

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 12-0837

HOLYOKE CITY COUNCIL & others¹
Plaintiffs

v.

CITY OF HOLYOKE & others²
Defendants

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

In August 2012, the City of Holyoke (“Holyoke”) implemented a needle exchange program administered by Tapestry Health Systems, Inc. (“Tapestry”). The question before the court is whether Holyoke did so lawfully.

The plaintiffs comprise the Holyoke City Council (the “City Council”) along with six of the fifteen City Council members, individually. Their amended complaint seeks injunctive relief against Holyoke, Alex B. Morse, in his official capacity as the Mayor of Holyoke, Robert S. Mausel, Katherine M. Liptak and Patricia A. Mertes, as Commissioners of the Holyoke Board of Health, and Tapestry (collectively referred to as the “defendants”) (Count I); declaratory judgment pursuant to G. L. c. 231A (Count II); and an order in the nature of mandamus pursuant to G. L. c. 249, § 5 (Count III). Both defendants and plaintiffs now move for summary judgment on all counts of the amended complaint.

¹ Kevin Jourdain, Daniel Bresnahan, Todd McGee, Joseph McGiverin, James Leahy, and Linda Vacon.

² Alex B. Morse, in his official capacity as the Mayor of Holyoke, Robert S. Mausel, Katherine M. Liptak, and Patricia A. Mertes, as Commissioners of Holyoke Board of Health; and Tapestry Health Systems, Inc.

For the reasons set forth below, defendants' motion for summary judgment is **DENIED** and the plaintiffs' cross-motion for summary judgment is **ALLOWED**.

BACKGROUND

The undisputed facts are summarized below:

Tapestry is a non-profit business entity which promotes the health and well-being of its clients, including those in Holyoke. It maintains sites in Hampden, Hampshire, Franklin, and Berkshire Counties. Tapestry's promotional materials state that it offers family planning and reproductive health care to often marginalized individuals, such as young people, women living in poverty, recent immigrants, uninsured and underinsured persons, injection drug users, the homeless and men and women with HIV/AIDS, regardless of their ability to pay.

On July 9, 2012, Tapestry brought a proposal to operate a needle exchange program before the Holyoke Board of Health. The Holyoke Board of Health voted unanimously to approve Tapestry's proposed program (the "Tapestry program"). After receiving a complaint that the July 9, 2012, meeting violated the Open Meeting Law, the Holyoke Board of Health rescinded its July 9, 2012, vote and scheduled a second hearing for August 14, 2012, in order to consider the proposed needle exchange program.

On August 7, 2012, by a vote of thirteen to two, the City Council voted to:

contest the implementation of any needle exchange program within the City of Holyoke, when such implementation occurred without the approval of said city council; further, that the council authorize its president on its behalf to retain legal counsel and take such action as is reasonably necessary to contest any such implementation of a needle exchange program within the City of Holyoke.

Mayor Morse vetoed the City Council's August 7, 2012, order on grounds that "the city council president may not retain separate legal counsel on behalf of the City Council."

On August 14, 2012, the Board of Health once again approved the Tapestry program.

At the August 14, 2012, hearing, Holyoke Police Chief James M. Neiswanger stated that police officers are at high risk when dealing with intravenous drug users and potential needlesticks. Chief Neiswanger expressed his strong support for the needle exchange program to promote the health of the community. City Councilors and members of the public expressed their opinions both in favor of and against the proposed needle exchange program. Based upon data, research, and expertise of public health officials, Mayor Morse expressed his full support for the program as a safe and efficient way to save lives and protect the people in the City of Holyoke by decreasing incidents of HIV and Hepatitis C.

On August 14, 2012, Mayor Morse wrote to then Commonwealth of Massachusetts Department of Public Health Commissioner John Auerbach and informed him that Holyoke had approved the Tapestry program. On August 17, 2012, the Department of Public Health forwarded a proposed contract to Tapestry to fund a portion of its needle exchange program in Holyoke. Both Tapestry and the Commonwealth executed the Department of Public Health contract (the "DPH contract").

