MEDERI, INC. VS. CITY OF SALEM & ANOTHER[1]

Docket:	SJC-13010
Dates:	February 3, 2021 - July 30, 2021
Present:	Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.
County:	Essex
Keywords:	Marijuana. License. Municipal Corporations, By-laws and ordinances, Contracts, Marijuana. Contract, Municipality. Mandamus. Practice, Civil, Action in nature of mandamus, Action in nature of certiorari, Motion to dismiss, Judgment on the pleadings. Regulation.

Civil action commenced in the Superior Court Department on December 21, 2018.

A motion to dismiss was heard by Timothy Q. Feeley, J.; and the case was heard by Jeffrey T. Karp, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William H. Sheehan, III, for the plaintiff.

Victoria B. Caldwell, Assistant City Solicitor, for the defendants.

Christine A. Baily, Special Assistant Attorney General, for Cannabis Control Commission, amicus curiae, submitted a brief.

BUDD, C.J. Since the sale and recreational use of marijuana became legal in the Commonwealth in 2016 pursuant to St. 2016, c. 334, entities seeking to open retail marijuana establishments and their prospective host communities have grappled with that statute as subsequently amended, along with the accompanying regulations promulgated by the Cannabis Control Commission (commission). In this case, the parties are at odds over (1) a municipality's role in deciding who is granted a license to sell marijuana; and (2) the restrictions, if any, that apply when a municipality is choosing between applicants for a retail marijuana license.

Mederi, Inc. (Mederi), sued the city of Salem (city), contending that by rejecting Mederi as a host community agreement (HCA) partner, the city effectively precluded Mederi from being considered for a license to sell marijuana because securing an HCA is necessary prior to applying to the commission for a license. Mederi also claims that the city's process was arbitrary or capricious and contrary to law. Mederi's suit did not survive the combination of orders allowing the city's motion to dismiss and motion for judgment on the pleadings filed ad seriatim. Before us is Mederi's appeal, which we transferred to this court on our own motion. Although we observe that the interplay between the statute and the regulations may have led to consequences perhaps not contemplated by the Legislature or the commission, we nevertheless conclude that Mederi's claims properly were denied, and thus affirm the decision.[2]

Background. 1. Statutory and regulatory framework. In 2016, Massachusetts voters approved the Regulation and Taxation of Marijuana Act, St. 2016, c. 334, codified at G. L. c. 94G, §§ 1 et seq., and amended the following year by St. 2017, c. 55, entitled "An Act to ensure safe access to marijuana" (recreational marijuana act). Chapter 94G provides for, among other things, the sale of marijuana to adults for recreational use and empowers the commission to oversee and regulate the use and distribution of recreational marijuana. See G. L. c. 94G, § 4. The Legislature tasked the commission with regulating the Commonwealth's new marijuana industry by, among other responsibilities, issuing licenses to prospective marijuana establishments.[3] Id.

The commission reviews licensing applications "on a rolling basis." 935 Code Mass. Regs. § 500.102(1)(a) (2021). In doing so, it prioritizes the review of applications from licensed marijuana treatment centers that seek to convert to retail marijuana establishments as well as economic empowerment priority applicants. 935 Code Mass. Regs. §§ 500.101(4), 500.102(2)(a) (2021). Economic empowerment priority applicants are, broadly speaking, those applicants from communities that have been disproportionately harmed by marijuana law enforcement (particularly Black, Hispanic, and Latino communities). 935 Code Mass. Regs. § 500.002 (2021). The commission statutorily is required to prioritize such applicants. See St. 2017, c. 55, § 56 (a) (ii); G. L. c. 94G, § 4 (a 1/2) (iv) (commission must adopt "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").[4] Likewise, qualifying applicants or licensees are eligible to receive training in, among other things, management, industry best practices, accounting and sales forecasting, and tax compliance. 935 Code Mass. Regs. § 500.105(17) (2021).[5]

Chapter 94G gives municipalities the power to regulate the operation of recreational marijuana establishments within their borders, including the ability to adopt ordinances governing the total number of such establishments, as well as the time, place, and manner of marijuana sales (with certain exceptions) as long as the ordinances do not conflict with the provisions of c. 94G. See G. L. c. 94G, § 3 (a).

Chapter 94G also allows municipalities to determine the conditions under which they are willing to "host" retail marijuana establishments. G. L. c. 94G, § 3 (d). The relevant section provides, in pertinent part:

"A marijuana establishment . . . shall execute an agreement with the host community setting forth the conditions to have a marijuana establishment . . . located within the host community which shall include . . . all stipulations of responsibilities between the host community and the marijuana establishment . . . ."

