

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

Green Island 716 Inc.

Respondent.

DECISION

Inspection No.: 104202408130054

Respondent requested an emergency hearing on August 15, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on August 13, 2024.

The emergency hearing began on August 21, 2024 which is within three (3) business days of the Respondent's request, and concluded on August 28, 2024.

The Respondent was represented by Phil Modrzynski.

The Office of Cannabis Management (hereinafter "OCM") was represented by Zachary Hirschfeld under the observation and supervision of Michael Waller.

Investigative Specialist Sarah Tagliaferro testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 3578 Walden Avenue Lancaster, New York 14086.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

There were no allegations of improper service raised during this hearing by Respondent's attorney. Petitioner stated that an employee in apparent control of the premises was served during the inspection and agreed to give the documents to the owner or an appropriate party. Additionally, Investigator Tagliaferro stated that she posted copies of the Notice of Violation and Order to seal on the front of the premises. (Exhibit D-2).

APPLICABLE LAW

Cannabis Law Article 6 §138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section.”

Cannabis Law Article 6 § 138-b(1) provides that orders to seal: In addition to any other authority conferred in this chapter, pursuant to the provisions of this section, the board or the office shall have the authority to issue an order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business as described in subdivision eight of section ten of this chapter, in violation of subdivision one or one-a of section one hundred twenty-five or subdivision one or eight or section one hundred thirty-two of this article.

Cannabis Law Article 6 §138-b(6) provides that an order to seal may be issued by the office or the board pursuant to subdivision three of this section only if:

- (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zoned and lawfully occupied as a residence; and
- (b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

Cannabis Law Article 6 §138-b(7) provides that in assessing whether unlicensed activity within a building is more than de minimis, the office or board, as relevant, shall consider factors such as any one or more of the following:

- (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises;

- (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter;
- (c) the volume of illicit cannabis products on site; and
- (d) the variety of illicit cannabis products on site. (See Regulations at 9 NYCRR 133.25(f)(3)(i-iv)).

Cannabis Law Article 6 §138-b (3) provides that the office may issue an order to seal with an immediate effective date if such order is based upon a finding by the office of an imminent threat to the public health, safety and welfare. (See Regulations at 9 NYCRR 133.25(f)(1)).

Cannabis Law Article 6 §138-b(4) sets forth the factors that determine an imminent threat to public health, safety, and welfare shall be limited to:

- (a) documented sales to minors;
- (b) unlicensed processing of cannabis products at the building or premises;
- (c) orders issued following an inspection wherein the person engaged in the unlicensed activity engaged in violent, tumultuous, or other behaviors indicating expressed intent to not comply with the office's order to cease the unlicensed activity;
- (d) documented presence of unlawful firearms at the building or premises;
- (e) proximity of the building or premises to schools, houses of worship, or public youth facilities;
- (f) presence of products deemed unsafe based on reports of illness or hospitalization; or
- (g) sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii).

FINDINGS OF FACT

1. Respondent was offering cannabis products for sale without a license issued by OCM. During the course of the hearing Investigator Tagliaferro testified that she had training and experience in identifying cannabis based on its smell and appearance, and that she was familiar with the names of different strains of cannabis. She explained that she had on the job training, and additionally reviewed and studied material distributed by OCM. When looking for illicit cannabis at a location, she stated that she typically looks for packaging labels that refers to cannabis. Investigator Tagliaferro testified that on the premises she observed what appeared to be adult use cannabis products in a display case, specifically cannabis vape and vape concentrate

products labeled with white and orange price sticker. (Exhibit B-7). The case, which was visible to customers, had a label stating buy 2 get one free. She explained that additional cannabis products were found in a box located high up on a shelf behind the counter. She stated that during the inspection she was told by a New York Department of Tax and Finance (hereinafter “DTF”) officer, that shortly before her inspection, an undercover officer from DTF purchased cannabis products from Green Island 716, Inc. The purchasing officer had entered the premises, requested cannabis product, and an employee of the location pulled cannabis products from a unwrapped box on the upper shelf of a wall. (Exhibit B-8 and B9). The purchasing officer was present and concurred as the information related to the purchase was relayed to Investigator Tagliaferro. On the date of inspection, Investigator Tagliaferro observed a fair number of cannabis products inside the Dr. Dabber box, specifically cannabis flower and edibles. (Exhibit B-13 through B-21). Investigator Tagliaferro testified that in addition to the products located in a display case and in the Dr. Dabber box, she observed products in a storeroom hidden behind a mirror. (Exhibit C-2 and C-3). The room contained a “Torch” branded box containing cannabis vape products. (Exhibit C-4). An additional box contained products labeled as cannabis concentrate vapes or as live resin diamonds, which had price tags affixed. Additionally, a paper bag which Investigator Tagliaferro identified as containing cannabis flower was observed. In the same room were products in boxes or bags labeled as cannabis pre-rolls, liquid diamonds.

