

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 107202408080013

Kush Blooms LLC

Respondent.

Respondent requested a non-emergency hearing on August 30, 2024. The inspection occurred on August 8, 2024.

The non-emergency hearing was conducted on October 3, 2024.

The Respondent was represented by Charles Gaughan, Esq.

William Austin testified on behalf of the Respondent.

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

Investigative Specialist Darrick Wakefield 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 3270 Lake Shore Road Blasdell, New York 14219.

The scope of the 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 off the evidence.

CONCLUSIONS OF 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. Investigator Darrick Wakefield testified during this hearing that he has had both in house and in the field training in identifying illicit cannabis products. He explained that he identifies cannabis products by looking at the packaging, as well as examining whether the product has the odor and appearance of cannabis. He also stated that he determines whether illicit cannabis is being sold by looking at whether the business has interior or exterior signage advertising the sale of cannabis. Investigator Wakefield's testimony, in addition to the Exhibits placed into evidence during this hearing, demonstrate that there was a large amount of cannabis being marketed and offered for sale at Kush Blooms LLC on August 8, 2024. Exhibit C5 features at least 45 packages, which appear to be Naked Worm Assorted flavor gummies with 1000mg THC. Exhibit D depicts many cannabis products including: Sour Nerds edibles, Torch Vapes, Waferz cannabis product, Cookies cannabis flower, Fryd cannabis oil, live resin, and liquid diamonds vapes, multiple varieties of Stiiizy 40's pre-rolls, Watermelon Runtz Diamonds Galaxy Bar, Cartel Money cannabis flower, Escobar OG Cannabis Flower, and unlabeled pre-rolls.

2. During the course of this hearing Respondent's called a witness William Austin to testify regarding the sealed location being the owner's Residence. Mr. Austin testified that he lives at 3255 Lake Shore Rd, across the street from Respondent's store at 3270 Lake Shore Rd. in Bladell. No evidence was presented as to whether this alleged use was pursuant to local law or ordinance, or if the location was zoned and lawfully occupied as a "residence." In the face of Mr. Austin's testimony, OCM failed to enter zoning maps, or zoning regulations for the building or area surrounding the building. Though Mr. Austin's testimony contained some inconsistencies, I found him to be credible. OCM asserts that Mr. Austin's work schedule would have made it impossible for him to observe the Respondent or visit daily or every other day. I disagree. Mr. Austin stated that sometimes the store was open when he got home from work and sometimes it was not. Mr. Austin's testimony was that he has lived at his residence for approximately 4 years, and the Respondent's store has been open for approximately two years. He stated that he has been at his current job for approximately 3 months. He currently works at a warehouse from, "4 until the employees finish for the night sometimes that might be 11¹ and sometimes it might be 1." He added that on Sundays he gets home between 4 and 8, and that at his last job he got off at 7. The hours of the premises are featured in Exhibit B2 as: 9:30 to 11 Monday through Saturday and 10 to 10 on Sundays. Given that he lives across the street, Mr. Austin easily could visit the premises prior to work most days, and after work on Sundays. He could have gone after work at his last job, almost every day. He explained that he had been in the back of the shop at least 20 or more times, he had eaten with the Respondent there, and that he was aware that the Respondent lived there as he saw his car in the parking lot after hours. Additionally, he stated that the Respondent was living there after a dispute with a significant other.

OCM asserted that the facilities at the premises were not conducive to being a residence. However, Investigator Wakefield testified that the premises in question had a mini fridge, a microwave, and a toaster oven. No pictures were placed in evidence showing the full layout of this area, which amounted to a kitchenette, nor were there pictures taken of any other area in the rear of the store. Additionally, Respondent's counsel placed into evidence two exhibits, Exhibit 1 and Exhibit 2, which I considered solely for purposes of the room layout, and scale. Both exhibits depict a room or rooms with a large piece of gray furniture which appears to be a couch, chaise, or futon. Investigator Wakefield testified that the furniture could indeed have been a futon. The same piece of furniture appears to be located in Exhibit C1. Exhibit C1 appears to be an extremely poor and blurry, cut-off photo of a section of this room. Though Investigator Wakefield testified that there were multiple back rooms in the location, none of those rooms are featured in the exhibits placed into evidence by Petitioner. Nor was the number of back rooms disclosed or their layout and contents described in detail. Investigator Wakefield testified that he observed a storage closet with a janitor's sink and control box on the premises. Mr. Austin testified that he once observed the Respondent come from the back of the store "all wet," and he inquired if the Respondent had just taken a shower. The Respondent said he had. When questioned about whether there was a shower on the premises, Mr. Austin said that there was not, and he had inferred that Respondent had taken what amounts to a "bird bath" in a "slop sink" on the premises.

¹ Respondent testified in sum and substance: that he works 4 until we finish for the night, sometimes it might be 11 sometimes it might be 1. Given that he referenced the night. It can be inferred that he works from 4pm until 11pm or 1am.

OCM is required to affirmatively prove by a preponderance of the evidence that the premises to be sealed is not being used as a residence, which is zoned and lawfully occupied as a residence. The Respondent put forth evidence that the premises in question was a residence. OCM could have put forth evidence that the premises was either not a residence, or that if it was or could be, it was not zoned or lawfully occupied as a residence. OCM failed to prove that the premises was either not in fact being used as a residence, or that if it was, it was not zoned or lawfully occupied as a residence. OCM simply put forth conclusory statements that were unsupported by the Exhibits placed in evidence. For those reasons I must find that the order to seal should be vacated.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 8, 2024, IS HEREBY VACATED FROM THE DATE OF THIS DECISION.

Dated: October 17, 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 October 17, 2024, to the following:

Nickolas Perry

Sheila Wagner

Celena Ditchev, Esq.

Abir Ahmed, Esq.

Charles Gaughan, Esq.