Id. Municipalities may charge marijuana establishments a "community impact fee" that, among other requirements, does not exceed three percent of the marijuana establishment's gross sales. Id.

Although the commission's regulations are silent on the process of negotiating an HCA, in a nonbinding guidance document, the commission states that it "encourages municipalities to carefully consider the impact of the particular marijuana establishment proposed for a community, as well as benefits it may bring in local revenue and employment, when negotiating [an HCA]."

An applicant must provide the commission with proof of an HCA as part of its application for a license. 935 Code Mass. Regs. § 500.101(1)(a)(8) (2021).

2. The city's HCA application process. Pursuant to G. L. c. 94G, § 3 (a) (2), the city passed an ordinance limiting the maximum number of marijuana retail establishments within the city to five. The city published guidelines explaining the HCA application process, including the minimum requirements necessary to apply. Among other things, applicants were required to submit business plans and to describe any prior experience managing a marijuana business. They also were required to provide documentation of their financial solvency; detailed information regarding the proposed location of the retail establishment, including traffic and security plans; and a copy of a special permit issued by the city's zoning board of appeals or evidence of site control of the proposed location for the establishment.[6]

The guidelines also listed the following favorable criteria that would be considered:

"(a) Demonstrated direct experience in the cannabis industry or a similar industry. (b) Managers, directors, officers, investors, and others related to the establishment are free of any disqualifying criminal convictions. (c) Minimal traffic impacts and appropriate mitigation for impacts is offered. (d) Approval of security plan by Chief of Police. (e) Financial records, business plan, and other documentation demonstrates strong capitalization or access to financing to ensure success of business. (f) Geographic diversity of the establishment in relation to other established or permitted marijuana retail establishments."

A review committee was established to evaluate the applications and provide recommendations to the mayor, who would make the final determination whether to enter into an HCA with a particular applicant.

3. Facts and procedural posture. We summarize the relevant facts taken from the record, reserving certain details for later discussion. In September 2018, Mederi applied for an HCA with the city to open a retail marijuana establishment on Highland Avenue in Salem. At the time Mederi applied, there were a total of eight applicants vying for four then-available slots.[7] In addition to meeting all of the city's stated requirements, Mederi made extra property tax payments at the city's request.

In December 2018, after the city informed Mederi that it had "not been chosen to advance to the next round of consideration," Mederi filed a two-count complaint in the Superior Court seeking relief in the nature of mandamus, i.e., an order requiring the city to enter into an HCA with Mederi, as well as certiorari review of the city's rejection of Mederi's application.[8] A Superior Court judge (first motion judge) dismissed the mandamus claim in an order allowing the city's motion to dismiss the complaint. Thereafter, both parties moved for judgment on the pleadings on the remaining certiorari claim. After a hearing, a different Superior Court judge (second motion judge) allowed the city's motion. We transferred Mederi's timely appeal to this court on our own motion.

Discussion. 1. Mederi's claims for relief. Mederi contends that the first motion judge erred in dismissing the first count of his complaint (mandamus) and, in the alternative, that the second motion judge erred in allowing the city's motion for judgment on the pleadings on his remaining certiorari claim. We are not convinced.

a. Mandamus. Mederi argues that it was error to reject its claim for mandamus relief. We disagree. A request for relief in the nature of mandamus is "a call to a government official to

perform a clear cut duty" (citation omitted). Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't, 448 Mass. 57, 59-60 (2006). See Johnson v. District Attorney for the N. Dist., 342 Mass. 212, 214-215 (1961) (mandamus proper where district attorney refused to comply with personnel board's decision to reinstate petitioner as special messenger, because statute at issue "impose[d] a clear duty upon the [district attorney] to comply with the board's decision"); Strong, petitioner, 20 Pick. 484, 497-498 (1838) (mandamus proper remedy where board of examiners refused to give petitioner –- duly elected as county commissioner –- certificate of his election, because "counting the votes, and ascertaining the majorities and giving certificates of the result, are mere ministerial acts"). Further, "even if the act sought to be compelled is ministerial in nature, relief in the nature of mandamus is extraordinary and may not be granted except to prevent a failure of justice in instances where there is no other adequate remedy." Lutheran Serv. Ass'n of New England v. Metropolitan Dist. Comm'n, 397 Mass. 341, 344 (1986) (Lutheran Serv. Ass'n). See Anzalone v. Administrative Office of the Trial Court, 457 Mass. 647, 655 (2010) (mandamus is "an extraordinary remedy, invoked sparingly by the court in its discretion").