Respondent’s attorney asserted throughout the hearing that the products observed on site were not tested, were only allegedly cannabis, and that the Cannabis Law Article 6 §138-b did not allow the products to be inferred to be cannabis based solely on the label or marketing as such. However, Cannabis Law Article 6 §138-b (1) specifically refers back to Cannabis Law Article 6 §125 which states that no unlicensed person shall sell at retail products marketed or labeled as cannabis. It also refers to Cannabis Law Article 6 §132 which prescribes penalties for those offering to sell cannabis and cannabis products or products marketed or labeled as such. Thus, it is evident that any failure of the section to directly mention “offers to sell” or “labeled or marketed as cannabis” does not prohibit a finding that offering to sell products labeled or marketed as cannabis is in contravention of Cannabis Law Article 6 §138-b. I find that there is ample evidence that Green Island 716 Inc. was selling or offering to sell cannabis products or products marketed or labeled as such, without a license. Additionally, even if there were a finding that Cannabis Law Article 6 §138-b, did not apply to products marketed or labeled as cannabis, the product and warning labels on the items at hand, in conjunction with the manner and method in which the vast majority of product was hidden, leads me to find that the products were in fact cannabis. A lot of effort was placed into concealing the products found in both the Dr. Dabber box and behind the secret mirror-door in the storeroom. Many other products were visibly offered for sale at the location. However, the vast majority of the illicit products were concealed. This demonstrates a clear consciousness of guilt on the part of the Respondent.

2. Investigator Tagliaferro testified that no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance no part was zoned and lawfully occupied as a “residence.” She stated that she did not observe any of the hallmarks of a residence on the premises, including but not limited to, showers, kitchens, clothing, or dressers.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. The Cannabis Law outlines four non-exclusive factors to be considered when determining whether business activity should be considered as de minimis. Of those four factors, at least two were present at Green Island 716 Inc. during the inspection; a notable volume and a variety of cannabis product on site. There were Torch and Looper vape products in a few different varieties located in the display case. (Exhibit B-6). The Dr. Dabber box contained products by BackPack Boyz LA, Torch, First Class, Ganja Gummies, Faded Fruits and more, in multiple flavors, strains and strengths. (Exhibit B) The photographs in Exhibit B, in addition to the testimony of Investigator Tagliaferro, indicate that there were enough products contained in the Dr. Dabber box, that when extracted from the box they formed multiple small piles of gummies, flower, and other cannabis products on the display case. Exhibit C clearly shows Torch Live Resin Diamonds vape products, as well as Treezy, Kush King, Modus, Juiced Extracts, Glo Extracts, Zkittlez, Stiiizy, and other products in a variety of flavors, strains and forms. Though the products didn’t fill the storeroom, it was clear that they were more than just a de minimis part of the business activity given the volume, variety, and lengths that the business went to in order to conceal and store the products.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare in that: there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Multiple products observed in Exhibit B and C were not labeled in accordance with New York Law. According to the testimony of Investigator Tagliaferro as well as the photographic evidence, they contained pictures of cartoons and visuals or names that were attractive to children, which is unlawful. (Exhibit B-12, B-15, and B-16.) Additionally, numerous packages contained warning labels from California, other states, or that were fictitious. (Exhibit B-11, B-15, B-17, B-18, B-19, B-20, B-21, C-6, C-14, C-15, C-19, and C-20).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 13, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: September 3, 2024

Laurie Cartwright
Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k).

This decision was sent via email on September 3, 2024, to the following:

Nickolas Perry
Sheila Wagner
Michael Waller, Esq.
Zachary Hirschfeld
Phil Modrzynski, Esq.