



## MEMORANDUM

**TO:** Cannabis Regulatory Commission Board

**FROM:** Jeff Brown, Executive Director

**SUBJECT:** 2018 Request for Applications Remand Recommendation Report

**DATE:** January 7, 2022

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### **Executive Summary**

On March 22, 2018, the Department of Health (“Department”) released Executive Order #6 Report (“EO6”) which included recommendations for increasing access to medicinal cannabis. Concurrent with the release of EO6, the Department adopted several changes to the Medicinal Marijuana Program, including the addition of five new medical conditions.

On July 16, 2018, due to significant expansion in the Program following the addition of those medical conditions, the Department released a Request for Applications (“RFA”) for six new Alternative Treatment Centers (“ATCs”), seeking to double the number of ATCs from six to twelve, adding two additional ATCs in each region. Applications were due on August 31, 2018. The Department received 146 timely applications from 103 applicants.

On December 17, 2018, following three and a half months of review, the Department issued awards to six entities: MPX and Columbia Care in the Southern Region, GTI and NETA/TerrAscend in the Northern Region, and Verano and JG New Jersey in the Central Region. All other applications were denied.

Denied applicants had 45 days to appeal, and seventeen appeals were filed by the deadline of January 31, 2019.

On November 25, 2020, the Superior Court of New Jersey, Appellate Division, issued decisions in all appeals that remained pending for the 2018 RFA. Determining that there was not enough detail in the Department’s Final Agency Decisions, citing perceived scoring irregularities, and a lack of process for the appellants, the Court vacated seven Final Agency Decisions (“FADs”) for six appellants and remanded them to the Department for further proceedings.



On January 8, 2021, the Department sent letters to the six appellants outlining the additional process that would be undertaken prior to the issuance of new FADs. Following some back and forth and a return trip to the Appellate Division, where the Court upheld the Department’s process, the appellants complied with the process. Pursuant to the process, the Department convened a Quality Control Committee to review the 2018 RFA and solicited supplemental submissions from the appellants through which they could express grievances with the 2018 RFA process and question the scoring. The Department also gave the 2018 awardees – the respondents – the option to review and respond to the appellants supplemental submissions.

On April 12, 2021, the Cannabis Regulatory Commission (“Commission”) organized and pursuant to statute took authority over the 2018 RFA Remand process from the Department.

The final submissions from respondents in the Remand process were received on July 8, 2021.

Following a review by the Commission and the Quality Control Committee of the 2018 RFA, the supplemental submissions received from appellants, and the responses from awardees, it is the recommendation from staff of the Cannabis Regulatory Commission to uphold the denials issued in 2018 for the following reasons:

- The 2018 RFA was necessary to ensure that supply kept pace with the rapidly expanding demand from medicinal cannabis patients;
- The 2018 RFA was reasonably designed and executed in a similar manner to the previous 2011 RFA which was upheld in multiple appeals by the Superior Court, Appellate Division;
- Scoring in the 2018 RFA was undertaken by six highly qualified, experienced individuals with no conflicts of interest, and no outside business activity that would conflict with their work on the selection committee;
- Perceived “anomalies” or “errors” in scoring are explainable - the result of applicant error, ambivalent answers by applicants, or disagreement among scorers; and
- The results are not the result of an arbitrary, capricious, or unreasonable process.

### **Executive Order #6 and the 2018 RFA**

In March 2018, the Department issued EO6 which detailed proposed reform efforts to increase access to medicinal cannabis, reduce barriers for patients and physicians, and



loosen regulatory requirements for the medicinal cannabis industry. The report included the following recommendations:

- Department Actions, or those that the Department could undertake through administrative action;
- Regulatory Actions, or those that the Department could implement through rulemaking; and
- Statutory Actions, or those that required action by the Legislature to change.

Following the release of the EO6 Report, the Department undertook a three-pronged approach to enacting reforms, which included:

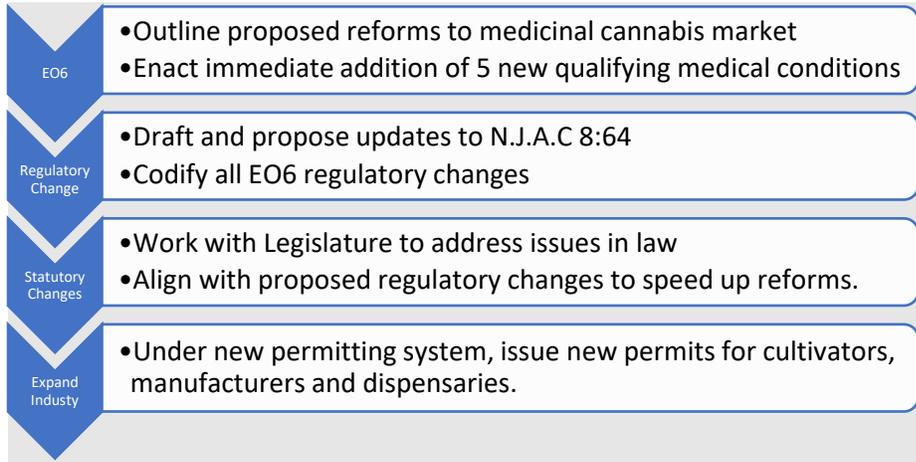
1. Implementing immediate Department level action of adding five new medical conditions and began planning for a redesign of the patient registry;
2. Crafting an update to N.J.A.C. 8:64 (now N.J.A.C. 17:30A) based on the EO6 Report conclusions; and
3. Working with sponsors in the Legislature, through the Governor's Office, on the recommended statutory changes to align the law with key regulatory recommendations.

The Department hoped that in quick succession, all three sets of recommendations could be implemented and the Department could effectively move to reduce the regulatory barriers in the expanding medicinal cannabis industry.

In June 2018, the Department proposed new regulations that would enact a new permitting structure - providing endorsements for stand-alone cultivators, manufacturers, and dispensaries -as well as the other EO6 reforms. Pursuant to the Administrative Procedures Act, the reforms were not effective until the Department's regulations were adopted, a process that often takes six months to a year to complete. Additionally, that same month, despite efforts in both the NJ Senate and General Assembly to reach consensus on medicinal cannabis reforms, it became apparent that the Legislature would not be able to pass a bill before it adjourned for the summer.



### Planned Post EO6 Activities



Concurrently, the pace of patient enrollment rose exponentially. At the end of March 2018, there were roughly 18,000 patients enrolled in the Medicinal Marijuana Program. Following the release of the EO6 report and the addition of five new medical conditions, including two types of chronic pain and anxiety, enrollment began to spike. By July 2018, patient enrollment grew to 25,000. By December 2018, patient enrollment reached 38,000. In July 2018, there were only 6 Alternative Treatment Centers to serve the entire patient population.

### Enrollment in 2018

Month	New Patient Enrollment	Event
January	839	
February	927	
March	812	EO6 Report
April	1711	
May	2787	
June	2898	Rules Proposed
July	3076	RFA Issued
August	3297	Applications Due
September	2630	
October	3343	
November	2731	
December	2177	Awards Issued

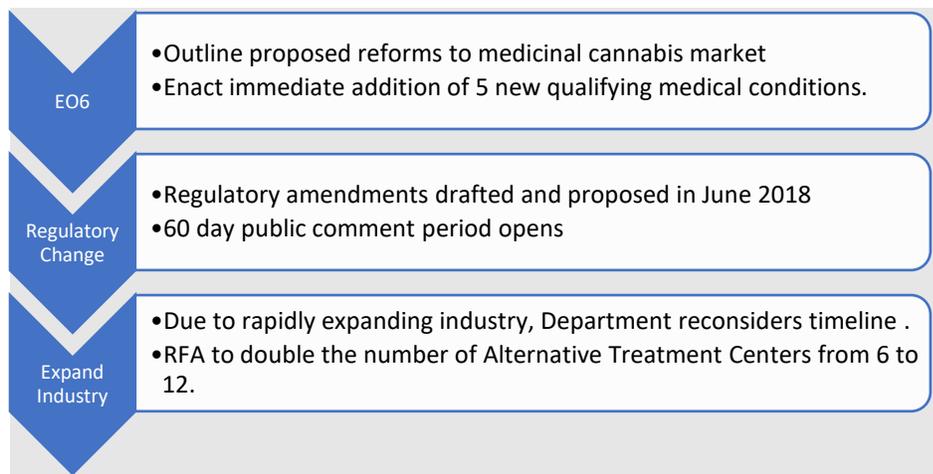
Due to the rapid expansion of the patient population, the Department amended its plans and chose to prioritize expansion of the industry under current rules ahead of the adoption



of its proposed rules. There was significant concern that the current six ATCs would be unable to handle the influx of new patients, and as such, the Department chose to proceed with an RFA to double the number of permits within the industry. As feared, inventories dwindled at some of the ATCs through the Summer of 2018 and into the Fall.

Thus, the Department prioritized the development, issuance, and completion of a RFA for six new ATCs.

### Actual Post EO6 Activities



These circumstances– the significant policy changes undertaken following the EO6 report and the resulting significant increase in patient population, and the struggles of the existing industry to keep adequate supply– are critical to understanding why the Department made certain choices during the 2018 RFA process. Notably, the Department was faced with an entirely new and rapidly changing situation. It had to adjust plans and policies on the fly to make sure that patients could continue to access the medicine they came to rely upon.

### Designing the 2018 RFA

In designing the 2018 RFA, the Department researched and analyzed five components:

1. The medicinal cannabis industry as it existed in New Jersey in 2018;
2. Stakeholder feedback provided during the EO6 process;
3. RFAs for medicinal cannabis businesses conducted in other states;
4. The policies, operations, and logistics from the original 2011 RFA for ATCs; and
5. Legal history from the 2011 RFA.



From the review of the medicinal cannabis industry in NJ in 2018, the Department concluded that there was a lack of readiness for expansion among the existing ATCs. Additionally, patients routinely complained of high prices and a lack of consistent quality among their products. Based on the Department's inventory data, it was clear that the ATCs were not capable of keeping an ongoing supply of cannabis, even for their own patients. As such, the Department recognized that business experience, financing, and direct knowledge of the operations required to serve medicinal cannabis patients – manufacturing, cultivation and dispensing – were critical to seeking new industry participants.

From a review of stakeholder feedback, the Department concluded that it was important to include measures in the RFA regarding diversity among employees and ownership of prospective ATCs, cost-effectiveness and value for patients, and commitments to research and community involvement.

From the review of RFAs in other states, the Department concluded that it was important to include measures related to regulatory compliance, and to try to focus submissions from applicants as much as possible and put a strict page limit on submissions so as not to inundate reviewers with superfluous or unnecessary information.

The Department then took its conclusions and looked at the 2011 RFA, including its legal history as a guide for undertaking a new, amended RFA.

### **The 2011 RFA compared to the 2018 RFA**

Because the 2011 RFA for ATCs was conducted under P.L. 2009, c.307 and the corresponding regulations at N.J.A.C. 8:64 (promulgated but not adopted at the time of RFA), the Department reviewed the 2011 RFA when drafting the 2018 RFA.

The 2011 RFA featured:

- Submission of applications by a strict deadline in accordance with an RFA that was compliant with the criteria in N.J.A.C. 8:64-6;
- A five-person, multi-disciplinary selection committee chosen to align with the criteria in the RFA, and certified to have no conflicts of interest;
- Independent scoring of each application, with every reviewer providing scores for every criterion, regardless of their expertise;
- The combination of all five reviewers scores to reach a cumulative total score for each applicant; and



- The deliverance of a final recommendation from the selection committee to the Department for consideration for awards<sup>1</sup>.

In 2011, the Department received 35 applications submitted by 21 applicants and moved expeditiously to review, score and issue awards. Applications were received by February 14, 2011, and reviews had completed by March 11, 2011. Final Agency Decisions were then issued by the Department on July 21, 2011 (denied applicants) and August 11, 2011 (awarded applicants).

Selections were appealed by three applicants, and were ultimately upheld by the Superior Court, Appellate Division. *Nat. Med., Inc. v. New Jersey Dep't of Health & Senior Servs.*, 428 N.J. Super. 259, 269, 52 A.3d 207, 213 (App. Div. 2012). The Court noted that the Department, in reaching its decisions, was entitled to a presumption of reasonableness and that the “presumption ‘is even stronger when the agency has delegated discretion to determine the technical and special procedures to accomplish its task.’”, citing *In re Application of Holy Name Hosp. for a Certificate of Need*, 301 N.J. Super. 282, 295, 693 A.2d 1259 (App.Div.1997). *Nat. Med., Inc.* at 269.

Furthermore, the Court noted that “Judicial deference is particularly appropriate ‘when the case involves the construction of a new statute by its implementing agency’ (Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A–1.1 et seq.)” and that “thereafter, the Department, as with all other administrative agencies, “possess[es] the ability to be flexible and responsive to changing conditions.” Citing *Texter v. Dep't of Human Servs.*, 88 N.J. 376, 385, 443 A.2d 178 (1982)

Finally, in rejecting appellants arguments, the court upheld that:

“In fact, the Act (P.L. 2009, c.307) charges the Department with the continuing responsibility of closely monitoring access issues. Specifically, the Act requires the Department to “evaluate whether there are sufficient numbers of [ATCs] to meet the needs of registered qualifying patients throughout the State...”

*Nat. Med. Inc.* at 271.

In reviewing the 2011 RFA, the underlying materials and policies, and the findings upholding those decisions, the Department went about the process of developing the 2018 RFA.

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<sup>1</sup> In 2011, this was delivered at a meeting at which point the selection committee endorsed all 10 of the highest scoring applications, noting that even though the scores differed, they were all qualified for permitting.



Based on this thorough review, the Department determined that the 2018 RFA should include:

- Submission of applications by a strict deadline in accordance with an RFA that was compliant with the criteria in N.J.A.C. 8:64-6;
- A six-person, multi-disciplinary selection committee chosen to align with the criteria in the RFA, and certified to have no conflicts of interest;
- Independent scoring of each application, with every reviewer providing scores for every criterion, regardless of their expertise;
- The averaging of all six reviewers' scores to reach a composite total score for each applicant<sup>2</sup>; and
- The deliverance of a final recommendation from the selection committee to the Department for consideration for awards.

In both the 2011 and 2018 RFA, the selection committee delivered scores and recommendations concerning the consideration of a group of applicants but did not recommend specific selections – rather leaving that to the Department's expertise to determine.

Importantly, the 2018 RFA improved on the 2011 RFA in several areas:

1. The selection committee members were trained at a formal educational session before they began scoring.
2. The selection committee members were provided with detailed scoring instructions. In 2011, the selection committee was simply provided with scoresheets that contained the text from the RFA itself.
3. The selection committee members had the ability to ask questions to selected and impartial staff during the process;
4. The selection committee drafted and submitted a formal written and signed report to the Department, noting the applicants in each region that they collectively believed were worthy of consideration for permit issuance.
5. The Department developed and utilized new fillable .PDF forms that made the collection and dissemination of applications and application materials easier.
6. The Department provided for the ability to submit applications electronically (with one paper copy), whereas in 2011 all submissions were collected in paper.

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<sup>2</sup> Mathematically, both adding all reviewers' scores and ranking by the total as was done in 2011 and adding all reviewers scores and then averaging them as was done in 2018 will result in the exact same ranking.



## **Issuance of the 2018 RFA and Application Submission**

The 2018 RFA was issued on July 16, 2018, with a notice appearing in the New Jersey Register and the RFA being posted on the Department's website. It is attached as Appendix A to this recommendation report.

The RFA adhered to N.J.A.C. 8:64-6 and 8:64-7 and provided mandatory requirements for applicants, to be submitted as "Part A" of the application, and several criteria and sub-measures for which applicants would be scored on a 1000-point scale, as "Part B" of the application.

Applicants were required to meet all mandatory requirements in Part A and to submit responses to all criteria and measures in Part B. Part B had a 300-page limit. Applicants were also permitted to submit limited materials in an appendix to their application.

The RFA provided an opportunity for applicants to submit questions ahead of time in writing, and the Department responded to *every responsive question it received*. Understanding that it was the first RFA in seven years, the Department prioritized communicating and educating the potential applicant pool ahead of submissions.

The RFA also called for a mandatory pre-application conference. There were roughly 800 attendees at the conference, a harbinger for the volume of applications the Department was to receive.

The forms utilized for the RFA were developed by the Department, tested, and released to the public for use in the RFA. They were fillable .PDFs that allowed applicants to both key in responses to the .PDFs and attach documents. The forms, if submitted electronically, required an electronic signature. Once signed, the forms and underlying documents became locked and unable to be edited.

