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KG WELLNESS #1, LLC, et al.,	* **IN THE**
Plaintiffs	* **CIRCUIT COURT**
v.	* **FOR**
MARYLAND CANNABIS ADMINISTRATION, et al.	* **ANNE ARUNDEL COUNTY**
Defendants	* **Case No. C-02-CV-24-000701**

* * * * * * * * * * *

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

There can be no dispute that the applications submitted by plaintiffs KG Wellness #1, LLC, KG Wellness #2, LLC, KG Wellness #3, LLC, KG Wellness #5, LLC, KG Wellness #6, LLC and KG Wellness #8, LLC ("Plaintiffs") failed to meet the Maryland Cannabis Administration ("Administration")'s minimum qualifications for entry into the lotteries for Standard Dispensary licenses in Talbot and Calvert Counties. There is no dispute that the Maryland General Assembly gave the Administration authority to establish the minimum qualifications for entry into the cannabis license lottery. Md. Code Ann., Alc. Bev. § 36-404(d)(1). There is no dispute that the Administration promulgated regulations stating that it would deny an application that contains a material misstatement. COMAR 14.17.05.03E(2).[1] There is no dispute that the Administration explained in instructions published on November 1, 2023—before the application period opened—that,

[1] Throughout their Complaint and Motion, Plaintiffs cite "COMAR 14.14.05.03." That chapter of COMAR does not exist. Presumably, Plaintiffs meant to cite COMAR 14.17.05.03.

in determining whether the business plan that applicants had to submit contained a material misstatement, the Administration would evaluate Attachment B– Business Plan Template ("Attachment B") of the application "to ensure that the applicant has accurately calculated the total costs of their proposed business by adding each line item of the worksheet." (Memorandum in support of Plaintiffs' Motion for a Preliminary Injunction ("Mot.") Ex. 1, at 3.) Those same instructions explained that one of the minimum requirements for a passing business plan is having "individual line items accurately equate to the total assumed pre-tax profits projects"; a business plan would fail if "the individual line items did not accurately equate to the total assumed pre-tax profits projected." (*Id.* at 9.) And there is no dispute that, despite this explicit instruction as to what constitutes a material misstatement, Plaintiffs all submitted Attachment Bs that failed to accurately tally the individual line items. (Compl. ¶¶ 43-44.) Now, months after the application period closed and other applicants submitted applications that met this and all other requirements for eligibility into the lottery, Plaintiffs ask this Court to excuse their error and compel the Administration to enter their applications into the lotteries for Standard Dispensary licenses in Talbot or Calvert Counties. The Court should decline to do so.

Instead, this Court should deny Plaintiffs' Motion for a Preliminary Injunction ("Motion") because Plaintiffs request for equitable relief is barred by laches. Plaintiffs' challenge as illegal the Administration's evaluation criteria regarding Attachment B, alleging that the Administration should have submitted such criteria through a rulemaking. The Administration announced the evaluation criteria regarding Attachment B—specifically, that a failure to correctly add the figures would result in a failing application—

on November 1, 2023. That is the date when the controversy that Plaintiffs assert arose, yet Plaintiffs said nothing. Instead, Plaintiffs voluntarily applied for cannabis licenses knowing that such criteria would be applied to theirs and all applications. The Administration then reviewed 1,708 applications according to these criteria, expending considerable resources doing so. Only after the application review was completed did Plaintiffs raise their challenge to the Administration's evaluation criteria for the Attachment B. Such delay is unreasonable, and to the detriment of the Administration.

The Court should also deny the Motion because Plaintiffs do not, and cannot, satisfy any of the four factors required to obtain preliminary injunctive relief under Maryland law. To start, Plaintiffs do not demonstrate a likelihood of success on the merits of their claims. Plaintiffs cannot demonstrate that they are entitled to any of the relief they seek because the Administration, pursuant to its clear statutory authority, established and applied the application review criteria regarding mathematical errors in Attachment B that it said it would: an application will fail if "individual line items did not accurately equate to the total assumed pre-tax profits projected." (Mot. Ex. 1, at 9.) Plaintiffs' reliance on accounting principles, the Sarbanes Oxley Act, and procurement law are neither relevant nor applicable.

Furthermore, common law mandamus is not an available remedy to compel the Administration to depart from its evaluation criteria in considering Plaintiffs' applications. The Administration has express statutory discretion to establish the minimum qualifications for entry into the lottery, which it exercised. Mandamus cannot compel the

Administration to abandon its discretionary decision to require that applicants accurately calculate the costs of their proposed business by adding each line item of Attachment B.

