

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

Exotic Habitz, LLC

Respondent.

DECISION
Inspection No. - 202202412110018

Respondent requested an emergency hearing on December 16, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on December 11, 2024.

The emergency hearing was conducted on December 19, 2024, within three business days of the request as prescribed by statute.

The Respondent was represented by Charles Gaughan, Esq.

Pernell Alexander Howard (hereinafter “Howard”) and Respondent, Khalyl Allen (hereinafter “Respondent”), testified on behalf of Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented William Pham, Esq.

Senior Investigator Andrew Gerken (hereinafter “Gerken”) 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 2533 Delaware Ave., Buffalo, NY 14216.

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.

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)).

Cannabis Law Article 6 §138-b(2) provides that “Any order to seal shall be served by delivery of the order 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 and shall be posted at the building or premises that have been sealed, secured and closed. A copy of the 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 pursuant to this subdivision. The order shall remain in effect pending a hearing and final determination of the board, or until such order is vacated by the office pursuant to subdivision six of this section. An order to seal shall explicitly state the procedure to request a hearing within seven days.”

FINDINGS OF FACT

1. On December 11, 2024, OCM conducted an inspection of Exotic Habitz, LLC (hereinafter “Exotic Habitz”) located at 2533 Delaware Ave., Buffalo, NY (Ex. A 1). At that time, Gerken issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises were sealed (Ex. A 1). On December 16, 2024, Respondent requested an Emergency Hearing with respect to the Order to Seal. A hearing was scheduled for December 19, 2024, at which Gerken appeared as the sole witness for OCM and Respondent along with Howard testified on behalf of the Respondent. Evidence presented by OCM suggested by a preponderance of the evidence that Exotic Habitz was engaged in the sale of cannabis without the necessary license. Gerken testified that upon arriving at the store, he witnessed a customer enter the store, appear to transact business with Exotic Habitz, and leave the store with a pre-rolled cigarette. This observation, that sales were occurring on site, was supported by records discovered once OCM entered the store. Sheets, which appear to record daily transactions, were found along with a point-of-sale system that also listed sales (Ex. B 20-22 & 29-48). Many of the entries made in the paper logs were either explicitly listed as sales of cannabis (i.e., “pre-roll”) or, Gerken testified, were suspected of consisting of cannabis sales; he stated that his training and experience led him to this conclusion as he recognized some of the designations used (e.g., “Runtz” and “half”). Further, many of the entries to the log simply listed a generic designation, such as “donation,” which suggests an attempt to disguise the true nature of the transaction (Ex. B 45-46).¹ It is notable that although Exotic Habitz displayed products in the store that were “legal” to sell, the vast majority of the transactions listed on the daily transaction sheets appear to be related to illicit cannabis sales (Ex. B 29-48). In addition to the records showing cannabis sales, the store also had signs and symbols that would signify that cannabis is likely for sale within the store. A large, inflatable pre-rolled, with the brand “RAW” embossed on it, was hung from the ceiling and visible from the outside (Ex. B 3 & 13). Paraphernalia, commonly used in the consumption of cannabis, such as glassware and ashtrays were displayed prominently within the store (Ex. B 12). Additionally, well known brands of cannabis were used in the decoration of the store (Ex. B 13). Several bags of presorted cannabis flower were discovered on the premises (Ex. C 5) and additional baggies of loose flower were also discovered (Ex. C 1-2). The loose flower, coupled with the processing equipment discovered (e.g., scales, bumpbox, rolling papers, and plastic tubes) suggest that the store was processing pre-rolls for individual sale (Ex. B 16, C 1-2, 4, & 7). Gerken also testified that Respondent did not possess an adult-use license; Respondent’s attorney produced no evidence of such a license. Respondent possessed a hemp license, however, it was expired (Ex. B 18).

The evidence introduced at this hearing and Gerken’s testimony indicate by a preponderance of the evidence that Respondent was offering cannabis products for sale without the necessary license being issued by OCM. It is undisputed that Respondent did not possess an adult-use cannabis license. Further, signs and symbols present would likely lead a consumer to conclude that cannabis could likely be purchased from Exotic Habitz. The point-of-sale system and ATM (Ex B 7), taken in isolation, suggest that sales (legal or otherwise) were occurring, but

¹ It should be noted that a sign posted near the point-of-sale system openly advertised that a customer could avoid paying tax on their purchase if the transaction occurred in cash (Ex. B 19). This demonstrates a willingness by the shop to violate the law and that the business routinely did not comport with standard business practices (i.e., collecting sales tax).

the daily sales sheets bolster heavily that cannabis sales occurred. Finally, Gerken's observation of a transaction occurring on the morning of the inspection, which in all likelihood was the sale of a cannabis product, confirms the conclusion.

