for RMEs. On August 1, 2018, Mederi obtained the required special permit from the ZBA. Mederi also hosted the requisite community outreach meeting for neighbors. Consequently, on September 7, 2018, Mederi submitted its completed application for an HCA to the City and the application was eventually referred to the Review Committee for consideration, along with the applications of seven other applicants.

D. Action Of The Review Committee

In October 2018, the Review Committee met to review the applications of eight applicants, including that of Mederi. Six of the eight applications, including Mederi, had proposed sites within Zone B2 on Highland Avenue.

The Review Committee consisted of (by title): Chair, Salem Planning Board; Chief, Salem Police Department; Assistant City Solicitor; Director of Planning & Community Development; Mayor; Chief of Staff, Office of Mayor; Executive Vice President of Salem Five; Ward 5 City Councilor; and, designee of City Council President. Following the meeting, the Assistant City Solicitor and the Mayor's Chief of Staff prepared a memorandum entitled, "Salem Host Community Agreement feedback from initial meeting," dated October 30, 2018, which summarized the Review Committee's assessment of the applicants ("Review Committee Memo"). Vol. 9, pp. 10 – 17.

The Review Committee Memo documented the Review Committee's evaluation of each of the eight applicants, noting each applicant's strengths and weaknesses in four categories: (1) site; (2) traffic and parking; (3) security; and, (4) industry experience and financing.

Using these criteria, the Review Committee concluded that three applicants (Atlantic Medicinal, NS Alternatives, and Seagrass) "appeared to be the strongest positioned to open, succeed, and provide minimal or manageable impact to the surrounding neighborhood." Vol. 9, p. 16, § X. INSA, a fourth applicant not yet through the special permit process, "was also considered a strong proposal." Three of the four applicants that received favorable consideration (Atlantic Medicinal, NS Alternatives, and INSA) were located on Highland Avenue, like Mederi. Vol. 9, p. 10.

The Review Committee determined that applications by Mederi and two others "were not as strong as the others." Vol. 9, p. 17, § X. In particular, "Mederi's lack of sufficient capitalization was concerning to the committee as was their lack of direct experience in the industry." Id.

E. The Mayor's Selections For HCA Consideration

There is no dispute that the Mayor's goal was to offer the opportunity to enter in HCAs to four applicants, matching the number of available RMEs. Generally speaking, the Review Committee Memo was submitted to the Mayor and she made the decisions regarding to whom to offer an opportunity to enter into an HCA with the City, as follows.[13]

[13] It bears repeating that there is no evidence in the record regarding the Mayor's deliberative process in deciding to whom to offer HCAs, although she presumably considered the applicants' application materials and the Review Committee Memo, all of which are included in the record before the Court.

On October 31, 2018, the City advised Seagrass that it had decided to enter into negotiations with it for an HCA, subject to the satisfactory completion of CORI checks. Thus, three RMEs/HCAs remained for determination.

On December 4, 2018, the City informed (via email) Atlantic Medicinal Partners, INSA, NS Alternatives, and Witch City Gardens, that the City had "narrowed the applicants for the three remaining licenses" to those four applicants, and that the City wanted to begin the HCA negotiation process. The email advised: "A final agreement to move forward will be contingent upon the completion of satisfactory CORI checks for the company principals and on reaching mutually acceptable terms for the [HCA] agreement. Once these items are complete, a final decision will be made on the three remaining licenses." Vol. 9, pp. 19 – 22.

Also on December 4, 2018, the City sent letters to Mederi, Sanctuary Medicinals, and Terpene Journey,[14] stating that, notwithstanding "a highly competitive process," they had "not been chosen to advance to the next round of consideration for the three remaining licenses." Vol. 9, p. 24.

The City ultimately entered into HCAs with Atlantic Medicinal, Seagrass, and INSA, but declined to negotiate an HCA with NS Alternatives (one of the applicants the Review Committee recommended). Instead, the City entered into an HCA with Witch City Gardens, which the Review Committee had not recommended as a top contender.

With respect to Witch City Gardens, the Review Committee Memo noted that its "geographic diversity from other operations was beneficial" and that "[t]here was an

[14] Like Mederi, the proposed locations for Sanctuary Medicinals and Terpene Journey were on Highland Avenue.

additional positive community impact of removing heavy truck traffic from the location and the Jefferson Avenue corridor and contributing to an improvement of the streetscape and neighborhood." As negative points regarding Witch City Gardens' application, the Review Committee Memo observed that "[t]he Police Department expressed some reservations about their security plan" and that "[t]he team involved demonstrated no experience in the cannabis industry."

