GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

TO: **Martha Jenkins**
General Counsel
Alcoholic Beverage Regulation Administration

FROM: **Brian K. Flowers** BKF
Deputy Attorney General
Legal Counsel Division

DATE: **February 1, 2022**

SUBJECT: **Legal Analysis – Application of Fifty Point Preference Legislation to Current Cases**
(AL-22-171 B)

The Council recently adopted emergency and temporary legislation designed to clarify a 50-point preference that applies to application for licensure as a medical marijuana dispensary, cultivation center, or testing laboratory. You asked whether this emergency and temporary legislation may be applied to applicants that previously submitted a letter of intent but have not undergone the full application process. Your agency may – indeed, must – apply this legislation to pending applications.

BACKGROUND

Under the Legalization of Marijuana for Medical Treatment Initiative of 1999,[1] the District's medical marijuana program is jointly overseen by the Alcoholic Beverage Control Board ("Board") and the Alcoholic Beverage Regulation Administration ("ABRA").[2] As part of that program, "[e]ach dispensary, cultivation center and testing laboratory" must be registered with

[1] Effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.01 *et seq.*).
[2] *See* D.C. Official Code § 25-204.02(a).

ABRA.[3] To start, a business interested in applying for registration must submit a letter of intent that formally notifies ABRA of its intent to apply.[4] The application process itself is competitive due to limits on how many of these dispensaries, cultivation centers, and testing laboratories may operate,[5] and one competitive element of that process is that an application "shall be awarded a preference equal to 50 points or 20% of the available points, whichever is more," if the applicant business qualifies as a "medical cannabis certified business enterprise."[6] (We will refer to this as the "CBE preference.")

The emergency and temporary legislation at issue here was designed to clarify who qualifies as a medical cannabis certified business enterprise for the purpose of the CBE preference. Previously, that category was not one that the Department of Small and Local Business Development ("DSLBD") would certify under its governing statute,[7] even though the category had "certified business enterprise" in its name and was defined in a way that closely resembled an equity impact enterprise, a category of business enterprise that DSLBD certifies.[8] This state of affairs generated confusion, which led to the emergency and temporary legislation at issue: the Fifty-Point Preference Clarification Emergency Amendment Act of 2021 ("Emergency Act")[9] and the Fifty-Point Preference Clarification Temporary Amendment Act of 2021 ("Temporary Act")[10] This emergency and temporary legislation changed the law governing this process. It stated that, to be a medical cannabis certified business enterprise, a business must, among other things, be certified as an equity impact enterprise.[11]

ANALYSIS

Your question arises because the Emergency Act went into effect 8 days before the application process began, but well after the letter of intent process closed.[12] Our understanding is that some applicants believe ABRA should not apply the Emergency Act to pending applications because it did not apply during the time when prospective applicants sent their letters of intent. In our

[3] D.C. Official Code § 7-1671.06(d)(1).

[4] 22-C DCMR § 5401.2 – 5401.4.

[5] *See* D.C. Official Code § 7-1671.06(d)(2) and (3).

[6] *Id.* § 7-1671.06(d)(5)(A).

[7] That statute (following a 2014 renaming) is the Small and Certified Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq*.). Categories of certified business enterprise are listed in Part D, Subpart 1 of the Act (D.C. Official Code §§ 2-218.31 – 2-218.39).

[8] *See* Fifty-Point Preference Clarification Emergency Declaration Resolution of 2021, § 2(d), effective November 2, 2021 (Res. 24-283; 68 DCR 11956) (describing the confusion about the prior law); D.C. Official Code § 2-218.02(8A) (definition of an equity impact enterprise).

[9] Effective November 18, 2021 (D.C. Act 24-211; 68 DCR 12363).

[10] Enacted on December 22, 2021 (D.C. Act 24-257; 68 DCR 14082).

[11] *See* Emergency Act § 2; Temporary Act § 2. This memorandum does not offer substantive commentary (including any policy analysis) on the Emergency and Temporary Acts; it reaches only those Acts' applicability to current cases.

