COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION NO. 2481CV00693

THEORY WELLNESS, INC., COMMUNITY GROWTH PARTNERS GREAT BARRINGTON OPERATIONS, LLC d/b/a REBELLE and HIGHMINDED, LLC d/b/a FARNSWORTH FINE CANNABIS,

Plaintiffs

v.

TOWN OF GREAT BARRINGTON,

Defendant

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION OF CANNABIS CONTROL COMMISSION TO INTERVENE

INTRODUCTION

This case involves a dispute over the validity and enforceability of a "host community agreement" ("HCA") between each of the Plaintiffs and the Town of Great Barrington ("Town") entered into in connection with Plaintiffs' operation of marijuana establishments. All three Plaintiffs operate recreational (adult use) retail marijuana businesses in Great Barrington , and Plaintiff Theory Wellness also operates a medical marijuana facility.

The Plaintiffs' Complaint alleges that the Community Impact Fees (CIFs) under their respective HCAs were improperly assessed, that the Town is not entitled to any CIFs, and that payments made to the Town (other than charitable donations) must therefore be returned. While the Complaint is founded on the assertion that the HCAs are invalid or illegal because they do

not comply with the current provisions of Chapter 94G of the General Laws,[1] the true nature of the action is a request for a determination of rights and obligations of private parties under voluntary contracts. It is not an action that touches on any rights or interests of the Cannabis Control Commission ("Commission") in a such a substantive manner as to justify either mandatory or permissive intervention by the Commission. Accordingly, the Commission's motion should be denied.

ARGUMENT

I. THE PRINCIPLES OF INTERVENTION DO NOT SUPPORT THE COMMISSION'S MOTION.

Intervention is governed by Mass. R. Civ. P. 24. Depending on the facts of the case, a non-party to an action may intervene as of right under subsection (a) of Rule 24, or by permission of the court under subsection (b).

A. The Commission Cannot Meet its Burden for Intervention as of Right.

Subsection (a) of Rule 24 provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the Commonwealth confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Mass. R. Civ. P. 24(a)

A person or entity proposing to intervene as of right must satisfy four criteria: "(1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the litigation in which the applicant wishes to intervene; (3) the applicant must show that, unless able to intervene, the disposition of the action may, as a practical matter, impair or impede his ability to protect the interest he has; and (4) the applicant

[1] Regulation of the Use and Distribution of Marijuana Not Medically Prescribed

must demonstrate that his interest in the litigation is not adequately represented by the existing parties." Reilly v. Town of Hopedale, 102 Mass. App. Ct. 367, 383 (2023), quoting Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56, 61 (2000). The Appeals Court has plainly stated: "Upon timely application, a judge should grant a party's motion for intervention of right when '(1) the applicant claims an interest in the subject of the action, (2) he is situated so that his ability to protect his interest may be impaired as a practical matter by the disposition of the action, and (3) his interest is not adequately represented by the existing parties.'" Frostar Corp v. Malloy, 77 Mass. App. Ct. 705, 709-710 (2010) (quoting Johnson Turf & Golf Mgmt., Inc. v. Beverly, 60 Mass. App. Ct. 386, 389 (2004)).

B. The Motion is Not Timely.

Plaintiffs filed their complaint on March 14, 2024. (Docket document 1) The Commission first gave notice that it was contemplating a motion to intervene in November of 2024, when its counsel contacted counsel for the Plaintiffs and counsel for the Town. Following that communication, the Plaintiffs and the Town, as a general courtesy, filed a joint motion to continue the hearing on Plaintiffs' motion for judgment on the pleadings on November 12, 2024. (Docket document 7) The hearing had been scheduled for November 19, and the Plaintiffs and the Town proposed a 30-day continuance to allow for the filing of a motion to intervene. On November 13, 2024 the motion to continue was endorsed by the Court as allowed, but without a new hearing date. (see Docket entry) A notice of hearing date was issued on February 3, 2025, setting the new date as June 9, 2025. As of February 3, the Commission had not served or filed a motion to intervene. The motion now before the Court is dated April 30, 2025, and was deemed

served on May 8, 2025 following a conferral between counsel for the Commission and counsel for the Town.[2]

C. The Commission Does Not Have an Interest in the Transaction That is the Subject of This Litigation.

The Plaintiffs' complaint seeks relief in connection with host community agreements between the Plaintiffs and the Town. It asks for a declaratory judgment regarding community impact fees paid and payable under those agreements (Count I); and damages on account of alleged breach of contract (Count II), breach of the implied contractual covenant of good faith and fair dealing (Count III)[3], and unjust enrichment of the Town by virtue of receipt of fees paid by Plaintiffs (Count IV). It is, from both a legal and practical perspective, a breach of contract action, a claim for relief arising from agreements entered into with the Town. Thus, the essence of the litigation is a commercial dispute.