The August 17, 2012, Amendment to the DPH contract demonstrates that the scope of the Tapestry program extends beyond needle exchange alone. In particular, I note the following provisions:

This amendment is to support the recently approved Syringe Services Program (SSPs) for Holyoke, MA. This SSP is a public health integrated communicable disease and comprehensive medical and substance use treatment and prevention services program to decrease HIV, HCV and STI transmissions among injection drug users and their partners. In addition to access to sterile injection equipment and disposal services, this program will provide required and allowable program components.

The following required and allowable/approved program components will be delivered directly and through [sic] area provider collaborations: client recruitment/engagement, integrated HIV, HCV, STI screening, linkage to care, referral (with the exception of the three approved HIV partner services

providers) for HIV and STD partner services, prevention interventions serving HIV+ individuals interventions targeted to high-risk or persons with unknown HIV status.

Allowable/approved program components: syringe services programming, overdose education and/naloxone distribution, evidence-based HIV prevention interventions for individuals at highest risk for acquiring HIV, and referral/access to pre-exposure prophylaxis (PrE) and non-occupational post exposure prophylaxis (nPEP) services.

The Department will require new or revised Memoranda of Understanding or equivalent documentation of agreement within 90 days of approval of this amendment between Tapestry Health Systems and care providers and social service providers in Holyoke and surrounding Communities that will be involved in mutual referral and service coordination relationships with the Holyoke Syringe Services Program.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when the material facts are undisputed and “the moving party is entitled to judgment as a matter of law.” Mass. R. Civ. P. 56 (c); *Godfrey v. Globe Newspaper Co., Inc.*, 457 Mass. 113, 118-119 (2010). To be successful, the moving party must either submit affirmative evidence that negates one or more elements of the other party’s claim or demonstrates that the opposing party has no reasonable expectation of proving an essential element of its case. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The opposing party cannot defeat the motion simply by resting on the pleadings and mere assertions based on disputed facts. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). “Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment.” *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 550 n.6 (2008). “[T]he judge must consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” but “may not consider the credibility of a

witness or the weight of the evidence.” *McGuinness v. Cotter*, 412 Mass. 617, 620, 628 (1992). “[C]onclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment.” *O’Rourke v. Hunter*, 446 Mass. 814, 821 (2006).

The parties present no genuine issues of material fact. Their controversy is ripe for summary judgment adjudication. At the core of the parties’ cross-motions for summary judgment is a determination whether G. L. c. 111, § 215, and G. L. c. 4, § 4, govern the parties’ actions, as plaintiffs maintain, or whether G. L. c. 94C, §§ 27, 27A, do so, as defendants maintain.

B. Standing

As a threshold matter, defendants challenge the plaintiffs’ standing to bring this action. The plaintiffs have such standing. Standing is treated as an issue of subject matter jurisdiction. *Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass.15, 21 (2006). To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury. *Slama v. Attorney Gen.*, 384 Mass. 20, 24 (1981). “Injuries that are speculative, remote, and indirect, are insufficient to confer standing.” *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 (1998). The injury alleged must be a direct consequence of the complained of action. *Id.*

Plaintiffs have asserted a claim that Mayor Morse and the Holyoke Board of Health usurped their legislative authority in authorizing the Tapestry program. An encroachment on legislative authority, as such, constitutes the sort of “injury” which imparts standing to entities such as the City Council. The City Council acted within the lawful exercise of its authority in voting to file this lawsuit.

The fact that the plaintiffs do not challenge the merits of the Tapestry program does not alter plaintiffs' standing. It is the claim of encroachment on legislative authority which imputes standing to the plaintiffs. Contrary to defendants' assertion, plaintiffs need not allege or demonstrate that the City Council would have voted against implementation of the Tapestry program. The City Council's failure to interfere with the Tapestry program, similarly, does not bar the plaintiffs' standing.

C. General Laws c. 111, § 215; G. L. c. 4, § 4; and Holyoke City Charter

In 1993, the Legislature enacted G. L. c. 111, § 215, authorizing up to ten pilot needle exchange programs. General Laws c. 111, § 215, reads in part:

The department of public health is hereby authorized to promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within the commonwealth, upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city or town.