Additionally, administrative mandamus will not lie where Plaintiffs challenge a quasi-legislative function of the Administration, namely the criteria it applies in evaluating whether a business plan has met the minimum qualifications for entry into a cannabis license lottery. Nor is administrative mandamus available to Plaintiffs, all of which lack a substantial right—i.e., a protected property interest—in applying for entry into a lottery for the chance to receive a cannabis license.

The balancing of harms and the irreparable injury factors of the preliminary analysis are effectively moot here, given that the parties have agreed that the Administration will not conduct the lottery for Standard Dispensary licenses in Talbot and Calvert Counties before the Court rules on the Motion. Given this agreement, and given that the singular issue in this case is capable of resolution at an evidentiary hearing, Plaintiffs face no irreparable harm in absence of a preliminary injunction. Further, Plaintiffs have not demonstrated that a preliminary injunction is necessary to protect their ability to pursue an opportunity to enter the lottery for a Standard Dispensary license in Talbot or Calvert County in future licensing rounds.

Finally, Plaintiffs have not demonstrated that the public interest favors granting the requested preliminary injunction. There is no public interest in including Plaintiffs in the lotteries simply because they qualified as social equity applicants where they failed to meet other application requirements. The public interest is in ensuring that all applicants are treated the same, which the Administration has done.

FACTUAL BACKGROUND

The Parties

Plaintiffs

Plaintiffs allege they are Maryland limited liability companies. (Compl. ¶¶ 9-14.) Plaintiffs are several entities named "KG Wellness" that pursued a cannabis license in Maryland's first licensing round. (*See id.* ¶¶ 42-43.) A separate KG Wellness entity, KG Wellness #4, LLC, has pending a lawsuit challenging a different licensing eligibility determination by the Administration. *See KG Wellness #4, LLC v. Maryland Cannabis Administration, et al*, Case No. C-02-CV-24-000396 (Cir. Ct. Anne Arundel Cnty. Feb. 16 2024). All Plaintiffs share the same business address. (Compl. ¶¶ 9-14.) All Plaintiffs appear to have utilized the same consultant to assist with their applications. (Ex. A, Affidavit of Andrew Garrison, ¶ 10.)

Defendants

The Administration is the State agency responsible for regulating Maryland's cannabis market, including exclusive responsibility for licensing cannabis businesses and conducting the cannabis license application process. *See* Alc. Bev. §§ 36-401, 36-404. William Tilburg is the Director of the Administration.

Dawn Berkowitz is the Deputy Director of the Administration. She has no responsibilities regarding applications for licensure and has had no contact with applicants. Plaintiffs do not allege that Ms. Berkowitz had any involvement with the matters at issue in this litigation.

Audrey Johnson is the Executive Director of the Office of Social Equity ("OSE"), an independent office within the Administration. *See* Alc. Bev. § 1-309.1. OSE, including Ms. Johnson, has no role in issuing cannabis business licenses nor reviewing cannabis license applications. Plaintiffs do not allege that Ms. Johnson had any involvement with the matters at issue in this litigation.

2023 Cannabis License Application

Following the passage of Question 4 on the November 2022 ballot, the people added Article XX to the Maryland Constitution. Article XX recognizes the right of an individual who is at least 21 years old to use and possess cannabis and further directs the General Assembly to establish a regulatory framework. Md. Const. art. XX, § 1.

Among the many elements of Maryland's cannabis regulatory framework, the General Assembly decided to reserve the first round of cannabis licenses for those who qualify as a "social equity applicant" ("SEA"). Alc. Bev. § 36-404(d)(1); *see also id*. § 36-101(ff). There is no dispute that Plaintiffs qualify as SEAs, nor that all applicants whom the Administration determined were eligible for the lottery qualified as SEAs. To the extent that Plaintiffs allege that the Administration abdicated its responsibility to provide an opportunity for those who qualify as SEA (*see* Compl. ¶ 39), that is baseless.

An applicant must do more than qualify as SEA to be entered into the lottery for the first round of cannabis licenses. The General Assembly also required that applicants submit a detailed operational plan, business plan, and diversity plan, all of which must meet the minimum requirements established by the Administration. *See* Alc. Bev. § 36-404(d)(2). Further, the General Assembly mandated that the Administration determine

whether applicants met the criteria on a pass-fail basis. *See id.* Thus, an applicant will either meet the criteria or not; no partial credit is available for being close to meeting the criteria.

In October 2023, the Administration published general instructions for the cannabis license application ("General Instructions"). (Ex. B.) The General Instructions state in relevant part that the "Administration may deny or disqualify an application that: Is not complete in every material detail; Contains a material misstatement, omission, misrepresentation, or untruth; Does not meet minimum qualifications for the lottery; or Is not submitted by the established deadline of 5PM Eastern Standard Time on December 12th." (*Id.* at 9); *see also* COMAR 14.17.05.03E.

