

**Matter of Tree Hill Innovations, LLC v New York
State Cannabis Control Bd.**

2024 NY Slip Op 35004(U)

November 13, 2024

Supreme Court, Albany County

Docket Number: Index No. 904125-24

Judge: Sharon A. Graff

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
TREE HILL INNOVATIONS, LLC,

Petitioner,

DECISION & ORDER

Index No.: 904125-24

For a Judgment Pursuant to Article 78 of the CPLR

-against-

NEW YORK STATE CANNABIS CONTROL BOARD,
NEW YORK STATE OFFICE OF CANNABIS
MANAGEMENT,

Respondents.

Supreme Court, Albany County, Special Term
Return Date: July 11, 2024

Present: Hon. Sharon A. Graff, JSC

Appearances: Law Offices of Bernard V. Kleinman, PLLC
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Hon. Letitia James
Attorney General for the State of New York
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Graff, J.:

By petition dated April 29, 2024, Tree Hill Innovations. LLC (Petitioner), a women-owned business applicant for adult-use cannabis cultivator, processor, and distributor licenses (NYSCEF Doc. Nos. 5-7), seeks judicial review of the process by which the Respondents used a computer queuing program to randomly sequence applications for such licenses into application queues (“Queues”) and weight the pool of application to give extra chances to certain applicants.

Additionally, the Petitioner seeks a judgment declaring the Queues arbitrary and capricious and annulling same, as well as the vacatur of the current Queues for adult-use cannabis cultivator, processor, and distributor licenses.

The Respondents have answered the Petition and have interposed an objection in point of law that the Petition does not state a cause of action (see, CPLR 3211 [a][7]) and should therefore be denied.

Pursuant to the restorative justice and social equity goals of the Cannabis Law, the Respondent New York State Cannabis Control Board (“Board”), is charged with creating and implementing “a social and economic equity plan (“SEE Plan”) ...when issuing licenses for adult-use cannabis related activities.” Cannabis Law 87 (1). The SEE Plan is intended to “actively promote applicants from communities disproportionately impacted by cannabis prohibition (“CDI applicants”), and promote racial, ethnic and gender diversity” by assigning priority to applicants (“SEE applicants”), from such impacted communities and to those “who qualify as a minority or women-owned business, distressed farmers, or service-disabled veterans.” Cannabis Law 87 (1). Moreover, the SEE plan is also designed to “promote diversity in commerce, ownership and employment and opportunities for social and economic equity in the adult-use cannabis industry” and, in support of that design the Cannabis Law mandates that “(a) goal shall be established to award fifty percent of adult-use cannabis licenses” to SEE applicants. Cannabis Law 87 (2). Finally, the Cannabis Laws’ SEE Plan calls for extra priority to be given to the applications of CDI Applicants (“Extra Priority Applications”) who are able to demonstrate that they have income lower than a designated level and were either convicted of a marijuana related offense prior to the effective date of the Cannabis Law, or whose parent, guardian, child, spouse, dependent, or person they were dependent upon, was so convicted. See, Cannabis Law 87 (3). That plan is reflected in OCM’s Adult Use Regulations (see, 9 NYCRR 120.7 [c][3][i]; 9 NYCRR 121 [k]), is consonant

with the overarching economic, criminal justice, and participatory democratic restorative justice goals that informed the enactment of the Cannabis Law itself (see, Senate Introducer's Mem in Support, Bill Jacket, L. 2021, ch 92 at 7), and reflects the discretion vested in the Board to pursue those goals in, inter alia, the licensure process. See, Cannabis Law 10 (1)(2).

In September 2023, the Respondent New York State Office of Cannabis Management ("OCM") announced a window for all applicants seeking, inter alia, retail, microbusiness, cultivator, and distributor licenses would open on October 4, 2023, and would close on December 18, 2023. NYSCEF Doc. No. 38, paragraph 29. Retail and microbusiness applicants who could demonstrate proof of control over premises from which they would conduct their proposed businesses were directed to submit their application before November 17, 2023 ("November Application"), while all other applications were to be submitted by December 18, 2023 ("December Applications"). NYSCEF Doc. 25, p. 2. OCM concurrently published the "General Licensing Application Frequently Asked Questions" document (NYSCEF Doc. No. 26) that was intended to explain to the public how the application for licenses would be selected for licensure. That document was updated on November 3, 2023, and January 26, 2024. NYSCEF Doc. No. 38, paragraph 30. In addition, OCM commenced a statewide tour in October 2023, consisting of in-person and virtual presentations across the state ("Roadway to Adult Use Applications") designed to discuss and answer questions about the application and licensure process. The tour continued through December 2023. Moreover, the Board conducted monthly, public meetings that shared and memorialized, inter alia, application and licensure information. NYSCEF Doc. No. 38, paragraph 35.

