Nancy E. Glowa
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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

February 14, 2020

Clerk – Civil
Middlesex Superior Court
200 Tradecenter, 2nd Floor
Woburn, MA 01801

Re: Revolutionary Clinics II, Inc. v. City of Cambridge
Middlesex Superior Court C.A. No. 1981CV03035

Dear Sir/Madam:

Enclosed for filing in the above-referenced matter, please find the following documents:

1. Notice of Appeal;
2. Defendant City of Cambridge's Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order, and Certificate of Conferral pursuant to Superior Court Rule 9A(d)(1);
3. Defendant City of Cambridge's Memorandum in Support of Its Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order, with Exhibits; and
4. Certificates of Service.

If the Court is amenable to holding a hearing on the Defendant City of Cambridge's (the "City") Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order, the City respectfully requests that the Court hold the hearing at the Court's earliest convenience.

Additionally, as noted in the City's Certificate of Conferral pursuant to Superior Court Rule 9A(d)(1), Counsel for the Plaintiff has indicated that the Plaintiff objects to and will oppose this Emergency Motion.

Additionally, please find a copy of the following documents that are being filed with the Appeals Court on this date:

1. Defendant City of Cambridge's Petition for Interlocutory Review Under G.L. c.231, §118 (1st ¶);
2. Defendant City of Cambridge's Memorandum of Law in Support of Its Petition for Interlocutory Review Under G.L. c.231, §118 (1st ¶); and
3. The Record Appendix.

Please do not hesitate to contact me if you have any questions. Thank you for your attention to these matters,

Very truly yours,

Megan B. Bayer

cc: Zachary W. Berk, Esq.
Jeffery Scott Robbins, Esq.
Joseph D. Lipchitz, Esq.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
C.A. NO. 1981CV03035

REVOLUTIONARY CLINICS II, INC.,

Plaintiff,

v.

CITY OF CAMBRIDGE,

Defendant.

NOTICE OF APPEAL

Defendant City of Cambridge hereby appeals pursuant to G.L. c.231, §118 (2nd Paragraph) from Court's (McCarthy, J.) January 24, 2020 Memorandum of Decision and Order on Plaintiff's Motion for Preliminary Injunction.

CITY OF CAMBRIDGE
By its Attorney,

Megan B. Bayer (BBO# 669494)
City of Cambridge Law Department
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
mbayer@cambridgema.gov

CERTIFICATE OF SERVICE

I, Megan B. Bayer, do hereby certify that on February 14, 2020 a true and accurate copy of *Defendant City of Cambridge's Notice of Appeal* was served by first class mail postage prepaid to all counsel of record.

Megan B. Bayer

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
C.A. NO. 1981CV03035

REVOLUTIONARY CLINICS II, INC.,

Plaintiff,

v.

CITY OF CAMBRIDGE,

Defendant.

DEFENDANT CITY OF CAMBRIDGE'S EMERGENCY MOTION FOR A STAY OF THE COURT'S JANUARY 24, 2020 PRELIMINARY INJUNCTION ORDER

Defendant City of Cambridge (the "City") hereby respectfully requests that this Honorable Court stay the January 24, 2020 Preliminary Injunction Order, pursuant to Mass.R.Civ.P. Rule 62(c), pending the City's appeals pursuant to G.L. c.231, §118, 1st ¶ and 2nd ¶. On January 24, 2020, the Superior Court (McCarthy, J.) granted Plaintiff Revolutionary Clinics II, Inc.'s Motion for Preliminary Injunction and ordered that the City is restrained and enjoined from enforcing the two-year moratorium in its Cannabis Business Permitting Ordinance, Chapter 5.50 of the Cambridge Municipal Code (the "Permitting Ordinance"), and from taking any action to prevent the Plaintiff from immediately applying to convert its Medical Marijuana Treatment Center,[1] to a co-located adult-use cannabis retail establishment and MTC (the "Order"). Along with filing the instant motion, the City is simultaneously filing a Petition to the Single Justice pursuant to G.L. c.231, §118 (1st ¶) and a Notice of Appeal pursuant to G.L. c.231, §118 (2nd ¶).

[1] 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.

This Honorable Court should grant a stay of the Order because the City has a likelihood of success on appeal, and the granting of a stay promotes the public interest. The City brings this motion on an emergency basis because without immediate relief, the permitting preference for Economic Empowerment Applicants ("EE Applicants") certified as such by the Cannabis Control Commission provided for in the Permitting Ordinance will be of no effect, as any other qualifying applicant will be able to apply for a Cannabis Business Permit pursuant to the Permitting Ordinance. Time is of the essence to preserve the two-year permitting preference period for EE Applicants, otherwise the two-year period may expire before this lawsuit, including any possible appeals, has been resolved.

WHEREFORE, the City respectfully request that this Honorable Court grant its Motion to Stay the Court's Order pending the City's appeals pursuant to G.L. c.231, §118, 1st ¶ and 2nd ¶.

CITY OF CAMBRIDGE
By its Attorney,

Megan B. Bayer (BBO# 669494)
City of Cambridge Law Department
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
mbayer@cambridgema.gov

SUPERIOR COURT RULE 9A(D)(1) CERTIFICATE OF CONFERRAL

Counsel for the City has conferred with Counsel for the Plaintiff pursuant to Superior Court Rule 9A(d)(1) prior to filing this Emergency Motion to Stay, and Counsel for the Plaintiff has indicated that the Plaintiff objects to and will oppose this Motion.

