

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

The Trial Court  
Superior Court Department  
Civil Action No. \_\_\_\_\_

PROSPECT LAKE, INC.,	]
	]
Plaintiff	]
	]
v.	]
	]
MASSACHUSETTS DEPARTMENT	]
OF PUBLIC HEALTH, CHERYL	]
BARTLETTER, Commissioner, <i>et al.</i> ,	]
	]
Defendants	]

COMPLAINT

Introduction

This action seeks equitable and declaratory relief by statutory review of an administrative action and certiorari, regarding the plaintiff's competitive application to the state Department of Public Health (DPH, or the agency) for one of a limited number of licenses (registrations) to operate a registered marijuana dispensary (RMD) pursuant to St. 2012, c. 369. The plaintiff seeks to correct errors of law committed by the DPH in its evaluation of applications for RMD registrations, its issuance of registrations to certain applicants, and its denial of the applications by other applicants including the plaintiff. The plaintiff seeks equitable and declaratory relief, finding the DPH's RMD application process irreparably flawed, enjoining the DPH from issuing final RMD registrations to any applicant, and compelling the DPH to reconsider the plaintiff's application using a rational process that follows the state and federal constitutions, statutory law, applicable regulations and common sense.

Parties

1. Plaintiff Prospect Lake, Inc., is a domestic nonprofit corporation with its principal office at 223 Egremont Plain Rd #604, Great Barrington, Massachusetts.

2. Defendant Massachusetts Department of Public Health (DPH) is an executive agency of the Commonwealth of Massachusetts, with its principal office located at 250 Washington Street, Boston, Suffolk County, Massachusetts.

3. Defendant Cheryl Bartlett is the Commissioner of the DPH, appointed by the Governor of the Commonwealth of Massachusetts, and named herein in her official capacity.

4. Other necessary parties to this action are the some eighty nonprofit corporations that filed 100 Phase-2 applications for RMD registrations with the defendant DPH, whose interests will be affected by the declarations requested in this case.

#### Jurisdiction and Venue

5. Pursuant to G.L. c. 30A, sec. 14(1) and c. 249, sec. 4, the superior court department has jurisdiction over civil actions to annul, quash and correct errors of law in administrative proceedings of state executive agencies, and pursuant to c. 231A, sec. 1 and 2, “to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official,” with venue (pursuant to c. 30A, sec. 14[1]) in Suffolk County (“where the [defendant] agency has its principal office”).

#### Factual Allegations

6. Pursuant to St. 2012, c. 369 (An Act for the Humanitarian Medical Use of Marijuana), and 105 CMR sec. 725, defendant DPH is authorized and required to issue up to 35 RMD registrations (at least one per county, but no more than five for any single county) within the first year of the effective date of the state medical marijuana law (January 1, 2013), in a manner that protects the quality of medicine and the safety of qualified patients, RMD staff and neighbors of the RMDs.

7. Pursuant to the foregoing law and regulations, as supplemented by other public notices and “question and answer” documents issued by defendant DPH (DPH's RMD Requirements), the agency solicited RMD applications from nonprofit corporations in a two-phase process in 2013, culminating in a Phase 2 solicitation that closed on November 21, 2013, with RMD registration decisions to be announced by January 31, 2014.

8. The plaintiff – including its principal officers--in or about December 2012, began efforts to obtain an RMD registration for Berkshire County; since then, their RMD efforts have consumed more than 1,620 hours of time, and they have spent or borrowed some \$85,000.

9. On or before November 21, 2013, the plaintiff and other applicants, having succeeded in submitting a compliant Phase 1 RMD application and a \$1500 application fee to defendant DPH, were invited by DPH to submit a Phase 2 application, and did so, along with a \$30,000 application fee.

10. The plaintiff's Phase 2 application complied in all material respects with defendant DPH's RMD Requirements, and provided information clearly demonstrating its qualification to operate a Berkshire County RMD in a manner that protects the quality of medicine and the safety of qualified patients, RMD staff and neighbors of the RMDs.

11. On or about January 31, 2014, defendant DPH publicly issued three lists of RMD applicants, with separate notices to each applicant advising them of their placement in:

(a) a group of 20 applicants deemed provisionally registered as RMDs in ten of the Commonwealth's fourteen counties;

(b) a group of eight applicants invited (under procedures as yet to be announced by DPH and not contained within DPH's RMD Requirements) to apply for RMDs in one of the four counties

where no RMD was provisionally registered, including Berkshire County (the Second RMD Applicant List); and,

(c) a group of the remaining applicants, including the plaintiff, who were denied registration.