Thereafter, on January 30, 2024, OCM "used a computer program to randomly sequence the December Applications for the Queues to determine the order in which (OCM) would review applications." NYSCEF Doc. No. 37, p. 8. The Queues were solely created to determine the order

in which OCM would review applications. NYSCEF Doc. No. 38, paragraph 37. The process of reviewing applications was randomized, rather than conducted based on the order in which applications were submitted, to prevent the process from being rendered inequitable due to the monetary and/or technical advantages possessed by certain applicants (such as high-speed internet services or the ability to retain legal counsel) that would allow them to submit applications more rapidly than applicants who lacked such advantages. NYSCEF Doc. No. 38, paragraphs 37, 38. After a review of the applicant pool of the December Applications, OCM determined that 8 % of that pool consisted of Extra Priority Applications, and 92 % of the pool consisted of non-Priority Applications. NYSCEF Doc. No. 38, paragraph 40. Once the total number of SEE applicants were known upon the closing of the December window, OCA determined the weight Extra Priority Applications should receive in the December Queues by considering both the total number of SEE Applicants and the goal (see, Cannabis Law 87 [2]), of awarding 50 % of adult-use cannabis licenses to such applicants. NYSCEF Doc. No. 38, paragraphs 40-41. Consequently, December Extra Priority Applications “were included two extra times (in total three times) in the pool of December Applications that were randomly ordered in the December Queues.” NYSCEF Doc. No. 38, paragraph 39. The result of giving extra weight to the Extra Priority Applications resulted in the proportion of such applications making up almost 9% of the processor queue (48 out of 539 applications), slightly more than 17% of the cultivator queue (47 out of 277 applications), and slightly more than 11% in the distributor queue 33 out of 293 applications). NYSCEF Doc. No. 34, pp. 6-7. As such, the proportion of Extra Priority Applications increased in each of the queues and increased the likelihood that an Extra Priority Applications would receive a higher position in the Queues.

The Petitioner, a SEE applicant, asserts that the creation and implementation of the Queues was arbitrary and capricious and compromised by a lack of transparency and by violations in the application process.

“As this case did not involve a determination made after a quasi-judicial hearing required by law, judicial review is limited to whether the challenged portion of (OTDA’s) determination was irrational, arbitrary and capricious or contrary to law.” *Matter of Adirondack Wild: Friends of the Forest Pres. v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 191 (2019), citation omitted; see, CPLR 7803 (3). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Matter of O’Hagan v. City of New York*, 226 A.D.3d 1026, 1027 (2nd Dept. 2024), internal quotation marks, ellipsis and citations omitted; see, *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974). Upon finding that an agency’s determination is rationally based, a court “must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency.” *Matter of Brookdale Physicians’ Dialysis Assoc., Inc. v. Department of Finance of City of N.Y.*, 41 N.Y.3d 608, 616, (2024), internal quotation marks, brackets and citations omitted.

Upon review, it is apparent that the Respondents’ use of a computer queuing program to randomly sequence applications for adult-cannabis use licenses into application queues for review, and to further provide Extra Priority applicants three chances in the Queue after a review of the applicant pool, is consistent with the stated goals of the Cannabis Law. See, Cannabis Law 87 (1)(2)(3).

The Petitioner’s complaints about the lack of transparency of the formation of the Queues and the determination to employ a weighted system relative to Extra Priority applications, is unavailing. In this regard, the Court finds that OCM’s publication of the “Roadway to Adult Use

Applications” to explain to the public how the application for licenses would be selected for licensure, its commencement of a statewide tour designed to discuss and answer questions about the application and licensure process, and the Board’s monthly public meetings that shared and memorialized application and licensure information, contradicts any assertion that the application process was compromised by a lack of transparency.

The Court has considered and rejected the Petitioner’s arguments based on the assertion that the integrity of the Queues was compromised by violations by applicants in the application process. NYSCEF Doc. No. 39.

Finally, “(t)he Court finds that Respondents’ creation of the Queue and providing three chances in the Queue to Extra Priority applicants were rationally based and consistent with the terms and goals of the Cannabis Law and are not arbitrary and capricious. (Petitioners) and the public in general, had notice of the application process and its potential pitfalls.” *Friendly Flower 1 Inc, et al. v. New York State Cannabis Control Board, et al.*, Sup Ct, Albany County, Index No. 901180-24, p. 7.

Based on the aforesaid, it is hereby ORDERED that the Petition is Dismissed.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the Respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. The Respondents are not relieved from the provision of that rule regarding filing, entry or notice of entry.

SO ORDERED AND AJUDGED.

ENTER

Dated: November 13, 2024.
Albany, New York


HON. SHARON A. GRAFF, JSC

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11/14/2024

Papers Considered:

1. "Verified Petition" dated April 29, 2024.
2. "Order to Show Cause" dated April 30, 2024.
3. "Affirmation in Support of Verified Petition" by Marguerite Mikol, dated April 29, 2024, together with annexed Exhibits 1-7.
4. "Memorandum of Law in Support of Order to Show Cause" by Bernard V. Kleinman, Esq., dated April 30, 2024.
5. "Verified Answer" by James D. Taylor, Assistant Attorney General, dated July 3, 2024, together with annexed Exhibits A-Q.
6. "Memorandum of Law in Support of Respondent's Answer" by James D. Taylor, Assistant Attorney General, dated July 3, 2024
7. "Affirmation" by Tabatha Robinson, dated July 3, 2024.
8. "Affirmation" by Patrick McKeage, dated July 3, 2024.
9. "Affirmation" by Jodi Byron, dated July 2, 2024.
10. "Petitioner's Reply Memorandum of Law in Support of Order to Show Cause," by Bernard V. Kleinman, Esq., dated July 11, 2024, together with Annexed Exhibits 1-2.