Applications were due on August 31, 2018.

Application submission was relatively simple and uncomplicated. The Department provided two options for submission:

1. Submit electronically through a web portal and deliver one signed paper copy to the Department by the deadline; or
2. Submit 10 paper copies.

On August 31, 2018, the Department received 146 timely applications.



## **Selection Committee Recruitment, Qualifications and Training**

To score the applications received for the 2018 RFA, the Department recruited a selection committee that included six individuals with diverse experiences that tied back to the criteria and measures that they were to score.

The six selection committee members possessed the following experience:

1. Management and regulation of medicinal cannabis;
2. Public safety, security, investigations, and compliance with medicinal cannabis regulations;
3. Regulation of industrial agriculture;
4. Laboratory sciences and testing of medicinal cannabis;
5. Public health systems management and procurement; and
6. Diversity, business development, and procurement.

Of the six selection committee members, one was a supervisor, four were directors, and one possessed a leadership position in branch leadership for a major state agency. Every selection committee member had over 10 years of experience in their respective fields; half had over 25 years of experience.

Importantly, because all the selection committee members were in leadership positions within state government, they all also had experience with:

1. Budgeting;
2. The evaluation of grant proposals, bids, and/or license/permit applications;
3. Government processes and adherence to statutes and regulations; and
4. The evaluation of personnel and their professional qualifications.

Each member of the 2018 RFA selection committee was highly trained, experienced in their field, had proven their competency through rich histories serving the public interest, and was determined by the Department to be uniquely qualified to assist with the review of applications as part of the 2018 RFA.

After recruiting the six selection committee members, the Department undertook several actions to ensure they were free from outside influence and possessed no conflicts of interest. Every selection committee member:

- Submitted an outside business disclosure form to ensure that no outside business conflicted with their duties on the committee;
- Reviewed the list of applicants and their owners and principals and certified they had no conflicts of interest; and



- Signed confidentiality agreements, to ensure all selection committee deliberations were shielded from external knowledge and influence.

Prior to scoring, the selection committee was provided with a training that included an overview of the RFA, an overview of their duties pertaining to the RFA, a contextual summary of the medicinal cannabis market, and a diversity training component. They were also provided with detailed scoring instructions, which included both a training on all the scored sections but also all the mandatory requirements for the RFA. Importantly, in 2018, the Department delegated selection committee members with the ability to look at the mandatory requirements of the RFA (i.e., page limits, format, etc.) and deem whether the applications were responsive not only from an informational perspective, but also from a compliance perspective.

The selection committee training is attached as Appendix B to this report and the scoring instructions are attached as Appendix C.

### **Completeness Review**

Following the submission of applications, the Department undertook a completeness review to ensure that only complete applications – those that contained all mandatory requirements as outlined in the RFA – were released to the selection committee for scoring.

Eleven applicants were disqualified following the completeness review for missing mandatory documents.

Relevant to this recommendation report, two anomalies related to two appellants were uncovered during the completeness review:

1. Liberty Plant Sciences, who submitted electronically, failed to sign, and lock Part A of their Northern Region application; and
2. Although Pangaea only submitted one paper copy of their application, indicating they had intended to submit electronically, the Department had no electronic submission and no record of even an attempted electronic submission<sup>3</sup>.

The Department reviewed both cases prior to releasing the applications to the selection committee for scoring. In the case of Liberty Plant Sciences, because the applicant failed to sign and lock Part A of the application, the Department could not release the electronic

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<sup>3</sup> NoviSurvey, the platform used by the Department for application submission keeps a record of all form submissions. There were several applicants for which the Department had a record of an attempted or partial submission, but for Pangaea, no record existed.



version of the application to the selection committee. Doing so would enable each selection committee member to inadvertently alter the application itself, and the lack of a signature made it noncompliant with the terms of the RFA. Because Liberty Plant Sciences had submitted a complete paper application for the northern region that included all required signatures, the Department instead scanned the paper copy of the application and distributed that to the selection committee.

For Pangaea, because there was no record of even an attempted submission via electronic means, the Department considered disqualifying their application entirely. But because they had submitted a complete paper copy, the Department also chose to deem Pangaea's application complete and to allow Pangaea's application to move forward to the selection committee.

### **Timing of Scoring and Urgency**

In attempting to estimate how long scoring could possibly take in the 2018 RFA, and how long medicinal cannabis businesses could take to become operational, the Department looked at other recent states' attempts to competitively issue permits/licenses for medicinal cannabis businesses and looked at New Jersey's own history.

In terms of application numbers, in New Jersey, the 2011 RFA only had 35 applications. More recent (as of 2018) applications in other states ranged from dozens of applications to hundreds.

For the timeline for businesses to get operational post-award, the Department found evidence that it could be done in 9 months but that 12-18 months was more realistic. In New Jersey, former awardees ranged from 1 year to nearly 7 years to become fully operational.

In the RFA itself the Department announced that it intended to issue awards at the beginning of November 2018, 60 days after applications were submitted. Based on internal planning, this was the target date to ensure that a critical mass of awardees could be up and running to keep pace with increasing demand for medicinal cannabis. The Department also announced that it would seek to issue additional permits in the near future.

When the Department received 146 timely applications, the notions for a wrap up by early November faded away but increasing patient enrollment did not: the urgency to wrap up reviews and issue awards were underpinned throughout the whole process by the core mission to adequately serve patients who relied on medicinal cannabis to treat their debilitating conditions.



Similar to when the Department launched the 2011 RFA under new statutes and an unknown program future, in 2018 the Department was once again faced with dealing with new circumstances based on significant shifts in policy and making decisions on the fly to try and address those circumstances and needs.

In the case of the 2018 RFA, this meant working with the selection committee to wrap up the scoring process as expeditiously as possible and move on to permitting new ATCs to cultivate and dispense medicinal cannabis.

With three years of retrospective data, it is now clear that without this urgency – without a swift conclusion to the 2018 RFA – the medicinal cannabis market would have been in extreme peril at the beginning of 2020, right before the onset of the COVID-19 pandemic.

### **Scoring Process**

Scoring by the selection committee began in mid-September 2018. While originally intended to conclude by early November 2018, due to the volume of applications, scoring continued until early December.

Scoring was conducted independently, meaning each reviewer was responsible for reviewing and assigning scores on their own, without input or discussion from other selection committee members. This independence is a key feature of the process as it ensures that one selection committee member cannot exert too much influence over the process. Some selection methods allow selection committee members to meet and to discuss applications and scores, to reach an agreement and common ground. The Department purposefully kept scoring independent and instead of allowing discussion and debate to yield agreement, required the scorers to meet in the middle by averaging their scores.

Throughout the process, as evidenced by emails between the selection committee members and the Assistant Commissioner of the Division of Medicinal Marijuana, the Department provided ongoing support to the selection committee members but also continually pushed them to conclude scoring as expediently as possible.

Importantly, the emails show that the Department was engaged in consistent quality control throughout the whole process. For example, in an email to the selection committee on November 30, 2018, the Assistant Commissioner notes that several applications may require a second or closer look from selection committee members to ensure that all sections were appropriately scored.



The emails also show that the Department provided ongoing guidance on scoring. For example, in a November 11<sup>th</sup> email, the Assistant Commissioner responded to questions about how to score business financials and discount programs.

Scoring concluded in early December and the Department organized a meeting among selection committee members on December 11, 2018, to review their scores and recommend potential selections in each region. Prior to the meeting, selection committee members were asked to review their scores for quality control and correct any errors. At the meeting, the selection committee discussed the process, and discussed the results of the scoring. Importantly, selection committee members agreed that the top six scoring applicants in each region were all worthy of consideration for permit awards.

Following the meeting, the selection committee drafted, signed, and submitted a report to the Department noting their agreement on the top six scoring applicants in each region and recommending the same for consideration for permit awards.

### **Final Agency Decisions**

Following the receipt of the selection committee's recommendation report, the Department developed a formula for determining the order in which the regions would be picked. Because applicants could submit in multiple regions, and because the Department chose not to issue more than one permit to a single applicant, the order of regions could change the actual selections.

Therefore, the Department followed a formula that compared supply with demand statewide, and in each region, and ranked them according to need. As such the Department selected the following order, and only selected one application per applicant: South, North, Central.

Following the formula, the Department made the following selections:

Southern Region: MPX, Columbia Care

Northern Region: GTI, TerrAscend/NETA

Central Region: Verano, JG New Jersey

All other applicants were denied.