The City executed an HCA with Seagrass on December 6, 2018, and HCAs with Atlantic Medicinal and Witch City Gardens on December 20, 2018.

On January 15, 2019, the City executed its final HCA with INSA and sent a letter to NS Alternatives informing it that the City had decided not to enter into an HCA with it.

DISCUSSION

A. Standard of Review

The parties' cross-motions for judgment on the pleadings under Mass.R.Civ.P. 12(c) on Mederi's certiorari claim are before the Court. "The proper procedure in a c. 249, § 4, case is a motion for judgment on the pleadings." Northboro Inn, L.L.C. v. Treatment Plant Bd. of Westborough, 58 Mass. App. Ct. 670, 673 n.5 (2003) (citations omitted). Further, the Court is aware that "the animating principle behind certiorari review . . . is 'a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal.'" Revere v. Massachusetts Gaming Commission, 476 Mass. 591, 606 (2017) (citations omitted); see also Tracht v. County Commrs. of Worcester, 318 Mass. 681, 686 (1945) ("The function of a writ of certiorari is not to reverse or revise findings of fact but to correct errors of law committed by a judicial or quasi judicial tribunal where such errors appear

upon the face of the return and are so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy.") (citations omitted).[15]

As the SJC recently observed, the standard of review for this certiorari action is extremely deferential to the defendants:

> Generally, the standard of review for a certiorari action is calibrated to the nature of the action for which review is sought. Ordinarily, where the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the "substantial evidence" standard. On the other hand, **where the decision under review was not made in an adjudicatory proceeding, but rather entails matters committed to or implicating a board's exercise of administrative discretion, the court applies the "arbitrary or capricious" standard**.

Revere, 476 Mass. at 604 - 605 (2017) (internal quotations and citations omitted) (emphasis added).

Here, the defendants' refusal to enter into an HCA with Mederi was not made in an adjudicatory or evidentiary proceeding; rather, the process was more akin to the exercise of administrative discretion by a board or agency. The Review Committee's meeting to analyze the numerous applicants was not an adjudicatory proceeding. The benefits and drawbacks of each application and the assessment of the relative strength

[15] "In general, a plaintiff is only entitled to certiorari review of an administrative decision if it can demonstrate the presence of three elements: '(1) a judicial or quasi judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review.'" Revere, 476 Mass. at 600 (quoting Indeck v. Clients' Sec. Bd., 450 Mass. 379, 385 (2008)); see also School Comm. of Hudson v. Board of Educ., 448 Mass. 565, 576 (2007) ("To obtain certiorari review of an administrative decision, one must show '(1) a judicial or quasi-judicial proceeding; (2) a lack of all other reasonably adequate remedies; and (3) a substantial injury or injustice arising from the proceeding under review.'") (citations omitted). However, there is no dispute here that Mederi has demonstrated all three elements.

of the applications were documented in the Review Committee Memo as the opinions of its members, not as factual findings. More importantly, the Review Committee Memo does not memorialize the actual decision-making process undertaken by the Mayor in determining HCA recipients. It documents only the opinions and recommendations of the Review Committee, which the Mayor in the exercise of her discretion was free weigh.

Furthermore, the discretionary nature of whether to grant an HCA is supported by the fact that neither the Act nor the Cannabis Regulations "provide narrow and objective criteria for the [City] to apply in evaluating applications." Cumberland Farms, Inc. v. City Council of Marlborough, 88 Mass. App. Ct. 528, 530 (2015) (city council's decision to deny application for fuel storage license "was a discretionary action, meriting review only for an arbitrary or capricious decision" because the proceedings were not adjudicatory or evidentiary in nature). In fact, the Act's broad parameters regarding the content of HCAs necessarily involves the exercise of discretion on the part of City officials. See G.L. c. 94G, § 3(d) (broadly stating that an HCA "shall . . . set forth the conditions to have a[n] [RME] . . . which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment.").

As such, it is clear that the defendants' decision in denying Mederi an opportunity to execute an HCA was a discretionary action, meriting review under the "arbitrary or capricious" standard.[16]

[16] In its Memorandum and Decision on Plaintiff's Motion for Preliminary Injunction (Paper No. 13), the Court (Feeley, J.) applied the G.L. c. 30A, § 14, standard of review applicable to reviews of administrative agency decisions. Mederi argues that this standard of review is the law of the case and this Court must use the Chapter 30A standard in deciding the cross-motions for

B. The Defendants' Decision Was Not Arbitrary Or Capricious

A decision is arbitrary or capricious if it is unreasonable and is made willfully "without consideration and in disregard of facts and circumstances." Long v. Commissioner of Pub. Safety, 26 Mass. App. Ct. 61, 65 (1988). "The arbitrary and capricious standard of review 'requires only that there be a rational basis for the decision.'" Cumberland Farms, 88 Mass. App. Ct. at 530 (quoting Howe v. Health Facilities Appeals Bd., 20 Mass. App. Ct. 531, 534 (1985)).

Turning to the substance of the defendants' decision-making process and the manner by which the Mayor decided to enter into an HCA with four entities other than Mederi, the Court concludes that this decision was neither arbitrary nor capricious.

At the very beginning of the HCA application process, the City published the City Guidelines, which established the Review Committee, listed a number of favorable criteria the City hoped to see in applicants, and set forth the City's minimum expectations for any HCA it would sign. The Review Committee then evaluated applications based on those favorable criteria and prepared the Review Committee Memo explaining its rationale.

Mederi places under a microscope the Review Committee Memo's analysis of each of the eight applicants based on the aforementioned four factors (site, traffic and

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judgment on the pleadings. This Court disagrees. It is true that the Court's decision denying Mederi's motion for preliminary injunction noted the similarities between Chapter 30A and certiorari review, relied on established case law under Chapter 30A, and "treat[ed] this challenge to the City/Mayor's refusal to negotiate a HCA with Mederi as if it was a final decision of an agency under Chapter 30A" for purposes of assessing Mederi's likelihood of success on the merits. (Paper No. 13, Memorandum and Decision on Plaintiff's Motion for Preliminary Injunction, p. 15.). However, this Court, with the added benefit of full briefing by the parties and a more developed record, views the standard of review set forth in the Revere v. Massachusetts Gaming Commission case (a case not cited by the Court in denying the preliminary injunction) to be a more precise and appropriate articulation of the applicable standard.

parking, security, and industry experience and financing). Mederi's analysis is misplaced for several reasons. First, it is important to note that the Review Committee Memo is *not* the defendants' final decision. Thus, any inconsistencies in it (e.g., its conclusion that Mederi "lack[s] . . . direct experience in the industry," after noting that Mederi's "project team demonstrates good experience with the cannabis industry") do not render the Mayor's ultimate decision arbitrary or capricious. The Mayor ultimately entered into HCAs with three of the Review Committee's top contenders (Atlantic Medicinal, Seagrass, and INSA), but also entered into an HCA with Witch City Gardens, an applicant the Review Committee Memo noted "presented a mixed application for [an HCA]." Therefore, the Mayor did not simply adopt the Review Committee's recommendations wholesale.

Second, and more importantly, it is not up to this Court to second-guess the Mayor's decision-making process where, as the Review Committee Memo and the administrative record demonstrate, the eight applicants each had their own strengths and weaknesses in the various applicable categories. This is not a case where the applicants with the most boxes checked "won." The categories taken into consideration were not necessarily of equal weight, and the Court will not disturb the Mayor's evaluation of those factors in determining which applicants would work best in the City.

Third, the defendants' concerns regarding geographic diversity and impact on neighborhoods provides a rational basis for the decision to enter into HCAs with only two Highland Avenue applicants and to reserve the two other slots for non-Highland Avenue locations. From the very beginning of the HCA application process, the City Guidelines stated that RMEs with "locations that minimally impact surrounding

neighbors or the community at large" and "geographical diversity of the establishment in relation to other established or permitted marijuana retail establishments" were important factors in the defendants' decision-making process. With six of the eight applicants proposing locations on Highland Avenue, it was inevitable that some of those applicants would be rejected because of their location, even if they were otherwise well qualified. In fact, all four of the rejected applicants had proposed locations on Highland Avenue.

Fourth, when focusing on the two successful Highland Avenue applicants (Atlantic Medicinal and INSA), the Court observes both had extensive experience in the marijuana industry within the Commonwealth and could reasonably have been viewed by the Mayor as being more capable of navigating the complexities of the new retail marijuana industry than Mederi. Atlantic Medicinal's application showed that it had received provisional licenses for multiple marijuana facilities in Fitchburg and Department of Public Health licenses for operation in both Fitchburg and Wellfleet. INSA's application showed it had experience running a cultivation operation, processing facility, and medical dispensary in Easthampton, as well as a medical dispensary in Springfield. Under these circumstances, the decision to choose Atlantic Medicinal and INSA over Mederi was not arbitrary or capricious.

Mederi also claims the defendants impermissibly based their decision on which applicants the defendants thought could best fill the City's coffers, and required that applicants agree to HCAs containing fees in excess of those allowed by the Act.[17] See

[17] The City mandated a flat fee of three percent of the RME's gross sales for the community impact fee, an additional fee of one percent of gross sales for a transit enhancement fund, and a $25,000 per year minimum in charitable contributions.

G.L. c. 94G, § 3(d) (an HCA "may include a community impact fee for the host community; provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the [RME] and shall not amount to more than 3 per cent of the gross sales of the [RME]").[18] However, the evidence does not support the conclusion that the defendants chose the successful applicants based on their willingness to pay fees, or rejected other applicants because they offered less or objected to the fees. In fact, one of the entities that received an HCA, Witch City Gardens, only agreed to pay the minimum amounts required by the City.

At bottom, the HCA application process was far from the "backroom deal" Mederi claims. The defendants' decision to deny Mederi an opportunity to enter into an HCA is supported by a rational basis and is neither arbitrary nor capricious.

C. The Defendants' Decision Did Not Exceed Their Statutory Authority And/Or Infringe Upon The CCC's Authority To Issue RME Licenses

As stated, the Act grants the CCC the sole authority to decide which applicants to award RME licenses, but it cannot consider any applicant that has not executed an HCA with a municipality. See generally G.L. c. 94G, § 5(b). Citing the case of Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury, 94 Mass. App. Ct. 594 (2018), Mederi argues that, by entering into HCAs with only the four RME applicants they preferred, the defendants improperly circumvented the two-step, municipal-State process of issuing RME licenses contemplated by the Act, and usurped the CCC's

[18] Mederi's allegations that the defendants violated certain statutory requirements is "amenable to arbitrary and capricious review, where courts ask whether an agency's discretionary decision was 'legally erroneous or so devoid of factual support as to be arbitrary and capricious.'" Revere, 476 Mass. at 606 (citation omitted).

authority to decide which entities receive licenses. In that case, the Town of Salisbury ZBA defeated the two-step municipal-State approval process for digital billboards by approving only one of two competing applications for a special permit that were simultaneously before the ZBA, because two of the ZBA members thought local authorities, rather than the state, should decide which billboard should be built. Id. at 595-597. Although at first blush the Clear Channel case appears somewhat persuasive on this point, the Court concludes upon closer examination that Clear Channel is distinguishable.

In Clear Channel, Department of Transportation ("DOT") regulations (700 CMR § 3.17(5)(g) and (h)) ("DOT Regulations"), prohibited two digital billboards from being be erected within 1,000 feet of each other. Id. at 595. The DOT Office of Outdoor Advertising ("OOA") had the sole authority to approve a digital billboard. Id. However, the DOT Regulations provided that "an applicant must first receive local zoning board approval before applying to the OOA." Id. Plaintiff Clear Channel Outdoor, Inc. ("Clear Channel") and Northvision, LLC ("Northvision"), who were abutters, each applied to the Town of Salisbury ZBA for a special permit authorizing the erection of a digital billboard. Id. Practically speaking, given that Clear Channel and Northvision were abutters, only one of their applications to the OOA for the right to erect a digital billboard could succeed.

Clear Channel challenged the ZBA's decisions to deny its application for a special permit for the erection of a digital billboard and to grant Northvision's special permit. Id. At issue on appeal was the following conduct by members of the ZBA:

> Unhappy with this two-step regulatory framework, two members of the [ZBA] decided to defeat it by approving only

> one of the two competing applications for a special permit that were simultaneously before the board for decision. For purposes of this litigation, all parties have accepted that both applications met the criteria necessary for a special permit. The two board members who nonetheless voted to deny Clear Channel's application admittedly did so on impermissible grounds. Acting ultra vires in this way, they ensured that only Northvision's application could (and did) proceed to the OOA. The OOA was thus deprived of its opportunity to consider the competing Clear Channel application (which the parties agree met the requirements for zoning approval), and its ability to decide which of the two competing proposals should be approved within this particular 1,000 foot stretch in Salisbury.

Id. at 595 - 596.

To be sure, the ZBA members who voted to deny Clear Channel's application testified at their depositions that they were aware of the regulatory scheme, but thought local authorities should be the ones to decide which billboard should be built, and that they chose Northvision's application over Clear Channel's because Northvision had filed first. Id. at 597 - 598. The ZBA conceded that, in casting their votes as they did, these board members "considered factors that were irrelevant to the zoning scheme and that would not withstand judicial scrutiny." Id. at 599.

At issue on appeal was whether the trial judge abused his discretion by "prohibit[ing] evidence [at trial] of the board members' 'mental processes' and the reasons the board members voted to deny Clear Channel's application and approve Northvision's application." id. In rejecting Northvision's argument that "examination of the mental processes of administrative decision makers is appropriate only 'in extraordinary circumstances where there is a strong showing of improper behavior or bad faith on the part of the administrator,'" Id. at 600 (quoting New England Med. Center, Inc. v. Rate Setting Comm'n, 384 Mass. 46, 56 (1981)), the Appeals Court

noted, “we find it difficult to conceive that there is any stronger showing of improper behavior than the board’s admission that it issued its Clear Channel and Northvision decisions based on legally irrelevant grounds, which the board itself characterized as ‘unrelated to zoning interests’ and unable to ‘withstand judicial scrutiny.’” Id. Therefore, the Appeals Court annulled the decisions of the ZBA and directed it to “hold such further proceedings as may be necessary on the two applications, **conducted in such manner as not to defeat the two-step municipal-State process contemplated by the Legislature**.” Id. at 600 – 601 (emphasis added).

Here, Mederi argues that, like the ZBA’s decision in Clear Channel, inherent in the defendants’ denial of an opportunity for Mederi to enter into an HCA is that Mederi is unsuitable for an RME license, a decision left solely to the CCC under the Act. The Court agrees that the facts in Clear Channel bear some similarity to the defendants’ decision-making process given that the City opted to enter into HCAs with only as many applicants as RME licenses remained and, thus, denied their less-preferred applicants the opportunity to apply for licensing with the CCC. However, upon closer examination, the regulatory schemes at issue in each case are distinguishable in important ways.

The DOT Regulations at issue in Clear Channel prescribed various substantive restrictions on the location and appearance of billboards to be considered by the OOA in awarding permits, such as prohibiting signs that would not be in harmony with the surrounding area. 700 CMR § 3.07. The DOT Regulations also had an additional set of requirements regarding the location, appearance, and operation of electronic signs, in particular, such as limitations on the brightness of the sign and prohibitions on the use of sound and video. 700 CMR § 3.17. Therefore, in intentionally defeating the two-step,

municipal-State regulatory framework, the Salisbury ZBA deprived the OOA of the opportunity to consider the two competing applications and decide which should have been approved based on the various substantive requirements set forth in the DOT Regulations.

The Act and the Cannabis Regulations differ considerably from the DOT Regulations at issue in Clear Channel because they leave the substantive issues related to the time, place, and manner of RME operations to local authorities (i.e., the defendants). Other than prohibiting the CCC from issuing an RME license if the proposed location is within 500 feet of a school, the Act does not grant the CCC authority to weigh issues pertaining to the time, place, and manner of RME operations in awarding licenses.[19]

The Cannabis Regulations leave no room for the CCC to consider local issues like traffic congestion, geographic diversity, and disproportionate burdens on particular neighborhoods in determining which applicants should be awarded licenses. Further, the CCC reviews applications on a rolling basis, in isolation from each other. There is little opportunity for the CCC to compare applicants in a municipality to each other before issuing licenses. As a result, in determining that it wanted to limit the number of RMEs on Highland Avenue, the defendants did not deprive the CCC of any opportunity to which it is entitled under the Act or Cannabis Regulations to consider and evaluate competing applications.

[19] Section 5(b) of the Act provides that the CCC "shall approve a marijuana establishment license application and issue a license if:" (1) the application complies with the Act and Cannabis Regulations; (2) the local municipality does not inform the CCC that the applicant is "not in compliance with an ordinance or by-law consistent with section 3 of this chapter"; (3) the proposed location is not within 500 feet of a school; and (4) "an individual who will be a controlling person of the [RME] has not been convicted of a felony. . . ." G.L. c. 94G, § 5(b).

In Clear Channel, the Salisbury ZBA denied the OOA the substantive, deliberative process to which it was entitled under the DOT Regulations. Here, by considering local issues not addressed in the Act's and Cannabis Regulations' provisions regarding the CCC's role in awarding licenses, the defendants did not deprive the CCC of a deliberative process to which it was entitled. For these reasons, Clear Channel does not control.

Furthermore, as stated, the Act provides wide discretion to municipalities regarding the contents of HCAs. See G.L. c. 94G, § 3(d) (HCA "shall include, but not be limited to, all stipulations of responsibilities between the host community and the [RME]."). Given that the Act and Cannabis Regulations grant the CCC authority over important local issues related to the time, place, and manner of RME operations, the Court reads the HCA provision broadly, to include the option that municipalities may consider issues like geographic diversity and disproportionate impact on particular neighborhoods in deciding which applicants to award HCAs.[20] As such, the Court declines to adopt Mederi's interpretation of the Act that would grant local authorities a more limited opportunity to regulate this newly legal, emerging industry.[21]

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[20] Mederi's argument that community impacts like traffic and geographic diversity "were all specifically addressed in the context of Mederi's requesting and receiving a special permit from the ZBA" (Pl.'s Mem. in Supp. of Mot. for J. on Pleadings, p. 13) is unpersuasive because the ZBA's decision was based on a review of Mederi's proposed RME in isolation, not in relation to other proposed RMEs. Without geographic diversity as a factor within the purview of the CCC, this issue is left to the municipalities when they negotiate HCAs.

[21] The conclusion that the Act grants municipalities broad discretion to negotiate terms of HCAs is buttressed by the CCC's "Guidance on Host Community Agreements," which the CCC issued on August 9, 2018, but was not included in the record. See https://mass-cannabis-control.com/wp-content/uploads/2018/08/Guidance-on-Host-Community-Guidance.pdf (last accessed December 17, 2019).

The Guidance on Host Community Agreements states, in pertinent part:

> Under section 3(d) of Chapter 94G, all HCAs should include terms that describe the conditions that the municipality and Marijuana

At bottom, in declining to grant Mederi, one of six applicants with proposed locations on Highland Avenue, an opportunity to enter into an HCA, the Mayor did not usurp the CCC's role of being the ultimate decision maker on RME licensing because information related to local issues like traffic and geographic diversity do not fall within any of the many categories of information applicants are required to provide to the CCC. Consequently, it is reasonable for municipalities, as they forge ahead into the uncharted territory of legalized recreational marijuana sales, to consider factors like geographic diversity, traffic impacts, and security in evaluating HCA applicants. Local municipalities are in a better position than the CCC to analyze many of these issues, and it is the municipalities that are on the front line of dealing with any problems that might arise with the operation of RMEs within their borders. Therefore, local municipalities have a strong interest in ensuring the high quality of the entities with which they execute HCAs and which, in turn, receive RME licenses from the CCC.

For all of these reasons, the defendants' decision to enter into only four HCAs and to effectively limit the number of RMEs that could operate in the same geographical area on Highland Avenue was part of the discretionary decision-making authority left to municipalities by the Act and the Cannabis Regulations.[22]

> Establishment must satisfy for that establishment to operate within that host community. **Individual conditions can vary widely**.
>
> The **type and nature of the conditions included in an HCA are unlimited** by Section 3(d) of Chapter 94G. Indeed, the only required prerequisite is that the HCA identifies the party responsible for fulfilling its respective responsibilities under the agreement. **As such, the Commission is likely to take a broad view of acceptable conditions**.

Guidance on Host Community Agreements, pp. 2 – 4 (emphasis added).

[22] This conclusion is consistent with the aforementioned "Municipal Guidance" document issued by the CCC, which states that if a municipality adopts an ordinance or bylaw limiting the number of RMEs within its borders to a number that is less than the number of registered marijuana

As such, Mederi's motion for judgment on the pleadings is **DENIED** and the defendants' cross-motion for judgment on the pleadings is **ALLOWED**.

ORDER

For the above reasons:

1. Plaintiff's Motion For Judgment On The Pleadings (Paper No. 39) is **DENIED**.

2. Defendants City Of Salem And Mayor Kimberley L. Driscoll's Cross Motion For Judgment On The Pleadings (Paper No. 39.6) is **ALLOWED**.

3. Mederi's First Amended Verified Complaint is **HEREBY DISMISSED**.

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Jeffrey T. Karp
Associate Justice, Superior Court
Dated: December 19, 2019

dispensaries (i.e., medical marijuana dispensaries) within that community, "the municipality must determine which registered marijuana dispensaries will be permitted to proceed to the application process for adult use by executing a host community agreement with those dispensaries." Municipal Guidance, p. 17. Thus, the CCC acknowledged that municipalities have discretion when deciding which entities to enter into HCAs with and, in turn, which entities should have the chance to apply to the CCC for a license.