STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, R.I. 02920

IN RE:	:	
DBR Medical Marijuana Enforcement.	:	**DBR No. 18MM001**

ORDER RE: MOTION TO AMEND AND MOTION TO DISMISS

I. Introduction

This matter arose from an Order to Show Cause why Order to Cease and Desist Unlicensed Marijuana Cultivation Activity Should not Issue, Notice of Pre-Hearing Conference and Appointment of Hearing Officer ("Order to Show Cause") issued on May 11, 2018 by the Department of Business Regulation ("DBR") to Thad Luzzi, Tyler Losacano, and Eric Sobaczewski ("Respondents"). Pre-hearing conferences were held on May 29 and November 15, 2018. On December 12, 2018, DBR moved to amend the Order to Show Cause. On January 7, 2019, the Respondents filed an objection to the motion to amend and filed a motion to dismiss and requested that certain cease and desist orders be issued against the Department. On February 27, 2019, the Department filed its objections to the Respondents' motions. A hearing was held on the various motions and objections on March 5, 2019. All parties were represented by counsel.

II. Jurisdiction

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 21-28.6-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and 230-RICR-100-00-2 *Rules of Procedure for Administrative Hearings* ("AHR").

III. Issue

Whether the motion to amend the Order to Show Cause should be granted or should the motion to dismiss be granted and should the cease and desist orders be issued.

IV. Arguments

The Respondents argued that DBR lacks jurisdiction over unlicensed marijuana activity and its authority is limited to licensing, revocation, and suspension. They requested a dismissal of the Order to Show Cause for failure to state a claim and objected to DBR's motion to amend. The Respondents seek a cease and desist order against DBR for exceeding its authority by contacting medical marijuana tagholders. DBR moved to amend the Order to Show Cause to which the Respondents objected, and DBR objected to the motion to dismiss and request for the issuance of cease and desist orders. The parties' arguments will be discussed more fully below.

V. Relevant Statutes and Regulation

Pursuant to R.I. Gen. Laws § 21-28-2.08, marijuana is classified as a Schedule I drug. However, R.I. Gen. Laws § 21-28.6-1 *et seq*. provides an exemption from this prohibition. The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act ("Act") regulates when and how the possession of medical marijuana is allowed. The Act initially only provided that the Department of Health ("DOH") regulated medical marijuana patients and caregivers and compassion centers.[1] In 2016, the Act was amended to allow the licensing of cultivators and the

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[1] R.I. Gen. Laws § 21-28.6-3 provides as follows:

> Definitions. For the purposes of this chapter:
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> (2) "Cardholder" means a person who has been registered or licensed with the department of health or the department of business regulation pursuant to this chapter and possesses a valid registry identification card or license.
> ***
> (18) "Primary caregiver" means a natural person who is at least twenty-one (21) years old. A primary caregiver may assist no more than five (5) qualifying patients with their medical use of marijuana.

provision that all marijuana plants be tagged[2] and to move the licensing of compassion centers to DBR.[3] 2016 P.L. ch. 142 Art. 14. DBR and DOH now have regulatory and enforcement responsibilities over various parts of the medical marijuana statutory licensing scheme.

DBR is the regulatory agency for marijuana plants tags that are required by all growers whether patients, caregivers, or cultivators. DBR now regulates cultivators who supply the compassion centers (now regulated by DBR). Cardholders (patients, caregivers) who grow together now are to be licensed by DBR via the cooperative cultivator license. Thus, DBR is now responsible for the regulatory oversight of medical marijuana production.

R.I. Gen. Laws § 21-28.6-3(12) defines "licensed cultivator" as "means a person, as identified in § 43-3-6,[4] who has been licensed by the department of business regulation to cultivate marijuana pursuant to § 21-28.6-16." Licensed cultivators are only to sell marijuana to licensed compassion centers. R.I. Gen. Laws § 21-28.6-16 provides in part as follows:

> Licensed cultivators. (a) A licensed cultivator licensed under this section may acquire, possess, cultivate, deliver, or transfer marijuana to licensed compassion centers. A licensed cultivator shall not be a primary caregiver cardholder and shall not hold a cooperative cultivation license. Except as specifically provided to the contrary, all provisions of the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, §§ 21-28.6-1 – 21-28.6-15, apply to a licensed cultivator unless they conflict with a provision contained in § 21-28.6-16.
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> (b) Licensing of cultivators - Department of business regulation authority. The department of business regulation shall promulgate regulations governing the manner

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> (19) "Qualifying patient" means a person who has been diagnosed by a practitioner as having a debilitating medical condition and is a resident of Rhode Island.
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> (20) "Registry identification card" means a document issued by the department of health that identifies a person as a registered qualifying patient, a registered primary caregiver, or authorized purchaser, or a document issued by the department of business regulation that identifies a person as a registered principal officer, board member, employee, volunteer, or agent of a compassion center.

[2] R.I. Gen. Laws § 21-28.6-15 provides for the medical marijuana plant tags.

[3] R.I. Gen. Laws § 21-28.6-12(c)(5) provides for DBR to license compassion centers.

[4] R.I. Gen. Laws § 43-3-6 defines "person" as "extends to and includes co-partnerships and bodies corporate and politic."

in which it shall consider applications for the licensing of cultivators, including regulations governing:

(1) The form and content of licensing and renewal applications;

(2) Minimum oversight requirements for licensed cultivators;

(3) Minimum record-keeping requirements for cultivators;

(4) Minimum security requirements for cultivators; and

(5) Procedures for suspending, revoking, or terminating the license of cultivators that violate the provisions of this section or the regulations promulgated pursuant to this subsection.

(c) A licensed cultivator license issued by the department of business regulation shall expire one year after it was issued and the licensed cultivator may apply for renewal with the department in accordance with its regulations pertaining to licensed cultivators.

(d) The department of business regulation shall promulgate regulations that govern how many marijuana plants, how many marijuana seedlings, how much wet marijuana, and how much usable marijuana a licensed cultivator may possess. Every marijuana plant possessed by a licensed cultivator must be accompanied by valid medical marijuana tag issued by the department of business regulation pursuant to § 21-28.6-15. Each cultivator must purchase at least one medical marijuana tag in order to remain a licensed cultivator.

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(f) Cultivators shall be subject to any regulations promulgated by the department of health or department of business regulation that specify how marijuana must be tested for items, including, but not limited to, potency, cannabinoid profile, and contaminants.

(g) Cultivators shall be subject to any product labeling requirements promulgated by the department of business regulation and the department of health.

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(i) Cultivators shall only be licensed to grow marijuana at a single location, registered with the department of business regulation and the department of public safety. The department of business regulation may promulgate regulations governing where cultivators are allowed to grow. Cultivators must abide by all local ordinances, including zoning ordinances.

(j) Inspection. Cultivators shall be subject to reasonable inspection by the department of business regulation or the department of health for the purposes of enforcing regulations promulgated pursuant to this chapter and all applicable Rhode Island general laws.

(k) The cultivator applicant shall apply to the bureau of criminal identification of the department of attorney general, department of public safety division of state police, or local police department for a national criminal records check that shall include fingerprints submitted to the Federal Bureau of Investigation. ***

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(l) Persons issued cultivator licenses shall be subject to the following:

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(5) If a licensed cultivator violates any provision of this chapter or regulations promulgated hereunder as determined by the department of business regulation, his or her license may be suspended and/or revoked.

R.I. Gen. Laws § 21-28.6-14 provides in part as follows.

Cooperative cultivations. (a) Two (2) or more qualifying cardholders may cooperatively cultivate marijuana in residential or non-residential locations subject to the following restrictions:

(1) Effective January 1, 2017, cooperative cultivations shall apply to the department of business regulation for a license to operate;

(2) A registered patient or primary caregiver cardholder can only cultivate in one location, including participation in a cooperative cultivation;

(3) No single location may have more than one cooperative cultivation. For the purposes of this section, location means one structural building, not units within a structural building;

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(6) Cooperative cultivations are restricted to the following possession limits:

(i) A non-residential, cooperative cultivation may have no more than ten (10) ounces of usable marijuana, or its equivalent, and an amount of wet marijuana set in regulations promulgated by the departments of health and business regulation, forty-eight (48) mature marijuana plants, and forty-eight (48) seedlings;

(ii) A residential, cooperative cultivation may have no more than ten (10) ounces of useable marijuana, or its equivalent, and an amount of wet marijuana set in regulations promulgated by the departments of health and business regulation, twenty-four (24) mature marijuana plants, and twenty-four (24) seedlings;

(iii) A non-residential or residential, cooperative cultivation must have displayed prominently on the premises its license issued by the department of business regulation;

(iv) Every marijuana plant possessed by a cooperative cultivation must be accompanied by a valid medical marijuana tag issued by the department of business regulation pursuant to § 21-28.6-15. Each cooperative cultivation must purchase at least one medical marijuana tag in order to remain a licensed cooperative cultivation; and

(v) Cooperative cultivations are subject to reasonable inspection by the department of business regulation for the purposes of enforcing regulations promulgated pursuant to this chapter and all applicable Rhode Island general laws.

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(10) The department of business regulation shall promulgate regulations governing the licensing and operation of cooperative cultivations, and may promulgate regulations that set a fee for a cooperative cultivation license.

> (b) Any violation of any provision of this chapter or regulations promulgated hereunder as determined by the department of business regulation may result in the revocation/suspension of the cooperative cultivation license.

R.I. Gen. Laws § 21-28.6-13 provides that "[t]his chapter shall be liberally construed so as to effectuate the purposes thereof."