That the Plaintiffs rely on the alleged applicability of a statute and regulations within the administrative purview of the Commission does not give the Commission a cognizable interest in the transactions between the Plaintiffs and the Town. For the purpose of intervention, those transactions must be viewed as negotiated agreements for financial and other business arrangements. They do not create in the Commission the type of interest that properly supports intervention in this matter.

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[2] By e-mail exchange of May 8, counsel agreed on an extension of the time for the Town to serve its response to the motion, to May 16.

[3] For background, the Town notes the following. "A breach [of the covenant of good faith and fair dealing] occurs when one party violates the reasonable expectations of the other." Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 287–288 (2007). However, "the scope of the covenant is only as broad as the contract." Id. "In sum, the implied covenant of good faith and fair dealing cannot create rights and duties that are not already present in the contractual relationship. The covenant concerns the manner in which existing contractual duties are performed." Id. at 289. In addition, "the damages for breach of the implied covenant of good faith and fair dealing are the contract damages." T.W. Nickerson, Inc. v. Nickerson, No. BACV200200427, 2011 WL 7788023, at *7 (Mass. Super. Feb. 24, 2011), aff'd sub nom. T.W. Nickerson, Inc. v. Fleet Nat. Bank, 83 Mass. App. Ct. 1123 (2013); and see McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 234 n. 8 (1984) ("a suit for breach of an implied covenant of good faith and fair dealing is a suit on the contract"). In other words, a breach of the covenant does not entitle a plaintiff to special or different damages. Id.

It is undeniable that parties' claims in litigation may often be subject to or determined by the application and/or interpretation of statutory or regulatory provisions. That alone should not constitute an "interest" basis for intervention in such litigation by a governmental agency that happens to have administrative responsibility under the statutory scheme. Were the bar so low, agencies could conceivably be intervenors in a huge host of actions that are, for all practical purposes, private disputes. Such a result would turn Rule 24 on its head.

The burden of the party seeking intervention varies by the circumstances of the litigation, and that burden is heightened when the putative intervenor seeks to protect the same interest as that represented by another litigant. See Attorney General v. Brockton Agric. Soc., 390 Mass. 431, 434 (1983) (shareholder seeking to intervene on side of corporation with same interest has substantial burden). Such a heightened burden must be imposed here. At bottom, the Commission is looking to argue the same interest as is represented by the Plaintiffs.

An "interest," for Rule 24 purposes, "must be sufficiently direct and immediate to justify the intervention." Bolden, supra, 50 Mass. App. Ct. at 62, citing Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967). Whatever interest the Commission may be said to have in the transactions between Plaintiffs and the Towns, it simply does not rise to the level required by Rule 24.

D. To the Extent the Commission Has An Interest in This Action, That Interest is Being Adequately Represented by the Plaintiffs.

In their papers, the Plaintiffs expressly refer to and rely on G.L. c. 94G, §3, the statutory provision dealing with host community agreements. (See Complaint at ¶¶ 2, 14-15, 20-21, 54, 59, 61; and Memorandum in Support of Motion for Judgment on Plaintiffs' Claims and to Dismiss Defendant's Counterclaims (Docket document 7.1)) The memorandum includes an

explicit discussion of the statute and the interpretation contended for by the Plaintiffs. (See pp. 9-11.)

A central element of Plaintiffs' reliance is the applicability of the 2022 amendments to section 3 of Chapter 94G to the Plaintiffs' HCAs, even though they were entered into prior to the amendments. It is fair to say that the argument is essential to the Plaintiffs' case. The Commission's suggestion that the Plaintiffs' position in this litigation does not match or adequately embrace the Commission's position is without merit. Success for the Plaintiffs depends on the very same arguments the Commission wants to make.

II. PERMISSIVE INTERVENTION BY THE COMMISSION IS UNWARRANTED.

Subsection (b) of Mass. R. Civ. P. 24 provides for intervention by permission of the court. It states:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Here, there is no statute that affords a conditional right to intervene, and the Commission does not argue otherwise. As to the second prong of the rule, while Plaintiffs' claims rely on a statute administered by the Commission, intervention in this action would be prejudicial to the Town and should therefore be denied.

