

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

---

**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**  
**Inspection No. 211202408130032**

**SMOKE AND VAPOR OF MAHOPAC**

Respondent.

---

On August 19, 2024, Respondent requested an emergency hearing to contest the validity of an Order to Seal, which had been issued by enforcement agents of the Office of Cannabis Management on August 13, 2024, at his business located at 997 Route 6, in Mahopac, N.Y.

The hearing request was granted, and a virtual hearing was conducted within 3 business days of the request, via Webex on August 23<sup>rd</sup> and continued on August 27<sup>th</sup>, 2024. The scope of the hearing was limited solely to determine if the sealing provisions of Cannabis Law Article 6 § 138-b were proven by the Office of Cannabis Management by a preponderance of the evidence. Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled at a later date.

The Respondent was represented by Lance Lazzaro, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Michael Waller, Esq.

Senior Investigator William McKay and Michael Waller testified on behalf of OCM.

Er H. Bao testified on behalf of the Respondent.

## ISSUE

The allegations set forth in the Notice of Violation and Order to Seal indicated 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 conducted by agents of OCM on August 13, 2024, at the business known as Smoke and Vapor of Mahopac, located at 997 Route 6, Mahopac, NY. 10541.

## 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: 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)(2) requires any sealing order be served to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection. The sealing order must also be posted at the building or premises that was sealed, secured, or closed. Additionally, “a copy of the sealing order shall also be mailed to any address for the owner of the business *at any address provided by the person to whom such order was delivered...*” (emphasis added).

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, according to the credible testimony of Sr. Investigator William McKay. He testified that he received training at OCM in identifying and categorizing cannabis products and that during the inspection of the location he observed what appeared to him to be cannabis flower and pre-rolls, cannabis edibles, concentrates, a point-of-sale system, cannabis products with price tags and logos from California and Arizona, as well as cannabis products with labels indicating THC amounts of 2000 mg per package when 100 mg per package is the maximum amount allowed in New York State. He also observed cannabis products carrying well known cannabis brand names, including some with government health warnings on them. He corroborated this testimony with numerous photographs that he took at the time of the inspection. (Exhibits B1-11).
  
2. According to the credible testimony of the Investigator, the premises sealed was not being used as a residence. He testified that while he did see a day bed and some hotplates and cooking items located in the rear area of the store, he did not see sufficient evidence, in his opinion, to conclude that this location was lawfully being used as a residence. Furthermore, he testified that when he asked the business owner Mr. Bao at the time of the inspection, if he or anyone else lived there, Mr. Bao reportedly replied: “no, no, no.” The Investigator did qualify his testimony that Mr. Bao “spoke in broken English” and “was not as fluent as I am.” Investigator McKay also identified Exhibit A (4) as a photograph of a NYS driver’s license given to him by Mr. Bao, that showed Mr. Bao’s address as 997 Route 6, Mahopac, NY. Respondent testified, with the assistance of a Mandarin language interpreter, that he did reside at this location along with his girlfriend and two children, aged 8 and 9. Mr. Bao did concede that when the inspection was conducted, in the early afternoon of August 13, 2024, during the traditional summer school break, his girlfriend and two school aged children were not present. Moreover, his contention that his girlfriend and two children all slept on a shared day bed while he slept on the floor, was not credible. The lack of any additional chairs, tables, or other furnishings indicative of the residential needs of a family of four, further undercut his claim that this small area in the rear of a smoke shop was actually the family residence. Finally, petitioner’s Exhibits E and F received into evidence, do show that the location in question fell within an area of the town that was zoned for commercial use only. Therefore, after careful consideration of Mr. Bao’s testimony and the photographs depicted in Exhibits 4 (1,2&4) introduced by respondent’s counsel, I find that the evidence submitted only demonstrates that Mr. Bao’s family members would occasionally spend time visiting the business location while he was working. The totality of the evidence, however, including the credible testimony of Investigator McKay, has proven by a preponderance of evidence, that at the time of this inspection, this was a commercial business location that was not being lawfully occupied as a residence, as defined by Cannabis Law Article 6 § 138 (b)(6).

3. The unlicensed activity, which petitioner asserts warrants an order to seal, did constitute more than a “de minimis” portion of the business activity at that location, according to the credible testimony of the Investigator. He testified that he found a large variety, and a high volume, of illicit products during the inspection at this location. Cannabis Law Article 6 §138-b (7) and OCM Regulations 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. From the photographs entered as evidence during the hearing, and the testimony of the Investigator listing the numerous and varied items displayed for sale, it was demonstrated by a preponderance of the evidence that this location had a large variety and a substantial volume of illicit cannabis for sale. (Exhibits C 1-19). While Mr. Bao asserted that he had a license to sell tobacco and that the majority of his business was the sale of cigars and cigarettes, he also admitted on cross-examination that all of the cannabis items depicted in the photographs in evidence were being offered for sale at his store and that those items had been supplied to him during deliveries made during each of the previous two months.
4. This unlicensed activity did constitute 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. The Investigator further noted that many of the cannabis products contained labels indicating they were cannabis products from California, and many were brightly colored or depicted characteristics with special appeal to children, all in violation of New York law. Moreover, he identified several cannabis packages with labels indicating the presence of THC in amounts twenty times the legal limits. (B1-11).
5. Finally, the Notice of Violation and Order to Seal was properly served upon the respondent on August 13, 2024. The Investigator’s credible and undisputed testimony established that the Notice of Violation and Order to Seal was personally and directly served to the store’s owner Mr. Bao, who was present at the time of the inspection, and that it was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2). (See Exhibits A1-4). I reject respondent counsel’s assertion that Cannabis Law Article 6 §138(b)(2) also requires a subsequent mailing of the Notice of Violation and Order to Seal to the business owner’s address, even when the business owner is present at the time of the inspection and personally receives a copy directly. Nevertheless, I also determine that Exhibit D, as well as the credible testimony of Michael Waller, establishes that if such a mailing is required, that requirement was met when Mr. Waller placed a copy of the Notice and Order in the mailbox outside of a Post Office on August 22, 2024.

**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

*Thomas Kidera*  
\_\_\_\_\_  
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  
Lance Lazzaro, Esq.  
Michael Waller, Esq.