COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. | **SUPERIOR COURT**
CIVIL NO. 2019-3102-D

VAPOR TECHNOLOGY ASSOCIATION, IAN DEVINE
And DEVINE ENTERPRISE, INC.,
Plaintiffs,
vs.
CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts, and MONICA BHAREL, M.D. in her official capacity as DEPARTMENT OF PUBLIC HEALTH COMMISSIONER,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF-INTERVENORS' EMERGENCY MOTION FOR ORDER REQUIRING THE COMMONWEALTH TO SHOW CAUSE WHY IT FAILED TO COMPLY WITH THE COURT'S PRELIMINARY INJUNCTION ORDER AND WHY ITS PURPORTED OCTOBER 28, 2019 VAPING BAN IS NOT ENJOINED BY THAT ORDER

On October 28, 2019, the Massachusetts Department of Public Health ("DPH") filed emergency regulations 105 Code Mass. Regs. § 801.000, "Severe Lung Disease Associated With Vaping Products" ("The Emergency Regulations"), with the Secretary of the Commonwealth. In relevant part, those regulations provide:

> The sale of all vaping products to consumers in retail establishments, online, and through any other means, including . . . tetrahydrocannabinol (THC) and any other cannabinoid, is prohibited in the Commonwealth. For the avoidance of doubt:
>
> (A) A seller located in Massachusetts may not make an in-store sale of vaping products to a consumer located in Massachusetts.
>
> (B) A seller located in Massachusetts or a seller located in any other State may not make a sale of vaping products by online, phone, or other means for delivery to a consumer located in Massachusetts . . . .

105 Code Mass. Regs. § 801.010. The Emergency Regulations also ban the "physical display of usable vaping products in retail establishments . . . ." 105 Code Mass. Regs. § 801.015. Finally, they provide that the Cannabis Control Commission ("CCC") "shall enforce 105 CMR 801.000 to the extent it applies to its registered or licensed entities." 105 Code Mass. Regs. § 801.025(A).

The plaintiff-intervenors, Daniel Czitrom, Doug Luce, Will Luzier and Frank Shaw ("Intervenors"), contend that DPH exceeded its statutory authority in enacting these Emergency Regulations.

PRIOR PROCEEDINGS

The original complaint in this case challenged the "Order of the Commissioner of Public Health Pursuant to the Governor's September 24, 2019 Declaration of a Public Health Emergency" ("Order"). On October 4, 2019, the plaintiffs, Vapor Technology Association ("Association"), Ian Devine ("Devine") and Devine Enterprise, Inc. ("Company") (collectively, "plaintiffs") filed their complaint against defendants, Charlie Baker, in his official capacity as Governor of the Commonwealth of Massachusetts ("Governor"), and Monica Bharel, M.D., in her official capacity as Department of Public Health Commissioner ("Commissioner") (collectively, "defendants"). On October 21, 2019, the court allowed the Intervenors' motion to intervene in this case.

The court has already issued three orders. The first was the Memorandum and Order on Plaintiffs' Motion for a Preliminary Injunction. ("October 21 Order"), which preliminarily enjoined implementation and enforcement of the defendants' Emergency Order dated September 24, 2019 unless the defendants complied with G.L. c. 30A, § 2. The second order effectively

granted the Intervenors the same relief as the original plaintiffs with respect to vaping of crushed marijuana flower by medical marijuana card holders. Order on Intervenor-Plaintiffs' Motion for a Preliminary Injunction ("October 24 Order"). The court's third order, dated October 30, 2019 ("October 30 Order") denied the Plaintiffs' Emergency Motion For Order To Show Cause Why The Commonwealth Is Not, And Should Not Be, Enjoined From Enforcing The Ban On Nicotine Vaping Products ("Original Plaintiffs' Motion"). The court took no action at that time on the Intervenors' corresponding "Plaintiff-Intervenors' Emergency Motion For Order Requiring the Commonwealth To Show Cause Why it Failed to Comply with the Court's Preliminary Injunction Order and why its Purported October 28, 2019 Vaping Ban is not Enjoined by that Order." ("Motion").

The court held a hearing on the Motion and the Original Plaintiffs' Motion on October 29, 2019. Because of the novelty and difficulty of the statutory questions raised by the Motion, the court invited additional briefing by October 31, 2019. Both the defendants and the Intervenors filed additional materials on that date.

BACKGROUND

Facts

The court incorporates its discussion of the basic facts in its prior three Orders. Some additional events have occurred since the last of those orders.

On October 29, 2019, DPH confirmed a second death in Massachusetts due to vaping, reportedly from exclusive use of nicotine vaping products. DPH's affidavit in this court does not reflect the date of that death.[1]

On November 1, 2019, DPH filed a new filing form for 105 Code Mass. Regs. § 801.000, as well as a Small Business Impact Statement, with the Secretary of the Commonwealth's Regulations Division. The filings include an amended Emergency Adoption Addendum, finding that observance of the requirements of notice and public hearing would be contrary to the public interest, and setting forth a revised description of the emergency. It also filed a Notice of Hearing, which it published in the Boston Herald that day. DPH staff intends to hold a public hearing on the Emergency Regulations on November 22, 2019. It plans to leave the comment period open until November 29, 2019 and present the regulation, with any amendments, to the Public Health Council at the regularly scheduled meeting on December 11, 2019 to consider whether to publish a final regulation.

Statutory and Regulatory Scheme

In 2012, Massachusetts voters approved an initiative petition entitled, "An Act for the humanitarian medical use of marijuana," St. 2012, c. 369 ("medical marijuana initiative" or "2012 initiative"). The medical marijuana initiative contemplated that DPH would promulgate regulations concerning the implementation of a medical marijuana program in Massachusetts.

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[1] Without a date of death, this fact is consistent with various interpretations, including those of the plaintiffs and Intervenors. The report itself comes about 5 weeks after issuance of the original DPH Order. If the death occurred substantially after that Order, then it may be that, at best, the ban is having little effect (given the availability of out-of-state and black market sources, as well as existing supplies previously purchased by users). At worst the second death, if it occurred well after September 24, may be evidence of harm caused by eliminating legal sources of vaping products, which, as the plaintiffs and Intervenors argue, can increase resort to the black market, where the greatest dangers likely reside. Because of these unanswered questions, the court cannot assess the significance of that death for this litigation.

St. 2012, c. 369, §§ 8, 11, 13. In 2016, Massachusetts voters approved another initiative petition entitled, "The Regulation and Taxation Marijuana Act," St. 2016, c. 334 ("2016 initiative"). The purpose of the 2016 initiative was "to control the production and distribution of marijuana under a system that licenses, regulates and taxes the businesses involved in a manner similar to alcohol and to make marijuana legal for adults 21 years of age or older." St. 2016, c. 334, § 1. The 2016 initiative provided for the creation of the cannabis control commission [CCC] "to have general supervision and sole regulatory authority over the conduct of the business of [non-medical] marijuana establishments." St. 2016, c. 334, § 3. The 2016 initiative contemplated that the CCC had the authority to promulgate regulations pursuant to G.L. c. 30A "consistent with this chapter for the administration, clarification and enforcement of laws regulating and licensing marijuana establishments." St. 2016, c. 334, § 5. Elsewhere the 2016 initiative explained: "The [CCC] and [DPH] shall work collaboratively to ensure that the production and distribution of marijuana is effectively regulated in the commonwealth in furtherance of the intent of this act." St. 2016, c. 334, § 5.