DBR and DOH promulgated regulations regarding their respective authority and responsibility over medical marijuana. DBR's regulation, 230-RICR-80-5-1, *Medical Marijuana* ("MM Regulation") provides further requirements regarding the licensing and enforcement for cultivators. Pursuant to the Act, § 1.1(C) of the MM Regulation provides that DBR is responsible for licensing, operational requirements, and enforcement for compassion centers, licensed cultivators, and cooperative cultivations. DBR and DOH also determined that DBR will primarily administer all aspects of the plant tag program to fulfill the state obligation to monitor and verify compliance with the statutory requirements for tagholders.

VI. Discussion

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain

ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Motion to Amend

Section 2.11 of the AHR provides that any party may file motions that are permissible under the AHR or the Super. R. Civ. Pro. Thus, the determination of whether to grant the DBR's motion to amend turns on the applicability of Super R. Civ. Pro. 15.[5] The motion to amend seeks to add certain items to the allegations and to add a second count. The Respondents argued that both counts fail to state a claim and are beyond DBR's authority so that the motion to amend should be denied.

DBR filed the Order to Show Cause in May, 2018 and now seeks to amend it. Discovery has not been completed. Delay is an insufficient reason to deny a motion to amend. Rather it is the objector's burden to show that granting the motion creates substantial prejudice to the opposing party. See *Wachsberger v. Pepper et al.*, 583 A.2d 77 (R.I. 1980).

Since the rules allow liberal amendments unless there is undue prejudice to the objector, the motion to amend is granted. The Respondents' arguments against amending the Order to Show Cause will be addressed below in terms of the motion to dismiss. For ease of reference, the amended order shall be referred to as the Amended Order.

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[5] Super. R. Civ. P 15(a) provides in part as follows:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend the pleading at any time within twenty (20) days after the pleading is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

C. Motion to Dismiss

In determining a motion to dismiss for failure to state claim, the allegations contained in the claimant's motion will be assumed to be true and all doubts viewed in the light most favorable to the claimant. The motion should not be granted unless it is clear beyond a reasonable doubt that the claimant would not be entitled to relief under any sets of facts that could be proven in support of claimant's claim. *Ho-Rath v. Rhode Island Hospital*, 115 A.3d 938 (R.I. 2015); *Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055 (R.I. 1991); and *Ryan v. Department of Transp.*, 420 A.2d 841 (R.I. 1980).

DBR's Amended Order alleges that the lessees of the Westerly property at issue ("Property"), Thad Luzzi and Eric Sobaczewski, and their employee, Tyler Losacano (the Respondents), are engaging in unlicensed cooperative marijuana cultivation and marijuana cultivation in violation of the Act. Count 1 of the Amended Order alleges that the Respondents are in violation of R.I. Gen. Laws § 21-28.6-14(1)(1) by operating a cooperative cultivation without a license. Count II of the Amended Order alleges that the Respondents are cultivating marijuana in violation of the Act.

All administrative agencies powers are derived from statute, and an agency cannot do what is not provided for in law. "An administrative agency is a product of the legislation that creates it, and it follows that '[a]gency action is only valid, therefore, when the agency acts within the parameters of the statutes that define [its] powers.'" *In re Advisory Opinion to the Governor,* 627 A.2d 1246, 1248 (R.I. 1993) (citation omitted). See also *Iselin v. Ret. Bd. of Employees' Ret. Sys. of Rhode Island*, 943 A.2d 1045 (R.I. 2008); and *F. Ronci Co. v. Narragansett Bay Water Quality Management District Commission,* 561 A.2d 874 (R.I. 1989).

The Respondents argued that DBR only has authority over licensees so that it only can regulate those who are licensed cooperative cultivators. The Respondents argued that DBR does not have authority over qualifying cardholders or primary caregiver cardholders (DOH does) who do not elect to grow together. The Respondents argued that DBR only has limited authority regarding medical marijuana with the other powers of enforcement to be exercised by DOH or law enforcement. The Respondents argued that neither the Act nor the MM Regulation grant DBR authority beyond those acts requiring licenses.

"It is only after the licensing authority has been delegated by the legislature 'either expressly or by necessary implication' that the local governing bodies can act." *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002) (citation omitted). In this case, the authority over cultivators and tagholders has been delegated to DBR to license. A license is a privilege entitling a person to engage in an activity or business or occupation that is otherwise prohibited by law. *Zannelli v. Di Sandro*, 121 A.2d 652 (R.I. 1956).