Because an HCA is a prerequisite to applying to the commission for a license to sell recreational marijuana, 935 Code Mass. Regs. § 500.101(1)(a)(8), Mederi contends that a municipality's role in the regulatory structure is necessarily ministerial. Otherwise, Mederi contends, the municipality, rather than the commission, has the power to decide which entities may be considered for a license.

Here, Mederi claims that once it presented its application complete with all of the required documentation, and demonstrated its intention to accept the city's conditions, the city was required to execute an HCA with Mederi. Mederi contends that because the city failed to do so, mandamus relief is appropriate. This argument fails.

Nothing in G. L. c. 94G, § 3, imposes a duty on a city or town to enter into an HCA with a prospective recreational marijuana establishment simply because that establishment is able to fulfill the municipality's HCA requirements. Indeed, G. L. c. 94G, § 3 (d), the provision governing HCAs, merely provides that a prospective marijuana establishment must enter into an HCA with a host community before it can operate. That provision contemplates a negotiation between the host community and the applicant, stating that the HCA must include "all stipulations of responsibilities between the host community and the marijuana establishment." Id.

Further, no city ordinance requires the city to enter into an HCA with every applicant that meets the city's conditions for operating a retail marijuana business in the community.[9] This makes sense, because an "agreement," i.e., a "manifestation of mutual assent by two or more [parties]," see Black's Law Dictionary 84 (11th ed. 2019), requires each party to opt in -- an inherently discretionary act.

Because a municipality may use its discretion in determining whether to enter into an HCA with a prospective retail establishment, mandamus relief is not available to Mederi.[10] See Boston Med. Ctr. Corp. v. Secretary of the Exec. Office of Health & Human Servs., 463 Mass. 447, 470 (2012) (mandamus "is not an appropriate remedy to obtain a review of the decision of public officers who have acted and to command them to act in a new and different manner" [citation omitted]). See also Lutheran Service Ass'n, 397 Mass. at 344 ("a court may not compel performance of a discretionary act").

b. Certiorari. In the alternative, Mederi argues that the second motion judge erred by allowing the city's motion for judgment on the pleadings on Mederi's certiorari claim. See Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). We review appeals from such orders de novo. UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019).

A claim in the nature of certiorari pursuant to G. L. c. 249, § 4, provides for judicial review of administrative proceedings "where such oversight is not otherwise provided by statute." Yerardi's Moody St. Restaurant & Lounge, Inc. v. Selectmen of Randolph, 19 Mass. App. Ct. 296, 300 (1985). The standard of review for a certiorari action depends on the nature of the action for which review is sought. Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 604 (2017), and cases cited. "[W]here the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the 'substantial evidence' standard." Id. at 604-605, quoting Figgs v. Boston Hous. Auth., 469 Mass. 354, 361-362 (2014). However, where, as here, the decision being reviewed implicates the exercise of administrative discretion, the court applies the "arbitrary or capricious" standard, which is more deferential to the party defending the administrative action it took. Revere, supra at 605. See Attorney Gen. v. Sheriff of Worcester County, 382 Mass. 57, 62 (1980). This standard requires only that there be a rational basis for the decision. Attorney Gen., supra. See Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779, 792 (2012) ("A decision is not arbitrary and capricious unless there is no ground which 'reasonable [persons] might deem proper' to support it" [citation omitted]).

In support of Mederi's claim for certiorari relief are arguments that fall into two broad categories. Mederi maintains that (1) the city failed properly to evaluate Mederi's application according to the criteria set out in the published guidelines, and (2) the application process itself was unlawful.

i. Evaluation of HCA applications. When Mederi submitted its application for an HCA, it was one of eight applicants vying for four then-available slots.[11] As discussed supra, in evaluating applications for HCAs, the review committee considered criteria relating to experience in the marijuana industry, financial stability, geographic diversity, traffic impact, and the applicant's security plan. Mederi claims that based upon these criteria, its application was as strong as, or stronger than, the applications of those entities that were ultimately selected. Even assuming this to be true, the decision not to select Mederi cannot be characterized as either arbitrary or capricious.