As noted above, the motion to intervene is not timely. By virtue of the several months continuance of the hearing on Plaintiffs' motion for judgment, adjudication of claims in this action has already been delayed. That has exposed the Town to potential additional cost because

it has extended the time for which interest would be added to any award of damages that might be made to Plaintiffs.[4]

The monetary nature of the Plaintiff's claims further highlights the fact that this action is fundamentally a breach of contract claim. In that sense, it is much akin to a completely private dispute. Again, the fact that adjudication of Plaintiffs' claims requires interpretation of statutory provisions does not transform the agreements in question into transactions in which the Commission has an interest for purposes of Rule 24.

Further, the Commission does not, and cannot, assert that this Court is unable to interpret Chapter 94G as may be required to rule on Plaintiffs' claims. Indeed, this Court is well experienced in such an exercise, in the matter of Haverhill Stem LLC v. Fiorentini, Essex Superior Court C.A. No. 2177CV00375 (Memorandum of Decision and Order on Cross-Motions for Summary Judgment on Court-Endorsed Legal Issues, June 10, 2024), 2024 WL 3047937, to which the Commission refers in its supporting memorandum.

"Permissive intervention is wholly discretionary with the trial judge;" so that "a judge may permit intervention, but is not obliged to do so." Bolden, supra, 50 Mass. App. Ct. at 70, citing Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. School Comm. of Chelsea, 409 Mass. 203, 209 (1991), and Attorney Gen. v. Brockton Agric. Soc., 390 Mass. 431, 435 (1983). This Court will be well within its discretion to deny intervention by the Commission.

A. The Commission Has Mischaracterized the Haverhill Stem Decision.

In the memorandum accompanying the Commission's motion to intervene, the Commission asserts that the discussion on retroactivity of the 2022 amendments to G.L. c. 94G in the Haverhill Stem decision was "*dicta*." (Memorandum at p. 2) That is patently not the case.

[4] Plaintiffs expressly claim interest on community impact fee payments they say should be refunded by the Town. See Complaint, prayers for relief at clause (d), pp. 18-19.

The question of retroactivity was front and center in the Haverhill Stem case. At the outset, the judge noted that "[t]he parties dispute whether the 2022 statutory and 2023 regulatory amendments apply to their rights and obligations under the 2018 HCA." The concluding paragraph of the introductory section of the decision plainly states: "As is fully discussed below, the Court interprets certain provisions of the HCA, and rejects Stem's argument that the amendments to the statute and regulations should apply to the HCA." (2024 WL 3047937; see also excerpts from the as-filed decision attached hereto as Exhibit A, at pp.1-2.)Indeed, the very first issue of law addressed by the judge was retroactive effect of the 2022 amendments and the subsequent amendments to the Commission's regulations. It was stated thus:

> Does Chapter 180 of the Acts of 2022, "An Act Relative to Equity in the Cannabis Industry" ([2022] Act"), which amends G. L. c. 94G, §3(d), and the revised regulations adopted by the Cannabis Control Commission (935 CMR 500 et seq.) on September 23, 2023 to implement and enforce the [2022] Act, apply retroactively to the HCA entered into between Stem and the City of Haverhill, dated December 28, 2018, and if so, what year or dates that the HCA has been in existence? (2024 WL 3047937; Exhibit A, at p.13.)

After consideration of the parties' arguments, the Court found "a legislative intent that the 2022 amendments to §3(d) apply prospectively," and unequivocally "conclude[d] that the 2022 Act which amended G. L. c. 94G, §3(d), and the revised regulations adopted by the CCC in September 2023 (935 CMR 500 et seq.), do not apply retroactively to the parties' rights and obligations in the HCA entered into between Stem and the City in 2018." (Exhibit A, p. 18) Without question, the Court's findings and conclusions on the question of retroactivity are central to an essential issue in the case and are not *dicta*.

It is important to note that the decision in the Haverhill Stem action came more than 18 months after the 2022 amendments to Chapter 94G that were at issue, but the Commission did not seek to intervene in that action. There have been, and are presently, other pending actions by

marijuana establishments seeking return of community impact fees paid pursuant to host community agreements.[5] The Commission has not reported an intent to intervene in those actions, and to the best of the Town's knowledge the Commission has not sought intervention in any of those cases.

