

JUN 02 2017

Bessie M. Decker, Clerk
Court of Appeals
of Maryland

IN THE COURT OF APPEALS OF MARYLAND

JANE AND JOHN DOE, *et al.*

*

Appellants/Petitioners,

*

v.

*

September Term, 2017

ALTERNATIVE MEDICINE
MARYLAND, LLC

*

Case No. 148

*

Appellee/Respondent.

*

* * * * *

**RESPONDENT’S OPPOSITION TO PETITIONERS’ ANTICIPATED
EMERGENCY BYPASS PETITION FOR WRIT OF CERTIORARI
AND MOTION TO STAY CIRCUIT COURT ACTION
AND
APPELLEE’S OPPOSITION TO APPELLANTS’ ANTICIPATED
EMERGENCY MOTION FOR STAY OF PROCEEDINGS IN THE
CIRCUIT COURT FOR BALTIMORE CITY AND/OR INJUNCTION
AND
REQUEST FOR HEARING**

COMES NOW the Appellee/Respondent, Alternative Medicine Maryland, LLC (hereinafter “Respondent”), by and through counsel, Brian S. Brown, Christopher T. Casciano, Brown & Barron, LLC, Byron L. Warnken, Byron B. Warnken, Warnken, LLC, John A. Pica, Jr., and John Pica and Associates, LLC, and hereby respectfully moves this Honorable Court to summarily deny (1) Appellants/Petitioners’ anticipated emergency bypass petition for writ of certiorari and motion to stay circuit court action, and (2) Appellants/Petitioners’ anticipated emergency motion for stay of proceedings in the Circuit Court for Baltimore City and/or injunction, and respectfully requests a hearing and a reasonable opportunity to be heard with regard to the above, and in support thereof, states as follows:

I. INTRODUCTION

Based upon emails received from the moving parties, it is anticipated that, on June 2, 2017,

the Appellants/Petitioners/Proposed Intervenors, Jane Doe, John Doe, Curio Wellness, LLC, Doctor's Orders Maryland, LLC, Green Leaf Medical, LLC, Kind Therapeutics, USA, LLC, SunMed Growers, LLC, Maryland Wholesale Medical Cannabis Trade Association, and the Coalition for Patient Medicinal Access, LLC (hereinafter "Petitioners") will seek an emergency bypass petition for writ of certiorari and motion to stay circuit court action, and an emergency motion for stay of proceedings in the Circuit Court for Baltimore City and/or injunction. For the reasons stated herein, Petitioners' anticipated requests for "emergency" relief must be summarily denied.

Respondent received Petitioners' aforementioned petition and motions shortly after 4:00 p.m. on June 1, 2017, and upon review of such, felt compelled to respond in an expedited fashion to correct numerous errors, oversights, omissions and misrepresentations made by the Petitioners.

Respondent, in pursuing the underlying lawsuit, seeks, among other things, injunctive relief to address the Defendant below Natalie M. Laprade Maryland Medical Cannabis Commission's (the "Commission") unlawful, unconstitutional, arbitrary, and capricious actions, omissions and patent missteps in implementing and administering Maryland's Medical Cannabis Program. Specifically, the record developed below reflects that the Commission intentionally and/or negligently ignored its legislatively-mandated duty and directive to "actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers." MD. CODE ANN., HEALTH GEN. §13-3306(a)(9) (2017). The Commission admittedly ignored race and ethnicity throughout the entire licensing process in clear contravention of its authorizing statute. Then, the Commission compounded this failure by replacing top ranked applicants with lower ranked applicants in the name of "geographic diversity," yet gave no consideration whatsoever to the racial and ethnic diversity of its applicant pool, and

subsequent pre-approved licensees.

At this juncture, the Commission (and now the Petitioners) with the underpinnings of a categorically flawed and unlawfully-implemented Medical Cannabis Program, now intend to turn a blind eye to the Commission's flagrant errors and omissions that have fatally infected the entire medical cannabis grower application and pre-approval process, and push forward with Stage 2 of the medical cannabis licensing process (*i.e.*, the granting and issuance of final licenses to begin growing, cultivating, selling and otherwise profiting from medical cannabis), without the inclusion of deserving applicants like the Plaintiff AMM, without the requisite programmatic active seeking of racial and ethnic diversity mandated by the Maryland Legislature, and with numerous inadequately capitalized licensees; again, all to the detriment of individually aggrieved and unsuccessful applicants who relied on the Commission to follow the law in implementing its licensing scheme, and the general public as a whole.

At the outset, Respondent is compelled to address various unfounded assertions by Petitioners that, by filing the instant action, it is somehow deliberately seeking to delay the distribution of medicine to patients. Nothing could be further from the truth. Instead, if there is any delay in implementing the Medical Cannabis Program, it is of the Defendant Commission's own making, in utterly failing to follow and/or blatantly disregarding the law. In an effort to expedite the underlying Circuit Court matter, Respondents have requested an expedited Scheduling Order with a short trial date, so as to ensure that the laws of Maryland are followed, and patients are permitted access to medical cannabis in a safe and expeditious manner.

Petitioners arguments in support of the requested "emergency" relief are fundamentally flawed in that they are based on an erroneous premise that the Commission's Stage 1 pre-approvals, and Stage 2 final licenses have been and will be issued and obtained in legal manner

and consistent with the intent of the Maryland Legislature; when, in reality, the facts demonstrate otherwise. It is Respondent's position that the entire licensing process, including but not limited to the granting of pre-approvals and the issuance of a final license to ForwardGro, LLC, was conducted in derogation of the law and in an unconstitutional, arbitrary and capricious manner, such that all medical cannabis pre-approvals, and any licenses stemming therefrom, are categorically invalid, and for which no entity can maintain a legitimate property right.

II. BACKGROUND

A. The Maryland Medical Cannabis Program

In 2013, the Maryland Medical Cannabis Commission was established by the Maryland Legislature to “develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner.” MD. CODE ANN., HEALTH GEN. §13-3302 (2017). In tasking the Commission with the implementation of Maryland's Medical Cannabis Program, which necessarily included the pre-approval and licensure of medical cannabis growers, the Maryland Legislature promulgated a series of statutory laws and directives, which affirmatively required that the Commission “**shall actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers,**” and “[e]ncourage applicants who qualify as a minority business enterprise....” *Id.* § 13-3306(a)(9) (emphasis added).

A detailed review of the legislative history of Maryland Medical Cannabis Program, and its enacting and enabling legislation, evinces the Legislature's increasingly adamant demand for racial diversity and demonstrates a clear, unmistakable Legislature intent to achieve racial diversity in awarding medical cannabis grower licenses. As further evidence that the statute requires racial diversity in the awarding of medical cannabis grower licenses, the Legislature differentiated

between the awarding of licenses and encouraging applicants who qualify as minority business enterprises. It is clear that “actively seek” means something more than encourage minority applicants to apply. There is a striking change of expression between the requirement to “actively seek to achieve” diversity, Health Gen. § 13-3306(a)(9)(i)(1), and the requirement to “encourage” minority business enterprises to apply in the very next section of the statute. *Id.* § 13-3306(a)(9)(i)(2). Thus, had the Legislature only intended the Commission to merely encourage racial diversity, it would have done so. Instead, the Legislature made it clear that the Commission was to *actively seek* achieve racial and ethnic diversity in the awarding of grower licenses.

The Maryland Legislature, by way of Health Gen. § 13-3316, authorized and directed the Commission to “adopt regulations to implement” the medical cannabis statute and program. The Commission devised a two-stage application review and scoring process and promulgated regulations, which went through several drafts and public comment periods. The Commission determined that, during Stage I, it would issue “pre-approval” for up to 15 grower license applicants. COMAR 10.62.08.06(A)(1)(b). The Commission stated it intended to “award [grower] licenses to the best applications that most efficiently and effectively ensure public safety and safe access to medical cannabis.” COMAR 10.62.08.05(G).

On January 23, 2015, the Commission issued “proposed” regulations that considered “racial, ethnic, and geographic diversity,” and minority business enterprises in the criteria for Stage 1 grower license pre-approval.

During the 2015 Legislative Session, Delegate Christopher West requested advice from the Attorney General’s (“AG”) office about the constitutionality of the requirement to “actively seek to achieve” racial and ethnic diversity, and to “encourage” minority business enterprises to apply. Importantly, this request was not made by the Commission or any of its representatives. It was

made by a delegate solely in his capacity as a delegate. The Attorney General responded to Delegate West on March 13, 2015, by letter authored by Kathryn M. Rowe, an Assistant Attorney General, and the Commission subsequently obtained a copy of the letter. (See the March 13, 2015 Letter from Assistant Attorney General Kathryn M. Rowe to Delegate Chris West, attached hereto as **Exhibit A**). The letter stated, in part, that “constitutional limits, however, would prevent the Commission from conducting race or ethnicity-conscious licensing in the absence of a disparity study showing past discrimination in similar programs.” The Attorney General also indicated that absent a disparity study, “the efforts of the Commission to seek racial and ethnic diversity among growers and dispensaries would have to be limited to broad publicity given to the availability of the licenses and encouragement of those from various groups.”

On September 14, 2015, the Commission removed all references to and mention of racial and ethnic diversity from its regulations. This was seemingly after obtaining a copy and misinterpreting the letter from the Attorney General’s office. The letter was never directed to the Commission, nor was it legal advice.

The final version of COMAR 10.62.08.05 provides that the Commission may consider geographic diversity for scoring purposes, but does not prescribe how geographic diversity factors into the Stage 1 rating system. **It is undisputed that none of the Commission’s regulations mention or consider racial or ethnic diversity as part of the application or licensing process.** In fact, the Commission has acknowledged, through the testimony of witnesses, that it did not consider racial and ethnic diversity when awarding stage 1 license pre-approvals.

The Commission, in drafting, revising and finalizing the aforementioned regulations, and otherwise implementing Maryland’s Medical Cannabis Program, failed to request additional advice from the Attorney General about whether and how to conduct the requisite “disparity study”