[12] *See* 22-C DCMR § 5401.2 (noting the limited timeframe for submitting letters of intent); Medical Cannabis Program: Public Notice, 68 DCR 12526 (Nov. 26, 2021) (noting that the letter of intent process closed on May 21, 2021).

view, the Emergency Act governs current applications, as will the Temporary Act once it becomes effective.

When a question like this arises, a court may need to engage in the complex inquiry of whether applying the new law to pending cases would render that law "retroactive" (or, put differently, give that law, "retroactive effect"). Contrary to how we would ordinarily use the word "retroactive,"[13] a statute is not considered retroactive under governing case law "merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf v. Usi Film Prods., Inc.*, 511 U.S. 244, 270 (1994). A statute is not retroactive unless it would "impair rights a party possessed when she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Frazier v. DOES.*, 229 A.3d 131, 140 (D.C. 2020) (cleaned up).[14]

We need not engage in that complex inquiry here, however. Before a court asks whether applying new legislation to pending cases would give that legislation retroactive effect, it asks whether the legislature "has expressly prescribed the statute's proper reach, and in the absence of language as helpful as that," whether the court can "draw a comparably firm conclusion about the temporal reach specifically intended by applying our normal rules of construction." *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 37 (2006) (cleaned up). If it can, that intended temporal reach controls. *Id.* This principle resolves your question because normal rules of statutory construction make it clear that the Emergency and Temporary Acts apply to pending applications.

The Acts reach these applications because of the "basic principle of statutory interpretation" that "each provision of [a] statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous. *Grayson v. AT&T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (en banc) (original brackets and internal citation omitted). The Emergency and Temporary Acts would be superfluous if they did not apply to currently pending applications. Emergency legislation operates for only 90 days,[15] and temporary legislation expires after 225 days,[16] so the Emergency and Temporary Acts cumulatively operate for less than a year (with a likely 2-day gap in between them).[17] They will thus expire before the next set of applications can be sent in. The medical marijuana registration process operates on an annual basis,[18] and

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[13] *See Retroactive*, Black's Law Dictionary (11th ed. 2019) (defining it as "extending in scope or effect to matters that have occurred in the past"); *Retroactive*, The Merriam-Webster Dictionary (2004) (defining it as "made effective as of a date prior to enactment").

[14] We also note that truly retroactive legislation is not categorically impermissible. *See Landgraf*, 511 U.S. at 266 (discussing particular types of impermissible retroactive legislation).

[15] *See* D.C. Official Code § 1-206.02(c)(1).

[16] *See, e.g.*, Temporary Act § 5(b) ("This act shall expire after 225 days of its having taken effect").

[17] The Emergency Act will expire on February 16, 2022, and the Temporary Act is not projected to become law until February 18, 2022. *See* https://lims.dccouncil.us/Legislation/B24-0479 (expiration date of the Emergency Act); https://lims.dccouncil.us/Legislation/B24-0480 (projected law date for the Temporary Act).

[18] D.C. Official Code § 7-1671.05(3) (medical marijuana registration cards expire annually). One recently adopted exception is that, those who register between November 5, 2021 and January 31, 2022 will receive registration cards that expire biennially. *See* Medical Marijuana Patient Access Emergency Amendment Act of 2021, effective November 5, 2021 (D.C. Act 24-206; 68 DCR 12188).

based on this year's application timeframe,[19] ABRA will not begin accepting next year's applications until November 2022. Yet the Temporary Act is projected to expire on October 1, 2022, which means it (like the Emergency Act) cannot apply to applications in the next application period (and the Emergency Act cannot even apply to letters of intent for that period). The only way to give these acts effect is to apply them to the applications submitted for this application period.

If you have any questions, please contact Josh Turner at 442-9834, or me at 724-5524.

BKF/jat

[19] *See* Medical Cannabis Program: Public Notice, 68 DCR 12526 (Nov. 26, 2021) (this year's application process began on November 29, 2021).