This action, a contractual dispute in which the Commission has no particularized interest, is not the proper platform for the Commission to seek adjudication of generalized assertions regarding the scope and applicability of section 3 of G.L. c. 94G. Indeed, the focus of the proposed Complaint of Intervenor is the asserted authority of the Commission to "review and approve or disapprove HCAs that were entered into before the 2022 law." (¶33, at p. 6) The complaint reveals its true purpose when it goes on to allege that the Town "seeks to circumvent the law and undermine the authority of the Commission to review and approve each HCA governing the operations of Marijuana Establishments in the Commonwealth." (¶41, at p. 8, emphasis supplied)

CONCLUSION

For the foregoing reasons, the Commission's Motion to Intervene should be denied.

[5] See, e.g., Berkshire Roots Inc v. City of Pittsfield, Berkshire Superior Court, 2376CV00145; Mass Organic Therapy Inc v. Town of Hanover, Plymouth Superior Court, 2483CV00949; Ascend Mass, LLC et al v. City of Newton, Middlesex Superior Court, 2581CV00398 (three plaintiff establishments).

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Dated: May 16, 2025

977258/60102/0024

CERTIFICATE OF SERVICE

I, David J. Doneski, Esq., hereby certify that on the below date, I caused a copy of the foregoing Memorandum to be served by electronic mail to the following counsel of record:

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977258/60102/0024

EXHIBIT A

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2177CV00375

HAVERHILL STEM LLC

vs.

JAMES J. FIORENTINI[1] & another[2]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COURT-ENDORSED LEGAL ISSUES (Paper Nos. 32 and 33.1)

INTRODUCTION

Plaintiff Haverhill Stem LLC ("Stem") has operated a retail recreational marijuana store in the City of Haverhill ("City") since May 2020, after having obtained a final license to do so from the Cannabis Control Commission ("CCC") pursuant to G.L. c. 94G, §§ 1, *et seq.* ("Marijuana Act").

As required by the Marijuana Act, the parties entered into a Host Community Agreement ("HCA") in December 2018, which requires, *inter alia*, Stem to pay annual community impact fees ("CIFs") of three percent of its gross sales to the City for five years.

In 2021, Stem brought this suit against the City after a dispute arose between the parties regarding the assessment and documentation of the first annual CIF under the parties' HCA.

[1] In his capacity as mayor of the City of Haverhill.

[2] City of Haverhill.

After Stem filed this lawsuit in 2021, the Legislature amended the provisions of the Marijuana Act that govern CIFs and HCAs, effective November 9, 2022, and, in response, the CCC[3] amended its regulations at 935 CMR 500, *et seq.*, effective September 23, 2023.

The parties dispute whether the 2022 statutory and 2023 regulatory amendments apply to their rights and obligations under the 2018 HCA. In response to that dispute, the Court ordered the parties to agree upon issues of law to frame for the Court's consideration on summary judgment. In response, the parties submitted to the Court a "Joint Statement of Issues Framed for Summary Judgment" (Paper No. 30), which the Court endorsed on October 18, 2023. See marginal endorsement order at Paper No. 30.

On February 7, 2024, the parties were before the Court for a hearing on the parties' cross-motions for summary judgment on those issues, i.e., Plaintiff's Motion For Summary Judgment On Statement Of Framed Issues Pursuant To The Court's Endorsement Dated October 18, 2023 (Paper No. 32) ("Stem Motion") and Defendant's Motion For Summary Judgment On Court-Endorsed Legal Issues (Paper No. 33.1) ("City Motion").

As is fully discussed below, the Court interprets certain provisions of the HCA, and rejects Stem's argument that the amendments to the statutes and regulations should apply to the HCA. Accordingly, the Stem Motion is **DENIED** and the City Motion is **ALLOWED in part.**

[3] The CCC is the state-level entity tasked with overseeing the cultivation, use and distribution of medical and recreational marijuana. See G.L. c. 10, § 76 (establishing CCC); G.L. c. 94G, § 4 (granting regulatory powers to CCC).