In 2017, the Legislature enacted "An Act to ensure safe access to marijuana," St. 2017, c. 55 ("2017 act"). The 2017 act created the CCC to regulate both non-medical **and** medical marijuana in Massachusetts, and provided that with respect to DPH's medical marijuana program, "**all** rights, powers and duties of the [medical marijuana] program shall be transferred to, and assumed by, the [CCC]." St. 2017, c. 55, § 64(b) (emphasis added). The 2017 act further provided for the enactment of G.L. c. 94I which concerns the "Medical Use of Marijuana." Section 7 of that statute provides that the CCC "shall promulgate rules and regulations for the implementation of this chapter under the procedures of chapter 30A . . . [and that] **[n]o**

regulation of the [CCC] regarding the medical use of marijuana shall be more restrictive than any rule or regulation promulgated by [DPH] pursuant to chapter 369 of the acts of 2012 and in effect on July 1, 2017." St. 2017, c. 55, § 44, codified at G.L. c. 94I, § 7 (emphasis added). Relevant here is that DPH's 2017 regulations included 105 Code Mass. Regs. § 725.100(A)(3), which provided registered marijuana dispensaries "**must make vaporizers available for sale** to registered qualifying patients." (emphasis added). A similar regulation was later adopted by the CCC as part of its current regulations. See 935 Code Mass. Regs. § 501.100(1)(c) (2019) ("An [Registered Marijuana Dispensary] must make vaporizers available for sale to registered qualifying patients."). However, effective November 1, 2019, the CCC has removed this language from its regulations.

DISCUSSION

I.

> To obtain preliminary relief, plaintiffs must prove a likelihood of success on the merits of the case and a balance of harm in their favor when considered in light of its likelihood of success. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). "One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent." Shaw v. Harding, 306 Mass. 441, 449-50 (1940). A party seeking to enjoin governmental action must also ordinarily show that "the relief sought will [not] adversely affect the public." Tri-Nel Mgt. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Commonwealth v. Mass CRINC, 392 Mass. 79, 89 (1984).

October 21 Order at 10-11.

For all the reasons stated in the October 30 Order, the Plaintiffs and Intervenors are irreparably harmed by the Emergency Regulations. For the reasons discussed below, the Intervenors are likely to show that the Emergency Regulations conflict with CCC's authority and with patients' statutory rights under the medical marijuana laws (G.L. c. 94I and implementing regulations). The Emergency Regulations, therefore, are very likely invalid, because a state

agency "may not adopt regulations that conflict with State law." Am. Motorcyclist Ass'n v. Park Com. of Brockton, 412 Mass. 753, 755 (1992).

II.

The court applies a two-step test to determine whether a regulation exceeds an administrative agency's authority. See, e.g., Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 520 (2019). See also Arlington v. Federal Communications Comm'n, 569 U.S. 290, 297-298 (2013) (court applies the same analysis whether the issue is "framed as an incorrect application of agency authority or an assertion of authority not conferred"). First, the court must consider whether the Legislature, through the enactment of a statute, has spoken with certainty on the topic at issue and if it has done so unambiguously, the court must give effect to the Legislature's intent. See Craft Beer Guild, LLC, 481 Mass. at 520; Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633 (2005). If the statute is ambiguous or there is gap in statutory guidance, the court determines whether the agency's resolution of the issue can be reconciled with the governing legislation. See Craft Beer Guild, LLC, 481 Mass. at 520; Goldberg, 444 Mass. at 633. "In doing so, we accord 'substantial deference' to the agency charged with interpreting and administering the statute in question, and do not invalidate regulations unless 'their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" Craft Beer Guild, LLC, 481 Mass. at 520 and cases cited. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 681 (2010) ("We accord substantial discretion to an agency to interpret the statute it is charged with enforcing, especially where . . . the Legislature has authorized the agency to promulgate regulations")." On the other hand, "regardless of the merits of particular

regulations, an administrative body has no inherent authority to issue regulations . . . or promulgate rules or regulations that conflict with the statutes or exceed the authority conferred by the statutes by which the agency was created." Massachusetts Hosp. Ass'n, Inc. v. Dep't of Med. Sec., 412 Mass. 340, 342 (1992) (internal quotations and citations omitted). See Clothier v. Contributory Retirement Appeal Board, 78 Mass. App. Ct. 143, 146 (2010) (erroneous interpretation by the board cannot enlarge eligibility under the retirement laws).

A.