The review committee considered Mederi's application along with the applications of seven other entities: Atlantic Medicinal Partners, Inc. (Atlantic Medicinal); I.N.S.A., Inc., doing business as INSA Salem (INSA); NS Alternatives LLC (NS Alternatives); Sanctuary Medicinals, Inc. (Sanctuary Medicinals); CTDW, LLC, doing business as Seagrass (Seagrass); Terpene Journey, LLC (Terpene Journey); and Witch City Gardens, LLC (Witch City Gardens). The committee concluded that Atlantic Medicinal, NS Alternatives, Seagrass, and INSA had the strongest proposals because they "appeared to be the strongest positioned to open, succeed, and provide minimal or manageable impact to the surrounding neighborhood." The committee explained its reasoning thoroughly in a memorandum to the mayor:

"All four offered strong evidence of capitalization, with detailed business plans demonstrating realistic projections of growth and costs. All four also came with the strong endorsements for their site security plans by the Police Department . . . . With the exception of INSA, the companies will have secured, indoor delivery areas for their products. As delivery of product would be by van-sized vehicles, Atlantic and Seagrass'[s] proposals would eliminate larger truck deliveries to those locations . . . . Atlantic and INSA's general distance from residences was also advantageous. Lastly, INSA, Seagrass, and NS Alternatives involve teams who have successfully been engaged in the cannabis industry . . . and demonstrated substantial familiarity with the industry."

The review committee recognized that Mederi's application was "not without merits," as it would improve the condition of a "blighted commercial property" and "would serve a separate area of customers from other proposed companies, contributing to . . . geographic

diversity." However, the committee considered the applications of Mederi, Terpene Journey, and Sanctuary Medicinals to be "not as strong as the others."[12] Mederi, for instance, lacked "sufficient capitalization" and "direct experience in the industry." It also was one of five applicants seeking to operate on Highland Avenue.

The city ultimately chose to enter into HCAs with INSA, Witch City Gardens, Seagrass, and Atlantic Medicinal.[13] Because the city had a rational basis for choosing these applicants, its decision not to enter into an HCA with Mederi was neither arbitrary nor capricious. See Attorney Gen., 382 Mass. at 62. Based on the high number of applicants on Highland Avenue, the city ultimately selected two applicants that planned to locate on that street –- Atlantic Medicinal and INSA –- that, in its view, had stronger proposals than Mederi.

Notably, and as the review committee recognized in its memorandum, the executives at INSA had extensive experience within the marijuana industry, whereas Mederi's chief executive officer had less than one year of direct experience as a licensed medical marijuana caregiver in Maine. Further, the committee determined that Atlantic Medicinal and INSA provided evidence of "ample" and "very strong" capitalization and submitted business plans that projected "conservative and reasonable" revenue growth. By contrast, the committee expressed concerns about Mederi's financial strength and its "sole capitalization" consisting of a private investor from New Jersey who had not yet completed "due diligence."

Although Mederi may quibble with the city's reasoning and disagree with the city's ultimate course of action, there is no evidence that the city's decision was "either based on a legally untenable ground or [was] unreasonable, arbitrary, or capricious." Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 219 (1989). The city made a rational choice to forgo Mederi's application in favor of other prospective retail marijuana establishments to bolster the geographical diversity of retail marijuana establishments throughout the city.[14]

ii. Unlawful process. Mederi contends that the city's application process was contrary to law, and therefore the results should be nullified. Pointing out that each of the successful applicants had promised to provide the city with additional benefits, financial and otherwise, if granted an HCA, Mederi argues that because it offered less financial and charitable incentives than did other applicants, it was not chosen.[15] That is, Mederi alleges that the city's selections were predicated on an unlawful "pay-to-play" scheme.

The record does not support Mederi's claim, as another of the applicants not selected, Terpene Journey, offered to provide significant additional financial benefits if it were granted an HCA. Terpene Journey offered to donate up to ten percent of its annual profits to a fund to address local issues such as traffic and homelessness, at least $10,000 per year to youth prevention initiatives, and $50,000 to the North Shore Alliance of GLBTQ Youth. In contrast, Witch City Gardens and INSA, with whom the city entered into HCAs, did not offer any additional direct pecuniary benefit. See note 15, supra. Mederi presents no credible evidence that the city based its decisions on the additional benefits that the applicants offered if selected.[16]

Mederi also claims that the city used the HCA application process improperly to persuade Mederi to make additional payments to cover certain property taxes. Specifically, Mederi alleges that the city, expressing concern over the delinquent real estate taxes owed by the owner of 250 Highland Avenue and the adjacent property at 260 Highland Avenue, suggested that Mederi gain site control over both properties. Mederi purportedly made payments to the owner of both 250 and 260 Highland Avenue, allowing the owner to pay off the overdue taxes on one of the properties. There is no reason to believe that these events had an impact on the city's decision not to execute an HCA with Mederi. We therefore discern no unlawful, arbitrary, or capricious action in the city's recommendation that Mederi obtain site control of 260 Highland Avenue.[17]

Mederi further challenges the city's HCA fee terms, arguing that the city improperly charged HCA recipients in excess of the community impact fee allowed by law. Although this is an issue of concern, as discussed infra, Mederi does not have standing to contest the city's HCA fees because it never executed an HCA with the city. "A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred" (citation omitted). Revere, 476 Mass. at 607. Mederi has not been required to pay these additional fees because it has not executed an HCA with the city; it therefore has suffered no cognizable injury.

Thus, on this record Mederi has failed to sustain its heavy burden to demonstrate that the city acted arbitrarily or capriciously in its decision-making process. See Attorney Gen., 382 Mass. at 62.

2. Observations regarding the statutory and regulatory framework. For the reasons explained supra, we affirm the Superior Court's dismissal of Mederi's suit. However, the issues raised reveal potential inconsistencies in the interplay between G. L. c. 94G and the regulations

promulgated to implement at least one of its implied goals, i.e., making the Commonwealth's marijuana industry equitable.

The statutory scheme requires the commission to prioritize applicants that will benefit communities disproportionately affected by the enforcement of prior laws prohibiting marijuana sales and distribution. Pursuant to c. 94G, the commission must adopt "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 1/2) (iv). To this end, the recreational marijuana act requires "prioritiz[ing] review and licensing decisions for applicants . . . who . . . demonstrate experience in or business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for offenses under [the Commonwealth's controlled substances act, G. L. c. 94C]." St. 2017, c. 55, § 56 (a) (ii). See 935 Code Mass. Regs. § 500.102(2)(a).

We observe, however, that in practice the commission's regulations may fall short of accomplishing this goal. The regulations call for economic empowerment priority applicants to receive "[p]riority application review" by the commission. 935 Code Mass. Regs. § 500.102(2)(a). However, because municipalities, as the de facto gatekeepers to such priority application review, are not required to consider whether any entity seeking to enter into an HCA is an economic empowerment priority applicant, such applicants may receive no commission review at all.[18]

Further, although we conclude that Mederi does not have standing to contest the payments the city requires of its HCA partners in excess of the community impact fee, see G. L. c. 94G, § 3 (d), we acknowledge the concern raised. The applicable statutory provisions and regulations are silent with respect to whether municipalities may mandate such payments; viable arguments may be made on both sides of the issue.[19] Regardless, the practice of requiring HCA partners to make payments in addition to the community impact fee has the potential to create an unfair advantage for municipalities and better-funded applicants. Importantly, it also may create a barrier to entry for prospective economic empowerment priority applicants.

Implementing the framework governing the new recreational marijuana industry has revealed gaps that the Legislature and commission likely did not anticipate. Closing those gaps would provide much-needed clarity.

Judgment affirmed.

footnotes

[1] Mayor of Salem.

[2] We acknowledge the amicus brief submitted by the Cannabis Control Commission (commission).

[3] A "marijuana establishment" is "a marijuana cultivator, independent testing laboratory, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business." G. L. c. 94G, § 1.

[4] This requirement demonstrates the Legislature's intent to assist through retail-marijuana legislation communities disproportionately affected by enforcement of marijuana crimes.

[5] Individuals other than owners of economic empowerment priority applicants may qualify for these services. To qualify, an individual must meet certain criteria showing, generally, that they have been disproportionately affected, reside in a community so affected, or have experience serving populations so affected by prior enforcement of the marijuana laws. 935 Code Mass. Regs. § 500.105(17)(b).

[6] "Site control" may be accomplished by purchase or lease of the property. Under section 6.10.7(3) of the city's ordinance, an applicant for a special permit to operate a marijuana establishment "shall submit proof of site control and right to use the premises proposed for the marijuana establishment and may include a deed, notarized statement from the property owner and a copy of the lease agreement, or real estate contract contingent upon successful licensing, or a letter of intent by the owner of the premises indicating intent to lease the premises to the petitioner contingent upon successful permitting."

[7] The other applicants were Atlantic Medicinal Partners, Inc. (Atlantic Medicinal); I.N.S.A, Inc., doing business as INSA Salem (INSA); NS Alternatives LLC (NS Alternatives); Sanctuary Medicinals, Inc.; CTDW, LLC, doing business as Seagrass (Seagrass); Terpene Journey, LLC; and Witch City Gardens, LLC (Witch City Gardens).

[8] While the city's motion to dismiss was under advisement, Mederi filed an amended complaint, which added a third count naming the commission as a defendant and seeking an injunction preventing the commission from issuing a license for a retail marijuana establishment to operate in the city without considering an application from Mederi. This additional count subsequently was dismissed, and Mederi did not appeal from that decision.

[9] We note, however, that a city or town may not bar the operation of retail marijuana establishments within the municipality altogether. See G. L. c. 94G, § 3 (a) (2) (i).

[10] In support of its position, Mederi relies on Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury, 94 Mass. App. Ct. 594 (2018) (Clear Channel). There, the Appeals Court held that the zoning board of appeals of Salisbury circumvented a process imposed by regulation for the approval of billboards by granting a special permit to only one of two applicants, improperly eliminating the power of the Department of Transportation to select one billboard for approval. Id. at 595-596. That case, however, is inapposite. The plaintiff in Clear Channel sought judicial review pursuant to G. L. c. 40A, § 17, not mandamus relief. Id. at 596. A claim for mandamus relief would have failed (just as Mederi's claim fails here), as the Appeals Court explicitly noted that the board's role in granting a special permit had a discretionary component. Id. at 600. See Lutheran Serv. Ass'n, 397 Mass. at 344 ("a court may not compel performance of a discretionary act").

[11] A fifth slot had already been filled by an entity previously licensed to distribute marijuana for medicinal purposes. See 935 Code Mass. Regs. § 500.101(4).

[12] As for Witch City Gardens, the review committee concluded that its application was "mixed." For example, although the committee found that the proposed location would create geographic diversity vis-à-vis other marijuana establishments, and would "contribut[e] to an improvement to the streetscape and neighborhood," the committee also noted that the Witch City Gardens team had no experience in the cannabis industry.

[13] The city also attempted to negotiate an HCA with NS Alternatives. The record does not show why those negotiations did not result in an HCA, nor does it show why the city entered into an HCA with Witch City Gardens despite its "mixed application."

[14] Mederi also takes issue with the city not requiring certain applicants to submit criminal offender record information (CORI) forms with their initial applications. However, it appears that the city did not run any CORI checks until after it selected the leading applicants. Thus, the city treated all applicants equally with respect to their criminal record information.

[15] Atlantic Medicinal offered to pay $60,000 to the city's general fund, among other donations; Seagrass agreed to pay the city an additional amount of from one and one-half to two percent of gross sales, among other donations; INSA offered to provide various charitable services, including participating in community safety, employment, and environmental initiatives, as well as drug awareness education; and Witch City Gardens offered to host

conferences, seminars and drug awareness programs in the city. In contrast, Mederi offered to improve the appearance of its property and to purchase and improve the adjacent property as well.

[16] As there is no evidence that the city made its selections based on anything other than its own guidelines, we need not consider further Mederi's allegation that the city engaged in a "pay-to-play" scheme. However, we note that the regulations do not prohibit a municipality from choosing HCA partners based on the unsolicited benefits they agree to provide to the community.

[17] Although Mederi apparently believes that it was misled, it does not argue that the city promised Mederi a slot in exchange for the tax payments.

[18] We also note that because the commission considers applications on a rolling basis, 935 Code Mass. Regs. § 500.102(1)(a), it may be unable to give priority review to economic empowerment priority applicants if such applicants do not win (or at least place) in the race to present a completed application to the commission.

[19] We note, however, that it is the commission's position that, under the current statutory scheme, its role is limited to reviewing license applications after an HCA has been executed. See G. L. c. 94G, §§ 3 (d), 5 (b) (1); 935 Code Mass. Regs. § 500.101(1)(a)(8). In 2019, the commission voted to ask the Legislature for authority to review the details of HCAs. In 2020, the House of Representatives passed a legislative proposal that would have given the commission authority to review HCAs and additionally would have clarified that municipalities may not impose or consider fees other than the community impact fee. 2020 House Doc. No. 4398. The Senate did not pass the legislative proposal.