2. Exotic Habitz consisted of a retail section and a separate area which could be accessed from the store. This area (which seemed to serve in part as storage) included two rooms and a bathroom (which housed a shower) that seems designed to serve as living quarters. There was even an outside entry door leading to the apartment in the back of the building, that appears to have been used in the past as the "apartment's" main entryway. Gerken testified, however, that no part of the premises to be sealed was used as a residence at the time of the inspection. He stated that he saw no chest-of-draws, clothing, toiletries in the bathroom, kitchen, or bed. He did state that there was a small kitchenette, but "very little food" on site, and that there was an air mattress, but that it was uninflated and crumbled in a corner of a room. He testified that the air mattress looked as if it had not recently been used. He also highlighted that there was no "go bag," which might contain items that one would expect to find in a location being used as even an occasional residence. Further, Gerken testified that Respondent told him on the day of the inspection that no one lived in the premises, but that "people stayed there occasionally." Gerken also stated that trash and debris were piled in the rooms and in the hallway leading to the bathroom, which made accessing the bathroom difficult; this difficulty in accessing the bathroom was furthered due to the state of the door. One of the hinges was broken, making it very difficult to open the door. Gerken also testified that the bathroom looked as if it had not been accessed recently. Additionally, Gerken testified that, when questioned during the inspection, the Respondent and Howard both gave other addresses (not the store's address) as their residences. Finally, Gerken testified that no electricity seemed to be running to much of the area that housed the "residential area." He stated that the investigators had to use flashlights when searching this section as none of the lights worked – he highlighted certain pictures in evidence to show the use of the flashlight (see Ex. C 1 & 6-7).

Respondent contradicted the testimony of Gerken and asserted that one of his employees (Howard) paid him rent and lived in the residential section of the store. Howard supported this and testified that he was living in the store and paying rent to Respondent at the time of the inspection and Order to Seal. Howard's identification, however, listed a separate address that did not align with this testimony. Respondent introduced evidence that purportedly showed the rooms being utilized as a living area.

The conflict between Gerken's testimony and the testimony of Respondent and Howard are at the heart of the issue of whether any "part of the premises to be sealed is used in part as a residence." I must first highlight that I discount nearly all of the evidence submitted by Respondent as being irrelevant. Even if I assume that all the pictures submitted by Respondent show what Respondent and Howard testified that they showed, most are outdated and unhelpful. The reason for this is that prior to the inspection (Howard was unsure of when the event occurred, Respondent estimated it occurred in October), an accident occurred at the back of the store which resulted in significant damage to the apartment "entrance" (Ex. 2 E). The door was smashed and later boarded up, no longer able to be used. The door was, apparently, still boarded

up at the time of the inspection (Ex. 2 A).² The damage to the apartment seemed extensive and Respondent and Howard both supported this finding, testifying that the electricity was impacted, which is why many of the lights in the “residential” section of the store did not function. The damage, which was a result of a car smashing into the door, fundamentally changed the condition of the “residential” section and I must conclude, therefore, that the pictures entered into evidence by Respondent did not show the condition of the store on the date of the inspection. It is possible that someone (Howard or another person) lived in the residential section of the store at one time – this could have been true even in the recent past, before the accident. But the presence of the trash and debris, the lack of electricity, and the disorderly manner that Gerken testifies he found these rooms on the date of the inspection lead me to believe that no one lived there, likely since the crash occurred circa October 2024. While it is possible that individuals may stay at the location, from time to time, utilizing the air mattress when necessary, I do not find Howard’s testimony that he inflates and deflates the air mattress on a daily basis, as a way of explaining the condition of the air mattress on the date of the inspection, to be a believable explanation.³ Howard’s testimony generally seemed to have inconsistencies in a number of areas. First, he testified that he had not paid rent to Respondent since the date of the “crash.” He later countered this testimony, with the aid of Respondent’s attorney, and said that he did pay rent after the crash, but this was not his original testimony. Further, he stated at one point, when speaking about his residence, that he hadn’t lived in the store since the “crash.” He quickly changed this and stated that he’d meant “inspection” not crash, but I suspect that his initial testimony was more truthful. Finally, he stated that he was “unaware” of the gun found in Exotic Habitz. It is unlikely that a person living in location as Howard testified, could “overlook” an AR-15 and multiple magazines, including one that contained approximately 50 rounds of ammunition. Either he was being untruthful regarding his knowledge of the gun, or he was truly not aware of the gun, but this seems highly unlikely if he lived in the “apartment.” Further, I find it difficult to believe that a person would continue to pay \$700/month in rent for an apartment with little electricity, a broken (possibly inaccessible) bathroom door, and trash and debris littered about – I do not believe the “residential” area was habitable at the time of the inspection. More likely, the “residential” section of the store was utilized prior to the crash as either a lounge area or apartment, but that this usage was discontinued or greatly limited after the catastrophic damage that occurred due to the crash. This conclusion explains the state of the location on the date of the inspection as testified to by Gerken.⁴

OCM failed to produce pictures of the “residential” area. Gerken testified he had taken such pictures on the date of the inspection, but OCM neglected to enter any into evidence. Even after Respondent’s attorney questioned Gerken as to the reason for the absence of these pictures, OCM still did not submit pictures of the “residential” section of the store. OCM’s failure to produce additional evidence is confusing at best. Respondent’s attorney on cross-examination

² Respondent’s attorney stated numerous times that the front door – the door which led to the retail portion of the store – was the only way of accessing the building.