The Intervenors have a strong likelihood of prevailing at step one of the analysis, because the Legislature has specifically addressed the question at issue in this case. In reaching that conclusion, the court does not limit its consideration to the particular statutes and provisions cited by the agency, because the meaning or ambiguity of words may only become apparent when placed in context. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). Instead, the court may consider the overall statutory scheme as "the meaning of one statute may be affected by other Acts, particularly where [the Legislature] has spoken subsequently and more specifically to the topic at hand." Id. at 133.

DPH promulgated its emergency regulations pursuant to G.L. c. 111, §§ 1-3, 5 and 6, and G.L. c. 17, § 2A.[2] General Laws c. 111, § 6 provides: "[DPH] shall have the power to define, and shall from time to time define, what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health." These

[2] G.L. c. 111, §§ 1-3, and 5 address, respectively, definitions, duties of the Commissioner of DPH, powers of the Public Health Council and powers and duties of the DPH itself. None of them addresses the substantive content of DPH regulations.

statutes seemingly provide DPH with broad authority to promulgate regulations concerning all manner of products, which purportedly spread diseases dangerous to public health, as the DPH claims it has done here.

However, the court must view the DPH's alleged authority over vaping products related to medical marijuana in light of subsequent legislation, now codified at G.L. c. 94I, which specifically addresses the medical marijuana industry. See Brown & Williamson Tobacco Corp., 529 U.S. at 143 (internal quotations and citations omitted) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

Reading G.L. c. 94I, c. 111, § 6, and c. 17, § 2A together and taking into account c. 94I's text and the circumstances surrounding its enactment, the DPH very likely exceeded its authority. The Legislature has spoken clearly on this issue in two separate ways.

B.

First, the legislature has clearly granted CCC exclusive powers over medical marijuana. Massachusetts medical marijuana regulation has evolved from a program within DPH to a regulatory scheme entrusted an entire agency, the CCC. The legislature (through the 2016 initiative petition) used the clear language of exclusivity when referring to CCC's powers with respect to non-medical marijuana: The CCC is "to have general supervision and **sole** regulatory authority over the conduct of the business of marijuana establishments . . . ." St. 2016, c. 334, § 3 (Emphasis added). It has defined and limited DPH's role: to "work collaboratively" and in

an advisory role. St. 2016, c. 334, § 5. Thereafter, in crafting legislation to create the CCC and implement a new regulatory scheme concerning marijuana, the legislature determined that it was likewise appropriate for the CCC and, not DPH, to regulate the medical marijuana industry. It has spoken clearly about the total transfer of all authority over the medical marijuana program to CCC: "**all** rights, powers and duties of the [medical marijuana] program shall be transferred to, and assumed by, the [CCC]." St. 2017, c. 55, § 64(b) (Emphasis added). The 2016 initiative adopted a model "similar to alcohol" regulation, which is administered under the State Treasurer's auspices, rather than in an agency within the governor's secretariats. St. 2016, c. 334, § 1. See G.L. c. 10, § 70 (Alcoholic Beverages Control Commission).

This clear language should be enough, but additional canons of statutory construction confirm this conclusion. St. 2017, c. 55 is more specific as to medical marijuana than any of the statutes that DPH cites in support of the Emergency Regulations. It is also the more recent enactment. As a more specific, later enactment, it displaces any inconsistent provisions of G.L. c. 111. See, e.g. Commonwealth v. Houston, 430 Mass. 616, 625 (2000) ("to the extent a conflict between the two statutes exists, 'the more specific statute controls over the more general one' . . . If provisions of those two statutes are irreconcilable, the later enacted . . . provision should control.") (citation omitted); Lukes v. Election Comm'rs of Worcester, 423 Mass. 826, 820 (1996) ("where two provisions are in conflict, if a specific provision . . . is enacted subsequent to a more general rule, the specific and not the general provision applies.").

Moreover, the purpose and history of c. 2017, c. 55 (discussed under "Statutory Scheme" above) line up with the court's interpretation. See Commonwealth v. Williamson, 462 Mass. 676, 683 (2012) (The court should construe the statute consistent with its "scheme and

purpose."). The court reads the statute "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." In Re Adoption of Marlene, 443 Mass. 494, 498 (2005), citing Telesetsky v. Wight, 395 Mass. 868, 872 (1985).

The obvious purpose of the transfer of "all" (and "sole"[3]) power over medical marijuana was to change the inputs into decision-making in this area. The legislature was not willing to allow DPH policies to control. It wanted to involve two other constitutional officers in the decision-making, to the end that medical marijuana regulation would reflect broader representation of affected communities and individuals. The legislature did not want DPH to regulate medical marijuana, but the Emergency Regulations do just that. The conflict with the legislative scheme could not be clearer.

It is not even clear what power DPH actually claims here. The Emergency Regulations provide that the CCC "shall enforce 105 CMR 801.000 to the extent it applies to its registered or licensed entities." 105 Code Mass. Regs. § 801.025. DPH does not explain its theory of shared authority, but it appears that even DPH acknowledges that medical marijuana regulation requires using CCC's separate authority, either as a matter of law or practicality or both. Whatever its rationale, however, DPH necessarily is asserting the power to commandeer the

[3] Strictly speaking, St. 2016, c. 334, § 3 used the phrase "sole regulatory authority" to describe the CC's powers over non-medical marijuana. The 2017 act treats as equal the CCC's authority over both medical and non-medical marijuana. It would be odd to say that the CCC has "sole" authority over non-medical marijuana but non-exclusive authority over medical marijuana.

CCC to implement DPH's vision of medical marijuana regulation despite CCC's exclusive authority over that subject. That squarely violates the applicable statutes.

C.

Second, in G.L. c. 94I, § 7, the Legislature spoke specifically and clearly in prohibiting greater restrictions upon medical marijuana than existed on July 1, 2017. The purpose of § 7 was to preserve access to medical marijuana by using the status quo as a floor for the rights of medical marijuana card holders.

The defendants argue that § 7 limits only the CCC. But if DPH has the power to enact the Emergency Regulations as to medical marijuana, the limits in G.L. c. 94I, § 7 effectively become meaningless, in violation of controlling principles of statutory construction. Banushi v. Dorfman, 438 Mass. 242, 245 (2002) ("We do not read a statute so as to render any if its terms meaningless or superfluous."). Where, in G.L. c. 94I, § 7, the Legislature expressly denied a power to the CCC, why would it allow DPH to exercise that power? Moreover, § 7 sets July 1, 2017 as the date that fixes the maximum permissible restrictions for medical marijuana. That date itself expressly restricts DPH's authority, so that no DPH regulation purporting to restrict marijuana sales and businesses after that date is effective to bind the CCC. The legislature has spoken clearly on that limitation upon DPH.

There is also common sense. It makes no sense to claim that DPH may direct CCC to do what the legislature has said CCC may not do. Lacking any express statutory authority for that proposition, the defendants extrapolate from sources outside c. 94I to forge a superficially logical

argument that leads to an illogical and absurd result.[4] That result fundamentally conflicts with the actual text and purpose of c. 94I, as properly construed and discussed above.

The authority granted by G.L. c. 111, §§ 1-3, 5, 6 does not even hint at such an intrusion upon the legislature's authority to limit the CCC's powers. By asserting executive power to allow what the legislature has prohibited, the defendants violate Article 30 of the Massachusetts Declaration of Rights (separation of powers). As discussed above, basic principles of statutory construction line up with the common sense notion that DPH cannot force CCC to do that which the Legislature expressly prohibits.

Finally, the basic statutory structure supports the Intervenors' construction. The legislature has placed the CCC within the chapter of the General Laws devoted to the State Treasurer, not the Governor. See G.L. c. 10, § 1. The Governor has only one direct appointee to the CCC. G.L. c. 10, § 76. The other four members are either appointed directly by the Treasurer and Attorney General or by majority vote of those officers and the Governor. Id. Massachusetts' constitutional structure divides executive authority. While the Governor is elected to serve as the "supreme executive magistrate" (Mass. Const. Pt. II, Ch. II, Section 1, Art. I), the treasurer and attorney general are also elected directly by the people and have independent powers. Mass. Const. Art. Am. LXXXII.[5] It is highly unlikely that the legislature intended § 2A to serve as a vehicle for the governor and DPH (an agency within the Governor's Executive Office of Health

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[4] As former Appeals Court Justice Kass would say, "That sounds logical, but the logic is Gilbertian." See Kobayashi v. Orion Ventures, 42 Mass. App. Ct. 492, 500 and n. 9 (1997) (discussing the logic by which a long-dead baronet is deemed "practically alive" in Gilbert and Sullivan's Ruddigore).

[5] See, e.g. Secretary of Administration and Finance v. Attorney General, 367 Mass. 154, 159-163 (1975) (Attorney General's power over litigation policy).

and Human Services) to displace the CCC on matters that the legislature placed within the Treasurer's domain and entrusted to the appointees of three constitutional officers.

For all these reasons, c. 111 does not grant to DPH the power to adopt the Emergency Regulations, which conflict with c. 94I and the CCC's authority.

III.

That leaves General Laws c. 17, § 2A, which provides:

> Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, **take such action** and incur such liabilities **as he may deem necessary to assure the maintenance of public health and the prevention of disease.**
>
> The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same.

(emphasis added). To the extent of any inconsistency, this section yields to St. 2017, c. 55 for the same reasons discussed in Part II, above. In addition, there are several ways to construe § 2A in ways that do not conflict with CCC's authority.

DPH's authority under § 2A extends only to "**action**" found "**necessary** to assure the maintenance of public health and the prevention of disease." (emphasis added). There are a number of ways to reconcile the language of that statute with the CCC's enabling legislation. First, as noted in the October 21 Order at 12-13, the Supreme Judicial Court has already called into question whether the word "action" in § 2A extends to sweeping measures such as regulations banning products altogether. American Grain Prods. Processing Inst. v. Department

of Pub. Health, 392 Mass. 309, 323 (1984).[6] Second, § 2A confers authority on the Commissioner, not DPH. It does not authorize the Commissioner to exercise DPH's power to adopt regulations. Id. at 322. Section 2A says nothing about DPH's powers . It therefore has nothing to do with the Emergency Regulations adopted by DPH. Third, it is a stretch to say that the ban is "necessary" because the CCC -- the agency with actual responsibility for regulating medical marijuana -- has not taken the action that DPH thinks appropriate. The plain meaning of the word "necessary" therefore does not encompass disagreement with another agency's less intrusive regulation.[7] The Intervenors are likely to show that these constructions of § 2A will prevail.

There is no serious argument that these constructions would leave citizens unprotected in the event of an emergency affecting medical marijuana. For one thing, the CCC is a state

[6] The Supreme Judicial Court noted that the "Commissioner's takeover in 1976 of the operation of Woodland Nursing Home in Methuen and his payment of its employees and suppliers. . . was this sort of expenditure and administrative action which § 2A was designed to allow." American Grain, 392 Mass. at 321. It added that: "[w]e do not construe [§ 2A] to have transferred the power to adopt emergency regulations from the department to the Commissioner." Id. at 322.

[7] A contrary interpretation would raise troublesome questions. Suppose that the Department of Environmental Protection (DEP) declined to enact emergency regulations to address a new environmental threat. Could DPH and the Governor summarily override DEP's existing environmental regulations simply declaring a public health emergency under § 2A arising from chemicals in our land, air and water? If so, that would upend the expectations of, and reliance by, investors, business and citizens based upon DEP's regulations, much as the Emergency Regulations have done to vaping retailers. What if the lead agency was outside the Governor's executive offices? For instance, could DPH decide that the Alcoholic Beverages Control Commission was not adequately addressing an emergency rooted in display or sale of alcoholic beverages or that excessive handgun violence has become an emergency, justifying overriding existing firearms regulators at the municipal level? Many other scenarios exist in which the Governor and DPH might believe that other agencies are not doing enough – particularly those agencies that are overseen by constitutional officers other than the Governor. These troublesome implications, of course, apply not only to the medical marijuana issues, but also bear upon the need to recognize the significant limits upon the scope of § 2A. See footnote 6, above, discussing American Grain Prods. Processing Inst. v. Department of Pub. Health, 392 Mass. 309, 323 (1984).