DISCUSSION[13]

I. THE 2022 ACT'S AMENDMENTS TO SECTION 3(d) OF THE MARIJUANA ACT THAT BECAME EFFECTIVE ON NOVEMBER 9, 2022, AND THE RESULTING AMENDMENTS TO THE CCC's REGULATIONS THAT WERE ISSUED ON SEPTEMBER 23, 2023, DO NOT GOVERN THE PARTIES' 2018 HCA

Issue No. 1, as jointly framed by the parties for the Court's consideration, is as follows:

> Issue No. 1: *Does Chapter 180 of the Acts of 2022, "An Act Relative to Equity in the Cannabis Industry" ("[2022] Act"), which amends G.L. c. 94G, §3(d), and the revised regulations adopted by the Cannabis Control Commission (935 CMR 500 et seq.) on September 23, 2023 to implement and enforce the [2022] Act, apply retroactively to the HCA entered into between Stem and the City of Haverhill, dated December 28, 2018, and if so, to what year or dates that the HCA has been in existence?*

Stem argues that the 2022 amendments to section 3(d) of the Marijuana Act and the resulting 2023 revisions by the CCC to the regulations should be applied retroactively to the parties' 2018 HSA. The City disagrees.

The Court concludes that the 2022 Act, which amended G.L. c. 94G, § 3(d), and the mandated revised regulations adopted by the CCC at 935 CMR 500 *et seq.*, do not apply retroactively to the HCA entered into between Stem and the City in December 2018, and that the HCA and the conduct at issue in this dispute are governed by the language of G.L. c. 94G and 935 CMR 500 *et seq.* in effect at that time.

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[13] "'[S]tatutory interpretation is a question of law for the court to decide,' Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 764 n.2 (2000), and can be appropriately resolved by summary judgment if there is no real dispute as to the salient facts, Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976)." Molly A. v. Commissioner of the Dep't of Mental Retardation, 69 Mass. App. Ct. 267, 277 (2007). The parties agree that the five jointly framed legal issues are appropriately resolved at summary judgment.

A party arguing in favor of retroactivity, such as Stem, faces an uphill battle, as the law is well-settled in Massachusetts that, "[a]bsent a clear indication of legislative intent, a statute presumptively operates prospectively only." In re the Estate of Mason, 493 Mass. 148, 167 (2023).

As the SJC has long observed:

> Whether a statute applies to events occurring prior to the date on which the statute takes effect is in the first instance a question of legislative intent. . . . If "the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." . . . **Where there is no express legislative directive, th[e SJC] generally applies the rule of interpretation that statutes operate prospectively**. . . . Nevertheless, a statute **will be applied retroactively if** "it appears by necessary implication from the words, context or objects of [the amendments] that the Legislature intended [them] to be retroactive in operation" and **the retroactive intention is "unequivocally clear."**

Sliney v. Previte, 473 Mass. 283, 288 (2015) (citations and quotations omitted) (emphasis added).

To be sure, "'[i]t is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retrospectively, and as applying to pending actions or causes of action.'" White v. Hartigan, 464 Mass. 400, 422 (2013) (citations omitted); see also Hanscom v. Malden & Melrose Gaslight Co., 220 Mass. 1, 3 (1914) ("Doubtless all legislation commonly looks to the future, not to the past, and has no retroactive effect unless manifestly required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action.").

Here, several factors point to prospective application of the 2022 amendments to G.L. c. 94G, § 3. First, nothing in the 2022 Act expressly provides for retroactive application of the new statutory requirements to HCAs entered into prior to the effective date of the amendments, i.e., November 9, 2022.

The absence of express language in the 2022 Act regarding retroactivity is rendered even more meaningful by the fact that, in the 2022 Act, the Legislature explicitly made other contemporaneous amendments to the statutory scheme retroactive. See Section 29 of Chapter 180 of the Acts of 2022 ("Sections 1 and 2 shall take effect for taxable years beginning on or after January 1, 2022."). Had the Legislature intended that the amendments to G.L. c. 94G, § 3(d), have retroactive effect, it could have said so, as it did elsewhere. In short, there is "'no express legislative directive,'" Sliney, 473 Mass. at 288, and there are no "unequivocal terms" that manifestly require retroactive effect of the 2022 Act to the parties' 2018 HCA. Hanscom, 220 Mass. at 3.

In addition, the Court agrees with the City's argument that the 2022 amendments to § 3(d)(3) can only be read as applying to new HCAs submitted to the CCC for review after November 9, 2022, because for the first time, the Legislature has required the CCC to review and approve HCAs, by adopting the following new provision:

> The [CCC] shall review and approve each [HCA] **as part of a** completed marijuana establishment . . . **license application and at each license renewal**. . . . The [CCC] shall not approve **a final license application** unless the [CCC] approves the [HCA] and certifies that the [HCA] **complies with this subsection**.

G.L. c. c. 94G, § 3(d)(3) (eff. November 9, 2022) (emphasis added).

"Final license" is the CCC's term for an initial (as opposed to renewal) license. See 935 CMR 500.002 ("License means the certificate issued by the Commission that confirms that a Marijuana Establishment . . . has met all applicable [statutory] requirements . . . . A Marijuana Establishment . . . may hold a provisional or final License." "Provisional Marijuana Establishment License means a License issued by the Commission confirming that a Marijuana Establishment has completed the application process and satisfied the qualifications for initial licensure."); 500.103(1)-(2) (setting forth requirements for issuance of "provisional license" and "final license").

Thus, as a simple matter of statutory construction, if the CCC is required by the 2022 Act to "review and approve each [HCA] as part of a completed marijuana establishment . . . license application," G.L. c. c. 94G, § 3(d)(3) (eff. November 9, 2022), and that same subsection requires that the CCC "shall not approve a final license application unless the [CCC] approves the [HCA] and certifies that the [HCA] complies with this subsection," id., it follows that the CCC's review of the HCA "at each license renewal," id., applies to only those license applications approved after November 9, 2022.

Moreover, the 2022 amendments to § 3(d) affect substantive rights, unlike those regulating practice and procedure "that commonly are treated as operating retrospectively." White, 464 Mass. at 422. In particular, the 2022 amendments to section 3(d) provide that a CIF "shall . . . not mandate a certain percentage of total or gross sales as the community impact fee," G.L. c. 94G, § 3(d)(2)(i) (eff. November 9, 2022), and shall not be effective longer than eight years. Id. at § 3(d)(2)(i)(C) (eff. November 9, 2022). The previous version of the statute included no such prohibition, instead

providing only that the CIF "shall not amount to more than 3 percent of the gross sales of the marijuana establishment . . . or be effective for longer than 5 years." Id. at § 3(d) (eff. until November 8, 2022).

Here, the HCA, which was negotiated by the City and Stem in 2018, presumably in reliance on the HCA requirements and the CIF limits then in effect under G.L. c. 94G, § 3(d), provides for a CIF of three percent of Stem's gross sales for a period of five years. Retroactive application of the 2022 amendments to § 3(d) would render that provision of the parties' HCA unenforceable, thus affecting the substantive rights of the parties. See Fleet Nat'l Bank v. Commissioner of Revenue, 448 Mass. 441, 450 (2007) ("A statutory amendment that extinguishes a substantive right only operates prospectively, absent an explicit pronouncement from the Legislature to the contrary."); Hanscom, 220 Mass. at 3; Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 372 (2012) (court asks "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment,' and, if so, [we] apply the presumption that such a retroactive effect was not intended by the Legislature.") (citation omitted).

Having concluded that the 2022 amendments to G.L. c. 94G, § 3(d), do not apply retroactively to the parties' HCA, the Court likewise concludes that the CCC's amendments to the regulations made to effectuate the 2022 statutory amendments do not apply retroactively to the parties' HCA. To the extent language in the CCC's revised regulations suggests that they are to apply retroactively to HCAs entered into prior to November 9, 2022, that would be in excess of the CCC's authority. As an administrative

agency, the CCC has no authority to contradict what this Court has concluded is a legislative intent that the 2022 amendments to § 3(d) apply prospectively. While administrate agencies have broad authority to effectuate the purposes of their enabling legislation and courts generally accord substantial deference to their expertise and experience, "[w]hen an agency acts beyond the scope of authority conferred to it by statute, its actions are invalid and ultra vires." Armstrong v. Secretary of Energy and Environmental Affairs, 490 Mass. 243, 247 (2022). As a result, the amendments to the regulations undertaken by the CCC to effectuate the 2022 amendments to G.L. c. 94G, § 3(d), do not apply retroactively to the parties' HCA.

For all these reasons, the Court concludes that the 2022 Act which amended G.L. c. 94G, § 3(d), and the revised regulations adopted by the CCC in September 2023 (935 CMR 500 *et seq.*), do not apply retroactively to the parties' rights and obligations in the HCA entered into between Stem and the City in 2018.[14] Accordingly, as to Issue No. 1, the Stem Motion is **DENIED** and the City Motion is **ALLOWED**.

[14] As the Court concludes that the 2022 Act has no retroactive effect on the parties' HCA based on the plain language of the statutory amendments and the well-settled law disfavoring retroactivity, the Court need not reach the City's arguments that retroactive application of the statutory amendments to HCAs that were entered into before November 9, 2022, would violate: (1) the Contracts Clause to the United States Constitution; and, (2) the basic tenet of contract law that a "meeting of the minds" is required to establish valid contract formation.