

STATE OF NEW YORK
CANNABIS CONTROL BOARD

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NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,
APPELLANT-PETITIONER,

-against-

BREWSTER CONVENIENCE INC.,
APPELLEE-RESPONDENT
-----X

DECISION ON APPEAL

INSPECTION NO.:
211 2024 0820 0039

Appellant-Petitioner the New York State Office of Cannabis Management (“Appellant OCM”) appeals from a decision and order of the Office of Administrative Hearings (“OAH”) wherein the presiding Administrative Law Judge (“ALJ”) vacated a sealing order issued against Appellee-Respondent Brewster Convenience Inc. (“Appellee”) place of business. The Order to Seal (“OTS”) was issued by Appellant-OCM pursuant to New York State Cannabis Law (“Cannabis Law”) Article 6 §§ 138-a and 138-b and Title 9 of the Codes, Rules, and Regulations of the State of New York (“NYCRR”) § 133.25.

Appellant OCM submits the instant appeal, and the exception noted therein, to the Cannabis Control Board (“Board”) for review pursuant to Cannabis Law §§ 10(18) and 17(8) and 9 NYCRR § 133.25(k). Upon review of the record in this matter and for the reasons set forth below, the Board has determined that the appeal must be dismissed as moot and the application for relief denied.

STATUTORY BACKGROUND

In March 2021, New York enacted the Marijuana Regulation and Taxation Act (“MRTA”) legalizing adult-use cannabis and implementing a regulatory framework within the State of New York. The MRTA included enactment of Chapter 7-A of the New York State Consolidated Laws, known as the Cannabis Law. (Cannabis Law § 1).

Cannabis Law § 125 states that “[n]o person¹ shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, within the state without first obtaining the appropriate registration, license or permit” that is required under the law. In response to a violation of the Cannabis Law, and related regulations, including any activity outside the scope of the license, registration, or permit, Appellant OCM is authorized to take various actions, including but not limited to, issuing a notice of violation, civil penalties, fees, suspension,

¹ Under the Cannabis Law, “person” is broadly defined as “an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity.” (Cannabis Law § 3[40-a]).

cancellation, or revocation, seizure of product, and a stop order to cease unlicensed activity. (Cannabis Law §§ 132 and 138-a; 9 NYCRR §§ 133.4[c]; 133.25[b]).

Appellant OCM is further authorized to issue an immediate sealing 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 business² and upon a finding of an imminent threat to public health, safety, and welfare. (Cannabis Law § 138-b[1]; 9 NYCRR § 133.25[f]). Unlicensed activity is defined as any activity, within the authority of the office or the board to regulate, for which a person should have obtained a license, registration, or permit issued by the office or board, but failed to do the same. (Cannabis Law § 131[3][a]; 9 NYCRR § 133.1[i]). Additionally, any activity beyond the scope of any license, registration, or permit issued by the office or board may be considered unlicensed activity. (Id.) In assessing whether there is an imminent threat to public health, safety, and welfare, Cannabis Law § 138-b(4) provides factors the OCM shall consider. Upon finding such an imminent threat, an OTS may be issued 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 zone and lawfully occupied as a residence; and (b) the unlicensed activity is more than a de minimis³ part of the business activity on the premises or in the building to be sealed pursuant to the order. (Cannabis Law § 138-b[6]).

An OTS issued pursuant to Cannabis Law § 138-b shall be effective for one year from the later of the posting of the order or the date of judgment regarding the order. (Cannabis Law § 138-b[9]; 9 NYCRR § 133.25[g][5]). An OTS must explicitly state the procedure to request a hearing on the sealing order within seven days. (Cannabis Law § 138-b[2]; 9 NYCRR § 133.25[g][1]). The hearing must occur within three business days if the business submits a verified statement of ownership. (Cannabis Law § 138-b[3] and 9 NYCRR § 133.25[h][2]-[3]). The presiding ALJ will render an emergency hearing determination on the OTS within four business days of the hearing's conclusion. (9 NYCRR § 133.25[h][4]). Within thirty (30) days of the issuance of the ALJ's determination, any party may submit an appeal of the ALJ's determination to the Board and such appeal shall be based solely on the record on appeal. (9 NYCRR § 133.25[k]). Additionally, either party may request a hearing be scheduled on the underlying violations contained in the NOV and to enforce the Cease Order pursuant to 9 NYCRR §§ 133.10(a) and 133.10(e). (9 NYCRR §§ 133.25[h][4] and [i]).

² "[P]lace of business" shall not include a residence or other real property not otherwise held out as open to the public or otherwise being utilized in a business or commercial manner or any private vehicle on or about the same such property, unless probable cause exists to believe that such residence, real property, or vehicle are being used in such business or commercial manner as described herein." (Cannabis Law § 10[8]).

³ In assessing whether unlicensed activity is more than a de minimis part of the business activity at the premises, Cannabis Law § 138-b(7) states: the OCM "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."

PROCEDURAL BACKGROUND

Appellant OCM conducted a regulatory inspection of Appellee's place of business, located at 1505-1515 Route 22, Unit 10D, Brewster, N.Y., 10509, on August 20, 2024. Appellant OCM determined based on observations made during the inspection that Appellee was engaging in unlicensed activity in violation of the Cannabis Law and implementing regulations. Appellant-OCM issued a Notice of Violation ("NOV"), and an immediate OTS for Appellee's place of business because the unlicensed activity posed an imminent threat to the public health, safety, and welfare. Appellee requested an emergency hearing with the Office of Administrative Hearings ("OAH") on August 22, 2024, following the inspection.

A virtual hearing was conducted on August 27, 2024. The scope of the hearing was to determine whether the NOV and OTS issued by Appellant OCM against Appellee's business premises was done so in accordance with Cannabis Law 138-b. On August 28, 2024, the presiding ALJ issued a decision vacating the OTS. The ALJ determined that Appellant-OCM had not presented sufficient evidence regarding the volume and variety of cannabis products seized, to establish the primary purpose was for the sale of unlicensed cannabis products. Thus, the ALJ found that Appellant-OCM did not establish that the unlicensed activity was more than a de minimis part of Appellee's business activity.

Appellant OCM appeals the administrative decision issued by the presiding ALJ and requests the Board vacated the ALJ's decision and reinstate the OTS on Appellee's business premises. On appeal, Appellant OCM asserts that the ALJ improperly vacated the OTS because the evidence presented sufficiently established the unlicensed activity was more than a de minimis part of Appellee's business activity.

ANALYSIS AND REASONING

The record on appeal before the Board, in this matter, relates to the adjudication of an OTS issued by Appellant OCM. Pursuant to Cannabis Law § 138-b an OTS issued by the OCM can remain on the premises for one-year, either from the date of issuance or the date of the ALJ's decision if a hearing was held. Accordingly, if an ALJ should vacate the OTS and the one-year statutory period has run, there is no statutory or regulatory provision permitting Appellant OCM to appeal, reinstate or otherwise continue the order. In this matter, a hearing was held and a decision issued on August 28, 2024. Due to the passage of time, the Board would be unable to reinstate the OTS as requested by the Appellant OCM, rendering the appeal moot as there can be no immediate or practical consequence to either party. Where the Board can no longer lawfully grant the requested relief or other meaningful relief, no live controversy remains, and the appeal must be dismissed.

Mootness is a doctrine related to subject matter jurisdiction and thus must be considered. (Sportsmen's Tavern LLC v. New York State Liquor Authority, 195 A.D.3d 1557 [4th Dept. 2021]). An appeal is moot unless an adjudication on the merits will result in immediate and practical consequences to the parties. (Marxuach v. New York State Dept. of Corrections and Community Supervision, 211 A.D.3d 1442 [3rd Dept. 2022]; Coleman v. Daines, 19 N.Y.3d 1087 [2012]; City of

New York v. Maul, 14 N.Y.3d 499, 507 [2010]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). Courts are also generally “precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances.” (City of New York v. Maul, 14 N.Y.3d at 507, quoting Hearst Corp. v. Clyne, 50 N.Y.2d at 714).

The exception to the mootness doctrine is not applicable in this matter. (see Matter of Hearst Corp. v. Clyne, 50 N.Y.2d at 714–715; In re Raven K., 13 N.Y.S.3d 469, 471 [2015]) An exception to the mootness doctrine may apply where the issue to be decided, though moot, is (1) likely to recur, either between the parties or among other members of the public; (2) is a substantial and novel issue, and (3) will typically evade review. (Hearst Corp. v. Clyne, 50 N.Y.2d at 714-715; Saratoga Cnty. Chamber of Com., Inc. v. Pataki, 100 N.Y.2d 801, 810-11 (2003); City of New York v. Maul, 14 N.Y.3d at 507; (Marxuach v. New York State Dept. of Corrections and Community Supervision, 211 A.D.3d at 1444). In the instant matter, Appellant OCM did not raise a substantial or novel issue. The issue raised was a fact specific exception to the ALJ’s decision based on sufficiency of the evidence presented at the hearing. Due to the passage of time, no purpose would be served in addressing the merits of the exception raised because the requested relief of reinstating the OTS on Appellee’s business premises is no longer available.

Finally, it should be noted that the decision in this matter is limited with respect to the ALJ’s determination on the OTS issued by Appellant OCM against Appellee’s business premises. The inspection of Appellee’s business also resulted in the issuance of a NOV and a Cease Order, which were not adjudicated as part of the underlying hearing and thus not part of the appeal before the Board. Either party is permitted to request the scheduling of an administrative proceeding to enforce a Cease Order and to order a financial penalty for the underlying violation. (9 NYCRR §§ 133.25[h][4] and [i]).

CONCLUSION

Based on the foregoing, Appellant OCM’s appeal is dismissed as moot. This constitutes the final decision and order of the Board.

DATED: September 9, 2025