agency, with full power to adopt emergency regulations under G.L. c. 30A, §§ 2, 3. For another, the CCC has authority:

> Pursuant to M.G.L. c. 94G, § 4(a ½)(xxxi) . . .[to] order the removal or prohibition of sales by more than one Licensee of categories of product types, of specific product types or specific brands of products after note and a determination that Marijuana, Marijuana Products, and Marijuana Accessories (for the purposes of this section, "Product"), which based on preliminary evidence, pose a substantial risk to the public health, safety or welfare, including, but not limited to, that the product is especially appealing to Persons under 21 of age.

935 Code Mass. Regs. §§ 500.335(a), 501.335(a). CCC also has authority to impose a quarantine order "to protect the public health, safety or welfare." 935 Code Mass. Regs. 500.340, 501.340, citing G.L. c. 94G, § G.L. c. 94G, § 4(a)(xxxi) 4(a ½)(xix). Not only do these statutory and regulatory provisions provide full protection in the event of an emergency, but their mere existence weighs strongly against construing § 2A to intrude into CCC's exclusive authority.

IV.

The court has addressed many aspects of the balance of harms affecting the Intervenors' claims in the October 24 and October 28 orders, which are incorporated herein. As predicted, plaintiff Doug Luce's marijuana vaping supplies have run out, forcing him to return to his previous, higher level of opioid use to alleviate his severe pain. His experience is likely representative of a significant number of medical marijuana patients. The longer the ban remains in effect, the more patients will face undesirable choices, including opioid use, black market purchases or suffering severe pain. These are, of course, precisely the harms that c. 94I seeks to avoid.

Some serious public interest concerns are rooted in the medical marijuana statutes discussed above. There is a strong public interest in having agencies follow the law. There is a public interest, expressed in our statutes, in having CCC apply its expertise and exercise its authority over any ban on any medical marijuana products. As noted above, DPH likely exceeded its authority by banning vaping products used by medical marijuana card holders. The public interest favors relief that prohibits DPH from overstepping its bounds and displacing the CCC's authority.

Moreover, if G.L. c. 94I, § 7 prohibits a ban on medical marijuana vaping products, the Emergency Regulations directly contravene the public interest served by that statute. While CCC has yet to speak on that question, DPH cannot claim the mantle of public interest at this point with respect to medical marijuana.

V.

A.

The balance of harms, considered in the light of the Intervenors' likelihood of success, favors preliminary injunctive relief. As in the October 21 Order, the court's choice of remedy takes account of the possibility that executive branch can quickly cure the legal defects in the Emergency Regulations.

Like any Massachusetts agency the CCC itself has full authority to adopt emergency regulations under G.L. c. 30A, § 2. It may choose to promulgate the Emergency Regulations in whole or in part. Or, it may choose not to promulgate them for policy reasons or because of a construction of G.L. c. 94I, § 7, which falls within its interpretive authority in the first instance. The choice needs to come from the CCC, not DPH or this court. Before enjoining operation of

the Emergency Regulations as to medical marijuana, therefore, the court allows the CCC sufficient time to adopt emergency regulations, if it chooses.

Respecting CCC's exclusive authority to adopt any restrictions upon medical marijuana has practical implications. It not only respects the statutory scheme, but also allows the legislatively-designated agency to apply its expertise about the medical marijuana program. That process might produce the same result as the Emergency Regulations, but might not. For instance, the October 24 Order already noted the differing evidence regarding vaping crushed marijuana flower and vaping THC oils. The CCC has the authority and expertise to determine whether the two types of vaping should be treated differently. CCC may even conclude that G.L. c. 94I, § 7 prohibits any emergency ban of medical marijuana vaping products.

Requiring action by CCC also affects judicial review of the agencies' statutory interpretations. The CCC is entitled to deference as the agency charged with implementing and interpreting G.L. c. 94I, § 7.[8] If it construes that statute to tie its hands with regard to any prohibition on vaping, then the CCC's construction is likely controlling, not DPH's. See generally Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144, 154-155 (1991) (court defers to the agency that has statutory authority to make the decision at issue). Compare Felicetti v. Secretary of Communities and Development, 386 Mass. 868 (1982) (If two

[8] See Souza v. Board of Appeals on Motor Vehicle Liability Policies and Bonds, 462 Mass. 227, 229-230 (2012) ("In general, we give 'substantial deference' to an agency's interpretation of those statutes which it is charged with enforcing."), quoting Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass. 135, 141 (2009); Teamsters Joint Council No. 10 v. Director of the Dept. of Labor and Workforce Development, 447 Mass. 100, 110-111 (2006) (deferring to an agency's reasonable interpretation of a statute it is charged with enforcing); Molly A. v. Commissioner of the Department of Mental Retardation, 69 Mass. App. Ct. 267, 280, rev. denied, 449 Mass. 1111 (2007).

agencies have statutory responsibility, and disagree, the Court does not defer to either).

The court therefore allows the CCC time to adopt the Emergency Regulations in whole or in part – or decline to adopt any ban at all. Rather than disrupt the market, it allows the Emergency Regulations, as adopted by DPH, to remain in place for one week. One week is likely enough time to consider Emergency Regulations, since the CCC already has experience as the agency implementing the Emergency Regulations for the marijuana industry (see 105 Code Mass. Regs. §§ 801.005, 801.25(A)) and has the benefit of all the work done by DPH to date.

In allowing CCC one week to consider Emergency Regulations, the court does not imply in any way that any version of the Emergency Regulations is permitted by G.L. c. 94I, § 7. The court will not take no position on that question until the CCC takes a position, as the agency designated by the Legislature to decide the scope of G.L. c. 94I, § 7, in the first instance.

B.

The defendants moved orally for a stay pending appeal. The court's preliminary injunction effectively allows a one-week stay. If CCC quickly adopts the Emergency Regulations with respect to medical marijuana, the DPH Emergency Regulations would become superfluous as to medical marijuana. Since there is no need for duplicative regulations (and they may cause confusion) a preliminary injunction against the DPH regulations, as they affect vaping by medical marijuana card holders would not harm the defendants or the public interest at all. In that case, there will be no need for any stay.

On the other hand, if the CCC declines to adopt the Emergency Regulations as to medical marijuana, or enacts a more limited ban, then a stay would contravene the public interest by overriding CCC's statutory authority and allowing DPH to violate the statutes discussed above.

In that case, moreover, the severe, avoidable pain and other treatable conditions of medical marijuana patients would constitute serious irreparable harm.

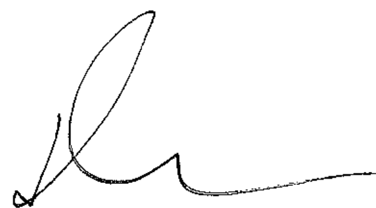
There is, accordingly, little or no prospect that a stay pending appeal would serve the public interest or avoid irreparable harm to citizens. The court denies the oral request for a stay pending appeal.

CONCLUSION

For the above reasons, the Court ALLOWS the "Plaintiff-Intervenors' Emergency Motion For Order Requiring the Commonwealth To Show Cause Why it Failed to Comply with the Court's Preliminary Injunction Order and why its Purported October 28, 2019 Vaping Ban is not Enjoined by that Order."

The court ORDERS:

1. As of 12:01 P.M. on November 12, 2019, with respect to the display and sale of Marijuana vaping products to medical marijuana card holders, the defendants are preliminary enjoined from implementing and enforcing 105 Code Mass. Regs. § 801.000, "Severe Lung Disease Associated With Vaping Products."



Dated: November 5, 2019

Douglas H. Wilkins
Associate Justice, Superior Court