COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
No. _____

REVOLUTIONARY CLINICS II, INC.
Plaintiff – Appellee,
v.
CITY OF CAMBRIDGE
Defendant – Appellant.

Middlesex Superior Court 1981CV02807

DEFENDANT CITY OF CAMBRIDGE'S MEMORANDUM OF LAW IN SUPPORT OF ITS PETITION FOR INTERLOCUTORY REVIEW UNDER G.L. c.231, §118 (1ST ¶)

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The Defendant-Appellant City of Cambridge (the "City") hereby submits its Memorandum of Law in support of its Petition for interlocutory review of the Superior Court's (McCarthy, J.) January 24, 2020 Order (the "Order"), which granted Plaintiff-Appellee Revolutionary Clinics II, Inc.'s ("Revolutionary Clinics" or "Plaintiff") Motion for Preliminary Injunction. The Order concerns the City's Cannabis Business Permitting Ordinance (the "Permitting Ordinance"), Chapter 5.50 of the Cambridge Municipal Code. The Permitting Ordinance requires that an applicant seeking to operate an adult-use cannabis[1] business, including a co-located adult-use cannabis retail establishment and Medical Marijuana Treatment Center ("MTC"),[2] obtain a Cannabis Business Permit for a Cannabis Retail Store from the City to do so. The Permitting Ordinance further provides that for the first two years from enactment, only Economic Empowerment Applicants ("EE Applicants") certified as such by the Cannabis Control Commission ("CCC") are eligible to receive a Cannabis Business Permit (the "two-year moratorium"), and the Order enjoins the City from enforcing the two-year moratorium. The Superior Court erred in finding that the City's Permitting Ordinance violates the Home Rule Amendment of the Massachusetts Constitution.

[1] The terms marijuana and cannabis are used interchangeably.
[2] The version of 935 CMR 500.000, *et seq*., that went into effect November 1, 2019, defines an establishment for the sale of medical marijuana as an MTC, formerly known as a Registered Marijuana Dispensary ("RMD").

Additionally, the Superior Court abused its discretion in finding that the Plaintiff would suffer irreparable harm without the requested injunctive relief.

I. Procedural Background.

The Plaintiff filed its Complaint and Motion for Preliminary Injunction on October 16, 2019. Appendix ("App.__) 5. The City filed an Opposition to the Motion for Preliminary Injunction, and the Court held a hearing on the Motion on October 29, 2019. App.6. On January 24, 2020, the Court issued its Order allowing the Plaintiff's Motion for Preliminary Injunction and restraining and enjoining the City from enforcing the two-year moratorium, and from taking any action to prevent the Plaintiff from immediately applying to convert its MTC to a co-located adult-use cannabis retail establishment and MTC. App.6. The City hereby appeals to the Single Justice from the Order, and simultaneously is seeking a stay of the Superior Court's Order in the Superior Court.

II. Facts.

A. The Adult-Use Cannabis Statutory Scheme.

In 2012, Chapter 360 of the Acts of 2012, entitled *An Act for the Humanitarian Medical Use of Marijuana*, was enacted by a ballot initiative and authorized MTCs to sell medical marijuana, or cannabis, to qualifying patients. App.13, ¶12. Thereafter, in November, 2016, a second ballot initiative was passed which allows for the adult use of cannabis for recreational purposes. App.13, ¶13.

The Adult-Use Cannabis Law was amended by Chapter 55 of the Acts of 2017, and is codified in G.L. c.94G (hereinafter, the "Adult-Use Cannabis Law" or G.L. c.94G). App.13, ¶¶13, 15. The CCC has enacted regulations entitled the Adult Use of Marijuana Regulations, found at 935 CMR 500.000, *et seq*., and entitled Colocated Adult-Use and Medical-Use Marijuana Operations found at 935 CMR 502.000, *et seq*. (the "CCC Regulations").

Chapter 55 of the Acts of 2017 requires the CCC to "prioritize review and licensing decisions for applicants … who: (i) are registered marijuana dispensaries [RMDs now defined as MTCs] …; **or** demonstrate experience in or business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for offenses under chapter 94C of the General Laws [EE Applicants]." St. 2017, c.55, §56 (emphasis added). Additionally, G.L. c.94G, §4(a ½)(iv) provides that the CCC shall adopt regulations that include "procedures and policies 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."

With these provisions in place it is clear that with the legalization of cannabis, the Legislature sought to respond to "evidence which demonstrates that certain populations, particularly Blacks and Latinos, have been disproportionately

impacted by high rates of arrest and incarceration for marijuana and other drug crimes as a result of state and federal drug policy." App.184. Therefore, the CCC has provided the following guidance to municipalities:

> In accordance with the Commission's mandate to promote and encourage full participation in the adult-use cannabis industry by those disproportionately harmed communities, the Commission's recommendation is for municipalities to prioritize review for these economic empowerment applicants at the local level as well. In other words, those prospective licensees should be reviewed for suitability before others. **Some municipalities in Massachusetts are considering prioritizing applicants by allowing them to move forward exclusively for a certain period of time. For example, a municipality may consider only economic empowerment applicants and applicants who are local residents for the first six months.**

App.193 (emphasis added).

Additionally, the Adult-Use Cannabis Law expressly allows and contemplates local action. General Laws c.94G, §3, entitled Local Control, provides that:

> (a) A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter and that:
>
> (1) govern the time, place and manner of marijuana establishment operations … .

B. <u>The Permitting Ordinance.</u>

On September 23, 2019, the Cambridge City Council voted to enact the Permitting Ordinance. App.223. The Purpose of the Permitting Ordinance states:

> This ordinance is intended to create a separate local permitting requirement for Cannabis Retail Store, Cannabis Cultivator, Cannabis Product Manufacturer and/or Cannabis Transporter (collectively "Cannabis Business") applicants to certify compliance with certain conditions in the public interest prior to being permitted to operate a Cannabis Business in the City. The City deems it to be in the public interest to give initial permitting preference for Cannabis Businesses to Priority Applicants, as defined herein.

§5.50.010 of the Permitting Ordinance.

The Permitting Ordinance defines a Priority Applicant as either a "Group A Priority Applicant" which is an EE Applicant, a Social Equity Program Applicant certified as such by the CCC, or other certain qualifying applicants, or a "Group B Priority Applicant" which is an MTC that was licensed by the state not later than July 1, 2017. §5.50.020 of the Permitting Ordinance. The Permitting Ordinance further provides that "[f]or the first two years after the Effective Date of this Chapter as stated in section 5.50.100 below, the City shall issue a Cannabis Business Permit to operate a Cannabis Retail Store only to Group A Priority Applicants who are EE Applicants certified as such by the [CCC]." §5.50.040 of the Permitting Ordinance.

The Permitting Ordinance and the two-year moratorium are properly enacted pursuant to the authority granted to the City pursuant to G.L. c.94G, §3 and

pursuant to the City's Home Rule powers. The Permitting Ordinance imposes reasonable safeguards to protect the public interest with respect to the operation of marijuana establishments and to govern the manner of marijuana establishment operations. The two-year moratorium regulates the manner in which a business may operate as contemplated by Chapter 94G. This requirement is also clearly a safeguard for the operation of marijuana establishments that promotes the public interest as the legislative intent of the Adult-Use Cannabis Law includes prioritizing the review and licensing of EE Applicants. St. 2017, c.55, §56.

C. Revolutionary Clinics' Operations.

Revolutionary Clinics has been an MTC since July 27, 2016 and has been open for operations at its Fawcett Street, Cambridge, location since September 4, 2018. App.12, ¶9. Revolutionary Clinics also has a provisional license from the CCC to operate as an MTC at a second Cambridge location at 541 Massachusetts Avenue. Id.

III. Argument.

A. Applicable Legal Standard.

The resolution of a Petition under G.L. c. 231, §118 requires the Single Justice to review the underlying order of the judge in the trial court to see whether there was an abuse of discretion or an error of law when evaluating the competing interests and issuing the relevant order. *See* Boston Herald, Inc. v. Sharp**,** 432

Mass. 593, 602 (2000). The Single Justice may review the judge's conclusions of law and reverse them if incorrect, and when the judge's findings are based on documentary evidence, as they are here, the Single Justice may draw their own conclusions from the record. Packing Industries Group, Inc. v. Cheney, 380 Mass. 609, 615-16 (1980).

The Superior Court erred and abused its discretion in applying the standard for a motion for preliminary injunction to the facts in this case. Where a private party seeks to enjoin government action, the standard for a preliminary injunction is that the private party must show irreparable harm and that the relief promotes the public interest or will not adversely affect the public. Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003); Garcia v. Dep't of Hous. & Cmty. Dev., 480 Mass. 736, 746–47 (2018).

B. The Superior Court Erred in Finding that the Permitting Ordinance Violates the Home Rule Amendment of the Massachusetts Constitution.

As found by the Superior Court in its Order, the adult-use cannabis statutory scheme as set forth in G.L. c.94G and the CCC Regulations does not expressly or implicitly preempt the field of permitting of adult-use cannabis establishments. Nonetheless, the Superior Court found that "[t]he Permitting Ordinance is in direct conflict with the CCC's priority applicant scheme [935 CMR 500.102(2)], which provides that the CCC '*shall* review applications from Priority Applicants on an

alternating basis, beginning with the first-in-time-application received from either an MTC Priority Applicant or Economic Empowerment Priority Applicant….'" Order, p.10.

However, in making this finding the Superior Court ignores the plain language of the CCC's priority applicant scheme found at 935 CMR 500.102(2), which state that the CCC shall review applications from MTCs and EE Applicants on an alternating basis, **but** "[w]here no completed application is available for review by the Commission from either of the priority groups defined in 935 CMR 500.102(2)(a), **the Commission shall review the next complete application from either group**." (emphasis added.) To the extent that the Permitting Ordinance's two-year moratorium would temporarily limit the number of applications to the CCC for adult-use licenses by MTCs, which seems highly unlikely given the fact the CCC is licensing adult-use establishments statewide and therefore its applicant pool is statewide and not limited to applicants within the City, the CCC's own regulations anticipate that the CCC may not be able to consider applications on an alternating basis and expressly allow the CCC to go to the next available application regardless of whether it is from an MTC or EE Applicant.[3] So even if

[3] The CCC Regulations themselves provide for a two-year exclusivity period in which only certain applicants, including EE Applicants but excluding MTCs, can apply for social consumption establishment and delivery only licenses, and the CCC has not altered its alternating application process in light of the fact that its

the Permitting Ordinance's two-year moratorium somehow reduced the number of MTCs applying for adult-use licenses from the CCC, there is no conflict with the CCC Regulations which allow the CCC to consider the next complete application from either group without alternating. Town of Wendell v. Attorney General, 394 Mass. 518, 528 (1985) ("the question [] is whether the local enactment will clearly frustrate a statutory purpose.").

As set forth in the facts above, the CCC has stated that pursuant to the Adult-Use Cannabis Law, municipalities should prioritize review of EE Applicants at the local level, and has stated this could be done by only considering EE Applicants for a certain period of time. The fact that the CCC through its own guidance contemplates local moratoriums for the purpose of advancing EE Applicants conclusively establishes that the CCC does not consider such a moratorium to frustrate the operation of its own regulations. The CCC's interpretation of its own regulations in this regard is owed deference by the courts. Wilson v. Comm'r Of Transitional Assistance, 441 Mass. 846, 851 (2004); Amherst–Pelham Regional Sch. Comm. v. Department of Educ., 376 Mass. 480, 491 (1978). The Superior Court erred in not giving deference to the CCC's interpretation.

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own regulations are limiting the number of MTCs eligible for licenses for a limited period of time.

Furthermore, even if it were not for the clear, plain language of 935 CMR 500.102(2)(a) that allows the CCC to consider the next complete application from either group without alternating, the Permitting Ordinance is not in conflict with Adult-Use Cannabis Law and the CCC Regulations because the Permitting Ordinance is a separate and distinct permitting process from the CCC licensing scheme, and there is no sharp conflict between the two. General Laws c.94G, §3 authorizes local ordinances, and under that authority, the City has adopted the Permitting Ordinance. Municipal ordinances are presumed to be valid. Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 744 (1993); *citing* Marshfield Family Skateland, Inc. v. Marshfield, 389 Mass. 436, 440, appeal dismissed, 464 U.S. 987(1983). The Supreme Judicial Court ("SJC") has held that "[i]n determining whether a local ordinance or by-law is inconsistent with a State statute, [it has] given municipalities 'considerable latitude,' requiring a 'sharp conflict' between the ordinance or by-law and the statute before invalidating the local law." Take Five Vending, Ltd., *supra; quoting* Bloom v. Worcester, 363 Mass. 136, 154 (1973). Cases where the court has found a sharp conflict are distinguishable from the case at bar.

Two SJC cases illustrate when there is a "sharp conflict" and demonstrate how such a conflict is wholly absent in the present case. In Town of Wendell v. Attorney General, 394 Mass. at 529, the SJC held that local regulation would

frustrate the purpose of the Massachusetts Pesticide Control Act's, namely the creation of a centralized, statewide scheme regulating the use of specific pesticides. The Town of Wendell holding is distinguishable from the present case because the Adult-Use Cannabis statutory scheme explicitly allows for local regulation especially where the Permitting Ordinance furthers the Adult-Use Cannabis statutory purpose of prioritizing EE Applicants. By way of further example, the case at bar is also distinguishable from St. George Greek Orthodox Cathedral of Western MA, Inc. v. Fire Dept. of Springfield, 462 Mass. 120 (2012), in which a local ordinance sought to regulate fire alarm systems more restrictively than required by the Building Code. In finding that the ordinance was in conflict with the Building Code, the SJC found that G.L. 143 required that the provisions of the Building Code "be binding on all cities and towns" and that if a municipality wanted to utilize more restrictive standards, it had to request authority to do so from the State Board of Building Regulations and Standards. In each of these SJC decisions the ordinances conflicted with existing statewide regulations that mandated that legislative action be taken only at the state level. In neither instance did the state legislation leave room for local regulation.

Here, the Permitting Ordinance created a separate, local permitting process, consistent with the express authority conveyed by G.L. c.94G, §3 to local communities to do so. Not only is there not a sharp conflict between state law and

the Permitting Ordinance, there is no conflict and the Permitting Ordinance actually furthers the purposes of the state law. For these reasons, the Superior Court erred in finding that the Plaintiff has a likelihood of success on the merits.

C. The Superior Court Abused its Discretion in Finding that the Plaintiff had Demonstrated Irreparable Harm.

In its Motion for Preliminary Injunction, the Plaintiff argued that it need not show irreparable harm and instead only had to make a showing that relief was in the public interest. The Superior Court found that whether or not it was necessary for the Plaintiff to show irreparable harm was not dispositive because the Plaintiff had shown irreparable harm. However, in reviewing the record that was before the Superior Court, it is clear that the Superior Court abused its discretion because the Plaintiff has not shown irreparable harm, and has not shown that the relief granted promotes the public interest or will not adversely affect the public interest.[4] Quarterman v. Springfield, 91 Mass. App. Ct. 254, 260 (2017) (abuse of discretion occurs when the judge makes a clear error of judgment in weighing the relevant factors such that the decision falls outside the range of reasonable alternatives).

The Superior Court abused its discretion in finding that the Plaintiff would suffer irreparable harm because the only harm possible is economic harm and it

[4] Additionally, where a private party seeks to enjoin government action, the private party must show irreparable harm **and** that the relief promotes the public interest or will not adversely affect the public. Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 *supra*; Garcia, *supra*.

does not threaten the very existence of the Plaintiff's business. The SJC held in Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 227-28 (2001), that when a business will have decreased revenue because a municipal regulation limits what the business can do, economic harm "will not suffice unless 'the loss threatens the very existence of the movant's business.'" Quoting Hull Mun. Lighting Plant v. MA Mun. Wholesale Elec. Co., 399 Mass. 640, 643 (1987).