On November 1, 2023, the Administration published further instructions on how to complete the application. (Mot. Ex. 1.) In these instructions, the Administration made clear that, in determining whether the business plan that applicants had to submit contained a material misstatement, the Administration would evaluate Attachment B "to ensure that the applicant has accurately calculated the total costs of their proposed business by adding each line item of the worksheet." (Mot. Ex. 1, at 3.) The Administration further stated in these instructions, in the matrix of evaluation considerations for Attachment B, that failing to accurately equate to the total of the line items would result in failure. (*Id.*, at 9.)

Plaintiffs' Applications

Plaintiffs KG Wellness #1, KG Wellness #2, KG Wellness #3, and KG Wellness #6 applied for Standard Dispensary licenses in Calvert County. (Compl. ¶ 41.) Plaintiffs KG Wellness #5 and KG Wellness #8 applied for Standard Dispensary licenses in Talbot

County. (*Id.*) All Plaintiffs listed 5000 Thayer Center, Suite C, Oakland, Maryland 21550 as their business address. (*Id.* ¶¶ 9-14.) Several of the individuals named in the applications share an email domain name ending in "@kanagrove.com" (Ex. A, ¶ 10), a company that is "working with investors and entrepreneurs who are seeking to purchase licensed and fully compliant cannabis facilities." *See* https://www.kanagrove.com. Kanagrove's website indicates it has ownership interests in dispensaries in California, Illinois, and Connecticut, along with 200,000 square feet of cultivation and processing facilities. *Id.*

While all the individuals identified in the Plaintiffs' applications were verified SEAs, and are different in name, the applications that were submitted by all six entities were exactly the same. (*See* Compl. ¶ 43.) All six of the applications included an identical Attachment B, as required; however, the sum of the various financial figures was not totaled correctly. (*See id.* ¶ 44.) The total anticipated pre-tax profits should have been $7,303,000 based on the figures listed in the preceding rows, but the total listed was $7,484,000. (*Id.*)

Application Review

After the application period closed on December 12, 2023, the Administration reviewed all timely applications to determine which applicants are eligible to be entered into the lottery. (Ex. A, ¶ 11.) On February 9, 2024, the Administration notified applicants of their eligibility or ineligibility for the lottery. (Compl. ¶ 46.) The Administration informed Plaintiffs that their applications were ineligible for the lottery. (*Id.*) The Administration provided applicants found to be ineligible for the lottery 10 days to request

a review of the records. COMAR 14.17.05.07A. Plaintiffs requested and participated in the record review process. (Compl. ¶ 48.) During these records reviews, Administration staff explained to Plaintiffs that their applications were determined to be ineligible for the lottery because they failed to accurately calculate the figures in Attachment B of their applications. (Ex. A, ¶ 12.)

The Administration offered all applicants whose applications did not meet the minimum requirements for entry into the lottery, including Plaintiffs, the option of a refund of their application fees or to have their application fees applied to the next licensing round. (Ex. A, ¶ 14.)

The Administration held several lotteries for cannabis licenses, organized by region (for Standard Grower and Processor licenses, and Micro Grower, Processor, and Dispensary licenses) or county (for Standard Dispensary licenses) on March 14, 2024. (Compl. ¶ 8.) The parties agreed that the Administration will not conduct the lottery for standard dispensary licenses in Talbot and Calvert County until the Court rules on the instant Motion. (*Id.*)

ARGUMENT

I. PLAINTIFFS UNREASONABLY DELAYED BRINGING THEIR CHALLENGE TO THE ATTACHMENT B EVALUATION CRITERIA TO THE DETRIMENT OF THE ADMINISTRATION, SO LACHES BARS THEIR REQUEST FOR EQUITABLE RELIEF.

The doctrine of laches precludes equitable relief when "a plaintiff has exhibited negligence or lack of due diligence in asserting a right to the detriment of the defendant." *Jahnigen v. Smith*, 143 Md. App. 547, 555 (2002), *cert. denied*, 369 Md. 660 (2002).

Whether prejudice to the defendant has been established "is generally held to be anything that places [an opposing party] in a less favorable position." *Ademiluyi v. Egbuonu*, 466 Md. 80, 124 (2019) (quoting *Parker v. Bd. of Election Sup'rs*, 230 Md. 126, 130 (1962)).

The core of Plaintiffs' challenge is that the Administration's evaluation criteria regarding Attachment B is illegal since it was not promulgated in regulation. (Compl. ¶ 54.) While that argument is incorrect for reasons set forth below, Plaintiffs could have—and should have—raised their challenge when they learned of the Attachment B evaluation criteria on or around November 1, 2023. Yet they did not, and instead submitted their applications knowing that the Administration would be applying such criteria to theirs and all other applications. At that point a justiciable controversy arose, if not sooner, because Plaintiffs submitted applications and Attachment B evaluation criteria were known. Yet they continued to wait to bring their challenge until the Administration reviewed all 1,708 applications that it received before the application deadline, and continued to wait until the Administration completed all of the records reviews. In short, Plaintiffs waited until the entirety of the application and application review process was complete to raise a challenge that they could have raised in November. Such delay is unreasonable. And while Plaintiffs may argue that a delay of a few months cannot be unreasonable, the Appellate Court of Maryland has made clear that laches is not merely a question of time, but of the equity of permitting the claim to be enforced. *See Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 612 (2019). "Thus, even a relatively short period of time may be found to constitute an unreasonable delay resulting in laches under the circumstances of the case." *Id.* The circumstances of this case, where Plaintiffs allowed the entirety of the application

review process to conclude before raising their challenge to the legality of evaluation criteria, constitute an unreasonable delay.

The detriment of such delay to the Administration is plain. It applied the evaluation criteria that it announced it would, in reliance on having announced the criteria and no one raising any issue. Staff spent several weeks reviewing 1,708 applications, then additional weeks conducting records reviews for all applicants that requested one. If Plaintiffs felt that the Attachment B evaluation criteria is illegal, they would have saved the Administration, as well as other applicants, a lot of time and effort by raising that challenge in November. They did not. Instead, they played the role of Johnny Come Lately, raising a challenge only as a last-ditch effort to attempt to remedy their failure to follow the Administration's plain instructions. Granting them relief now would result in prejudice to the Administration and those who applied. *See, e.g.*, *Schaeffer v. Anne Arundel Cnty.*, 338 Md. 75, 84 (1995). Accordingly, laches bars Plaintiffs' request for a preliminary injunction.

II. PLAINTIFFS HAVE FAILED TO CARRY THEIR BURDEN OF DEMONSTRATING THAT ALL FOUR FACTORS WEIGH IN FAVOR OF THE PRELIMINARY INJUNCTION THEY SEEK.

A court must consider four factors in deciding whether to issue an interlocutory injunction:

1. The likelihood that the plaintiff will succeed on the merits;
2. The "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal;
3. Whether the plaintiff will suffer irreparable injury unless the injunction is granted; and
4. The public interest.

Fogle v. H & G Restaurant, Inc., 337 Md. 441, 455-56 (1995). If the party seeking the relief fails to prove any one of the four elements, then the court must deny the injunction. *Id*. at 456.

A. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Claims.

A party seeking the interlocutory injunction "must establish that it has a real *probability* of prevailing on the merits, not merely a remote *possibility* of doing so." *Id*. (emphasis in original); *accord Eastside Vend Distributors, Inc. v. Pepsi Bottling Grp., Inc.*, 396 Md. 219, 241 (2006). All of Plaintiffs' claims are premised on the argument that the Administration erred as a matter of law in deciding that, in order to be eligible for entry into the cannabis license lottery, applicants must correctly calculate the figures required in Attachment B. Fatal to all of Plaintiffs' claims are the inescapable facts that the General Assembly granted the Administration discretionary authority to determine the minimum qualifications for eligibility for the lottery, and that the Administration announced before the application period opened that a failure to calculate the figures in Attachment B correctly would result in a failure of the application. Plaintiffs, and all other applicants, were on notice that this is how the Administration would review Attachment B before preparing and submitting their applications. The Administration applied that evaluation criteria consistently across all applications it reviewed; that such consistent application disqualified Plaintiffs does not mean that the Administration acted improperly, let alone illegally. Plaintiffs may disagree that such error is material, but the General Assembly did not grant Plaintiffs the authority to determine the application qualifications. Plaintiffs'

errors were material pursuant to the evaluation criteria that the Administration established and applied. Accordingly, they cannot demonstrate a likelihood of success on the merits of its claims for a declaratory judgment, mandamus, or common law judicial review.

1. The Administration Properly Exercised Its Discretionary Authority to Interpret and Apply Its Regulations by Designating Errors in Attachment B as Material.

Plaintiffs allege that the Administration acted inconsistently with the statutory and regulatory licensing requirements by specifying that a mathematical error in Attachment B constitutes a material error warranting denial of an application, and that an application that contains such error in Attachment B does not meet the minimum qualifications for entry into the lottery. That argument is based on nothing more than Plaintiffs' opinion that such errors should not be material. But Plaintiffs' opinion is not determinative here. The Administration is the administrative body charged with cannabis licensing in Maryland, and the Administration is afforded deference in interpreting its own regulations. As the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland) has explained, that agencies are owed significant deference in the interpretation of their own regulations:

> "[A]gency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. A question concerning the interpretation of an agency's rule is as central to its operation as an interpretation of the agency's governing statute. Because an agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute."

Maryland Transp. Auth. v. King, 369 Md. 274, 289 (2002) (quoting *Maryland Comm'n on Hum. Rels. v. Bethlehem Steel*, 295 Md. 586, 592–93 (1983)). Unless the agency's

interpretation of its regulation is "plainly erroneous or inconsistent with the regulation," courts give deference to the agency's interpretation. *Id.* (cleaned up).

Here, the Administration determined that "material," for purposes of COMAR 14.17.05.03E, includes mathematical errors in Attachment B. That determination is consistent with the regulation, as well as the statute that grants the Administration discretion to determine the minimum qualifications for licensure. *See* Alc. Bev. § 36-404(d). In short, the Administration has clear authority to determine what is material to one's ability to demonstrate that it meets minimum requirements in a cannabis license application. Plaintiffs attempt to muddy the issue by suggesting that the Administration used a different standard in assessing the applications, one of "strict accuracy" versus a "material misstatement." (Mot., at 6.) Plaintiffs' so-called 'standards' are one in the same: the Administration failed Plaintiffs' applications on the basis of the inaccuracy in Attachment B, which constitutes a material misstatement.

Moreover, the Administration published its interpretation in the application instructions on November 1, 2023, in which it clearly states that "[Attachment B] will be evaluated to ensure that the applicant has accurately calculated the total costs of their proposed business by adding each line item of the worksheet." (Mot. Ex. 1, at 3.) The Administration further stated in the matrix of evaluation considerations for Attachment B, under Criteria for Failure, "Did not include or consider the eight financial metrics OR the individual line items did not accurately equate to the total assumed pre-tax profits projected." (*Id.*, at 9.) This is in addition to the extensive outreach and education on how to complete the application that the Administration, including OSE, provided prior to the

application deadline. At each of these trainings, accuracy was emphasized. (Ex. A, ¶ 5.) All applicants, including Plaintiffs, were on notice that an error in Attachment B is material.

The Administration applied this evaluation criteria for Attachment B consistently across all applications that it reviewed, not simply the six applications that Plaintiffs submitted. (*Id.* ¶ 9). By acting pursuant to its discretionary authority and in a consistent manner, the Administration did not act arbitrarily or capriciously. If anything, Plaintiffs' requested relief would have the Administration take inconsistent actions with respect to their applications, by applying different evaluation criteria than the Administration applied to all other applications. The Court should not countenance such an inequitable result.

Plaintiffs' reliance on procurement law and Generally Accepted Accounting Principles is misplaced. (*See* Mot., at 9-12.) Applications for cannabis licenses are not governed by procurement law but, rather, Title 36 of the Alcoholic Beverages and Cannabis Article. Further, that Plaintiffs' mathematical error was a matter of hundreds of thousands of dollars and not millions or tens of millions of dollars is irrelevant. The dollar amounts listed in Attachment B are not the relevant consideration, as the instructions make clear. (Mot. Ex. 1, at 3.) Rather, the ability of applicants to accurately calculate costs is the material consideration. (Ex. A, ¶ 8; Mot. Ex 1, at 3, 9.)

Equally misplaced is Plaintiffs' reliance on *Green Healthcare Solutions, LLC v. Natalie M. Laprade Md. Medical Cannabis Commission*, 254 Md. App. 547 (2022). That case involved civil procedure, namely whether a party must exhaust an administrative remedy that was not established in statute or regulation. The holding in *Green Healthcare*

does not require that the Administration put the application instructions through the APA process, where the instructions and its attachments only provided additional guidance on the application review criteria that the Administration rightfully established.

Plaintiffs' pleadings and exhibits incorporated therein make clear that the Administration did nothing other than exercise its statutory authority to determine what constitutes a material misstatement in a cannabis license application and then consistently apply that evaluation criteria to all applications, Plaintiffs' included. Thus, Plaintiffs have not pleaded facts demonstrating that the Administration acted arbitrarily or capriciously, abused its discretion, or otherwise violated any law or right of Plaintiffs. Plaintiffs have not demonstrated a likelihood of success on the merits of their claims for relief. On this basis, then, the Court should deny their Motion.

2. Mandamus Is Not Available to Compel the Administration to Reverse Its Discretionary Determination of Minimum Qualifications for a Cannabis Application to be Deemed Eligible for a Lottery.

Common-law mandamus is "an extraordinary remedy" that

> "is generally used to compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which the party applying for the writ has a clear legal right. The writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment."