While defendants maintain that G. L. c. 111, § 215, does not govern this action, the parties dispute the definition of the term "local approval." The defendants maintain that a vote of the municipal Board of Health, along with the Mayor's approval, constitutes "local approval." The plaintiffs maintain that "local approval" requires a vote of the City Council. The plaintiffs draw upon G. L. c. 4, § 4, in arguing that G. L. c. 111, § 215, mandates that a municipality's legislative body, such as the City Council, must approve such a needle exchange program.

General Laws c. 4, § 4, entitled "Acceptance of Statutes by City, Town, Municipality or District," reads:

Whenever a statute is to take effect upon its acceptance by a municipality or district, or is to be effective in municipalities or districts accepting its provisions, this acceptance shall be, except as otherwise provided in that statute, in a municipality, by a vote of the legislative body, subject to the charter of the municipality, or, in a district, by vote of the district at a district meeting.

The Holyoke's City Charter establishes that the City Council exercises all legislative powers for the municipality and creates a separation of powers. The Holyoke City Charter at Title I, § 2 provides:

The administration of all the fiscal, prudential and municipal affairs of said city, with the government thereof, shall, except the affairs of the public schools of said city, be vested in an executive department, which shall consist of one officer, to be called the mayor, and in a legislative department, which shall consist of a single body, to be called the city council, the members whereof shall be called councilors. The executive department shall never exercise any legislative power, and the legislative department shall never exercise any executive power, except as herein otherwise provided.

The defendants argue that the Mayor and the Board of Health acted within their powers when they implemented the program without the approval of the City Council because (1) G. L. c. 94C, §§ 27, 27A, govern this controversy, not G. L. c. 111, § 215, and G. L. c. 4, § 4; and, (2) because Section 46-33 of the Holyoke Code of Ordinances authorizes "the board of health . . . [to] make all regulations which it may deem necessary in regard to the removal and abatement of filth, rubbish, nuisances, and causes of disease," a vote by the Holyoke Board of Health constituted the requisite "local approval" under G. L. c. 111, § 215.

D. General Laws c. 94C, §§ 27, 27A

In 1993, the Legislature revised G. L. c. 94C, § 27, to decriminalize the distribution and possession of needles obtained through an approved pilot needle exchange program as set forth in G. L. c. 111, § 215. Specifically, from 1993 to 2006, Section 27(f) provided in relevant part:

Notwithstanding any general or special law to the contrary, needles and syringes may be distributed or possessed as part of a pilot program approved by the [DPH] in accordance with [G. L. c. 111, § 215] and any such distribution or exchange of said needles or syringes shall not be a crime.

Added by St.1993, c. 110, § 142 (July 19, 1993).

In 2006, the Legislature amended G. L. c. 94C, § 27, to remove the reference to legal possession and distribution of needles through a needle exchange program. The current version of Section 27, as amended in 2006, legislates only the sale of hypodermic syringes and needles, but not the possession or non-sale distribution of them.

Hypodermic syringes or hypodermic needles for the administration of controlled substances by injection may be sold in the commonwealth, but only to persons who have attained the age of 18 and only by a pharmacist or wholesale druggist licensed under the provisions of chapter 112, a manufacturer of or dealer in surgical supplies or a manufacturer of or dealer in embalming supplies. When selling hypodermic syringes or needles without a prescription, a pharmacist or wholesale druggist must require proof of identification that validates the individual's age.

Added by St.2006, c.172, § 3 (eff. Sept. 18, 2006) entitled "An Act relative to HIV and Hepatitis C prevention" (the "2006 Act").³ As amended, G. L. c. 94C, § 27, legalized the manner in which hypodermic needles and syringes may be lawfully "sold" by authorized entities to persons who have attained the age of eighteen. The statute eliminated a number of prohibitions relating to the purchase, distribution and possession of syringes without medical authorization. The amendment to G. L. c. 94C, § 27, did not include a "local approval" requirement similar to G. L. c. 111, § 215.