³ I believe that Respondent’s evidence also counters this, as the picture of Howard having his hair done shows the mattress fully inflated, during a time when, if he deflated it daily, one would expect it to be deflated (Ex. A 5).

⁴ Even if the pictures introduced by Respondent were contemporaneous with the inspection, there are still questions as to whether Howard was a full-time resident of the location. The pictures showed a dog, something that would support a finding of “residency,” but Howard testified that the dog was not his. The pictures also did not fully show the residence and lacked certain aspects that one would expect in a residence.

appeared rightfully suspicious as to why OCM did not introduce these pictures. This failure, however, is not quite enough to result in a finding in favor of Respondent. I find that the store was not being used as a residence at the time of the inspection, but only by the slimmest of margins. Due to the credible testimony of Gerken, the muddled and sometimes confusing testimony of Howard, and the explanation of the crash, which harmonized the apparent conflict between the photos introduced by Respondent with Gerken's testimony as to the state of the shop on the date of the inspection, I find that Exotic Habitz was not being used as a residence on the date of the inspection.

3. The unlicensed activity which warranted an order to seal constituted more than a "de minimis" part the business activity. While only a limited amount of product was discovered in the store, the daily sheets which described the volume of sales leads to this conclusion (Ex. B 29-48). More than a dozen pages, each recording the transactions for a different day, listed products being sold by the store. A large portion of these listings were either obvious cannabis products (e.g., pre-roll), consistent with being cannabis products (according to Gerken's testimony), or listed a non-descript transaction (e.g., donation). It is more likely than not that most if not all of these listings represented a cannabis transactions – the dollar figure and descriptions listed on the pages were in line with cannabis sales. The volume of cannabis, while not overwhelmingly large, were significant. Further, the devices and paraphernalia discovered on site (e.g., scales, bumpbox, rolling papers, and plastic tubes) are indicative of a store that processed cannabis. This would allow for limited amounts to be kept in the store, but sales to happen at a large rate. Further, the signs and symbols present in the store, were blatant and I believe designed to advertise the presence of cannabis. The "Raw" inflatable and the use of known cannabis brands, in particular, were strong indications that cannabis could likely be procured from Exotic Habitz. It is for these reasons that I find that by a preponderance of the evidence that the trade of illicit product at Exotic Habitz was more than de minimis.

4. The unlicensed activity being conducted at Exotic Habitz constituted an imminent threat to public health, safety, and welfare in that there were sales of cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Further, Respondent was likely processing cannabis on property. Finally, an illegal firearm was recovered from the location. Respondent did not possess an adult-use or processing cannabis license. It is highly unlikely that the cannabis found on site underwent any official testing in New York. The loose flower found on site was in plain plastic bags with no markings whatsoever. This loose flower, coupled with the processing equipment and the numerous sales of "pre-rolls" (including the sale of one witnessed directly by Gerken) supports a finding that processing was occurring on site. Finally, the weapon discovered was testified to be illegal by Gerken, as it violated the Safe Act. This testimony was bolstered by Respondent who testified that he was arrested on the day in question and that the police still had the gun in question. The gun magazines found at the shop exceed the limit set by New York State as Gerken testified that magazines held more than the maximum allowed by law. Due to these three findings, (any one of which could have resulted in a similar finding) I find that the activity occurring at Exotic Habitz constituted an imminent threat to public health, safety, and welfare.

5. Service appears to have been validly conducted and Respondent received adequate notice of the NOV/OTS. While Respondent made no assertion that he did not receive adequate notice,

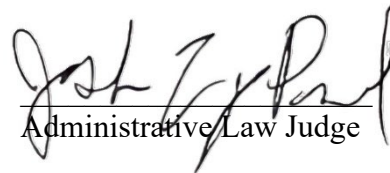
OCM issued the NOV/OTS to the employee working at Exotic Habitz on the day of the inspection. This occurred before Respondent arrived at the location and participated in questioning by OCM and law enforcement, thereby receiving direct notification of the violations recorded during the inspection.

DECISION

The Respondent engaged in the sale of illicit cannabis and cannabis products without a license, registration, or permit to do so, at the location of 2533 Delaware Ave., Buffalo, NY 14216. In so doing, Respondent violated Cannabis Law Article 6. The Order to Seal is hereby affirmed.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON DECEMBER 11, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: December 26, 2024


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 December 26, 2024, to the following:

Charles Gaughan, Esq.

William Pham, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev