Actualize Dispensary Inc. v New York State Off. of Cannabis Mgt.
2025 NY Slip Op 34032(U)
October 1, 2025
Supreme Court, New York County
Docket Number: Index No. 150392/2025
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** — ***Justice*** **PART** **36**

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INDEX NO. 150392/2025

MOTION SEQ. NO. 001

ACTUALIZE DISPENSARY INC., ASTRO MANAGEMENT, INC., L.O.R.D.S. LLC, and R&R REMEDIES LLC,
Petitioners,

\- v -

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT, NEW YORK STATE CANNABIS CONTROL BOARD, TREMAINE WRIGHT, FELICIA A.B. REID, BUZZY NY LLC, AT THE FACTORY LLC, LEAFY NYC II LLC, and TAOZEN, LLC,
Respondents.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 91, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158

were read on this motion to/for **ARTICLE 78**.

Petitioners contend that the New York State Office of Cannabis Management ("OCM") and New York State Cannabis Control Board's ("CCB") approval of Resolution 2024-105 and Resolution No. 2024-110 granting four retail cannabis dispensary licenses to Buzzy NY LLC (hereinafter, "Buzzy), Taozen LLC (hereinafter, "Taozen"), At The Factory LLC (hereinafter, "ATF") and Leafy NYC II LLC (hereinafter, "Leafy") (together as, "respondent applicants"), each within 1,000 feet of petitioners' respective "proximity protected" dispensaries, was arbitrary and capricious.[1] According to petitioners, the approval of a dispensary located within 1,000 feet of an existing dispensary may only occur if the proposed dispensary location would promote "public convenience and advantage" based on a thorough and reasoned analysis of the seven factors listed in 9 NYCRR 119.4(b). Petitioners rely on the CCB approval documents to note that the approvals lack detailed consideration of the statutory factors since they contain no explanations of how the factors were satisfied. For example, in granting Leafy's, Buzzy's, and ATF's applications, petitioners argue that the CCB relied on flawed opinions from the relevant Community Boards in favor of the proposed locations which are based on general sentiment and on subjective considerations that do not consider how approvals of the dispensaries would impact cannabis market saturation.

Petitioners also posit that in addition to the relevant Community Boards receiving and reviewing a significant number of cannabis dispensary applications within a short period of time, an opinion from a Community Board is not a substitute for an independent analysis by the CCB of the factors as required under 9 NYCRR 119.4(b). According to petitioners, the CCB, without

[1] Familiarity with the facts of this proceeding is presumed and for reasons of brevity will not be repeated here.

providing any supporting data, considered population density and the surrounding block and avenues as factors in approving the resolutions[2] at issue. Petitioners aver that the consideration of the surrounding blocks and avenues is inappropriate because they are the subject of proposed revisions to the statutory factors which have not yet been formally adopted.

Next, petitioners assert that due process was violated during the approval process as there was minimal deliberation among the OCM and CCB members. Petitioners insist that the approval process lacked transparency regarding the facts or evidence considered and that the affected licensees, like petitioners, were not afforded an opportunity to contest the determinations. Petitioners further urge the court to find that while the OCM licensing framework mirrors that of the New York State Liquor Authority ("SLA"), the OCM fails to apply a fact-based, transparent standard when granting proximity waivers for cannabis dispensaries, indicating that the approval determinations are not based on any clear or rational standards, which injects uncertainty into the regulatory framework. Petitioners also articulate that the grant of the proximity waivers frustrates the underlying policy goals of NYCRR 119.4 which seek to prevent oversaturation of cannabis dispensaries. The waivers should be granted sparingly, petitioners argue, specifically only where there is reason to believe that the granting would not oversaturate the market.

In addition, while the court declined to sign the temporary restraining order ("TRO") portion of the Order to Show Cause, petitioners here contend that they are entitled to a grant of a preliminary injunction pursuant to CPLR 6301 and/or a stay of enforcement of OCM determination which granted the proximity waivers at issue here. Petitioners reiterate that given the reasons stated above concerning the arbitrary and capricious nature of the grant of the resolution, they have established a likelihood of success on the merits. Addressing the irreparable harm prong, petitioners assert that the proximity waivers grant will allow respondents to divert customers from petitioners' businesses, resulting in significant losses of current or future profits, market share, and goodwill, undermining petitioners' competitive advantage in an already saturated market. Petitioners note that since they are new in the cannabis business, it will be difficult to quantify the damages that they will suffer if the injunction is not granted. With respect to the balance of the equities prong, petitioners posit that the balance of the equities tilts in favor of granting the preliminary injunction and stay sought herein. An injunction or a stay will not prejudice respondents, argue petitioners, because, upon information and belief, the respondents' dispensaries are not yet operational and therefore, an injunction or stay will not disrupt their operations or cause them to lose revenue (NYSCEF Doc. No. 14, *petitioners' memo of law*). In support of the application, petitioners attach a copy of the CCB approval notes, a copy of Resolution 2024-105 and Resolution No. 2024-110, proximity protection map, and approvals (NYSCEF Doc. Nos. 2-13).