The Final Agency Decisions for the awardees and all the denials are available at: <https://www.nj.gov/cannabis/businesses/medicinal/>



## **Appeal and Remand**

Following the issuance of Final Agency Decisions, in accordance with statute and regulation, applicants were provided with 45 days to file an appeal in the Superior Court of New Jersey, Appellate Division. Seventeen appeals were filed by the deadline of January 31, 2019.

Eight appeals, those remaining as of the end of 2020, were decided on November 25, 2020, by the Appellate Division. The decision affirmed the FAD issued to Compassionate Care Foundation, and vacated seven FADs (from six appellants) remanding them to the Department for further proceedings. Specifically, the Court instructed the Department to undertake an additional process that would enable the appellants to raise questions or grievances with the 2018 RFA and the scoring process, and through which the Department could examine those questions and grievances and respond accordingly.

Following the decision, the Department created a process that included two facets:

1. The establishment of an internal Quality Control Committee to begin reviewing the 2018 RFA; and
2. A formal process by which the remanded appellants could provide the Department with written supplemental submissions questioning or raising grievances with the scoring in the 2018 RFA.

On January 8, 2021, the Department sent a letter to appellants providing them with 30 days to provide supplemental submissions. Instead of providing supplemental submissions, the appellants made several demands of the Department, two of which included tolling the 30-day clock for submission and providing more detail about the process.

On January 29, 2021, the Department sent another letter to appellants providing them with 60 days to provide supplemental submissions and providing additional details about the remand process. Appellants again sent letters demanding -- among other things -- an in-person meeting and amendments to the process.

On February 25, 2021, the Department affirmed the process and rejected appellants demands but also offered them additional time to provide their supplemental submissions. Again, appellants did not provide supplemental submissions and continued to make demands. Appellants then filed an emergent motion in the Superior Court, Appellate Division asking for intervention and a Stay of the process.



On March 17, 2021, the Superior Court, Appellate Division rejected appellants' motion and upheld the Department's ability to undertake the process as outlined in the January 29, 2021, letter.

Appellants then petitioned the Department to include expert reports in the remand process. The expert reports had been rejected by the Appellate Division, and, as they were not part of the record of the 2018 RFA, were rejected by the Department.

On April 12, 2021, the Cannabis Regulatory Commission organized and pursuant to statute took authority over the 2018 Remand.

In accordance with the process outlined in the January 29, 2021, letter, the appellants were given 60 days from the date the motion was decided to provide supplemental submission and then, upon receipt of the supplemental submissions, respondents (the awardees) were afforded 30 days to respond.

The final submissions were received on July 8, 2021.

### **Quality Control Committee and Process**

Following the remand in the 2018 RFA, the Department established a Quality Control Committee. This Committee included four individuals. All were employees of the Department of Health and/or the Cannabis Regulatory Commission.

The expertise possessed by the Quality Control Committee includes:

- Over a decade of experience in healthcare policy, government affairs, communications, and healthcare advocacy;
- Over a decade of experience in data analytics;
- Over a decade establishing investigative guidelines and standardizing procedures for investigations on behalf of the State;
- Over two decades of experience conducting investigations of entities and individuals for professional licensure;
- Over a decade of experience conducting financial source and investment investigations on behalf of State and private entities;
- Experience designing process quality control data metrics and dashboards;
- Experience providing data reporting and outcome analysis; and
- Professional degrees including, Master of Business Administration with a concentration in Data Analytics and Masters in Public Administration.



The Quality Control Committee undertook a review of the 2018 RFA, the submissions by the remanded applicants, and conducted new analyses to determine whether the issues raised by the appellants amounted to a failure of the RFA process and scoring. Specifically, the committee:

- Reviewed the applications, scores, scoring instructions, and background materials for the RFA;
- Reviewed the remanded applicants' supplemental submissions, applications and any responses received by the awarded respondents;
- Conducted a statistical analysis of the scores delivered in the 2018 RFA; and
- Conducted an audit of a selection of scores from the 2018 RFA to assess compliance with the RFA scoring guidelines.

### **General Quality Control Review Results**

The Department recognized after the 2018 RFA that the process for awarding ATC permits was not perfect but was fair and reasonable. Even before the 2018 Court Opinion and Remand, when planning for the 2019 RFA, the Department already made several changes as a result of the 2018 RFA to streamline scoring and improve the overall process. These changes included:

- Splitting the selection committee members into teams, based on expertise;
- Providing the selection committee members with more detailed scoring instructions, and reducing their ability to declare a particular response “non-responsive”;
- Reducing the page limits to reduce the ability for applicants to present ambivalent information using overly expressive and confusing narratives;
- Making key measures more specialized in nature and having them reviewed by one individual;
- Providing reviewers with more time to review applications; and
- Implementing formal post-selection committee quality control measures, including a statistical analysis of reviewers' scoring.

Following the November 25, 2020, Court Opinion, in early 2021, the Department began its quality control review of the 2018 RFA. Two members of the Quality Control Committee for the 2018 RFA undertook a review of the winning applications and the appellants' applications, the scores they received as well as the instructions and the RFA itself. Additionally, one member reviewed the administrative history of the RFA itself, and another conducted a statistical analysis of the scores in the RFA.



## **Administrative Review**

The administrative review of the 2018 RFA found that the RFA complied with the statutes and rules that underpin the Department's authority to issue RFAs, receive and score applications, and issue awards. As outlined in this report, the Department undertook a methodical, reasonable, and fair process that included several important steps:

- Development and issuance of an RFA to address key needs in the medicinal cannabis market;
- Education and communication with potential applicants about the RFA through both written Q+A and a pre-application conference;
- Strict deadlines for the submission of materials;
- In depth completeness review of applications to ensure only complete applications are scored;
- Comprehensive scoring by a highly qualified selection committee;
- Selection of awards based on the scores of the selection committee and in accordance with a formula based on patient need.

Two deficiencies with the process were identified by the Department and were related to the reality of the medicinal cannabis market as it existed in 2018:

1. The Department developed a complex application that was meant to prioritize selection of experienced companies that could get operational quickly, expand with the market, and address the significant expansion in the patient population in New Jersey; and
2. The Department pushed the selection committee aggressively to finish the process so that awards could be issued, implementation could begin, and the market could avoid significant supply shortages.

These two deficiencies combined with the volume of applications received resulted in the selection committee needing to do their work and review a significant amount of material in a relatively short time. But the Department was faced with a dramatically changing policy landscape and a growing need to act – a looming medicinal cannabis supply crisis – and the selection committee rose to the task, sacrificing nights, weekends, and holidays to finish the scoring as quickly as possible.

Because all applicants faced the same conditions, and because the Department was uniquely positioned to utilize its expertise to determine the speed at which reviews are conducted – balancing thoroughness with deadlines – these issues do not make the whole process arbitrary, capricious, or unreasonable. In fact, in the 2011 RFA the



Department put similar conditions on the selection committee and the process was upheld by the Appellate Division, noting that the Department possessed the flexibility to determine and run the RFA based on what was most needed at the time.

### **Review of Scores and Applications**

The remand review of the awarded applications, the appellants applications, and their scores faced various obstacles: the selection committee had long been disbanded, members had moved on to new jobs in state government and others had retired. Additionally, it was unlikely that reviewers would remember their rationale for awarding a particular score. To overcome these obstacles, the Department/Commission decided to look at the scores delivered, the applications themselves, the supplemental submissions from appellants, and the scoring instructions to determine whether a score may or may not be reasonably justified. As part of this quality control review, the Department/Commission would only seek to overturn or seek to amend a score if there was clear and convincing evidence that the selection committee erred in their scoring.

The initial review of the scores and applications identified two measures that required a closer look, as they were responsible for a significant amount of the variation in scores:

- Criterion 1, Measure 5: Financial Suitability; and
- Criterion 2, Measure 3: Diversity.

The reviewers noted that these measures had the most variation among scores and that scorers may have struggled to assess the responses before them and noted that scorers were most likely to utilize scores of '0' on these two measures.

Following the initial review, the Department looked at these two measures between the selected applications and the denied applications, the composite scores they received, and whether or not the score they received was indicative of their responses.

The Department then looked at this ranking and the scores and the applications and noted that the high scoring applications generally had the following characteristics:

- Clear language explanations of their business plans and the materials provided for access to capital, financial statements and history of businesses taxes paid.
- Concise financial projections, with well-reasoned explanations underpinning them, and a clear demonstration of the ability to become profitable;
- Clear, signed commitments to financing;
- Third party validation of their claims; and



- Statements and evidence of tax compliance, regardless of whether or not the entity was newly formed.

**Criterion 1, Measure 5: Financial Suitability**

Applicant	1-5 Composite Score	Rank
NETA	97.33	1
JG	95.17	2
MPX	93.33	3
GGB	86.5	4
GTI	86.33	5
Harvest	85.83	6
Bloom	83.67	7
Verano	83.33	8
Columbia Care	82	9
Liberty Plant Sciences	76	10
Altus	69.5	11
Pangaea	66.5	12

Applicants that scored lower exhibited at least one or more of the following deficiencies:

- Submitted business plans that had forecasts and projections that were not as clearly explained as they could have been;
- Provided evidence of access to capital and financial projections but did not clearly explain them;
- Did not provide financial statements, or provided them for other related entities without clearly explaining the connection;
- Made statements that they did not have financial statements or a record of paying taxes as a new company<sup>4</sup>;

<sup>4</sup> The Department did not require applicants to set up new business entities to apply for the RFA. The Department simply required them to be registered to do business in the state of NJ. The Department in fact set out scoring that benefited experienced companies in many areas, including related to history of tax compliance and providing financial statements, and then in several instances these experienced companies set up new companies in NJ and noted in their applications that they had no history of paying taxes as a new company and no certified financial statements – even though these companies operate in many different states and noted as much in other parts of the application. When comparing Criterion 1, Measure 1 with Criterion 1, Measure 5, many of these companies touted their operations in other states and how experienced they were, only to get to Criterion 1, Measure 5,



- Did not provide any third-party validation, or provided third-party validation that included significant caveats – i.e., support letters that noted they had not actually seen the financials but rather were only attested to;
- Provided proof of funds but no commitment to using that money to finance the proposed ATC; and
- Presented information that was contradictory with information presented on another part of the application.

Although the Department/Commission may have ranked the responses slightly differently in retrospect, the review of Criterion 1, Measure 5 shows a reasonable review by the selection committee at the time of application. The applications that scored lower generally provided lower quality responses and were assessed accordingly. Most importantly, there was not clear and convincing evidence that the scores received by the applicants on Criterion 1, Measure 5 were somehow arbitrary, capricious, or unreasonable – even with the assignment of ‘0’s by some scorers. In the cases where 0’s were assigned, the applicant made a statement that could be deemed non-responsive (i.e., a multi-state company claiming they have no financial statements and no history of paying taxes), they presented information that was not easily understood or connected to the question, or the information contradicted a response on another part of the application.

For these reasons, the Commission should not overturn or amend the results delivered by the selection committee on Criterion 1, Measure 5.

Similarly, to the review of Criterion 1, Measure 5, the Department looked at Criterion 2, Measure 3 and assessed the selected applications and the denied applications, the composite scores they received, and whether the score they received was indicative of their responses.

For Criterion 2, Measure 3, higher scoring applications featured responses that demonstrated:

- For measure 2-3A, a clear commitment to diversity throughout the organization and proposed ATC; and
- For measure 2-3B, the possession of a WBE certification either by the ATC entity itself or by an entity with a significant ownership percentage of the ATC entity.

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where they defaulted to the stance that they have no certified statements and no history paying taxes. It is very understandable why some members of the selection committee gave lower scores to such companies for doing this.



**Criterion 2, Measure 3: Diversity**

<b>Applicant</b>	<b>2-3 Composite Score</b>	<b>Rank</b>
MPX	48	1
Verano	46.833	2
NETA	45.66	3
Bloom	34.5	4
Altus	33.17	5
GTI	32.33	6
Columbia Care	31	7
Liberty Plant Sciences	29.67	8
JG	26.5	9
Harvest	26.33	10
Pangaea	20.5	11
GGB	16.83	12

Middle-scoring responses featured:

- Strong performance on 2-3A through demonstrating a clear commitment to diversity throughout the organization; and
- Responses on 2-3B that denoted the entity did not have an MBE, WBE or VOB certification and did not provide enough information for the committee to determine they could qualify in the future, or the inclusion of information that seemed contradictory to another part of the application.

For this measure, lower scoring responses featured:

- Less detail about the diversity in the proposed company; and
- No evidence of certifications or designations.

For Criterion 2, Measure 3, the composite scores again proved to be a reasonable determination of the quality of the responses received. The review showed no clear evidence that a composite score should be overturned or changed, and in fact the scores delivered generally tracked the information provided and its compliance with the scoring instructions – even in cases where one or more members of the selection committee



delivered a '0'<sup>5</sup>. In totality, the results are reflective of a reasonable review of the application materials by the selection committee.

For these reasons, the Commission should not overturn or amend the results delivered by the selection committee on Criterion 2, Measure 3.

### **Statistical Analysis**

Finally, the Commission conducted a statistical analysis of each individual reviewer to determine if any of their scores were statistical outliers and therefore inconsistent. In a situation where each reviewer is scoring independently, consistency within that reviewer's scores is a far more important measure than the consistency with other reviewers' scores. Said another way, it is acceptable and even expected that two reviewers would disagree on the merits of a particular application or response, but it would be problematic if one reviewer was applying the scoring rubric inconsistently and in an unexplainable fashion.

These graphs show the scores of each reviewer plotted according to their statistical curve. They show that every reviewer delivered scores according to a normal curve. Furthermore, the statistical analysis itself reveals that there were only 13 outlier scores out of 810 total application scores (135 applications multiplied by 6 reviewers). All 13 of those outlier scores were for the lowest scoring applications, applications that clearly had significant deficiencies that led reviewers to score them outside of their normal range.

All scores delivered to awardees and to appellants fall within these normal curves and are therefore statistically consistent for each reviewer.

The curves, however, do show that:

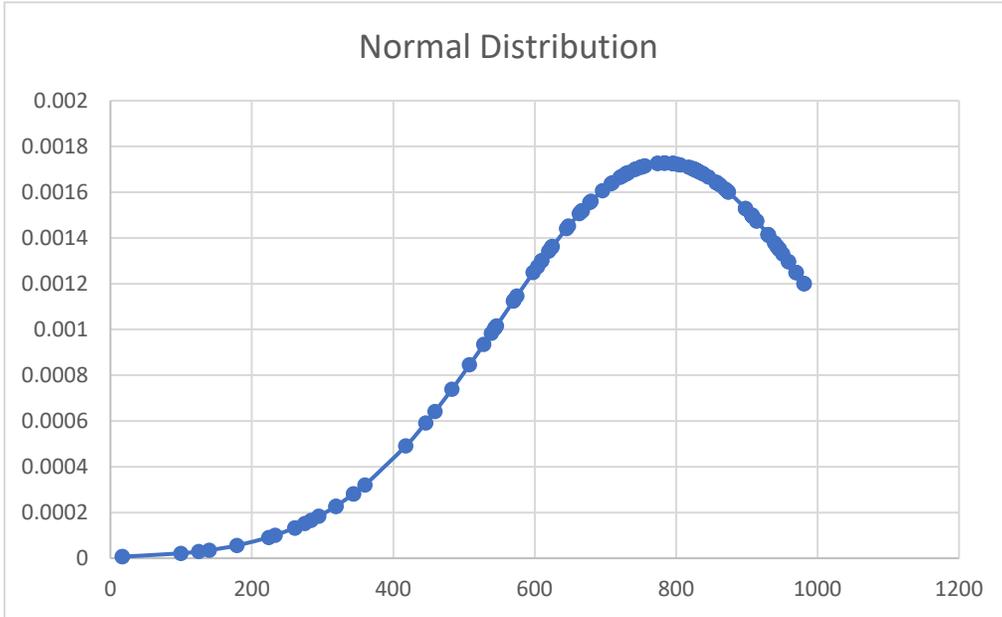
- Reviewers 1, 2 and 3 had a broader distribution of scores than reviewers 4, 5 and 6;
- Reviewer 3 was the toughest grader with a median score of 661;
- Reviewers 4, 5, and 6 all had scores clustered toward the higher end of the curve, meaning they delivered much higher scores overall than reviewers 1, 2 and 3.

