

**125th St. Bus. Dist. Mgt. Assoc., Inc. v
New York State Off. of Cannabis Mgt.**

2023 NY Slip Op 32306(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 153804/2023

Judge: Shahabuddeen Abid Ally

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. SHAHABUDDEN ABID ALLY</u>	PART	16TR
	<i>Justice</i>		
-----X		INDEX NO.	<u>153804/2023</u>
125 TH STREET BUSINESS DISTRICT MANAGEMENT ASSOCIATION, INC.,		MOTION DATE	_____
Petitioner,		MOTION SEQ. NO.	<u>001</u>

- v -

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT, CHRISTOPHER ALEXANDER, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, 246 WEST LLC, "ABC CORP" AND "JOHN DOE,"

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18-25, 31-73 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this Article 78 proceeding, petitioner seeks an order preliminarily enjoining respondents from issuing a final approval for a conditional adult use retail dispensary ("CAURD") license for the storefront located at 248 West 125th Street, Manhattan (the "Premises") and nullifying the designation of the Premises as a dispensary. Respondents oppose and cross-move to dismiss the petition pursuant to CPLR § 3211. The parties appeared before the Court for oral argument via Microsoft Teams on June 6, 2023, after which the Court reserved decision. Upon hearing the parties and consideration of the above cited papers, the Court denies petitioner's motion and grants respondents' cross-motion. The petition is therefore dismissed in its entirety.

Background

The relevant and undisputed facts are as follows: Petitioner is a New York State corporation engaged in providing Supplemental Services to the 125th Street Business Improvement District (“BID”). The BID contracts with the City of New York Department of Small Business Services to represent the interests of property and business owners in the community, particularly those relating to sanitation and security within its jurisdiction. The BID’s area of coverage includes the storefront at 248 West 125th Street, New York, NY (the “Premises”), which has been proposed as the location for a new cannabis dispensary.

Since the 2021 enactment of the Marihuana Regulation & Taxation Act (“MRTA”), cannabis distribution has been a regulated industry governed by the Cannabis Law. Pursuant to the Cannabis Law, respondent New York State Office of Cannabis Management (“OCM”) and the Cannabis Control Board (the “Board”) were created and designated as the licensing agency for the various types of cannabis licenses available in New York, including conditional adult use retail dispensary (“CAURD”) licenses (*see* Cannabis Law §§ 2, 7, and 8).

To obtain a CAURD license, an applicant must undergo a two-stage process (Cannabis Law § 61 et seq.). In the first stage, the applicant must submit an application to be reviewed by OCM’s licensing team (Mckeage Affidavit at ¶ 39). If the application satisfies the required criteria and scores high enough, the team makes a recommendation to the Board (*id.*). The Board may grant or deny the applicant a provisional license based upon the recommendation and a vote of its members (*id.*). While an applicant is provisionally licensed, they cannot operate a dispensary or otherwise engage in selling or distributing cannabis products until it receives full licensure (*id.* at ¶ 42).

Next, the provisional licensee must complete the second stage of the process, which includes a notification to the appropriate municipality where the dispensary will be located (Cannabis Law § 76[2]). In New York City, the provisionally approved applicant must give notice to the Community Board with jurisdiction over the area where the proposed dispensary will be located (Cannabis Law § 76[2][b]). Only after notifying the Community Board can a provisional licensee submit its second application, which requires information regarding the provisional licensee's owners and other involved persons, site plans, and other documentation (Mckeage Affidavit, exhibit J).

Before notice can be sent to the appropriate Community Board, a proposed site must first be chosen. To that end, CAURD licensees are eligible to receive state support through the New York Social Equity Cannabis Investment Fund (the "Fund"), which identifies, secures, and renovates potential sites for operation as dispensaries (Mckeage Affidavit, exhibit A). The Fund is a private fund created pursuant to New York State Finance law § 99-ii(2) and Pub. Auth. Law § 1678(32) to provide funding for use in the CAURD program. In this capacity, the Fund acts through its agent the Social Equity Servicing Corporation ("SESC") (*id.*). Regardless of whether a Fund site or other site is chosen by a provisional licensee, it is OCM or the Board who makes the final determination regarding whether a proposed location complies with applicable Cannabis Law regulations (Mckeage Affidavit at ¶ 37).

Upon receiving notice from a provisional licensee, a Community Board has thirty days to provide OCM or the Board with its opinion in favor of or against the granting of full licensure to the applicant (Mckeage Affidavit, exhibit M). This opinion, which is advisory, can include negative recommendations or contingent requirements placed by the community upon the provisional licensee (Mckeage Affidavit, exhibit O). Whatever the opinion, it is made part of the

record upon which OCM and the Board base the final approval determination (Cannabis Law § 76[4]).

The final licensing decision is made by OCM and the Board after a subsequent review which takes into account the opinion of the Community Board (Mckeage Affidavit at ¶ 54). If the opinion is negative, OCM provides a recommendation to the Board based on a review of the application and indicating to the Board that the community opinion was negative (*id.* at ¶ 59). The Board may then take any of several measures, including hearing from the provisional licensee and/or the Community Board, before making its final determination (*id.* at ¶ 60). Whether a Community Board opinion was positive or negative, the Board is required to provide an explanation in writing of how the opinion was considered. (Cannabis Law § 76[4]). Only after the applicant receives the Final Approval Letter and its license certificate, and a compliance check of the site has been conducted, can the dispensary go into operation (Mckeage Affidavit at ¶ 65).

On January 25, 2023, the Board issued a provisional license to an applicant (“Applicant”) (*id.* at ¶ 73). The Applicant selected the Premises as a proposed dispensary location, which lies within the jurisdictional bounds of Community Board 10 (*id.* at ¶ 74). In February 2023, the Office of the Governor informed petitioner that a lease for the Premises had been executed for the purpose of operating a dispensary (Petition at ¶ 60). As of that date, Community Board 10 had not been provided formal notice nor an opportunity to opine on the opening of a dispensary at the Premises (*id.* at ¶ 62).

Petitioner commenced the instant action by order to show cause on or about April 26, 2023. While the motion was pending but before oral arguments, the Applicant sent notice of the

proposed location to Community Board 10. At the time of oral argument, Community Board 10 had not yet submitted its opinion to the Board.

Discussion

The Court will first address the cross-motion as it is ultimately dispositive of this action.

A party may move to dismiss an action pursuant on the ground that the court lacks subject matter jurisdiction over the cause of action (CPLR § 3211[a][2]) or that the party asserting the claim has failed to allege a cognizable cause of action (CPLR § 3211[a][7]).

Cannabis Law § 135 provides that actions by the Board are subject to judicial review in the manner set forth in CPLR Article 78. A proceeding brought pursuant to Article 78 “shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer” (CPLR § 7801[1]). “To challenge an administrative determination, the agency action must be final and binding upon the petitioner” (*Matter of Ranco Sand & Stone Corp. v Vecchio*, 27 NYS3d 92, 98 [2016]). An agency action becomes final and binding when the following two requirements are shown: “completeness (finality) of the determination and exhaustion of administrative remedies” (*Walton v N.Y.S. Dep’t of Correctional Servs.*, 8 NY3d 186, 194 [2007]). Further, where there has been no injury, there is no standing to bring an article 78 proceeding (*East Ramapo Cent. School Dist.*, 29 NY3d at 939, citing *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 11 [1975]).).

Respondents argue that this special proceeding must be dismissed because there has been no final approval for a CAURD license. Until OCM or the Board makes a final determination that an application is fully approved, respondents contend, the application remains subject to further review and possible rejection. Respondent points out that even if a provisional license has

been issued, without final approval for a CAURD license the holder of a provisional license cannot operate a dispensary and therefore petitioner has suffered no injury.

Petitioner acknowledges that the full licensing process has not yet been completed and that the Applicant holds only a provisional license. Petitioner contends that this matter is nonetheless ripe for judicial review because various actions by respondents and the Fund indicate that full licensure is essentially a *fait accompli*, rendering further notice requirements moot and Community Board opinion irrelevant. For example, petitioner argues that the renovation that has begun at the Premises represents a financial investment that the Board would be loathe to squander by later denying the applicant a license. Petitioner similarly claims that OCM's "meet and greet" with the applicant reaffirms that OCM and the Board have committed to the applicant's full licensure even if it has not yet been issued.

The Court finds petitioner's argument unavailing. There is no dispute that there remain numerous steps for the applicant to take before a CAURD license can be issued, one of which explicitly provides Community Board 10 the chance to be heard. There is also no dispute that unless and until a full CAURD license is issued, the applicant cannot operate a dispensary and may yet still be denied full licensure. Further, because the dispensary is not yet operational, petitioner cannot demonstrate that its members have suffered cognizable injury that can provide standing to bring this proceeding at this time.

This remains true regardless of how much construction has taken place at the Premises. A private entity's investment of money and time into renovating the Premises before full licensure has been granted is a risk that lies with that entity. It is not for this Court to determine whether such investment is a sound one.

Further, allowing the application process to take its course would provide petitioner exactly what it claims to be seeking: the opportunity for the neighborhood's views to be heard through its Community Board. Conversely, the Court notes that granting an injunction would itself preclude Community Board 10 from providing its opinion on the proposed dispensary. In any event, the parties acknowledged at oral argument that notice has since been provided to pursuant to the Cannabis Law and Community Board 10 now has full opportunity to make its views known to OCM and the Board.

To the extent that petitioner argues respondents' other actions demonstrate that full licensure is a foregone conclusion, the Court is not persuaded that such actions signify that the process has been predetermined or otherwise "rigged." Should full licensure ultimately be granted, petitioner may then have recourse to Article 78 review if it believes its concerns have not been satisfactorily addressed through the administrative process. Respondent's cross-motion is therefore granted.

Conclusion

Based on the foregoing, the Court finds that respondents have demonstrated that the matter is not ripe for judicial review and that this action is therefore premature. As such, the Court is precluded from considering petitioner's application on the merits. Any remaining arguments not explicitly addressed herein have been considered by the Court and are either moot or unpersuasive.


Accordingly, it is hereby:

ORDERED and ADJUDGED that respondents' cross-motion is granted and the petition is dismissed in its entirety; and it is further

ORDERED and ADJUDGED that petitioner’s motion for a preliminary injunction and temporary restraining order is denied; and it is further

ORDERED that respondents shall serve upon petitioner a copy of this decision and order with notice of entry within thirty days thereof.

This constitutes the decision and order of the Court.

<u>7/10/2023</u>				
DATE			SHAHARUDEEN ABID ALLY, A.J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	<input type="checkbox"/>	OTHER