The OCM and CCB oppose the petition, and cross-move to dismiss same pursuant to CPLR 7804(f) and 3211(a)(2). They contend that the proximity protection accorded to petitioners does not bar CCB from granting a cannabis license where it would promote public convenience pursuant to 9 NYCRR 119.4(b). The CCB asserts that when reviewing an applicant's application seeking approval to operate within 1,000 feet of a previously approved

[2] Respondent applicant's application for dispensary locations were approved as memorialized in Resolution 2024-105 and Resolution 2024-110.

location, the review is based on the Public Convenience Regulations factors enumerated in 9 NYCRR 119.4(b). According to the CCB, it has considerable latitude to determine how much weight to accord each factor.

The CCB asserts that, in sum and substance, applications for retail cannabis licenses were approved after it found that generally the applicants had all necessary Community Board approvals; the location of the dispensaries were in significant commercial corridors that were pedestrian friendly and could be easily reached by public transportation; the noise from the dispensaries is negligible; dispensaries would replace the prevalence of illegal cannabis sales in the area; and there was no history of cannabis violations or criminal activity at the locations.

Next, the CCB posits that petitioners lack standing to challenge the determinations because the nature of the injury alleged, namely the negative effect of the approvals on petitioners' cannabis business, are not cognizable, as neither the Cannabis Law nor Public Convenience regulations protect businesses from competition. The CCB asserts that Cannabis Law § 10 permits the CCB to increase competition to avoid market dominance by an entity and thus, petitioners alleged competitive harms are not within the zone of interests protected by law.

CCB also argues that the petition must be dismissed for the additional reason that OCM and its executive director, Felicia A.B. Reid, are improper parties. According to CCB, neither OCM nor its executive director have the authority to approve the dispensary applications. Moreover, they did not participate in approving the applications challenged here. The CCB posits that contrary to petitioners' contentions, it acted within its jurisdiction when it relied on the record submitted by the applicants to evaluate the statutory factors. The CCB also argues that since petitioners' economic interest in their respective business does not entitle them to be heard as a matter of constitutional right before new cannabis licensing applications can be granted, petitioners' argument that that they were not given adequate notice and an opportunity to participate in the hearing is meritless.

Further, the CCB contends that petitioners have failed to meet their burden on the preliminary injunction request and therefore, that branch of the petition must also be dismissed. CCB insists that since it made a holistic consideration of the public convenience factors pursuant to 9 NYCRR 119.4(b), petitioners have not demonstrated a likelihood of success on the merits, especially where, as here, the CCB may rule in favor of an applicant even if some factors do not favor it. Concerning the irreparable harm prong, the CCB avers that the alleged harm of possible business competition and a loss in prospective profits is wholly economic and speculative and does not constitute irreparable harm. To the extent petitioners neither allege that they have an exclusive right to sell cannabis nor that the applicants whose dispensary licenses were granted violated an existing contractual business relationship with petitioners, CCB contends that petitioners' harm is wholly economic and speculative, and not irreparable. Lastly, the CCB argues that the equities favor respondents because petitioners' injunction seek to reverse the determinations, which has the possibility of preventing the CCB from exercising its statutorily proscribed discretion to create a functioning, legal cannabis market, populated only with duly licensed dispensaries (NYSCEF Doc. No. 118, *memo of law in opposition and cross-motion*).

The CCB attaches copies of the application materials considered and affidavits from members of the CCB who participated in granting the location waiver applications (NYSCEF Doc. Nos. 100-117).

Furthermore, the respondent applicants oppose and cross-move for dismissal, in sum and substance, contending that in addition to expending a significant amount of financial resources to ready their cannabis dispensaries for business, the petition must be dismissed under CPLR 3211(a)(1) and (7) because the documentary record conclusively establishes a lawful and rational agency determination, and that the petition fails to plead facts that, if accepted as true, would constitute a legally cognizable claim (NYSCEF Doc. Nos. 124; 133; and 135).

In reply, petitioners contend that the economic injury alleged which threaten their viability is sufficient for standing. As such, the economic injuries confer standing here because they fall within the "zone of interests" protected by the relevant law. They contend that since the CCB distance regulations are intended to protect the interest of licensees critical to creating a viable market, petitioners have standing to initiate the instant petition because the grant of the adult cannabis license would oversaturate the cannabis market. According to petitioners, their continued economic viability and avoiding "over-saturation" are central to the CCB waiver analysis. Petitioners further contend that to the extent the entire administrative record does not conclusively dispose of plaintiffs' claims, that branch of the opposition papers seeking to dismiss the petition pursuant to CPLR 3211(a)(1) should be disregarded. Petitioners insist that the CCB has not posted transcripts of its meetings during which the cannabis dispensary licenses were granted and only provides scant documentation in support of the subject determinations which are being challenged here. They aver that insofar as the CCB neither considered the enumerated factors stated in 9 NYCRR 119.4(b) nor conducted its own independent analysis based on the information submitted by the applicants, the determinations granting the proximity waivers is arbitrary and capricious. Petitioners also reiterate the preliminary injunction arguments advanced above (NYSCEF Doc. No. 150, *reply*).

"Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue . . . the rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812-13 [2003]). Generally, "[a] petitioner challenging government agency action pursuant to an article 78 petition has the burden of demonstrating an 'injury in fact' and that the alleged injury falls within the 'zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted' in order to have standing to challenge that action" (*Matter of Stevens v New York State Div. of Criminal Justice Servs.*, 40 NY3d 505, 5154 [2023], quoting *Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]).

"The injury-in-fact requirement necessitates a showing that the party has 'an actual legal stake in the matter being adjudicated' and has suffered a cognizable harm that is not 'tenuous,' 'ephemeral,' or 'conjectural' but is sufficiently concrete and particularized to warrant judicial intervention" (*Matter of Mental Hygiene Legal Servs. v Daniels*, 33 NY3d at 50, quoting *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211, 810 N.E.2d 405, 778 N.Y.S.2d 123 [2004]). Concerning the zone of interest test, "a party must show that the in-fact

injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" (*Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]).

The standard of review in this Article 78 proceeding is whether the respondents' determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). "The court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz v Brown*, 80 NY2d 998, 1001 [1992]). Whether an administrative decision is arbitrary or capricious depends on whether the determination "'is without sound basis in reason and is generally taken without regard to the facts'" (*Matter of Galaxy Bar & Grill Corp. v New York State Liq. Auth.*, 154 AD3d 476, 482 [1st 2017], citing *Pell v Board of Education*, 34 NY2d 222, 231 [1974]). A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (see *Sewell v New York*, 182 AD2d 469, 473 [1st Dept. 1992]). As such, "[i]f the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion" (*Sullivan County Harness Racing Ass'n v Glasser*, 30 NY2d 269, 278 [1972]).

Concerning the proximity distance requirements, 9 NYCRR 119.4(b) provides that:
"(b) The [Cannabis Control] Board may determine that granting a license would promote public convenience and advantage as described in paragraphs (1) and (2) of subdivision (a) of this section by considering the following factors, which include:

(1) the number, classes, and character of other licenses in proximity to the premises and in the particular municipality or subdivision thereof;
(2) evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies;
(3) whether there is a demonstrated need for such license;
(4) effect of the grant of the license on pedestrian or vehicular traffic, and parking, in proximity to the premises;
(5) the existing noise level at the premises and any increase in noise level that would be generated by the proposed premises;
(6) the history of cannabis violations and reported criminal activity at the proposed premises; and
(7) any other factors specified by law or regulation that are relevant to determine that granting a license would promote public convenience and advantage of the community."

As a preliminary matter, petitioners fail to convince the court that they have standing to commence the instant petition. Petitioners' alleged injury is purely economic or competitive. Petitioners have neither submitted evidence nor alleged sufficient facts establishing that they have, in fact, been injured by the CCB's determination, and allegations that they will be injured in the future is speculative, at best. Furthermore, competitive injury, such as that alleged by petitioners here, is insufficient to confer standing unless such injury is within the zone of interests protected by the controlling statute (see *Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]). The court finds that petitioners have failed to establish that any alleged economic or competitive injury that they may suffer is within the zone of interests

protected by the Cannabis Law. The overriding purpose of the statute is to regulate cannabis, promote significant economic growth, make substantial investment in communities most impacted by cannabis criminalization, and reduce the illegal drug market (*see* Cannabis Law § 2). Petitioners fail to convince the court that the statute merely protects existing retail cannabis locations from competition. As such, petitioners have failed to demonstrate that they have been injured by the grant of proximity waivers permitting the applicants to operate their cannabis dispensaries within 1000 feet from petitioners' respective cannabis locations and that the injury falls within the zone of interest (see *Utica Ins. Co. v RJR Maintenance Group, Inc*., 90 AD3d 554, 555 [1st Dept 2011]).

Assuming, *arguendo*, that petitioners have standing, their relief is nonetheless denied. Here, a review of the record reveals that the CCB's determination was grounded in the record submitted, aligned with statutory and regulatory authority, and reflective of its mandate to promote safe, equitable access to cannabis in New York. Although the CCB did not delineate every factor in its discussions, the record demonstrates that the factors were considered in its overall analysis. In sum and substance, the CCB adopted a holistic approach to applying the factors enumerated in 9 NYCRR 119.4(b) insofar as it approved applications for retail license after determining that the applicants had all necessary licenses and approvals; that each dispensary location was in a bustling commercial corridor, easily reachable by public transportation; that each posed negligible noise concerns; that approval might dampen the prevalence of illegal cannabis sales in the area; and that the applicants had no history of cannabis violations or criminal activity at the locations proposed. Given the above, petitioners cannot meet their burden for a preliminary injunction. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that the petition is denied; and it is further

ORDERED that the cross-motion is granted, and the proceeding is dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, respondents shall serve a copy of this decision and order, with notice of entry, upon petitioners.

This constitutes the decision and order of this court.

October 1, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X] CASE DISPOSED	[ ] NON-FINAL DISPOSITION	
	[ ] GRANTED [X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE