

## Municipalities Can Choose Cannabis Winners – Superior Court Confirms Local Authority over Cannabis Licensing



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A Superior Court judge confirmed that municipalities are not obligated to enter into Host Community Agreements (“HCA”) with recreational cannabis retailers. A prospective recreational cannabis retailer sued the City of Salem for refusing to enter an HCA with it. The decision affirms the important role municipalities play in the cannabis licensing process: they essentially have veto power over a prospective cannabis establishment seeking to operate within their borders by virtue of their authority to decide whether—and on what terms—to enter into an HCA.

In order to obtain a license from the Cannabis Control Commission (“CCC”), a prospective applicant for a cannabis cultivation, testing, manufacturing, or retail operation must demonstrate that it has entered into an HCA with the city or town where the operation will be located. The HCA can regulate the time, place, and manner of the applicant’s operation, and can mandate “community impact fees” to mitigate costs imposed on the municipality by the cannabis establishment. The community impact fee must be reasonably related to the municipality’s costs, and is limited to no more than 3% of the gross sales of the establishment.

### Facts of the Case

The city of Salem has an ordinance limiting the number of retail cannabis establishments in the city to five. The city established an application procedure and criteria that it would follow in order to determine whether to enter into an HCA with a prospective retail establishment. The city entertained applications from a number of establishments, and chose five to enter into HCAs with—the same number as available licenses for the city. Because an HCA is a prerequisite to apply for a license from the CCC, Salem effectively determined which applicants were eligible for a state license.

Mederi, Inc., the plaintiff in the case, is one of the retailers not chosen. Mederi sued, claiming that Salem had usurped the authority of the CCC in determining which establishments would be eligible for a license, and that it abused its discretion by failing to enter into an HCA with Mederi.

The court entered judgment for Salem and dismissed the complaint.

### Court Affirms Local Control over Cannabis Establishments

According to the court, Salem did not exceed its authority under the recreational cannabis statute (G.L. c. 94G, §§ 1–21) by only entering into HCAs with a limited number of prospective retailers. The court held that although the statute gives the CCC sole authority to award licenses, the statutory and regulatory scheme reserves a measure of local control for host communities through the use of HCAs. The statute and CCC’s regulations give local authorities discretionary authority over “substantive issues related to the time, place, and manner” of cannabis establishments, such as traffic impacts and geographic diversity. Applicants are not required to provide the CCC with information about these local factors, so the issues can only be addressed by municipalities through HCAs. The court observed that this balance makes sense given that local authorities are better positioned to evaluate local issues, and will bear the brunt of any adverse impacts.

### Local Decisions Reviewed for Abuse of Discretion

The court reviewed Salem’s specific decision regarding whether to enter an HCA with Mederi under a deferential, abuse-of-discretion standard. Salem’s application procedure for HCAs identified a number of criteria that would be considered relevant, including location, security plan, industry experience, and capitalization. Applications were reviewed by a committee that then made recommendations to the mayor. The mayor had ultimate authority to select applicants to negotiate an HCA, and was not bound by the committee’s recommendations.

Because Salem’s is a discretionary process, rather than a formal adjudicatory or evidentiary proceeding, the court declined to substitute its own judgment for the mayor’s, especially where the process called for the weighing of multiple criteria of possibly unequal weight. The court found that there was a rational basis for Salem’s decision, in part because six of the eight applicants—including Mederi—proposed locations on the same street, and the city had an interest in achieving geographical diversity among the approved retail establishments.

### Impact of Decision

This decision confirms that cities and towns maintain a substantial degree of control over the cannabis licensing process through HCAs. Municipalities essentially have veto power over a prospective cannabis establishment seeking to operate within their borders, by virtue of their authority to decide whether—and on what terms—to enter into an HCA. Where the local process for deciding whether to enter an HCA is a discretionary one, and the criteria considered are rationally related to local “time, place, and manner” issues such as traffic control and geographical diversity, a local decision will be all but unassailable in court.

Some cannabis industry representatives worry that this control gives municipalities too much power to extort fees and other expensive conditions from applicants. Indeed, Mederi asserted in litigation that the Salem mayor’s decision was the result of a “backroom deal” and based on which applicants were willing to give the most money to the city. The court found no evidence that successful applicants were chosen based on their willingness to pay fees, or that the unsuccessful applicants had offered less or objected to fees. But the significant discretionary authority given to municipalities does raise the specter of potential for abuse.

To maintain flexibility while administering a fair system and avoiding costly legal challenges, cities and towns should adopt a clear, discretionary process for evaluating potential cannabis establishments for HCAs—one where the ultimate decision requires weighing multiple identified factors, rather than simply tallying up the boxes checked by each applicant. Further, decisions should explicitly relate to traffic, geographic diversity, and other local impacts that the legislature left to cities and towns.

The Superior Court’s decision in *Mederi, Inc. v. City of Salem* is available [here](#).