Here, the Permitting Ordinance does not affect Plaintiff's ability to continue to operate an MTC at its two Cambridge locations. Additionally, pursuant to G.L. c.94G, §16, the Plaintiff can have three MTCs licenses and three adult-use cannabis licenses from the CCC, so there is nothing prohibiting the Plaintiff from operating a third location outside of Cambridge.

The Superior Court found that the Plaintiff entered into leases over market rate because of the planned adult-use cannabis business. However, when the Plaintiff was first licensed to operate as an MTC in Cambridge, it was July 27, 2016, and adult-use cannabis sales did not even become legal until after the November, 2016 ballot vote. App.13, ¶13. Accordingly, the Plaintiff decided to enter into business as an MTC without any guarantee it would ever be able to undertake adult-use cannabis sales, and assumed that risk. Furthermore, the Superior Court found that "it seems only natural that a business permitted to sell a product to only customers who qualify for and go through the process of obtaining

medical approval to buy the product would suffer substantially if other businesses are able to sell that same product to any of-age customer who walks through the door." However, medical cannabis, as opposed to adult-use cannabis, is sold tax-free, at higher potency levels since it is for medical purposes, and may be sold to people under 21 years of age with a prescription, which supports the continued viability of an MTC. G.L. c.94I, §8; G.L. c.64N, §4; 935 CMR 500.140(3); 935 CMR 500.150(4); 935 CMR 501.103; 935 CMR 501.140(3); 935 CMR 501.150.

These facts are distinguishable from Modern Continental Const. Co. Inc. v. Lowell, 391 Mass. 829 (1984), which the Superior Court relies on for the proposition that the Plaintiff would not have a way to be made whole if it is successful on the merits without an injunction. That case involved a challenge to the award of a contract under procurement law, and without an injunction, the contract would be awarded to another bidder, the work performed, and all payments made, so Modern Continental would not have a remedy. Here, if the Plaintiff is ultimately successful on the merits, the Plaintiff would be able to commence adult-use cannabis sales[5] and realize any possible profits from those sales. This is not a situation where the Plaintiff will be permanently precluded from taking the action it seeks to take and generating the revenue it seeks.

[5] Whether Plaintiff is successful on the merits in this case or not, Plaintiff will be able to commence adult-use cannabis sales after the two-year moratorium.

On the other hand, EE Applicants are applicants who face "barriers to entry in the regulated marijuana industry" and the Permitting Ordinance is an effort to assist in overcoming those barriers. App.189. Without the two-year moratorium, EE Applicants will be harmed because they will still face barriers to entry. Thus, as found by the Legislature as set forth above in the Facts, it is in the public interest to prioritize EE Applicants. Accordingly, the two-year moratorium promotes the public interest, and the public interest is adversely affected without it in place. Therefore, the Superior Court abused its discretion in finding that the Plaintiff had demonstrated irreparable harm, and the relief is not in the public interest.

IV. Conclusion.

For the forgoing reasons, the City respectfully requests that the Single Justice reverse the Superior Court's Order and dissolve the preliminary injunction.

Respectfully submitted,
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By its Attorney,

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Date: February 14, 2020

Certificate of Compliance with Appellate Rules

This Memorandum complies with the type-volume limitation of Mass.R.A.P. 16 (a)(5)-(11) because this Memorandum contains 3,444 words, excluding parts of the Memorandum exempted pursuant to Mass.R.A.P. 16 (a)(5)-(11).

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/s/ Megan B. Bayer
Megan B. Bayer

Certificate of Service

I, Megan B. Bayer, attorney for Defendant City of Cambridge, hereby certify that a true and genuine copy of this MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW UNDER G.L. C.231, §118 (1ST ¶) has been served upon attorneys for the Plaintiff, via electronic service and first-class mail to:

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February 14, 2020 /s/ Megan B. Bayer
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