Megan B. Bayer

CERTIFICATE OF SERVICE

I, Megan B. Bayer, do hereby certify that on February 14, 2020 a true and accurate copy of *Defendant City of Cambridge's Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order* was served via e-mail all on counsel of record and by first class mail postage prepaid to all counsel of record.

Megan B. Bayer

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
C.A. NO. 1981CV03035

REVOLUTIONARY CLINICS II, INC.,

Plaintiff,

v.

CITY OF CAMBRIDGE,

Defendant.

DEFENDANT CITY OF CAMBRIDGE'S MEMORANDUM IN SUPPORT OF ITS EMERGENCY MOTION FOR A STAY OF THE COURT'S JANUARY 24, 2020 PRELIMINARY INJUNCTION ORDER

Defendant City of Cambridge (the "City") hereby submits this Memorandum in Support of its Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order, pursuant to Mass.R.Civ.P. Rule 62(c), pending the City's appeals pursuant to G.L. c.231, §118, 1st ¶ and 2nd ¶. On January 24, 2020, the Superior Court (McCarthy, J.) granted Plaintiff Revolutionary Clinics II, Inc.'s ("Revolutionary Clinics") Motion for Preliminary Injunction and ordered that the City is restrained and enjoined from enforcing the two-year moratorium in its Cannabis Business Permitting Ordinance, Chapter 5.50 of the Cambridge Municipal Code (the "Permitting Ordinance"), and from taking any action to prevent the Plaintiff from immediately applying to convert its Medical Marijuana Treatment Center ("MTC"),[1] to a co-located adult-use cannabis retail establishment and MTC (the "Order"). Along with filing the instant motion, the City is simultaneously filing a Petition to the Single Justice pursuant to G.L. c.231, §118 (1st ¶) and a Notice of Appeal pursuant to G.L. c.231, §118 (2nd ¶).

[1] 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").

This Honorable Court should grant a stay of the Order because the City has a likelihood of success on appeal, and the granting of a stay promotes the public interest. The City brings this motion on an emergency basis because without immediate relief, the permitting preference for Economic Empowerment Applicants ("EE Applicants") certified as such by the Cannabis Control Commission ("CCC") provided for in the Permitting Ordinance will be of no effect, as any other qualifying applicant will be able to apply for a Cannabis Business Permit pursuant to the Permitting Ordinance. Time is of the essence to preserve the two-year permitting preference period for EE Applicants, otherwise the two-year period may expire before this lawsuit, including any possible appeals, has been resolved.

I. Procedural Background.

The Plaintiff filed its Complaint and Motion for Preliminary Injunction on October 16, 2019. The City filed an Opposition to the Motion for Preliminary Injunction, and the Court held a hearing on the Motion on October 29, 2019. 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. The Order is attached as Exhibit A. The City hereby requests a stay from the Order, and simultaneously is filing a Petition to the Single Justice and Notice of Appeal, both pursuant to G.L. c.231, §118.

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. Complaint, ¶12. Thereafter, in November, 2016, a second ballot initiative was passed which allows for the adult use of cannabis for recreational purposes. Complaint, ¶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). Complaint, ¶¶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." *See* the CCC's *Summary of Equity Provisions*, attached to the Affidavit of Megan B.

Bayer, Esq. ("Bayer Affidavit"), which is attached hereto as Exhibit B. 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.**

(emphasis added.) *See* the CCC's *Guidance on Equitable Cannabis Policies for Municipalities*, p.5, attached to the Bayer Affidavit.

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. The Permitting Ordinance.

On September 23, 2019, the Cambridge City Council voted to enact the Permitting Ordinance. *See* the Permitting Ordinance, which is attached hereto as Exhibit C, and which is attached to the Complaint. 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 a 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. Complaint, ¶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. Motion to Stay Standard.

Pursuant to Mass.R.Civ.P. Rule 62(c) a court may stay an injunction during the pendency of an interlocutory appeal. The standard of review applied to a motion for a stay is the same standard that is required to obtain a preliminary injunction. Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 709 (1990); Doe v. Superintendent of Schools of Weston, 461 Mass. 159, 163-164 (2011); Dinucci v. Dinucci, 45 N.E.3d 610 (Mass. App. Ct. 2016) (Rule 1:28 Decision). Accordingly, the standard that the Court should apply to the instant motion is the preliminary injunction standard that would be applicable if the City was seeking a preliminary injunction.

When requesting preliminary injunctive relief between private parties, the moving party must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm without injunctive relief pendite lite; and (3) the anticipated harm to be suffered by the moving party if the injunctive relief is denied outweighs the harm the opposing party will suffer if enjoined. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). However, the criterion for injunctive relief differs, where the party requesting injunctive relief is a governmental entity. The courts have held that when a municipal party is requesting the relief, the determination must be whether: (1) the moving party has shown a likelihood of success on the merits; and (2) the moving party's requested relief "promotes the public interest, or, alternatively, will not adversely affect the public." LeClair, Jr. v. Town of Norwell, 430 Mass. 328, 331-32 (1999), citing Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984); Edwards v. Boston, 408 Mass. 643, 646-47 (1990) (noting that the issue of irreparable harm is not a required element for injunctive relief).

Accordingly, since the City is requesting the stay, the determination is whether the City has shown a likelihood of success on appeal, and whether the stay promotes the public interest. Here, for the reasons set forth below, the City has a likelihood of success on appeal, and the requested stay promotes the public interest.

B. Likelihood of Success on Appeal.

1. Applicable Legal Standard For Appeal.

The standard of review on appeal is 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 or Appeals Court 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 or Appeals Court may draw their own conclusions from the record. Packing Industries Group, Inc. v. Cheney, 380 Mass. 609, 615-16 (1980).

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

The City has a likelihood of success on appeal on its argument that 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.[2] So even if 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 ("the question [] is whether the local enactment will clearly frustrate a statutory purpose.").

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

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.

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 City has a likelihood of success on appeal in its argument that the Superior Court erred in finding that the Plaintiff has a likelihood of success on the merits.

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

The City also has a likelihood of success on appeal in its argument that 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.[3] 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 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

[3] 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 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).

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. Complaint, ¶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[4] 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. 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. *See* the CCC's *Guidance on Equitable Cannabis Policies for Municipalities*, p.1, attached to the Bayer Affidavit. Without the two-year moratorium, EE Applicants will be harmed because they will still face barriers to entry. Therefore, the City has a likelihood of success in its argument that the Superior Court abused its discretion in finding that the Plaintiff demonstrated irreparable harm.

C. A Stay Promotes the Public Interest.

As stated above, when a municipal party is requesting the relief, which in this case is a stay of the Order, the standard is whether the moving party's requested relief "promotes the public interest, or, alternatively, will not adversely affect the public." LeClair, Jr. v. Town of Norwell, 430 Mass. 328, 331-32 (1999). Here, the City is requesting a stay of the Order, so the public interest standard applies. It is well established that it is in the public interest for a municipality to enforce its ordinances. Wyman v. Zoning Bd. of Appeals of Grafton, 47 Mass.App.Ct. 635, 638–639 (1999; Bldg. Inspector of Lancaster v. Sanderson, 372 Mass. 157, 162–63 (1977); Brady v. Bd. of Appeals of Westport, 348 Mass. 515, 518 (1965); Building

[4] 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.

Comm'r of Medford v. C. & H. Co., 319 Mass. 273, 283 (1946). Here, the City is seeking a stay of the Order so that it can maintain the status quo and continue to enforce the Permitting Ordinance, and specifically the two-year moratorium, during the pendency of this litigation.

Furthermore, the Permitting Ordinance furthers an important public interest recognized by the Legislature. EE Applicants are applicants who represent areas that were disproportionately impacted by the prior criminalization of cannabis, or who will employ or are owned by individuals who were disproportionately impacted by the prior criminalization of cannabis. Cite affidavit & CCC info on EE Applicants. The Legislature has mandated that EE Applicants be given priority, and has recognized that there need to be "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." G.L. c.94G, §4(a ½)(iv); St. 2017, c.55, §56.

Accordingly, after months of public hearings at the local level and with guidance from the CCC, the City enacted the Permitting Ordinance, which promotes the public interest by giving priority to EE Applicants on a temporary basis through the two-year moratorium. As set forth above, 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. *See* the CCC's *Guidance on Equitable Cannabis Policies for Municipalities*, p.1, attached to the Bayer Affidavit. Without the two-year moratorium, EE Applicants will be harmed because they will still face barriers to entry, and their competitors will be able to make a quick entry into the Cambridge adult-use cannabis market.

IV. Conclusion.

WHEREFORE, the City respectfully request that this Honorable Court grant its Motion to Stay the Court's Order, pending the City's appeals pursuant to G.L. c.231, §118, 1st ¶ and 2nd ¶.

CITY OF CAMBRIDGE
By its Attorney,

Megan B. Bayer (BBO# 669494)
City of Cambridge Law Department
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
mbayer@cambridgema.gov

CERTIFICATE OF SERVICE

I, Megan B. Bayer, do hereby certify that on February 14, 2020 a true and accurate copy of *Defendant City of Cambridge's Memorandum in Support of Its Emergency Motion for a Stay of the Court's January 24, 2020 Preliminary Injunction Order* was served via e-mail all on counsel of record and by first class mail postage prepaid to all counsel of record.

Megan B. Bayer

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 PETITION FOR INTERLOCUTORY REVIEW UNDER G.L. c.231, §118 (1ST ¶)

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I. Request for Review.

The Defendant-Appellant City of Cambridge (the "City") hereby requests interlocutory review of the Superior Court's (McCarthy, J.) January 24, 2020 Order (the "Order"), which granted Plaintiff-Appellee Revolutionary Clinics II, Inc.'s ("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 store and Medical Marijuana Treatment Center ("MTC"),[2] in the City receive a Cannabis Business Permit 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 for a Cannabis Retail Store (the "two-year moratorium"). The Plaintiff operates an MTC in Cambridge.

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[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.

In the Court's Order, the Superior Court restrains and enjoins 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. This Court should reverse the Superior Court's Order and dissolve the injunction immediately for the following reasons.

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, 935 CMR 500.000 and 935 CMR 502.000 (the "CCC Regulations"), does not expressly or implicitly preempt the field of permitting of adult-use cannabis establishments. Therefore, if there is no irreconcilable sharp conflict between the presumptively valid local Permitting Ordinance and the adult-use cannabis statutory scheme, the Permitting Ordinance does not violate the Home Rule Amendment of the Massachusetts Constitution. "In determining whether a local ordinance or by-law is inconsistent with a State statute, we have 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. v. Town of Provincetown, 415 Mass. 741, 744 (1993); *quoting* Bloom v. Worcester, 363 Mass. 136, 154 (1973). Here, the Superior Court erred in finding a sharp conflict.

Specifically, 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....'" 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. So even if the Permitting Ordinance's two-year moratorium somehow reduced the number of MTCs applying for an adult-use license from the CCC, there is no conflict at all with the CCC's regulations which allow the CCC to

consider the next complete application from either group without alternating. Therefore, there is no sharp conflict between the CCC's priority applicant licensing scheme and the City's separate and distinct Permitting Ordinance. Accordingly, the Permitting Ordinance does not violate the Home Rule Amendment, and the Plaintiff does not have a likelihood of success on the merits.

Additionally, the Superior Court abused its discretion by not giving deference to the CCC's own interpretation of the adult-use cannabis statutory scheme, which supports the two-year moratorium.

Furthermore, notwithstanding that this Court should reverse the Superior Court's Order and dissolve the injunction because Plaintiff does not have a likelihood of success on the merits, the Trial Court abused its discretion in finding that the Plaintiff will suffer irreparable harm without the requested relief.

II. Statement of the Issues of Law Raised by the Petition.

The issues of law raised by the Petition are (a) whether the Superior Court erred in finding that the Permitting Ordinance violates the Home Rule Amendment of the Massachusetts Constitution, (b) whether the Superior Court abused its discretion by not giving deference to the CCC's interpretation of the adult-use cannabis statutory scheme and its own regulations, and (c) whether the Superior Court abused its discretion in finding that the Plaintiff would suffer irreparable harm without the requested injunctive relief.

III. Motion for Reconsideration.

The City has not filed, and does not intend to file, a motion for reconsideration in the Superior Court.

IV. Relief Requested.

The City respectfully requests that the Single Justice reverse the Superior Court's Order and dissolve the preliminary injunction.

V. Addendum.

The Superior Court's (McCarthy, J.) January 24, 2020 Order is attached hereto.

Respectfully submitted,

CITY OF CAMBRIDGE
By its Attorney,

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Date: February 14, 2020

Certificate of Compliance with Appellate Rules

This Petition complies with the type-volume limitation of Mass.R.A.P. 16 (a)(5)-(11) because this Petition contains 940 words, excluding parts of the Petition exempted pursuant to Mass.R.A.P. 16 (a)(5)-(11).

This Petition complies with the typeface requirement of Mass.R.A.P. 16 (a)(5)-(11) and the type style requirements of Mass.R.A.P. 16 (a)(5)-(11) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word Version 1908 with font Times New Roman 14 pt.

/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 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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And by first-class mail to the Superior Court:

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Middlesex Superior Court
200 Trade Center, 2nd Floor
Woburn, MA 01801

February 14, 2020

/s/ Megan B. Bayer
Megan B. Bayer

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1981CV03035

REVOLUTIONARY CLINICS II, INC.

vs.

CITY OF CAMBRIDGE

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, Revolutionary Clinics II, Inc. ("Revolutionary Clinics"), filed this civil action on October 16, 2019, challenging the validity of a Cannabis Business Permitting Ordinance (the "Permitting Ordinance") enacted by the defendant, the City of Cambridge (the "City"). Revolutionary Clinics is a "Registered Marijuana Dispensary" ("RMD") that has been lawfully selling medical marijuana in the City since September 4, 2018. It now seeks to convert its medical marijuana businesses to "Colocated Marijuana Operations" ("CMOs") that also sell recreational, adult-use marijuana in the City. It alleges that the Permitting Ordinance, which imposes a two-year moratorium on non-Economic Empowerment applicants receiving Cannabis Business Permits from the City, violates the Home Rule Amendment to the Massachusetts Constitution. The matter is now before the Court on Revolutionary Clinics' motion for a preliminary injunction, which seeks to enjoin the City from implementing the Permitting Ordinance and from taking any action to further delay the conversion of Revolutionary Clinics' businesses to CMOs. The Court conducted a hearing on October 29, 2010. For the reasons stated below, the plaintiff's motion for a preliminary injunction is **ALLOWED**.

BACKGROUND

I. Regulatory Scheme

In 2012, Massachusetts voters approved Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana," which allowed for the sale and regulation of marijuana for medical purposes. On December 15, 2016, the "Regulation and Taxation of Marijuana Act," Chapter 334 of the Acts of 2016 ("Recreational Marijuana Act"), became effective after having been approved by voters in November 2016. Generally speaking, the Recreational Marijuana Act, codified at G. L. c. 94G, § 1 et. seq., authorized the sale of marijuana to adults for recreational use. 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 Recreational Marijuana Act, at Chapter 94G (the "Cannabis Act"). The preamble of the Cannabis Act notes: "The deferred operation of this act would tend to defeat its purpose, which is to regulate forthwith marijuana in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."

The Cannabis Control Commission (the "CCC") is the state-level entity tasked with overseeing the use and distribution of both medical and recreational marijuana. The CCC regulates and controls the licensure of RMDs for the sale of medical marijuana, retail establishments for the sale of adult-use recreational marijuana, and CMOs. Section 56 of the Cannabis Act provides, in pertinent part, as follows:

> (a) The [CCC] shall prioritize review and licensing decisions for applicants for retail, manufacture or cultivation licenses who:
>
> (i) are registered marijuana dispensaries with a final or a provisional certificate of registration in good standing with the department of public health pursuant to 105 CMR 725.000 that are operational and dispensing to qualifying patients; or

> (ii) 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.
>
> (b) The commission shall identify all applications subject to prioritization under subsection (a) submitted between April 1, 2018 and April 15, 2018 and grant or deny such applications prior to reviewing any other applications for licenses.

In addition, Section 73(b) of the Cannabis Act provides:

> Notwithstanding any general or special law to the contrary, for the purposes of reviewing and approving an application for a license to operate a marijuana establishment, the [CCC] shall identify applicants who are holders of a provisional or final certificate of registration pursuant to chapter 369 of the acts of 2012 [the act legalizing medical marijuana] and accompanying regulations. The commission shall consider issuance of a provisional or final certificate of registration as achievement of accreditation status. The commission shall ensure an expedited review process for applicants for a license to operate a marijuana establishment who have achieved accreditation status and shall only require that such applicants submit specific information not previously required, analyzed, approved and recognized by the department of public health.

Section 4 of Chapter 94G sets forth the authority of the CCC concerning the oversight and regulation of the adult-use cannabis industry in Massachusetts. It begins by stating that the CCC "shall have all the powers necessary or convenient to carry out and effectuate its purposes. . ." G. L. c. 94G, § 4(a). Among other things, the CCC has the power to require applicants to apply for licensure under Chapter 94G; determine which applicants shall be awarded licenses; deny, limit, suspend, or revoke licenses; and investigate the qualifications of applicants for licensure. G. L. c. 94G, § 4(a). Section 4 also tasks the CCC with adopting "regulations consistent with this chapter for the administration, clarification and enforcement of laws regulating and licensing marijuana establishments." G. L. c. 94G, § 4 (a ½). Section 4(a ½)

includes thirty-four subparagraphs laying out the types of information the regulations "shall include." Among them are requirements that the regulations include:

> (i) Methods and forms of application which an applicant for a license shall follow and complete before consideration by the [CCC];
>
> . . .
>
> (iii) qualifications for licensure and minimum standards for employment that are directly and demonstrably related to the operation of a marijuana establishment . . .;
>
> iv) 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;
>
> (v) standards for the licensure of marijuana establishments, including, but not limited to updated that licensure;
>
> . . .
>
> (viii) criteria for evaluation of the application for a license[.]

In addition, G. L. c. 94G, § 4(c)(4), provides that the CCC shall not adopt regulations that "prohibit a medical marijuana treatment center and an experienced marijuana establishment operator from operating a marijuana establishment at a shared location[.]"

In accordance with the mandate of G. L. c. 94G, § 4, the CCC has adopted comprehensive regulations governing the "Adult Use of Marijuana" and "Colocated Adult-Use and Medical-Use Marijuana Operations" (the "CCC Regulations"). 935 Code Mass. Regs. § 500.000; 935 Code Mass. Regs. § 502.000.[1] Under the CCC Regulations, RMDs seeking "CMO"

[1] The CCC Regulations regarding Adult Use of Marijuana, 935 Code Mass. Regs. § 500.000, became effective on March 29, 2018, and were recently revised on November 1, 2019. The CCC Regulations regarding Colocated Adult-Use and Medical-Use Marijuana Operations, 935 Code Mass. Regs. § 502.000, became effective on December 14, 2018.

licenses must comply with 935 Code Mass. Regs. § 500.101(2), and any action on RMDs' applications for CMO licenses, and the licensure of CMOs, is to be "determined in a form and manner determined by the [CCC] which includes, but is not limited to, the procedures set forth in 935 CMR 500.102: *Action on Applications*." 935 Code Mass. Regs. §§ 502.101-502.102. Pursuant to 935 Code Mass. Regs. § 500.102(2), the CCC is to provide certain applicants with "priority application review" as follows:

> (2) Action on Completed Applications.
> (a) Priority application review will be granted to existing MTC Priority Applicants and Economic Empowerment Priority Applicants.
> (b) The Commission 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 as recorded by the Commission's electronic license application tracking system. Where 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.

The CCC defines the terms "MTC Priority Applicant" and "Economic Empowerment Applicant" as follows:

> MTC Priority Applicant means a previously Registered Marijuana Dispensary (RMD) Priority Applicant that demonstrated that it had received a Final Certificate of Registration and is selling Marijuana or Marijuana-infused Products as of the date of application; it had received a Final Certificate of Registration, but is not selling Marijuana or Marijuana-infused Products as of the date of application; or it had received a Provisional Certificate of Registration, but not a Final Certificate of Registration. This applicant has priority for the purposes of the review of its license application.
>
> Economic Empowerment Priority Applicant means an applicant who demonstrated and continues to demonstrate three or more of the following criteria: a majority of ownership belongs to people who have lived for five of the preceding ten years in an Area of Disproportionate Impact, as determined by the Commission; a

> majority of ownership has held one or more previous positions where the primary population served were disproportionately impacted, or where primary responsibilities included economic education, resource provision or empowerment to disproportionately impacted individuals or communities; at least 51% of current employees or subcontractors reside in Areas of Disproportionate Impact and by the first day of business, the ratio will meet or exceed 75%; at least 51% of employees or subcontractors have drug-related CORI and are otherwise legally employable in Cannabis enterprises; a majority of the ownership is made up of individuals from Black, African American, Hispanic or Latino descent; and other significant articulable demonstration of past experience in or business practices that promote economic empowerment in Areas of Disproportionate Impact. This applicant has priority for the purposes of the review of its license application.

935 Code Mass. Regs. § 500.002.

Section 3 of Chapter 94G, entitled "Local Control," outlines the methods by which municipalities may play a role in regulating recreational marijuana businesses within their borders. It provides, in pertinent part:

> (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 and of any business dealing in marijuana accessories, except that zoning ordinances or by-laws shall not operate to: (i) prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment engaged in the same type of activity under this chapter. . . .

Section 3(a) includes four other types of ordinances and by-laws municipalities may enact. They allow for municipalities to "limit the number of marijuana establishments in the city or town," "restrict the licensed cultivation, processing and manufacturing of marijuana that is a public

nuisance," "establish reasonable restrictions on public signs related to marijuana establishments," and "establish a civil penalty for violation of an ordinance enacted pursuant to this subsection. . . ." G. L. c. 94G, § 3(a)(2)-(5).

II. Revolutionary Clinics and the City's Permitting Ordinance

On September 23, 2019, more than two years after the Cannabis Act was signed into law, the City adopted the Permitting Ordinance, which creates a separate local permitting requirement for entities seeking to operate, among other things, cannabis retail stores. The "Purpose" section 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 preferences for Cannabis Businesses to Priority Applicants, as defined herein.

The Permitting Ordinance goes on to define two categories of "Priority Applicants": "Group A Priority Applicants" include certified Economic Empowerment ("EE") Applicants, certified Social Equity Program Applicants who are also Cambridge residents, certified Women or Minority Owned businesses, and Cambridge residents earning less than fifty percent of Area Median Income for at least the past three years; "Group B Priority Applicants" include "RMD[s] within the City that [were] licensed or registered by the Massachusetts Department of Public Health not later than July 1, 2017 to sell cannabis products in a Cannabis Retail Store pursuant to the Commonwealth's medical use of marijuana laws, which seek[] to operate as [] licensed marijuana retailer[s] pursuant to the Commonwealth's adult use of marijuana laws. . . ." Section

5.50.040 of the Permitting Ordinance, entitled "Permitting Preferences for Priority Applicants," forms the basis of Revolutionary Clinics' Complaint in this matter. It provides as follows:

> The City shall issue a Cannabis Business Permit pursuant to this Chapter only to Priority Applicants. For the first two years after the Effective Date of this Chapter [on September 23, 2019], 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].

The parties do not dispute that Revolutionary Clinics is an RMD or MTC as defined by the CCC Regulations.[2] Nor do they dispute that Revolutionary Clinics fits the Permitting Ordinance's definition of a Group B Priority Applicant. Revolutionary Clinics has been an RMD since July 27, 2016, and has been lawfully selling medical marijuana on Fawcett Street in the City since September 4, 2018. Revolutionary Clinics also has a provisional certificate of registration from the CCC and a certificate of occupancy from the City to sell medical marijuana at a second location at 541 Massachusetts Avenue. Thus, while Revolutionary Clinics falls within the class of entities that may obtain a Cannabis Business Permit from the City, Section 5.50.040 prohibits it from doing so until September 23, 2021, at the earliest.

STANDARD OF REVIEW

The standard for granting a preliminary injunction is well settled. In actions between private parties, the moving party must show: (a) a likelihood of success on the merits; (b) it will suffer irreparable harm without injunctive relief; and (c) the anticipated harm to be suffered by the movant if the injunctive relief is denied outweighs the harm the opposing party will suffer if

[2] The court uses the terms MTC and RMD interchangeably. The current CCC Regulations, as amended November 1, 2019, use the term MTC, and define that term as including RMDs. See 935 Code Mass. Regs. § 500.002. At the time the parties briefed and argued the preliminary injunction motion, the earlier version of the regulations, which used the term RMD, was in effect.

the injunction is issued. *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). "Where a party seeks to enjoin government action, the judge also must 'determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.' " *Garcia* v. *Department of Hous. & Community Dev.*, 480 Mass. 736, 747 (2018), quoting *Loyal Order of Moose, Inc., Yarmouth Lodge # 2270* v. *Board of Health of Yarmouth*, 439 Mass. 597, 601 (2003); *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984).

DISCUSSION

I. Likelihood of Success on the Merits

The Court first considers Revolutionary Clinics' likelihood of success on the merits of its Complaint. It is Revolutionary Clinics' burden, as the party seeking injunctive relief, to show that there is a likelihood it will prevail on the merits. "The sine qua non of this [preliminary injunction] inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc.* v. *SprintCom Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

Revolutionary Clinics' principal argument is that the Permitting Ordinance is unconstitutional under the Home Rule Amendment. "The Home Rule Amendment authorizes a municipality or bylaw to 'exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight' of the Home Rule Amendment." *Easthampton Sav. Bank* v. *Springfield*, 470 Mass. 284, 288 (2014), citing art. 89, § 6 of the Amendments to the Massachusetts Constitution. "Municipal bylaws are presumed to be valid." *Id.*

> In determining whether a local ordinance or bylaw is inconsistent with a State statute, the question is not whether the Legislature intended to grant authority to municipalities to act, but rather whether the Legislature intended to deny a municipality the right to legislate on the subject in question. Municipalities enjoy considerable latitude in this regard. There must be a sharp conflict between the ordinance or bylaw and the statute before a local law is invalidated. Such a conflict appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law.

(internal quotations and citations omitted) *Id.* at 288-289.