The Court will not interpret a licensing statute so that it is inconsistent with the purpose of the licensing statute. Thus, the Court rejected an interpretation of licensing exemptions that would have circumvented the purposes of such licensing exemptions in *Warwick v. Almac's*, 442 A.2d 1265 (R.I. 1982). In that case, while only one part of the statute included express prohibitory language, the Court found that when the legislature enacts a licensing statute and imposes certain conditions for the granting of such license, it would be unreasonable to interpret that statute as not requiring licensees to comply with those conditions. Finally, the Court found that injunctive relief was allowed for all violations and not just some since it would be unreasonable to limit the relief allowed. *Id.* See *Berkshire Cablevision v. Burke*, 488 A.2d 676 (R.I. 1985).

In the cultivator statute, DBR is authorized to license cultivators and cooperative cultivators. That authority includes considering applications for licensing and regulating the form and content of licensing and applications and procedures for suspending, revoking, or terminating cultivator licensees who violate said law. In order to be licensed as a cultivator or a cooperative cultivator, an application must be filed with DBR. If an application is denied by the DBR, it would be unreasonable that the applicant could then engage in the business for which its license application had been denied and that DBR would have no authority to seek enforcement against the failed applicant. Similarly, DBR in this action argued that the Respondents are engaging in activity that requires a DBR license but are not licensed for that activity so are violating the Act.

In *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), the Court found that in order to effectuate the legislative intent behind R.I. Gen. Laws § 3-5-21 (revocation or suspension of liquor licenses) that the statute must be construed to allow municipalities to impose conditions upon the issuance of a liquor license. The Court found that R.I. Gen. Laws § 3-1-5's provision that the liquor licensing statute be construed liberally in aid of its purpose to provide reasonable control of the traffic in alcoholic beverage provided that the standard for the imposition of such conditions of licensing be reasonable.[6]

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[6] More fully, the Court found as follows:

> [W]e note that the power to regulate business through licensing is an attribute of sovereignty, and may be exercised by a municipality only upon an express or implied delegation of this power. (citation omitted). According to § 3-5-15, the General Assembly has delegated to "the town councils or license boards of the several towns" the full and plenary power to issue, inter alia, class-B liquor licenses. This authority to issue such licenses is logically and appropriately complemented by § 3-5-21, which legislatively empowers these same governing bodies to revoke or suspend a liquor license for breach of any conditions upon which it was issued. From a review of the language in § 3-5-21, it is our considered judgment that the Legislature intended in conferring the power to revoke or suspend to implicitly authorize municipalities to attach conditions to the issuance of liquor licenses. If such an implication is not read into the statute, the power to revoke or suspend becomes a nullity since there is no basis upon which it can be exercised. (citation omitted). This court has consistently stated that we shall not construe a statute in a way that would "'attribute to the Legislature an intent that would result in absurdities or would defeat the underlying purpose of legislation.'" *City of Warwick v. Aptt*, 497 A.2d 721, 724 (R.I. 1985). We also note that "statutory provisions are ordinarily broadened on the principle of necessary

Similar to *Thompson*, R.I. Gen. Laws § 21-28.6-13 provides, "[c]onstruction. This chapter shall be liberally construed so as to effectuate the purposes thereof." R.I. Gen. Laws § 21-28.6-2(8) provides as follows:

> Legislative findings . . . (8) The goal of the medical marijuana program is to create a system that is transparent, safe, and responsive to the needs of patients. Consequently, the medical marijuana program requires regulation and a comprehensive regulatory structure that allows for oversight over all suppliers of medical marijuana while ensuring both safety and patient access.

Thus, in order to fulfill the purposes of the Act, the program is to be regulated with oversight to ensure safety and patient access. Thus, reasonable regulatory oversight would support that action be taken against activity that could be found to be unlicensed activity.

However, DBR does not have to rely on its implicit authority to pursue enforcement against people that could be engaging in activity that is required to be licensed by DBR as DBR also has explicit authority to engage in such enforcement activity.

In *Liquori v. Aetna Casualty & Sur. Co.*, 384 A.2d 308 (R.I. 1978), the Court found that the State's Insurance Commissioner (the DBR director) did not have the authority to order an insurance company to reinstate coverage. The Court found that the commissioner had great

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implication only where the absence of some provision would render impossible the accomplishment of the clear purposes of the legislation." *New England Die Co. v. General Products Co.*, 92 R.I. 292, 298, 168 A.2d 150, 153 (1961). Accordingly, we find that in order to effectuate the legislative intent behind § 3-5-21, the statute must necessarily be construed to imply that municipalities have the authority to impose conditions upon the issuance of a liquor license.

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Apparently the trial judge expressed a great deal of concern over the prospect that licensing boards and towns would utilize their allegedly unbridled powers under § 3-5-21 to impose unfair and absurd conditions upon the holders of liquor licenses. Without digressing to any great length, we find the language in § 3-1-5 to be dispositive of this matter:

"Liberal construction of title. -- This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages."

Clearly the language of § 3-1-5 mandates that our construction of § 3-5-21 be in accordance with the declared purpose of title 3. In effect § 3-1-5 therefore restricts the power of the towns and licensing boards to impose conditions under § 3-5-21 to those which promote the "*reasonable control of* * * * *alcoholic beverages.*" (Emphasis added.) Succinctly stated, § 3-1-5 requires that any conditions that a municipality may choose to enforce upon the issuance of a liquor license *must be reasonable. Thompson*, at 841-842.

licensing power, but it did not permit him to automatically impose whatever lesser sanctions he deemed fit to remedy a given situation. However, the law had changed by the time of *Blue Cross & Blue Shield of R.I. v. McConaghy*, 2002 R.I. Super. LEXIS 25 so that the insurance commissioner had explicit authority under a law enacted after *Liquori* that provided that DBR could "require the [insurance] licensee to take such actions as are necessary to comply with Title 27 [insurance statute] or the regulations thereunder." Thus, under R.I. Gen. Laws § 42-14-16(a)(4) the insurance commissioner could order an insurance company to pay refunds for payments collected in violation of the law.

Blue Cross found that while *Liquori* and *Narragansett Electric Co. v. Burke*, 404 A.2d 821 (R.I. 1979) refused to expand the powers of regulatory agencies beyond those specifically enumerated in their enabling statutes, DBR now had the statutory authority to order refunds since it could take such actions that were necessary to ensure statutory compliance. Similarly, such authority is found in R.I. Gen. Laws § 42-14-16.1 which provides in part as follows:[7]

> Order to cease and desist. (a) If the director, or his or her designee, has reason to believe that any person, firm, corporation, or association is conducting any activities requiring licensure under title 27 or any other provisions of the general laws or public laws within the jurisdiction of the department without obtaining a license, or who after the denial, suspension, or revocation of a license conducts any activities requiring licensure under title 27 or any other provisions of the general laws or public laws within the jurisdiction of the department, the department may issue its order to that person, firm, corporation, or association commanding them to appear before the department at a hearing to be held no sooner than ten (10) days nor later than twenty (20) days after issuance of that order to show cause why the department should not issue an order to that person to cease and desist from the violation of the provisions of applicable law.

DBR has the authority to order a person, firm, corporation, or association to cease and desist from engaging in activities that require licensure under provisions of the general laws or public laws within the jurisdiction of DBR without obtaining a license, or who after the denial,

[7] Effective June 22, 2018, P.L. 2018, ch. 47, art. 3, § 8 amended this statute to include not just insurance but all provisions of the law within the jurisdiction of DBR.

suspension, or revocation of a license conducts any activities requiring licensure of any other provisions of the general laws or public laws within the jurisdiction of DBR. DBR argued that the Respondents' business plan is an unlicensed cooperative and they are cultivating marijuana without any kind of license, and DBR argued that the Respondents are trying to fall under the auspices of medical marijuana by renting premises to tagholders.

The Respondents argued that DBR is interfering with their rights as landlords. However, DBR is alleging that their activity is in violation of the Act. Such allegations are no different than ordering a property owner to clean up his or her property that had been leased to tenants engaged in unlicensed auto salvage activity.[8] DBR's allegations go to the Respondents' involvement with the Property and DBR has made various allegations about the Respondents' activities that DBR believes violates the Act.

The Respondents argued that since they are not patient or primary caregiver cardholders, they cannot be cooperatively cultivating pursuant to the statute, and that providing shared space is not prohibited by the Act or MM Regulation. The Respondents argued that DBR's various reasons given in the Amended Order for why DBR believes the Respondents are engaging in unlicensed cultivation are arbitrary and capricious and amount to a promulgation of a rule by hearing rather than regulation. DBR has the authority to pursue what it considers activity in violation of the Act and has listed that activity in the Amended Order. DBR's action is predicated on what and why it considers the Respondents' activities to be unlicensed cooperative cultivation. Based on the allegations in the Amended Order, it cannot be concluded that the Amended Order has failed to state a claim because the Respondents are not cardholders or landlords. Instead, the issue is whether given the facts at issue, the Respondents are in violation of the Act.

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[8] See *In the Matter of: Unlicensed Salvage Yard Activity on Providence Plat #30, Scott Morris d/b/a "Abby Road Properties" et al.*, DBR No. 18AS001 (1/29/19).

Similarly, Count II revolves around the issue of whether marijuana is being cultivated in violation of the Act; in other words, can the Respondents do what they are doing without a DBR license. The Respondents argued that DBR has engaged in rulemaking without the appropriate procedure since it has created a definition of cultivation of marijuana in violation of the Act without promulgating a regulation. DBR argued that the definition at issue is the requested cease and desist language that applies to this situation. In other words, DBR is requesting language for a cease and desist order that describes the actions being performed by the Respondents that it believes are in violation of the Act. The issue at hearing is whether the acts alleged constitute unlicensed cultivation and if so, should a cease and desist order issue.

D. Request to Issue Cease and Desist Order – Standing of Tagholders

The Respondents argued that DBR should be ordered to cease and desist from prohibiting primary caregivers and qualified patients from growing on the Property. This argument arises from letters that DBR sent to tagholders after the issuance of the Order to Show Cause informing tagholders that unauthorized cultivation was occurring on the Property so that DBR was refunding the recipients' tag orders and informing the recipients that they could place an order for tags for an acceptable grow location.

DBR argued that the Respondents do not have standing to assert challenges to said letters as it would be for tagholders to challenge them. The Respondents argued that this is not a standing issue since DBR brought the action so conferred standing on the Respondents to challenge the letters to tagholders. The Respondents argued that DBR acted beyond its authority and harmed them by interfering with their business model and contractual relations.

"A party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing." *Tanner v. East Greenwich*, 880 A.2d 784, 792 (R.I.

2005). To determine whether a plaintiff has standing, the court must focus on the party who is advancing the claim rather than the issue sought to be adjudicated. An injury in fact is economic or otherwise and is defined as an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. The Court has recognized the injury must be of a personal nature and distinct from the community as a whole. *N&M Prop., LLC v. Town of W. Warwick*, 964 A.2d 1141 (R.I. 2009).

A tagholder could have challenged DBR's determination about an appropriate grow location. Here, the Respondents are challenging DBR's determination that the Property is the site of an unlicensed cultivation and cooperative cultivation. The current administrative hearing will decide whether that determination was correct or not. The Respondents argued that DBR should not have informed the tagholders about its determination until the administrative proceeding is over as DBR's determination is being appealed. There is nothing stopping the Respondents from informing their tenants of their appeal of DBR's determination. However, it is not in the scope of this administrative hearing for the Respondents to assert the tagholders' challenges. The Respondents may want to rent space to tagholders but the fact that DBR is challenging their business model does not mean they have suffered an economic injury that allows them to assert a challenge on behalf of the tagholders about not being able to use the grow location. The Respondents are already challenging DBR's actions against them regarding the activities at the Property. The Respondents are challenging DBR's determination of what the Respondents refer to as their business model, but that does not include asserting challenges on behalf of former tenants that the tenants could have challenged and chose not to.[9]

[9] As DBR pointed out, tagholders have substantial privacy protections in the Act. R.I. Gen. Laws § 21-28.6-6(k)(1). It would infringe on the tagholders' privacy rights to allow the Respondents to assert challenges to DBR on behalf of tagholders when the Respondents are not those tagholders. Indeed, in reviewing a town ordinance that would require registered medical marijuana cardholders to reveal their identity, the Superior Court found that "[t]his imminent

E. Inspection

The Respondents argued that DBR's hand-delivery of the notice of inspection to the tagholders and inspection on the same day violated the MM Regulation's inspection requirements for tagholders. Separate and apart from the fact that the Respondents do not have standing regarding the tagholders' claims (see above), Section 1.9(L) of the MM Regulation sets out a process whereby when DBR has reasonable grounds to believe a tagholder has not obtained or renewed tags and may be in violation of the Act and/or regulations that DBR may send a written notice and a second written notice and failing a response may try other methods of contact. Said regulation provides that if an alternative contact attempt has been unsuccessful then DBR may conduct reasonable inspections and shall make an effort to schedule inspections in advance. Said regulation provides that this process is discretionary (may)[10] but the Respondents argued that DBR's failure to follow this process for tagholders made its inspection "improper" and is being used to penalize the Respondents.

The United States Supreme Court has held that any expectation of privacy in commercial premises is less than a similar expectation in an individual's home. *New York v. Burger,* 482 U.S. 691, 700 (1987). Furthermore, certain "closely regulated" industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor. *Id.*

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invasion of privacy presents a concrete and particularized injury, leading this Court to find that the Does [anonymous tagholders] have standing to challenge the Ordinance." *R.I. Patient Advocacy Coalition Found. (RIPAC) v. Town of Smithfield,* 2017 R.I. Super. LEXIS 150, *5. In other words, allowing the Respondents to assert challenges on behalf of tagholders could cause the tagholders themselves an injury in fact.

[10] The Rhode Island Supreme Court has held that while the word "shall" generally indicates a mandatory requirement, the use of shall is only directory if not accompanied by a sanction for failure to comply with the mandatory language especially in statutes designed to secure order, system, and dispatch. See *Providence Teachers Union v. McGovern,* 319 A.2d 358 (R.I. 1974). The Court also held that statutes imposing apparently mandatory language on public officials are often directory in nature. See *New England Development, LLC v. Berg,* 913 A.2d 363 (R.I. 2007). Here the regulatory language is clearly discretionary in the use of "may," and "shall" refers to making an effort to schedule inspections in advance. However, there is no sanction attached to the failure to make an effort to schedule an inspection in advance. Indeed, as indicated in Court cases regarding inspections (see below), it would not always be prudent to schedule inspections in advance.

Essentially, administrative inspections without court orders are often necessary to further an important state regulatory scheme. *Id.* at 710. As the Court found, "[i]f an inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id.* at 710 (citation omitted).

Relying on *New York v. Burger,* the Rhode Island Supreme Court in *Keeney v. Vinagro*, 656 A.2d 973 (R.I. 1995) found that a warrantless search of a pervasively regulated business is reasonable if the following three (3) criteria are met:

1) "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."
2) "the warrantless inspections must be necessary to further the regulatory scheme."
3) "the statute's inspection program, in terms of the certainty and regularity of its application," must provide "a constitutionally adequate substitute for a warrant." *Keeney*, at 975. See also *Burger*, 482 U.S. at 702-03.[11]

DBR has statutory authority over medical marijuana tagholders.[12] While parts of the medical marijuana program are not commercial such as patients (e.g. patient cardholders), DBR

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[11] *Vinagro v. Reitsma*, 260 F.Supp.2d 425 (D. R.I. 2003) declined to extend this exemption from warrant requirements when a regulatory agency conducted an inspection in conjunction with a criminal investigation. There is no evidence that such facts would apply to this matter. While some states have declined to apply *Burger* to state matters, the *Burger* test has been adopted by this State. And indeed, the U.S. Supreme Court has favorable commented on *Burger* when discussing how administrative searches without particularized suspicions of misconduct do not require a warrant. The Court stated in *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)

> We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. See, *e.g., New York v. Burger,* 482 U.S. 691, 702–704, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (warrantless administrative inspection of premises of "closely regulated" business); *Michigan v. Tyler,* 436 U.S. 499, 507–509, 511–512, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 534–539, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (administrative inspection to ensure compliance with city housing code).

[12] The statutory scheme for marijuana plant tags is found in R.I. Gen. Laws § 21-28.6-15. R.I. Gen. Laws § 21-28.6-15(b) provides as follows:

> (b) *Enforcement:*
> (1) If a patient cardholder, primary caregiver cardholder, or licensed cultivator violates any provision of this chapter or the regulations promulgated hereunder as determined by the departments of business regulation and health, his or her medical marijuana tags may be revoked. In addition, the

has statutory authority over the production of medical marijuana. Medical marijuana is a closely regulated industry not only by virtue of its licensing scheme[13] but also as an exception to a criminal drug statute.[14] Section 1.9(B) of the MM Regulation provides that DOH and DBR agreed that DBR would take the lead on enforcing the medical marijuana plant tag program.[15]

In receipt of a complaint, DBR inspected tagholders at a commercial building. There is a strong public interest in ensuring that marijuana that is grown and used/sold complies with the Act; otherwise, it is a criminal violation. There is a strong public safety interest in compliance with the Act. Thus, there is a strong government interest that informs the regulatory schemes pursuant to which inspections can be made (public safety, public health, access to medical marijuana).

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department that issued the cardholder's registration or the license may revoke the cardholder's registration or license pursuant to § 21-28.6-9.

(2) The department of business regulation may revoke and not reissue, pursuant to regulations, medical marijuana tags to any cardholder or licensee who is convicted of; placed on probation; whose case is filed pursuant to § 12-10-12 where the defendant pleads nolo contendere; or whose case is deferred pursuant to § 12-19-19 where the defendant pleads nolo contendere for any felony offense under chapter 28 of title 21 ("Rhode Island Controlled Substances Act") or a similar offense from any other jurisdiction.

(3) If a patient cardholder, primary caregiver cardholder, licensed cooperative cultivation, or licensed cultivator is found to have mature marijuana plants without valid medical marijuana tags, the department or health or department of business regulation shall impose an administrative penalty on the patient cardholder, primary caregiver cardholder, licensed cooperative cultivation, or licensed cultivator for each untagged mature marijuana plant not in excess of the limits set forth in § 21-28.6-4, § 21-28.6-14 and § 21-28.6-16 of no more than the total fee that would be paid by a cardholder or licensee who purchased medical marijuana tags for such plants in compliance with this chapter.

(4) If a patient cardholder, primary caregiver cardholder, or licensed cooperative cultivation is found to have mature marijuana plants exceeding the limits set forth in § 21-28.6-4, § 21-28.6-14, and § 21-28.6-16 in addition to any penalties that may be imposed pursuant to § 21-28.6-9, the department of health or department of business regulation may impose an administrative penalty on that cardholder or license holder for each mature marijuana plant in excess of the applicable statutory limit of no less than the total fee that would be paid by a cardholder who purchased medical marijuana tags for such plants in compliance with this chapter.

[13] The Act regulates the purchasers, users, growers, and sellers of medical marijuana and where and how it can be grown.

[14] In its brief, DBR pointed out that the federal government in its discretion would not prosecute those entities who are in compliance with state marijuana regulations that are enforced by the state.

[15] See also DOH's regulation, *Medical Marijuana Program*, 216-RICR-20-10-3.6.2(B)(1).

The Respondents argued that the inspection never corroborated the complaint that caused DBR's inspection of the tagholders and is only mentioned in the Order to Show Cause as the reason for the inspection. DBR has a right to inspect whether it receives a complaint or not. Indeed, it would render an administrative inspection statute of a closely regulated industry meaningless to interpret such a statute to only allow inspections and enforcement only on the topic of a complaint filed with an agency. Specifically, the statutory and regulatory requirements and potential violations by Department licensees would often not be within the knowledge of a complainant. A complaint might cause an inspection but such an inspection can also find other possible violations not included in the complaint. If not, DBR would be curtailed in enforcing the statutory and regulatory requirements for its licensees which would render the licensing requirements and enforcement provisions meaningless as DBR would be unable to enforce statutory and regulatory requirements. It is for those reasons that *Keeney* adopted *Burger* regarding warrantless inspections for closely regulated businesses. *Burger* found that for regulatory inspections to be effective and serve as a deterrent, unannounced, even frequent, inspections are essential.

Based on case law, DBR has the right to inspect its licensees without receiving a consumer complaint; otherwise, it would be unable to enforce all the statutory and regulatory requirements of its licensees. Therefore, the result of the inspection in reaction to a complaint is irrelevant in that DBR has the general right to inspect its licensee since warrantless inspections are necessary for the furtherance of the regulatory scheme. Nonetheless, in this matter, the complaint related to a marijuana order emanating from the Property – where DBR's tagholders were located - would reasonably require an unannounced inspection in person to see if such an odor was detected.

Cooperative cultivation is subject to "reasonable inspections" by DBR. R.I. Gen. Laws § 21-28.6-14(a)(6)(v). Cultivators are subject to "reasonable inspections" by DBR. R.I. Gen. Laws

§ 21-28.6-16(j). The MM regulation provides for "reasonable inspection" by DBR of tagholders. Section 1.9(L)(5). While the MM Regulation provides for written notice prior to inspection of tagholders, such provisions are not mandatory but rather are limited by reasonableness. See *Thompson* ("reasonable" is a permissible standard for a grant of authority to an agency).

DBR's reasonable inspection of tagholders at the Property led DBR to conclude that activities in violation of the Act were occurring at the Property. It may be in some situations, a notice sent either by hand or mail as detailed in the MM Regulation would be how the DBR would proceed with ensuring compliance, but it is not required for all situations. The inspection was not an issue of criminal law or a criminal search. Rather it was a regulatory inspection that resulted in DBR concluding that the Respondents are in violation of the Act. That conclusion by DBR is being challenged by the Respondents via the hearing process.

F. Motion to Strike

The Respondents moved to strike paragraphs ten (10) to 13 of Amended Order that recite information regarding criminal charges against Respondent Losacano as irrelevant to the issue of cooperative cultivation and because criminal charges are outside DBR's authority. DBR objected to the motion as untimely (241 days after the issuance of the Order to Show Cause rather than the 20 days allowed by Super R. Civ. Pro. 12(f)) and that this information is admissible under R.I. Gen. Laws § 42-35-10(1) (rules of evidence for administrative hearings). DBR is not seeking to prove its case on the fact that Losacano was criminally charged, but rather argued that the facts alleged that gave rise to the criminal charge also support DBR's contentions in its action. DBR seeks to show that Losacano was transporting marijuana as part of unlicensed cultivation of marijuana. The issue of the charges and alleged actions by Losacano should be addressed at hearing as to admissibility and/or relevance. There are no grounds to strike such allegations.

VII. Conclusion

Based on the foregoing, the undersigned grants the DBR's motion to amend and denies the Respondents' motion to dismiss and their motion to strike and their motion that DBR cease and desist from sending letters to tagholders.

Prior to a hearing, the parties may conduct and complete discovery. A status conference shall be scheduled for the purpose of setting a discovery schedule and to address any other relevant issues.[16]

Entered this 25th day of April, 2019.

Catherine R. Warren
Hearing Officer

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(a) WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF A PETITION DOES NOT STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 25 day of April, 2019, that a copy of the within Order was sent by electronic delivery and first class mail, postage prepaid to David J. Pellegrino, Esquire, and John E. Ottaviani, Esquire, Partridge Snow & Hahn, 40 Westminster Street, Suite 1100, Providence, R.I. 02903 and by electronic delivery to Jenna Giguere, Esquire, and Sara Tindall-Woodman, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 68, Cranston, Rhode Island.

[16] If the parties prefer to agree to a discovery schedule without a status conference, they shall inform the undersigned of their agreed to schedule.