Falls Rd. Cmty. Ass'n, Inc. v. Baltimore County, 437 Md. 115, 139 (2014) (quoting *Goodwich v. Nolan*, 343 Md. 130, 145 (1996)); *accord Mayor & City Council of Balt. v. ProVen Mgmt., Inc.*, 472 Md. 642, 669–70 (2021). As discussed above, the General Assembly granted the Administration discretionary authority to determine the minimum

qualifications for eligibility into the cannabis license lottery. *See* Alc. Bev. § 36-404(d). The Administration exercised that authority in determining that a mathematical error in Attachment B constitutes a material error. Plaintiffs seek a writ of mandamus compelling the Administration to reverse that discretionary determination as to what constitutes minimum qualifications and a material misstatement in an application. For this, mandamus will not lie. *See Goodwich*, 343 Md. at 145.

For this independent reason, Plaintiffs have failed to demonstrate a likelihood of success on Count II of their Complaint.

3. Administrative Mandamus Is Not Available to Challenge the Administration's Quasi-Legislative Determination That a Mathematical Error in Attachment B Constitutes a Material Error, Nor Where Plaintiffs Lack a Substantial Interest in Applying for an Opportunity to Enter the Cannabis License Lottery.

Pursuant to Maryland Rule 7-401(a), administrative mandamus is available only to challenge agency actions that are quasi-judicial. Md. Rule 7-401(a); *see also Talbot Cnty. v. Miles Point Prop.*, LLC, 415 Md. 372, 394 (2010) (noting that "for administrative mandamus to lie in any given case, the underlying action being reviewed must be quasi-judicial in nature, where quasi-judicial action is synonymous with administrative adjudication"). Whether a given act is quasi-judicial in nature is guided by two criteria: "(1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property, and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence." *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 33 (2006); *accord Maryland Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 514-15, (2012). "[T]he

greater a decisionmaker's reliance on general, 'legislative facts,' the more likely it is that an action is legislative in nature." *Miles Point Prop.*, 415 Md. at 387.

Plaintiffs frame their challenge as quasi-judicial because the Administration made determinations regarding their applications. (*See* Compl. ¶¶ 71-75.) But Plaintiffs do not actually contest the Administration's scrutiny of their particular applications; Plaintiffs concede that mathematical errors exist in all of their Attachment Bs. (*See id*. ¶¶ 43-44.) In other words, this is not a dispute about what two plus two equals. Rather, Plaintiffs challenge the Administration's determination that a mathematical error in Attachment B constitutes a material error. That determination relies on general, legislative facts, such that it is quasi-legislative, not quasi-judicial. *See Miles Point Prop.*, 415 Md. at 387, 2 A.3d 344. As such, administrative mandamus cannot lie. Md. Rule 7-401(a).

Additionally, even if Plaintiffs challenge a quasi-judicial Administration action—they do no not—a court is without jurisdiction to issue a writ of administrative mandamus unless "any substantial right of the plaintiff may have been prejudiced" by the agency's decision. Md. Rule 7-403; *see also Barson v. Maryland Bd. of Physicians*, 211 Md. App. 602, 618–19 (2013) (noting that an individual may not bring a petition for administrative mandamus unless he or she can show the denial of "clear legal right or protected interest" (quoting *Perry v. Department of Health & Mental Hygiene*, 201 Md. App. 633, 637 (2011))). A substantial right is a protected property interest. *See Perry*, 201 Md. App. at 640 (citing *Oltman v. Board of Physicians*, 182 Md. App. 65 (2008)).

Plaintiffs have no protected property interest in being entered into a lottery for a chance to be awarded a cannabis license. As the United States Supreme Court explained,

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *accord Samuels v. Tschechtelin*, 135 Md. App. 483, 524 (2000). Plaintiffs baldly assert "a substantial right for their applications for valuable cannabis licenses to be evaluated in a fair manner consistent with the statutes and regulations empowering MCA to review their applications" (Compl. ¶ 78), but plead no facts as to an actual property interest. Nor could they, given that Maryland law is clear that a cannabis license does not confer property rights. Alc. Bev. § 36-401(h)(1). Indeed, this Court has repeatedly recognized that an applicant has no property interest in a cannabis license that it applied for but did not receive, even where, as here, a plaintiff framed its claim as a right to a fair application review. *See Roundtable Wellness, LLC v. Scott R. Welsh, et al.*, Case No. C-02-CV-20-001928 (Cir. Ct. Anne Arundel Cnty. Mar. 1, 2021 order) (attached), *aff'd*, *Roundtable Wellness, LLC v. Natalie M. LaPrade Maryland Medical Cannabis Commission*, No. 0116, Sept. Term, 2021, 2022 WL 1469349 (May 10, 2022); *Green Healthcare Solutions, LLC v. Natalie M. LaPrade Maryland Medical Cannabis Commission*, Case No. C-02-CV-21-000328 (Cir. Ct. Anne Arundel Cnty. Nov. 23, 2022 order) (attached).