The Court concludes that Revolutionary Clinics has a likelihood of succeeding on its claim that the Permitting Ordinance and its two-year moratorium denying RMDs/MTCs the opportunity to obtain a permit to operate as CMOs in the City violates the Home Rule Amendment because it is inconsistent with G. L. c. 94G and the CCC Regulations promulgated pursuant to G. L. c. 94G. The Permitting Ordinance appears to exceed the limited power G. L. c. 94G granted to municipalities to regulate adult-use marijuana businesses and to conflict with the CCC Regulations' method for giving priority review to EE applicants and MTC applicants. Section 3 of G. L. c. 94G bars the City from adopting ordinances or by-laws regulating marijuana establishments that are "in conflict with this chapter or with regulations made pursuant to this chapter. . . ." G. L. c. 94G, § 3(a). The Permitting Ordinance is in direct conflict with the CCC's priority applicant scheme, 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. . . " (emphasis added). 935 Code Mass. Regs. § 500.102(2). By allowing only EE Applicants to obtain the local permitting necessary to submit a license application to the CCC, the Permitting

Ordinance circumvents the CCC Regulations' requirement that the applications of EE Applicants and MTC Priority Applicants be reviewed on an alternating basis.

This case is distinguishable from *Mederi, Inc.* v. *Salem*, Essex County Superior Court, C.A. No. 1877CV01878 (December 19, 2019), where the court (Karp, J.), in ruling on cross-motions for judgment on the pleadings, held that the City of Salem did not exceed its statutory authority or infringe upon the CCC's authority to issue licenses to recreation marijuana establishments when it entered into host community agreements (a prerequisite to applying for licensure with the CCC) with certain applicants it deemed preferable based on a number of factors, but refused to do so with the plaintiff. The court explained that G. L. c. 94G did not grant the CCC the authority to weigh local issues like time, place, and manner of operations in awarding licenses and that the CCC Regulations left no room for the CCC to consider local issues like traffic congestion and geographic diversity in deciding which applicants should be awarded licenses. As a result, the City of Salem's decision to enter into a limited number of host community agreements with those local issues in mind did not deprive the CCC of any opportunity to which it was entitled under either G. L. c. 94G or the CCC Regulations. Here, in contrast to *Mederi*, G. L. c. 94G and the CCC Regulations both speak to the issue of priority review for RMD and EE Applicants and set out the method for doing so. Because the City's Permitting Ordinance conflicts with that method, it seeks to deprive the CCC of the authority to which it is entitled under G. L. c. 94G and the CCC Regulations to grant priority review to RMD and EE Applicants on an alternating basis.

In reaching its ruling that Revolutionary Clinics has demonstrated a likelihood of success on the merits of its claim that the Permitting Ordinance violates the Home Rule Amendment, the Court deems it worth pointing out what the court is <u>not</u> ruling.

First, the Court is not ruling, as Revolutionary Clinics suggests in footnote 6 of its Memorandum of Law in Support of its Motion for Preliminary Injunction, that the nature of the CCC's licensing authority under G. L. c. 94G and the CCC Regulations indicate an intent to preempt the field. In fact, the Court's ruling in *Mederi*, supra, suggests the opposite, at least with respect to municipalities' exercise of discretion in entering into host community agreements pursuant to G. L. c. 94G, § 3(d). In addition, the Court is not persuaded that G. L. c. 94G, § 3(a)(1), in particular, is fatal to the Permitting Ordinance. That subsection provides that "*zoning* ordinances or by-laws shall not operate to . . . prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment engaged in the same type of activity under this chapter. . ." (emphasis added). G. L. c. 94G, § 3(a)(1). The Court is not convinced that the Permitting Ordinance is a *zoning* ordinance, as opposed to a general bylaw. Section 1A of G. L. c. 40A defines "zoning" as "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants." However, not all ordinances or by-laws that regulate land use are considered to be zoning laws. *Lovequist* v. *Conservation Comm'n of Dennis*, 379 Mass. 7, 12 (1979). See *Valley Green Grow, Inc.* v. *Charlton*, 2019 WL 1087930 at *7-9 (Mass. Land Ct. March 7, 2019) (Foster, J.) (discussing "interplay of zoning and general bylaws and the circumstances under which a general bylaw impermissibly intrudes upon a subject regulated by a zoning bylaw" and concluding that town's general bylaw to ban all non-medical cannabis uses was invalid). The parties have not fully briefed the issues involved in determining whether the Permitting Ordinance constitutes a zoning bylaw under the framework

laid out in *Valley Green Grow*, and the Court need not hang its hat on that argument to find a likelihood of success on the merits. See *Valley Green Grow*, 2019 WL 1087930 at *7-9, citing *Spenlinhauer* v. *Barnstable*, 80 Mass. App. Ct. 134, 139-140 (2011), *Lovequist* v. *Conservation Comm'n of Dennis*, 379 Mass. 7 (1979), and *Rayco Inv. Corp.* v. *Board of Selectmen of Raynham*, 368 Mass. 385 (1975). Finally, the Court does not reach Revolutionary Clinics' argument that the Permitting Ordinance violates Revolutionary Clinics' right to equal protection under the Massachusetts Constitution as a preference based on race.

II. Balancing of Harms

Turning to the issue of irreparable harm, Revolutionary Clinics contends that it need not show irreparable harm because, "[w]here, as here, a suit is brought by citizens acting as private attorneys general to enforce a statute or declared policy of the Legislature, a showing of irreparable harm is not required for the issuance of a preliminary injunction." *Fordyce* v. *Hanover*, 457 Mass. 248, 255 n.10 (2010), citing *LeClair* v. *Norwell*, 430 Mass. 328, 331-332 (1999). The Court is not persuaded that this case falls within that category of cases where a showing of irreparable harm is not necessary. See *LeClair*, 430 Mass. at 331 (irreparable harm not required in case brought by taxpayers pursuant to G. L. c. 40, § 53, because statute "provides a mechanism" for citizens to bring suit as private attorneys general); *Edwards* v. *Boston*, 408 Mass. 643, 646 (1990) (same). In any event, this issue is not dispositive as the court concludes that Revolutionary Clinics has made a showing of irreparable harm if a preliminary injunction is not entered.

The City's claim that the injunction must be denied because, ". . . the Two-Year Moratorium on converting to an adult-use Cannabis business or co-located cannabis business does not threaten the very existence of its business" is misplaced. See Defendant's Memorandum

at p. 18, citing *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227-228 (2001) ("economic harm alone however, will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business'") (quotations in the original). The affidavit of Keith Cooper, Revolutionary Clinics' CEO, outlines the harm it is likely to suffer due to the Permitting Ordinance. Cooper explains that Revolutionary Clinics has invested substantial sums to open two of the three CMOs it is entitled to operate under state law in the City and that, before the City enacted its Permitting Ordinance on September 23, 2019, it entered into leases for two locations at two to three times market rates because of the planned cannabis use. Unable to use those locations as CMOs because of the Permitting Ordinance, Revolutionary Clinics is left to bear both the expense of its investment and the lost profits sustained from being unable to participate in the adult-use marijuana market. Having committed substantial investments to open two of its permissible three CMOs in the City, Revolutionary Clinics would now be left to compete, as a medical marijuana-only establishment, with adult-use marijuana retailers and CMOs in neighboring communities. The court accepts the assertion in Cooper's affidavit that "medical marijuana-only establishments in states that have legalized cannabis for adult-use have struggled to survive." Cooper Aff., para. 13. 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 its doors.

Furthermore, the City disregards the legal authority applicable where a moving party has no adequate remedy at law for its economic harm. Absent an injunction, Revolutionary Clinics does not have an adequate remedy at law because there appears to be no cause of action available that would permit it to recovery money damages for the financial losses it would likely suffer

due to the City blocking its entry into the adult-use market for two years.[3] See *Modern Continental Constr. Co, Inc.* v. *Lowell*, 391 Mass. 829, 837-838(1984) (entry of preliminary injunction appropriate where remedy at law would not provide adequate compensation for plaintiff's financial losses).

The Court concludes that this irreparable harm Revolutionary Clinics would suffer if injunctive relief is denied outweighs any harm the City may suffer if the injunction is issued. The City failed to identify any harm that it would suffer in its memorandum and during oral argument. See Defendant's Opposition Memorandum at pp. 17-18. The only arguable potential harm to the City upon the issuance of an injunction is that EE Applicants within its borders will not get the benefit of the super-priority given to them by the Permitting Ordinance, something the City believes to be in the public interest. The Court finds this argument unavailing. Given the court's conclusion that that super-priority contained in the Permitting Ordinance conflicts with G. L. c. 94G and the CCC Regulations, there is no potential harm suffered by the City by the issuance of a preliminary injunction.

III. Public Interest

The Court also concludes that the preliminary injunction Revolutionary Clinics seeks promotes the public interest. See *Garcia*, 480 Mass. at 747. There is a clear public interest in enforcing statutory law and the declared policy of the Legislature, and in invalidating conflicting local ordinances. Here, the court has concluded that Revolutionary Clinics is likely to succeed on

[3] Even if Revolutionary Clinics could recover its anticipated monetary loss, that amount would be difficult to compute and likely speculative, given the unknown variables and an absence of historic data on the recreational marijuana market in the City. See *Frank D. Wayne Assoc., Inc.* v. *Lussier*, 16 Mass. App. Ct. 986, 988 (1983) (noting injunctive relief is often given in cases involving violation of noncompete agreements, where quantification of damages is "particularly difficult and elusive").

the merits of its claim that the Permitting Ordinance violates the Home Rule Amendment. An injunction preventing the City from implementing the Permitting Ordinance will give effect to G. L. c. 94G and the CCC Regulations, which control how EE Applicants and RMD Applicants are to be given priority in the adult-use licensing process. While there may be, as the Permitting Ordinance states, a public interest served by giving EE Applicants super-priority over RMD Applicants, the CCC presumably considered that question when it enacted regulations giving EE Applicants and RMD Applicants equal priority review "on an alternating basis." 935 Code Mass. Regs. § 500.102(2).

ORDER[4]

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is **ALLOWED** as follows:

The Court hereby **ORDERS** that the City is restrained and enjoined from enforcing the second sentence of Section 5.50.040 of the City's Cannabis Business Permitting Ordinance, which imposes a two-year moratorium on Revolutionary Clinics' application process as described herein. The Court further orders that the City is restrained and enjoined from taking any action preventing Revolutionary Clinics from immediately applying to convert its medical marijuana businesses to Colocated Marijuana Operations, except to the extent allowed by G. L. c. 94G, § 3, and the CCC Regulations.

Kathleen M. McCarthy
Associate Justice of the Superior Court

Dated: January 24, 2020

[4] This Order applies to only the second sentence of Section 5.50.040 of the Permitting Ordinance as that was the only section of the Permitting Ordinance that Revolutionary Clinics relied on in seeking this injunction.

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.

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[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. The Permitting Ordinance.

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,
CITY OF CAMBRIDGE
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

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