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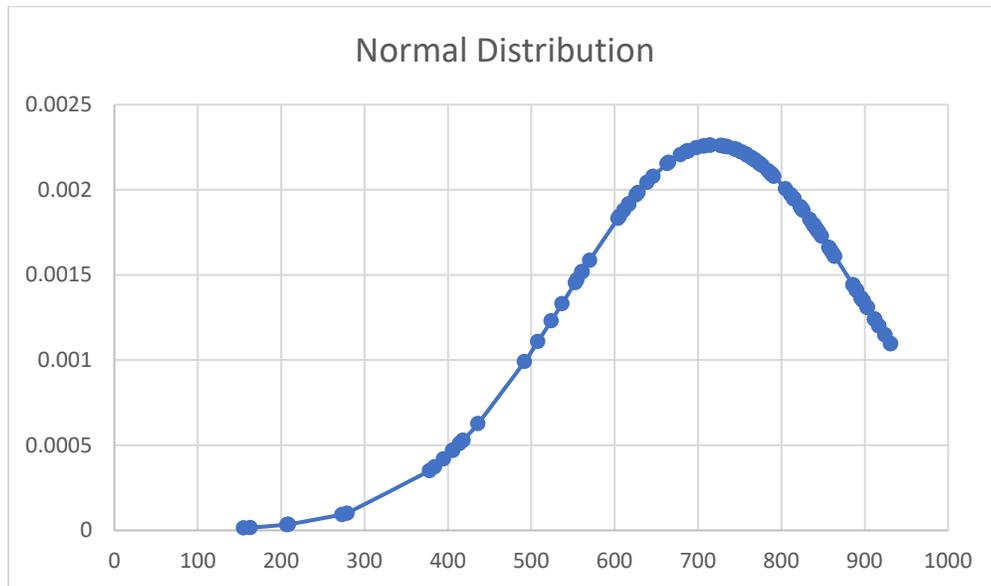
<sup>5</sup> In one example, an applicant simply states for 2-3B that an African-American woman is 51% owner of the company but does not have a certification. But in other parts of the application the applicant notes the company will be operated by a parent company, and indeed touts the experience of that parent company. Given that a company needs to demonstrate ownership and control to get certification, the response is not enough to give credit for having a certification and the applicant was penalized by some reviewers.