The 2006 Act also created G. L. c. 94C, § 27A(a), entitled "Collection and disposal of spent, non-commercially generated hypodermic needles and lancets," which provides that:

the department of public health, in conjunction with other relevant state and local agencies and government departments, shall design, establish and implement, or cause to

³ See also St.2006, c. 172, § 15, of the 2006 legislation enacted as a Special Law and providing that, "The department of public health shall perform a comprehensive study and review of the existing needle exchange programs established pursuant to section 215 of chapter 11 of the General Laws. The study shall include, but not be limited to: a review and analysis of the relationship between the provisions of this act and the operation of the needle exchange programs; the success of existing needle exchange programs; whether existing needle exchange programs should be maintained without change, phased out or expanded to other municipalities."

be implemented a program for the collection and disposal of spent non-commercially generated hypodermic needles and lancets

General Laws c. 94C, § 27A, further provides that "[t]he department may collaborate with private companies as well as not-for-profit agencies when designing, establishing and implementing this program." *Id.* General Laws c. 94C, § 27A(b), provides for the creation of "Sharps disposal programs."

The Code of Massachusetts Regulations implements the provisions of G. L. c. 94C, §§ 27, 27A. In order to effectuate the statutory mandate to collect and dispose of used syringes, 105 Code Mass. Regs. § 480.125(B) provides that "state and local agencies as well as businesses and non-profit organizations may establish sharps disposal programs." Likewise, the Code of Massachusetts Regulations authorizes municipal Boards of Health, such as the Holyoke Board of Health, to inspect and report on such disposal programs. 105 Code Mass. Regs. § 480.135(F), (G) provides, in pertinent part as follows, "In accordance with M. G. L. c. 94C, § 27A, federal, state and local agencies as well as businesses and non-profit organizations may establish sharps disposal programs "

E. Analysis

A plain reading of G. L. c. 111, § 215, and G. L. c. 94C, §§ 27, 27A, demonstrates that G. L. 94C, §§ 27, 27A, did not supersede G. L. c. 111, § 215. Courts interpret statutory language according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. See *Boston Police Patrolmen's Ass'n, Inc. v. City of Boston*, 435 Mass. 718, 719-720 (2002); *Commonwealth v. George W.*

Prescott Publishing Co., LLC, 463 Mass. 258, 264 (2012)(statutory language should be given effect consistent with its plain meaning and in light of the legislative aim unless doing so would achieve illogical result). Rules of statutory construction create a presumption that statutes are to be interpreted in a manner which is harmonious. See *Town of Hadley v. Town of Amherst*, 372 Mass. 461, 51 (1977).

The legislative history of needle exchange programs in Massachusetts demonstrates that G. L. c. 94C, § 27, was always circumscribed by the requirements of G. L. c. 111, § 215. General Laws c. 94C § 27, thus, never created a separate or independent authority for operating needle exchange programs as defendants argue. The 1993-2006 provision in G. L. c. 94C § 27, for a needle exchange program, in fact, was duplicative whereas G. L. c. 111, § 215, already governed such programs. In 2006, hence, the Legislature revised Section 27 to delete the extraneous needle exchange provisions of that statute. The Legislature further ratified the validity of G. L. c. 111, § 215, in the language of St.2006, c. 172, § 15.

The plain reading of the statutes along with their legislative history demonstrate that G. L. c. 111, § 215, and G. L. c. 94C, §§ 27, 27A, reflect a legislative continuum started in 1993, ratified in 2006 and continuing to present. None of the provisions set forth in G. L. c. 94C, §§ 27, 27A, permit non-sale distribution of hypodermic syringes and needles. Section 27 addresses the sale of hypodermic syringes and needles. Section 27A addresses their collection and disposal. Only G. L. c. 111, § 215, addresses needle exchange programs. The decriminalization of the possession of hypodermic syringes and needles as set forth in this statutory framework is consistent with the permissible sale of hypodermic syringes and needles. It does not, however, create legislative fiat for the non-sale distribution of hypodermic syringes and needles outside of the provisions of G. L. c. 111, § 215.

The parties' controversy pertaining to free distribution of hypodermic needles and syringes is governed by G. L. c. 111, § 215, and not G. L. c. 94C, §§ 27, 27A. Importantly, those activities set forth in the DPH contract apart from the direct distribution of hypodermic needles and syringes are not subject to the requirements of G. L. c. 111, § 215. For example, the Tapestry program is free to provide needle collection and disposal services pursuant to G. L. c. 94C, § 27A. It requires no municipal approval to do so. Similarly, Tapestry is free to engage in other services pursuant to the DPH contract apart from the non-sale distribution of hypodermic needles and syringes.