For these reasons, Plaintiffs have failed to demonstrate a likelihood of success on Count III of their Complaint.

B. The Balance of Harms Does Not Favor Granting the Motion

Plaintiffs carry the burden to show that the "balance of convenience" test weighs in their favor for this court to grant the relief sought. *State Dep't of Health and Mental Hygiene v. Baltimore County*, 281 Md. 548, 557 (1977). Thus, the Court considers "whether greater injury would be done to the defendant[s] by granting the injunction than would result to the plaintiff[s] from its refusal." *Id*. at 557 (citations omitted).

The balance of harms inquiry is effectively moot here because the parties have agreed that the Administration will wait to conduct the lotteries until after the Court rules on the Motion, and have further requested a hearing on the merits. (*See* Compl. ¶ 8.) In other words, a preliminary injunction is not necessary to allow this Court to rule on the merits of the dispute.

That said, the Administration is harmed by waiting to conduct the lotteries for Standard Dispensary licenses in Calvert and Talbot Counties, as the delay leads to additional costs that the Administration will bear in working with applicants to become fully licensed. Specifically, applicants who are selected in the lottery must undergo additional vetting to ensure the veracity of statements made in their applications. (Ex. A, ¶ 13.) The Administration has hired a third-party contractor, Verity, LLC, to assist with that additional review. (*Id.*) Verity is currently reviewing materials for the applicants selected in the lotteries that took place on March 14, 2024. (*Id.*) The delay in conducting the lotteries for Standard Dispensary licenses in Calvert and Talbot Counties will mean that Verity will have to perform work over a longer period of time, which will increase costs to the Administration. (*Id.*)

The Administration is also mindful of the applicants who have demonstrated their eligibility for the lotteries for Standard Dispensary Licenses in Calvert and Talbot Counties, and who are in limbo waiting for this litigation to conclude.

C. Plaintiffs Have Not Demonstrated That They Will Suffer an Irreparable Harm Absent a Preliminary Injunction.

As with the balancing of the harms factor, the irreparable harm factor for a preliminary injunction is effectively moot here given the parties' agreement; Plaintiffs face no irreparable harm absent the entry of a preliminary injunction because the relevant lotteries will not occur until after a hearing on the Motion.

Still, Plaintiffs have failed to demonstrate why their participation in the lottery for the first round of cannabis licenses is necessary to avoid irreparable harm. The Administration will conduct other rounds for cannabis licenses in which Plaintiffs could apply. *See* Alc. Bev. § 36-404(a)(2), (f)-(h). Given this, Plaintiffs do not face irreparable harm if their Motion is denied and the lotteries for Standard Dispensary licenses in Calvert and Talbot Counties proceed without Plaintiffs in them. *See Variscite NY Four, LLC v. New York State Cannabis Control Bd.*, No. 1:23-cv-015990 (AMN/CFH), 2024 WL 406490, at *14 (N.D.N.Y. Feb. 2, 2024), *appeal docketed*, *Variscite NY Four, LLC v. New York State Cannabis Control Bd.*, (2d Cir. Feb. 15, 2024) (no irreparable harm where "Plaintiffs could still receive a license as part of another prioritized group, or non-prioritized group" (internal quotations omitted)); *Peridot Tree WA Inc. v. Washington State Liquor & Cannabis Control Bd.*, *et al.*, No. 3:23-CV-06111-TMC, 2024 WL 69733, at *10 (W.D. Wash. Jan. 5, 2024), *appeal docketed*, *Peridot Tree WA Inc. v. Washington State*

Liquor & Cannabis Control Bd., *et al.* (9th Cir. Jan. 12, 2024) (no irreparable harm where there will be "future application rounds for cannabis retail licenses"); *Variscite, Inc. v. City of Los Angeles*, No. 2:22-CV-08685-SPG-SK, 2022 WL 18397510, at *12 (C.D. Cal. Dec. 8, 2022) ("the probability that Plaintiffs may in the future become eligible under the licensing provisions eviscerates the likelihood of *irreparable* harm.").

Nor do Plaintiffs face the prospect of being deprived of an opportunity to pursue a chosen profession. (*See* Mot., at 17-18.) Not only can Plaintiffs apply for a cannabis license in subsequent rounds, but many individuals associated with Plaintiffs already have cannabis businesses in other states. (Ex. A, ¶ 10.) The cases the Plaintiffs cite in support of this argument do not support their position because those cases involved materially different circumstances than those at issue here. In *Enyart v. National Conference of Bar Examiners, Inc*., 630 F.3d 1153 (9th Cir. 2011), the Court of Appeals for the Ninth Circuit found that plaintiff, a blind woman whose request to use special software to take the California bar exam was denied by the bar examiners, would suffer an irreparable harm if she were not able to use the requested software because otherwise she would be unable complete the exam in the allotted time and, in turn, could not be licensed to practice law in California. *Id.* at 1153, 1165–67. Finding that the refusal to allow the accommodation violated the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12189, the court affirmed the injunction directing the examiners to permit her to use the software while sitting for the bar exam. *Id.* at 1160-65, 1167.

City of Fremont v. FERC, 336 F.3d 910 (9th Cir. 2003), is even less helpful to Plaintiffs because the Ninth Circuit did not consider irreparable harm in the context of a

preliminary injunction but, rather, as part of the statutorily prescribed analysis of whether an appellate court has jurisdiction to review an order of the Federal Energy Regulatory Commission ("FERC"). *Id.* at 913-14. Pursuant to the Federal Power Act, an appellate court has jurisdiction to review a FERC order "if (1) the order is final; (2) the order, if unreviewed, would inflict irreparable harm on the party seeking review; and (3) judicial review at this stage of the process would not invade the province reserved to the discretion of the agency." *Id.* at 913-14 (citing 16 U.S.C. § 825l(b)). Thus, the irreparable harm analysis in *City of Fremont* is inapposite here.[2]

D. The Public Interest Does Not Favor a Preliminary Injunction.

Finally, Plaintiffs have failed to demonstrate that the public interest favors granting a preliminary injunction. Plaintiffs argue that "[t]here is no public interest in keeping

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[2] The facts of *City of Fremont* do not help Plaintiffs, either. The matter concerned a license to operate a hydroelectric project in California. 336 F.3d at 912. When the license was up for renewal, the incumbent licensee, Pacific Gas & Electric ("PG&E"), failed to submit a timely application; FERC refused to accept PG&E's untimely application. *Id.* at 912-13. There were no timely applications, however, so the project entered "orphan" status and FERC opened another application period. *Id.* at 913. Petitioner then applied for the license, as did PG&E which received incumbent status during the application review. *Id.* Incumbent status is significant because the Federal Power Act prohibits transferring a project from an incumbent to a new competitor if the new competitor's plans for the project are insignificantly different from those of the incumbent. *Id.*

Petitioner challenged FERC's decision to allow PG&E to apply for the orphaned project, arguing that PG&E's failure to submit a timely application in the initial round was disqualifying under the Federal Power Act. *Id.* The court rejected that argument, and deferred to FERC's decision that PG&E was not disqualified to apply for a license for the orphaned project, because orphaned status could only occur if an incumbent failed to submit a timely renewal application. *Id.* at 916. The court did find that it had jurisdiction to consider FERC's decision to permit PG&E to apply for the orphaned project because, if it did not, petitioner may suffer an irreparable harm by having to compete with PG&E given its incumbent status. *Id.* at 914.

Plaintiffs' applications out of the lottery" (Mot. Ex. 1, at 19), but the public's interest is not concerned with whether any particular applicant is eligible for or selected in the lottery but, rather, that the Administration conducted the application process according to the established criteria. It did. Plaintiffs could have raised a challenge to the Administration's requirement that applicants accurately calculate the total costs set forth in Attachment B when the Administration announced that criteria in November 2023, before the application portal opened and before all other applicants prepared and submitted applications that comply with that and all other requisite criteria. The inequity that would result if the Administration were to excuse this requirement only for Plaintiffs is not in the public interest.

The public also has an interest in progressing the licensing process that the voters authorized in passing Question 4 in November 2022, and that the General Assembly mandated in legislation. The applicants whom the Administration determined are eligible for the lotteries for Standard Dispensary Licenses in Talbot and Calvert Counties have an interest in progressing the licensing process, as well, having spent considerable resources in applying. Plaintiffs contend that the public interest is not harmed as the public can readily obtain cannabis for adult use; however, there is only one dispensary operating in Calvert County currently and none in Talbot County.[3]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.

[3] https://mmcc.maryland.gov/Pages/dispensary_map.aspx.

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Respectfully submitted,
ANTHONY G. BROWN
Attorney General of Maryland

//s// James N. Tansey

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HEATHER B. NELSON
ATTORNEY NO. 0612130164
JAMES N. TANSEY
ATTORNEY NO. 1612140277
MORGAN E. CLIPP
ATTORNEY NO. 0712120170
Assistant Attorneys General
300 W. Preston Street, Suite 302
Baltimore, Maryland 21201
Office: (410) 767-1877
Fax: (410) 333-7894
heather.nelson1@maryland.gov
jamie.tansey@maryland.gov
morgan.clipp1@maryland.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on this 15th day of April 2024, a copy of the foregoing was served electronically, in accordance with MD E-File and TylerHost requirements, via MDEC on all parties entitled to service.

//s// James N. Tansey

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James N. Tansey