### Reviewer 1

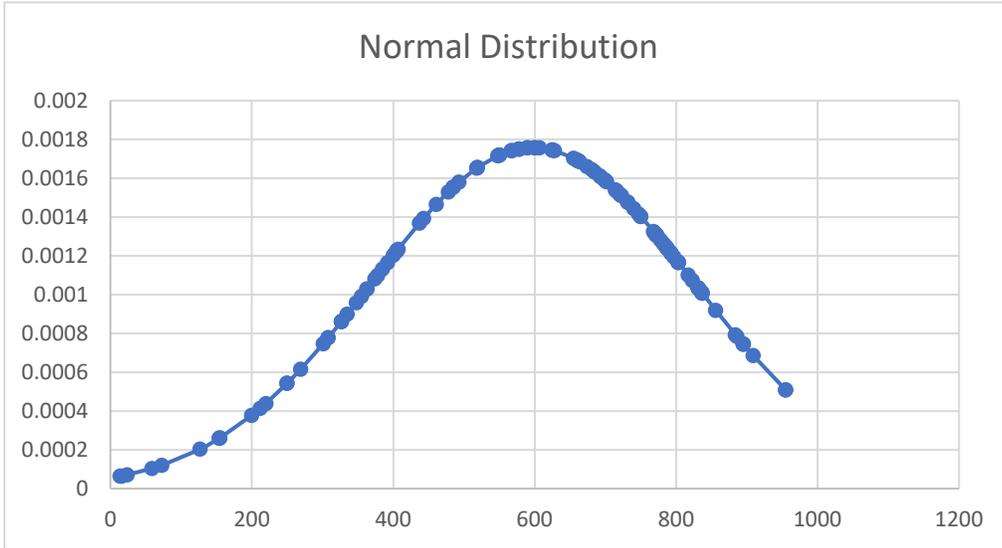


### Reviewer 2

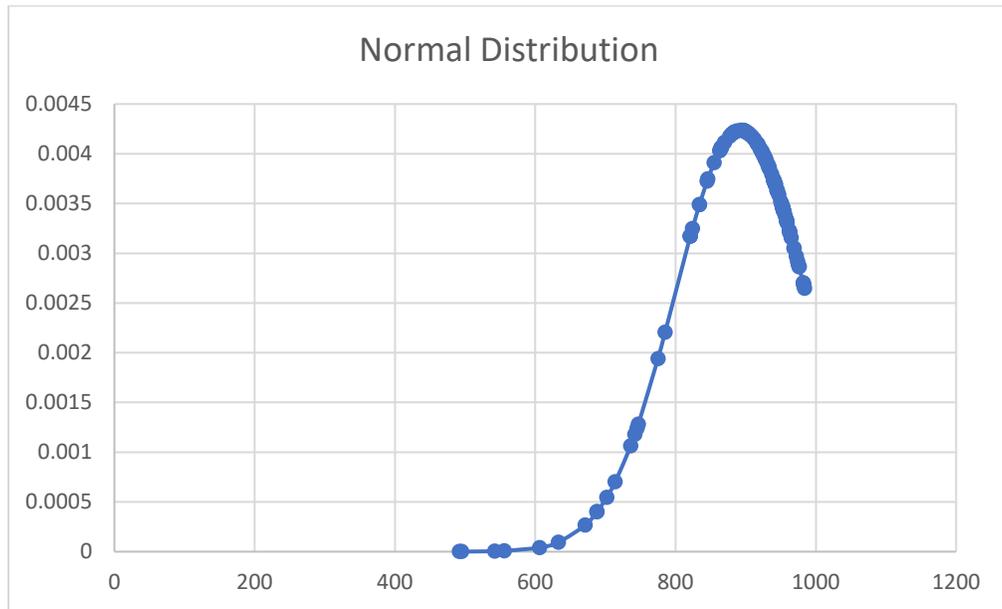




### Reviewer 3

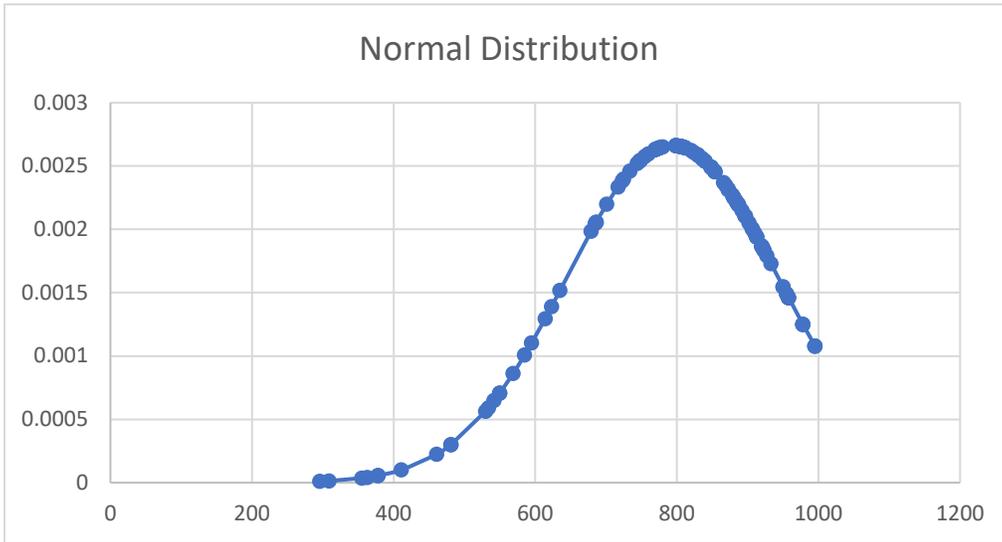


### Reviewer 4

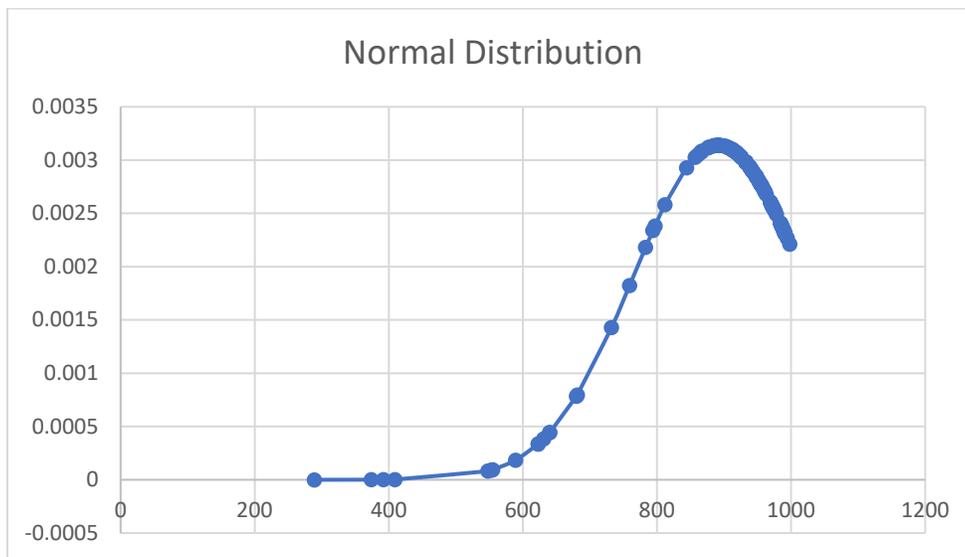




### Reviewer 5



### Reviewer 6





Given that the statistical analysis shows that each reviewer delivered scores in a statistically consistent manner; that the only outliers were for very low scoring applications; and that all the awardees and appellants were scored in consistent ranges for each reviewer, the Commission can have confidence in the consistency of the scores delivered. Furthermore, the statistical analysis provides no evidence to overturn or amend any of the scores delivered by the selection committee.

Finally, although consistency within one reviewer's set of scores is more important than a show of consistency between reviewers, the Commission nonetheless conducted a review of consistency of scores between reviewers. This review of consistency between reviewers shows a remarkable fact: the selected applicants were the ones that the most reviewers agreed should receive the highest scores. The statistical analysis is included by reference here and can be accessed on the Commission's website at [nj.gov/cannabis/businesses/medicinal/](http://nj.gov/cannabis/businesses/medicinal/)

### **Relative Error and Cannabis Applications**

The grievance submissions from the appellants rely heavily on the concept of "relative error." The Appellate Division also relied on the concept of "relative error" but acknowledged that relative error "is a concept that simply measures the extent to which a computation may be mistaken." Therefore, applying the concept of relative error to the selection process is inappropriate given the variation of subjective narrative responses provided for each measure by applicants.

To understand this concept, the application itself is a good starting point. Applicants were required to provide narrative responses – written expositions about their qualifications, their backgrounds, plans for regulatory compliance and many other factors. These written responses were then scored by a highly qualified selection committee against a broad scoring rubric provided by the Department.

To use the concept of relative error, one would be required to assume that the words put on the page by an applicant had an inherent and defined value in relation to each criterion and measure. Certainly, the paper has a physical weight, and the application has a monetary value to the applicant – indeed many hire application writers to paint their responses– but it does not arrive to the Department with a built-in, inherent "correct score" to which assigned scores can be measured against.

In accordance with the authorizing statute and rules, that score is determined by a selection committee that is chosen by the Department and done so according to a scoring rubric based on the criteria and measures contained in the rules and the RFA itself. The



only score that is inherent in the application is the score that the selection committee agrees it to be – and that the Department accepts. Except in this case, the selection committee was scoring independently, so they did not know whether they agreed or disagreed on a particular score – instead their scores were averaged to force them to meet in the middle on disagreements.

1. The 2018 RFA selection committee members are individual state employees- with diverse experiences, different professional expertise, and different points of view to apply to the scoring process. They were trained on a common rubric and to score responses to common questions, but the whole point of the endeavor was to take those diverse perspectives and combine them into one final composite score. If the Department intended to receive consistent scores between reviewers, the Department would have assigned one person to score all the applications or provided for a more evidence-based versus narrative-based application.

In fact, it was a conscious decision in designing the RFA to set forth general criteria and general instructions to the reviewers and allow the reviewers themselves to apply their own critical frameworks within the overall rubric. The process was designed this way because the Department recognized that in a competitive framework like the 2018 RFA, having variation was vital to being able to pick winners. Cannabis businesses around the country often play to the test; in-fact some have been known to hire consultants and application writers in order to score as highly as possible. Often these consultants and application writers submit for multiple clients in the same RFA. If the Department put out a detailed checklist for each criterion or measure, the Department would have gotten a collection of applications that scored equally, leaving the Department with no good differentiator between one applicant and another. Instead, the Department developed general criteria and entrusted a selection committee, consistent with the Department's regulations, to score those applications on those general criteria. This introduces a level of subjectivity to the review, but the Department selected highly qualified reviewers because the Department sought their collective opinions on which applicants were most worthy of a permit to operate an Alternative Treatment Center.

Let's look at how this model works in relation to Criterion 1, Measure 1: Past Business Experience. The applicants were put on notice through the RFA regarding what they needed to include in their applications, they then responded to the measure, and then they were scored by the selection committee. The selection committee members all reviewed the same material with the same instructions, but because of the subjective element of the review process they could arrive at different results:



- Two selection committee members came from the Division of Medicinal Marijuana. They had a host of history from which to draw from that other selection committee members did not.
- One selection committee member had a laboratory science background, which made them more apt at knowing when an applicant was embellishing their scientific “bonafides.”
- One selection committee member had a background in industrial agriculture which made them more adept at vetting claims related to cultivation and processing.
- One selection committee member had a background in diversity and inclusion and business development – this member was better at assessing whether an applicant was exaggerating the diversity of their business.
- One selection committee member had a background in public health systems management and procurement, which made them particularly adept at differentiating between applications and assessing their overall compliance with the terms of the RFA.

In this model, it is very probable – even expected and encouraged – that an applicant could have a slate of high scores, and a score or two that were considerably lower because a selection committee member was able to use their experience to better assess the response of an applicant.

Take Pangaea for example. In Pangaea’s supplemental submission, Pangaea notes that they received considerably lower scores from some reviewers under Criterion 1, Measure 1. It’s important to note that Pangaea’s application contains many individuals who were quite familiar to the Department. So, when Pangaea embellished the accomplishments of one or more of these individuals, they were judged accordingly by two selection committee members who were uniquely positioned to see the flaws with their submissions.

That is how the system was designed to work – Pangaea’s average composite score was rightfully brought down because of a problem with their submission. It was only caught by two selection committee members because those members were the only ones who had the full context of programmatic history under the Medicinal Marijuana Program. Similarly, if Pangaea had made up a cultivation technique that didn’t exist, or made erroneous claims about the science of cannabis, a different set of reviewers would have been inclined to score them accordingly. This is not an example of “relative error”, but rather an example of the review process functioning as it should.



The appellants alleged many instances like the Pangaea example in which the scores purportedly exhibit “100% relative error.” Here are some others, including responses to the assertions:

Applicant	Issue	Response
Liberty Plant Sciences	Liberty Plant Sciences received two scores of ‘0’ on the final measure in their Northern Region application.	Liberty Plant Sciences failed to sign and lock Part A of the electronic version of their Northern Region application. As such, it could still be edited and changed, and the Department could not distribute it to the Selection Committee. Instead, the Department scanned the entire paper copy, which was properly signed, and distributed that to the selection committee for scoring. The paper copy of their northern region application was 301 pages, one page over the limit. Two reviewers caught this fact and appropriately penalized their final response for going over the page limit.
Bloom	Bloom complains of receiving an inexplicable ‘0’ from one reviewer on measure 2-3b.	The measure asks for “certifications or designations proving the business is women-owned, minority-owned or veteran-owned.” Bloom’s response lists “memberships”. Generally, certifications and designations are earned by evidence whereas memberships are bought. It looks like Bloom meant to say certifications or designations, but their plain language response is confusing and therefore it is understandable that one reviewer would read their response as not being responsive to the question, which asked for certifications or designations, not memberships.
Pangaea	In addition to variation in scores as discussed	The Department has no record of Pangaea even attempting to submit