12. On information and belief, on or about January 31, 2014, without any basis in the defendant DPH's RMD Requirements, the agency privately notified a fourth group of applicants that pending the submission of additional information (an opportunity for additional submission not granted to entities whose RMD applications were denied), each would be provisionally registered as RMDs (the Fourth RMD Applicant List).

13. The non-ministerial process by which the defendant DPH evaluated RMD applications and awarded provisional RMD registrations to twenty applicants in ten counties, while denying the plaintiff's application:

(a) failed to comply with the DPH's RMD Requirements, and irreparably prejudiced the plaintiff's substantial rights;

(b) resulted in a defect of law so substantial as to make manifest that the annulment of the DPH's action on RMD applications is required to prevent a material wrong adversely affecting the real interests of the plaintiff and the general public;

(c) was based on evidence insufficient as a matter of law to warrant the agency's action;

(d) was improperly based on a policy existing outside the statutory and regulatory framework, thus violating the legal requirement of uniform standards and enforcement;

(e) violated federal and state constitutional provisions, was in excess of statutory authority, based on an error of law, made upon unlawful procedure, unsupported by substantial evidence,

made without evidence material to the RMD evaluation process which the plaintiff had no opportunity to present before the RMD application deadline which additional evidence renders the agency action unwarranted, arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law.

14. Among the actions or inactions without limitation of the defendant DPH constituting errors of law described above, are the following:

(a) the conduct described in the verified complaints filed against the DPH by plaintiff-RMD applicants 1 Releaf, Inc. (SUCV14-00617-F), Apex Compassion & Wellness Center, Inc. and Striar Center for Compassionate Care, Inc. (SUCV14-00729-F), which allegations are incorporated herein by reference;

(b) defendant DPH's irrational decision to base its selection of provisional RMD registrations upon a "scoring process" by a private contractor with no experience in the medical marijuana industry (as a DPH representative publicly has admitted), due to which inexperience or other factors resulted in random and irrational application scoring, including

(i) dramatically disparate scoring of identical or indistinguishable responses submitted by different RMD applicants; and

(ii) maximum scoring for applicant responses which received provisional registrations, which applications failed to meet the minimum criteria for scoring set by the DPH RMD Requirements;

(c) failure of the DPH to disqualify applications not complying with the RMD Requirements, such as the requirement that Phase 2 applicants were required to "clearly indicate if any

changes have been made to the organization's membership, mission and vision statement, management structure, or financing model since submission of the Phase 1 application;"<sup>1</sup>

(d) the agency's "due diligence" review of the "winning" RMD applications after the agency's award of provisional RMD registrations to those winning applications, rather than during the application evaluation process;

(e) other irregularities in procedure before the agency not shown on the record; and

(f) the agency's invitation to the Second List of RMD Applicants from other counties to re-apply in counties with which the applicants have no prior contact (allegation 11[b] above).

15. As an example of the "dramatically disparate scoring of identical or indistinguishable responses submitted by different RMD applicants" referred to in averment 14(b)(i) above, attached to this complaint and incorporated herein by reference as Exhibit A is an illustration of the disparate scoring of RMD application question 7.17, comparing the near-identical responses from different applicants which received grossly disparate scores from the DPH's medical marijuana-inexperienced scoring vendor.

#### Causes of Action

#### Count I: G.L., c. 30B, sec 5(e)

16. The plaintiff restates and incorporates by reference the allegations in paragraphs 1-17 above.

17. By the defendant DPH's actions or inactions described above, including the preliminary registration of RMD applications other than the plaintiff's which other applications failed to comply with the DPH RMD Requirements, the agency violated its obligations to evaluate RMD

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<sup>1</sup> Exhibit B, a copy of Applicant's letter to Karen Van Unen, Executive Director of the DPH medical marijuana program, compares the Phase 1 mission/vision statement of a successful applicant, Medical Marijuana of Massachusetts, Inc., with its Phase 2 mission/vision statement.

applications by appropriate criteria including the DPH RMD Requirements, as imposed by G.L. c. 30B, sec. 5(e).

Count II: G.L. c. 249, sec. 4

18. The plaintiff restates and incorporates by reference the allegations in paragraphs 1-17 above.

19. By the defendant DPH's actions or inactions described above, including the provisional registration of RMD applications other than the plaintiff's which other applications failed to comply with the DPH RMD Requirements and other irregularities in procedure before the agency not shown on the record, defendant DPH committed errors correctable pursuant to G.L. c. 249, sec. 4.