The program's non-sale distribution of hypodermic needles and syringes requires my consideration of two issues which arise under G. L. c. 111, § 215: first, whether the Tapestry program was a pilot program at the time it was authorized in 2012; and second, whether lawful local approval was obtained prior to implementation of the Tapestry program.

A pilot program is commonly understood to be a test program, an experimental or short-term trial that is subject to amendment, termination, or replacement. See, e.g., *United States Jaycees v. M.C.A.D.*, 391 Mass. 594, 598 (1984) ("pilot program" to allow local chapters to accept women authorized, initiated, and later terminated). While never denominated a "pilot" program, the Tapestry program was one of five needle exchange programs in existence in the Commonwealth at the time of its creation. In his August 14, 2012 letter to Department of Public Health Commissioner Auerbach, indeed, Mayor Morse referenced the creation of the Tapestry program "in accordance with Massachusetts General Law c. 111, § 215." In light of the circumstances at the time of the Tapestry program's creation, I accept that the Tapestry program was a pilot program for the purposes of G. L. c. 111, § 215.

The second issue presented is whether lawful “local approval” was obtained prior to implementation of the Tapestry program. The provisions of G. L. c. 111, § 215, G. L. c. 4, § 4, the Holyoke City Charter and the Holyoke City Ordinances are guiding. General Laws c. 111 is entitled “Public Health.” Notably, G. L. c. 111, § 122, authorizes municipal boards of health, such as the Holyoke Board of Health, to “examine into all nuisances, sources of filth and causes of sickness within its town . . . which may, in its opinion, be injurious to the public health [and] shall destroy, remove or prevent the same as the case may require . . .” *Id.*

Holyoke City Ordinance Sec. 46-33 echoes the provisions of G. L. c. 111, § 122. Section 46-33 provides as follows:

The board of health may make rules and regulations . . . which it may deem necessary in regard to the removal and abatement of filth, rubbish, nuisances and causes of disease.

(Code 1972, § 9-3). The Board of Health is an unelected body which the Mayor appoints. See Holyoke City Charter, Title VI, § 34.

While G. L. c. 111, § 215, is silent as to the definition or usage of the term “local approval,” G. L. c. 4, § 4, squarely addresses the issue in mandating a procedure for statutes which require “acceptance by a municipality.” The Legislature was clear – acceptance by a municipality, “except as otherwise provided, . . . [is] by a vote of the legislative body, subject to the charter of the municipality.” *Id.*

I am mindful of the critically important public health policies which anchor the defendants’ arguments. Nonetheless, the legislative mandates set forth in G. L. c. 111, § 215, and G. L. c. 4, § 4, ultimately govern the parties’ actions. General Laws c. 111, § 215, makes no exception to the provisions of G. L. c. 4, § 4. The Holyoke City Charter does not provide that

ORDER

For all the foregoing reasons, it is hereby **ORDERED** that the Defendants' Motion for Summary Judgment is **DENIED**, and that the Plaintiffs' Cross-Motion for Summary Judgment is **ALLOWED** as to Counts II and III of their Amended Complaint. To the extent Count I of the Amended Complaint sought only preliminary injunctive relief, and that by Order of this Court, dated November 28, 2012 (Carey, J.), such relief was denied, Count I is dismissed.


It is **DECLARED** that the non-sale distribution of hypodermic syringes and needles portion of the Tapestry program was not established or implemented with the requisite local approval of the Holyoke City Council.

It is further **ORDERED** that:

(1) the non-sale distribution of hypodermic syringes and needles portion of the Tapestry program must be discontinued unless and until it is authorized by vote of the Holyoke City Council; and

(2) this Order shall be **STAYED** for 120 days in order to give the Holyoke City Council the opportunity to consider the merits of the non-sale distribution of hypodermic syringes and needles portion of the Tapestry program and either to approve of it or to terminate such service alone.

March 14, 2016



Mark D Mason
Justice of the Superior Court