	<p>above, Pangaea also raises the scores for their floor plans.</p>	<p>electronically but did receive one full paper application which was deemed complete and scored. The floor plans, however, were not even close to being compliant with the Department’s instructions for submission (12 pt. font, 8.5 by 11 wherever possible). Notably, floor plans are one submission that the Department expected may not be able to be formatted as such but Pangaea’s floor plans were so large and cumbersome that several reviewers took issue with the lack of any sort of reasonable attempt to comply with the instructions (the floor plans, today, have broken the box in which they are kept because of how voluminous they are) and deemed them non-responsive.</p>
GGB	<p>GGB raised an issue with one reviewer giving their secure transport response a ‘0’ while receiving high scores from others.</p>	<p>GGB’s response states 1) that they do not anticipate needing to transport and therefore does not include SOPs for transport, but also states 2) that they intend to seek a satellite location and would create SOPs for transport then. So GGB said in their response that they don’t have SOPs and don’t need them, and then go on to say that they will transport in the future to a location that is not authorized as part of the RFA, but again does not provide SOPs. It is a confusing response and one reviewer found it to be non-responsive. The Commission cannot fault that call in retrospect.</p>
Harvest	<p>Harvest claims it was unfairly penalized for responses under Certified Financial Statements and Record</p>	<p>Both Harvest’s responses start with the statement, “As a newly formed entity, Harvest of New Jersey does not have...” [certified financial statement or a record of past business taxes paid].</p>



	<p>of past business taxes paid, where in both cases one reviewer gave them a '0'.</p>	<p>It is not unreasonable then to think that one of six individuals who had over 40,000 pages to read, may take them at their word that what they are about to present does not comply with the measure and therefore provided a score of '0'. It is also worth noting that the reviewer in question saw many applications from newly formed entities that included financial statements for that newly formed entity.</p>
<p>Altus</p>	<p>Altus claims it was errantly given a score of '0' by three reviewers for Measure 2-3b, and that the Department's scoring instructions contradicted guidance to applicants on this measure.</p>	<p>Altus begins its response by stating they "have no such designation at the time" but Altus "pledges to apply" if they qualify for one in the future. It is completely reasonable for three reviewers to have penalized Altus when they state clearly that they do not comply with the measure and may not in the future. The instructions do note that reviewers can give a '0' when there are no certifications or designations present, but they don't specify government-issued certifications or designations as Altus claims. Altus also tries to obscure this response by rattling off a number of suppliers that are certified that they pledge to do business with. Two reviewers bought into this response. But upon review the overall score is compliant with the RFA and rules and seems fair based on the information provided.</p>

In each of these cases, there were reviewers who scored a response highly and one or more reviewer who scored a response harshly. In each case there was a clear reason for a reviewer to give a '0' and an ambivalent response provided by the applicant that made it hard for reviewers to assess accurately – whether due to a violation of the rules



for the RFA, or the inclusion of gobs of prose meant to mask a particular shortcoming on a particular measure.

The best analogy for the RFA process comes from the sport of boxing. In Olympic boxing there are five judges and each scores a winner and loser of a particular round. The winner gets 10 points, and the loser gets less than 10, depending on several factors, including whether they violated the rules at all during the round. It is not uncommon in boxing for judges to be split in their assessment of the winner and loser, much like in the 2018 RFA it was not uncommon for reviewers to be split on a particular response from an applicant. That does not mean that the process or the review was arbitrary, capricious, or unreasonable. It simply means that two or more people responded differently to the same evidence. When that evidence is a subjective narrative in nature like the RFA responses, or fleeting like the speed of a boxer's jab, that evidence can be interpreted differently.

In the 2018 RFA, as both the RFA and the Application Instructions note:

“The application materials submitted by each applicant shall include a full and complete written response to each of the criteria specified in this announcement.”

It is not the fault of the Department, nor the selection committee, if an applicant presented ambivalent or otherwise unclear information that was challenging for the selection committee to score, or that yielded disagreement among selection committee members. It is the responsibility of the applicant to present complete information in an easy-to-understand format. In many cases, applicants did not do this and instead chose to employ prose intended to mask a particular shortcoming or did a poor job of explaining a particular answer. In some cases, they submitted information in a problematic manner or format for which they were penalized.

As the responsibility for the preparation of materials lies with the applicant, so too does the error in these cases.

### **Responses to Grievances**

The Quality Control Review and analysis above addresses several of the recurring grievances included in the supplemental submissions received from appellants. Specifically, this report has already addressed:



Grievance	Explanation
Variation among scores	Reviewers are expected to deliver different scores based on their expertise. The scores were analyzed statistically and found to be statistically consistent.
Zeroes	In the 2018 RFA, the selection committee was able to deliver zeroes if a response was deemed “non-responsive”. In each case examined where a ‘0’ was delivered it was explainable based on the information provided by the applicant. Potential reasons for zeroes included: non-compliance with page limits and other requirements; confusing responses to questions; responses that were inconsistent with other parts of the application or other responses in the application; and clear admissions by the applicants that their responses wouldn’t respond effectively to a particular question.
Complaints about a particular reviewer.	Every reviewer was shown to deliver scores in a statistically consistent manner. Reviewer 3, attacked by one appellant, was a tough grader but a consistent one. Reviewers scored independently but consistently.
Criterion 1, Measure 5	The Commission’s analysis of Criterion 1, Measure 5 show that despite inconsistency between reviewers in many cases, the composite scores delivered by the committee were consistent with the quality of response.
Criterion 2, Measure 3	The Commission’s analysis of Criterion 2, Measure 3 show that despite inconsistency between reviewers in many cases, the composite scores delivered by the committee were consistent with the quality of response.
“Relative Error”	The concept of relative error was improperly applied to the RFA. Each reviewer scored independently and was given autonomy to determine their own scores based on the RFA, the scoring instructions, and their unique background and professional experience. If the Department wanted totally consistent scores, it would have employed a single scorer. There were clearly areas where the committee disagreed on a particular score, but that does not make that disagreement unreasonable, arbitrary, or capricious. In many cases, there was variation in scores because reviewers were appropriately applying their expertise to the evidence before them, in others it was because an applicant presented ambivalent or otherwise confusing information in response to a question.



<p>“Inexplicable scores”</p>	<p>The Commission has provided a sampling of responses to those questioned as “inexplicable”. In all cases examined the Commission determined there was a rational reason for the scores delivered by the Committee. See previous section for some of these instances.</p>
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In addition to these recurring grievances, the recommendation memo also includes information on the following subjects raised by appellants:

- Additional details on the qualifications of the selection committee;
- Details about the quality control committee and process;
- Further details regarding the RFA process itself;
- Amended record to include the full details about how the Department operationalized the RFA and selected awardees; and
- The results of a statistical analysis of the scores delivered in the 2018 RFA to ensure the applications were consistently approached by reviewers.

Additional grievances raised by appellants include assertions that awardees were scored improperly, even though the appellants lack full access to the application materials, and the assertion the Department’s regional order of selections was flawed.

Having conducted the analysis outlined in this recommendation report, the Commission should reject both these assertions as they are not supported by the evidence.

**Recommendation**

Commission staff recommend that the Commission issue new Final Agency Decisions (“FADs”) to the six appellants in the 2018 RFA remand, denying their applications in the 2018 RFA. The reasons for this recommendation are contained in this report and summarized as follows:

- Pursuant to statute and regulation, in 2018 a highly qualified selection committee with no conflicts of interests undertook a comprehensive review of the applications in question and made recommendations<sup>6</sup> to the Department based on that comprehensive review;

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<sup>6</sup> The selection committee recommended the highest six scoring applications in each region for further consideration. Of the applications in question for this report, only Bloom, Liberty Plant Sciences and Harvest were recommended by the selection committee for further consideration.



- The Department then utilized a data-driven formula based on patient need to choose the highest scoring applicants in each region, consistent with the slate of applications recommended by the selection committee;
- Department and Commission staff have undertaken a thorough review of the 2018 RFA, including a review of the applications, the scoring, the Court Opinion, and the supplemental submissions received as part of the remand;
- Commission staff have analyzed the scores delivered in the 2018 RFA and determined through statistical rigor that they were delivered in a consistent manner;
- The Department and Commission have investigated measures in the 2018 RFA with high levels of variation between reviewers, and found the composite scores to be reflective of the quality of the responses presented by the applicants;
- The Department and Commission staff have determined that instances that have been cited as being the most “inexplicable” are in fact explainable; and
- The review conducted by the Department and the Commission has found no clear evidence of wrong-doing, non-compliance with authorizing statutes or regulations, and no evidence that any selection committee member(s) acted in an arbitrary, capricious, or unreasonable manner.

Additionally, because both Bloom and Altus have been awarded permits as part of the 2019 RFA, their FADs should note that not only is there no evidence to warrant new or additional awards pursuant the 2018 RFA, they are now also ineligible to receive another permit. Therefore, all six of the appellants should be denied on the merits of the evidence included in this report and the underlying materials.