Count III: G.L. c. 30A, sec. 14(7)

20. The plaintiff restates and incorporates by reference the allegations in paragraphs 1-17 above.

21. By the defendant DPH's actions or inactions described above, including the preliminary registration of RMD applications other than the plaintiff's which other applications failed to comply with the DPH RMD Requirements, the agency action:

(a) violated constitutional provisions;

(b) was in excess of statutory authority;

(c) was based on an error of law;

(d) was made upon unlawful procedure, and other irregularities in procedure before the agency not shown on the record;

(e) was unsupported by substantial evidence;

(f) made without evidence material to the RMD evaluation process, which the plaintiff had no opportunity to present before the RMD application deadline, which additional evidence renders the agency action unwarranted;

(g) was arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law.

Count IV: G.L. c. 231A

22. The plaintiff restates and incorporates by reference the allegations in paragraphs 1-17 above.

23. The foregoing conduct or inaction by the defendant DPH constitute errors of law and its violation of the plaintiff's substantial rights as to which an actual controversy has arisen as described above, as to which a determination of right, duty, status and other legal relations under an administrative regulation and injunctive relief is sought, including "a determination of the legality of the administrative practices and procedures of any ... state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated," for which relief is provided by G.L. c. 231A.

Relief Requested

*WHEREFORE*, the plaintiff requests that this court grant the following relief:

1. Declare the defendant DPH's denial of the plaintiff's RMD application, and award of provisional RMD registrations, to be based on an illegal process and unlawful exercise of the agency's authority;
  
2. Enjoin, preliminarily and finally, the defendant DPH from further processing provisional RMD registrations and from issuing final RMD registrations, at least until the agency reconsiders the plaintiff's RMD application based on a lawful and lawfully conducted RMD application process;

3. Grant the plaintiff leave to present to the defendant DPH additional evidence material to the RMD application process, which evidence the plaintiff was with “good reason” (G.L. c. 30A, sec. 14[6]) unable to present to DPH before it acted on plaintiff's RMD application;
4. Grant the plaintiff leave pursuant to G.L. c. 30A, sec. 14(5), to take testimony in court regarding irregularities in procedure before the defendant DPH not shown on the record; Grant leave to amend this complaint, to add necessary parties including if so deemed necessary, some or all other RMD applicants;
5. Order the defendant DPH to reconsider the plaintiff's RMD application based on a lawful and lawfully conducted RMD application assessment process, with or without the benefit of additional material evidence;
6. Order the defendant DPH to grant the plaintiff a provisional RMD registration for Berkshire County;
7. Order a remand of the entire RMD application process to the defendant DPH, or set aside or modify the agency's RMD application denial and provisional registration decisions on appropriate terms;
8. Order the defendant DPH to publicly disclose all emails and documents generated by it and its scoring contractor which pertain in any way to the scoring of RMD applications;
9. Order the defendant DPH to publicly disclose all emails and documents pertaining in any way to The Fourth RMD Applicant List (allegation no. 12 above);
10. Refund the plaintiff's \$31,500 application fees;
11. Grant the plaintiff its costs, including reasonable attorneys' fees; and

12. Grant such other relief as justice may require.

PROSPECT LAKE, INC.

By its attorneys:

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Michael D. Cutler (BBO# 110940)  
Tel. (617) 816-6056  
Email: Cutler @ EvansCutler.com

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Richard M. Evans (BBO# 156860)  
Tel. (413) 586-1348  
Email: Evans @ EvansCutler.com

EvansCutler Attorneys  
90 Conz Street  
Northampton MA 01060  
413-584-5111  
Attorneys for the Plaintiff

Dated: March 25, 2014

Exhibit A: Disparate Scoring Illustration

Exhibit B: Non-Disqualification Illustration

Exhibit B

Non-Disqualification Illustration

Prospect Lake, Inc.

To: Karen Van Unen, Executive Director

As an unsuccessful applicant for an RMD registration, we write to respectfully register an objection to an element of the selection process that unfairly benefited the Delahunt team (MMM). Had the DPH observed its own rules and pronouncements, the Delahunt application should have been disqualified.

Let me explain.

At the top of the first page of the Phase 2 application, under the caption “Phase 2 Instructions – READ CAREFULLY!,” is the caution:

**[\*\*] Applicants must follow all instructions below. Failure to comply with any instruction will result in disqualification.**

Among the “instructions below” is:

- Answers must clearly indicate if any changes have been made to the organization’s membership, mission and vision statement, management structure, or financing model since submission of the Phase 1 application.

In their response to Question 3 of the **Phase 1** application, requiring an applicant to describe the “Mission and vision of the corporation, “The Delahunt group provided the following statement:

Medical Marijuana of Massachusetts, Inc. (the Company) is a Massachusetts not-for-profit corporation. Its mission is to cultivate and deliver medical marijuana to registered qualified patients of the Commonwealth of Massachusetts in accordance with the highest standards for quality of products, services, patient safety and public safety with the goal of alleviating symptoms of debilitating health conditions that warrant the administration of medical marijuana.

The Company's mission is reflected in its Board of Directors, who control and oversee all business and operation decision-making for the Company. The Company's Directors and its other executive leaders are a unique and intentional grouping of people that reflects the Company's primary focus of ensuring public and patient safety in the delivery of medical marijuana to qualified registered patients. The Board of Directors is comprised of William Delahunt, Esq. (former U.S. Congressman (1997-2011) and Massachusetts District Attorney for over 20 years during which he promoted rigorous enforcement of drug diversion and distribution), Lianne Ankner, Esq. (an attorney specializing exclusively in regulatory compliance and corporate governance matters for health care provider clients), Jonathan Herlihy (chief operating officer of a large Massachusetts medical group practice and related surgery centers widely regarded as the premier medical practice in its specialty in the country), Avis Bulbulyan (an experienced cultivator of commercial-level production of medical marijuana in California), Trexler Topping, M.D. (a practicing physician, President of a large physician group practice and involved in health care policy decision-making on the Federal level). In addition, the Company's co-Heads of Security and Anti-Diversion consist of Carlo Boccia, former Special Agent in Charge of the New York division of DEA and Joseph Flaherty, Esq. who provided 20 years of service as a Massachusetts State Police Officer and was Detective Lieutenant for the Suffolk County District Attorney's office. The Company's Addiction Prevention Advisor is Raymond Tamasi, who is the Executive Director of The Gosnold Treatment Center on Cape Cod, a treatment center for substance abuse. All of the Directors, with the exception of Mr. Bulbulyan, are long-time Massachusetts residents, and Mr. Bulbulyan is relocating his family to Massachusetts in 2014.

The Company plans to operate as the premier model for the delivery of medical marijuana by implementing and endorsing the highest standards of professionalism, integrity, and ethics. It intends to offer courier service delivery of medical marijuana across the Commonwealth. In addition, it will offer significantly reduced prices for those registered patients who are able to demonstrate financial hardship. Finally, the Company is committed to supporting the communities in which it will operate, and will support local charitable initiatives.

In their response to questions 1.2 in their three Phase 2 applications, requiring a description of "the organization's mission and vision," the Delahunt group provided the following statement:

[The Company's mission is to cultivate and dispense medical marijuana to registered qualified patients of the Commonwealth in accordance with the highest standards for quality of products and services, with the goal of alleviating symptoms of debilitating medical conditions that warrant the administration of medical marijuana. The Company's mission is reflected in its Board of Directors and Executive Management Team, who oversee all business and operational decision-making for the Company.

The Company's vision is to operate as the premier model for the delivery of medical marijuana by implementing and endorsing the highest standards of professionalism, integrity, and ethics. It will focus intently on patient and public safety, anti-diversion and addiction prevention efforts. It will offer courier service delivery of medical marijuana across the Commonwealth. In addition, it will offer significantly reduced prices for registered patients who are Veterans and for those registered Patients who are able to demonstrate financial hardship. Finally, the Company is committed to working collaboratively with its host communities, to ensure alignment with local directives and providing financial support to local charitable initiatives.]

At the October Informational Session for Phase 2 applicants, it was announced that applications would undergo a “three-level review,” the first of which was called a “Technical Review.” The following slide was posted:

### Evaluation Process

•Applications will undergo a three-level review:

○ Technical Review:

- Applications will be evaluated on whether all instructions were followed.
- Complete submission and adherence to the instructions will allow for the application to be assessed. At this level, applications will be scored as “Complete” in order to move to Expert Review or “Disqualified” and therefore NOT eligible to move to Expert Review.

The mission/vision statement described in Phase 2 is clearly different from the one described in Phase 1, but the Delahunt application did not so indicate as required. The application thus failed to comply with the instruction.

The caution is very clear that noncompliance with the instructions will, not may, result in disqualification.

As the instructions were not followed, the Delahunt application should have been disqualified at the Technical Review level, and we are aggrieved that it was not. Maintaining the integrity of the DPH process, to ensure that it enforces all its rules uniformly, without holding well-known lobbyists to a different standard than less well-known applicants, this is all we ask.

Very truly yours,

Michael Marino  
Prospect Lake Inc  
The Circe Center  
917 579 0515  
mm@circecenter.org