



MEMORANDUM

TO: Cannabis Regulatory Commission Board

FROM: Chris Riggs, Chief Counsel

THROUGH: Jeff Brown, Executive Director

SUBJECT: Curio Holdings NJ, LLC – Recommendation to Deny Request for Stay of 2019 RFA Award Process

DATE: [January 7, 2022](#)

BACKGROUND: Curio Holdings NJ, LLC (“Curio”) was an applicant in the 2019 Request for Applications (“2019 RFA” or “RFA”) for a vertically integrated permit award in the Central region. Curio (scoring 719.33 points) failed to out-score the Central region awardees (Altus New Jersey [“Altus”] – 785.00 and Holistic [“Holistic”] NJ I LLC – 776.67).

Curio was informed that its application was denied by Final Agency Decision issued on October 15, 2021. On November 29, 2021, Curio filed a Notice of Appeal with the Appellate Division, appealing the denial of its application and the awards issued to Altus and Holistic. On December 1, 2021, Curio sent a letter to the Commission requesting that the Commission stay its process of further vetting and review of the awardees in the Central region. Further, the letter stated Curio’s intention to file a challenge to the Women and/or Minority-owned Business Enterprise certifications awarded to Altus and Holistic by the Department of Treasury. That administrative matter has been appointed a case manager by the Department of Treasury.

The basis for Curio’s arguments before the Commission, the Department of Treasury, and the Appellate Division is that neither Altus nor Holistic is deserving of their certifications as Women-owned Business Enterprises, and that if each had not been awarded points in the 2019 RFA process for their certifications as such, Curio would have received an award in the Central region.

The only matter before the Commission is **whether the Commission should stay the on-going post-award process** while Curio’s challenge at the Department of Treasury and in the Appellate Division are pending. Requesting an administrative stay is a procedural hurdle that Curio must satisfy before asking the Appellate Division to stay the matter while it considers the merits. For all of the reasons outlined in this recommendation memorandum, Curio’s Request for an administrative Stay of the vertically integrated Central Region 2019 RFA awards should be denied.



STANDARD: New Jersey Court Rule 2:9-7 requires that a motion for a stay of an administrative agency decision be “made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division.” The standard for an agency issuing a stay of its proceedings is the same standard used by the Superior Court when considering equitable/injunctive relief and was established by the New Jersey Supreme Court in the case of Crowe v. DeGioia, 90 N.J. 126 (1982). In that case, the Court established four factors that must be clearly and convincingly satisfied to justify the extraordinary remedy of preliminary relief:

- (1) A likelihood of success on the merits of the appeal;
- (2) The imminence of irreparable harm;
- (3) That the balance of the equities are in the movant’s favor; and
- (4) That the public interest will not be harmed.

The party seeking a stay bears the burden of demonstrating that it meets each of these factors by clear and convincing evidence. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (citing Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982)). Thus, for Curio to be successful in its request for a stay of the post-award process, the Commission must find **clearly and convincingly** that **all four factors** are met.

INTERNAL PROCESS: This matter has been reviewed and handled by Commission staff within the Office of Chief Counsel since the Curio letter of December 1, 2021, was received. Upon receipt of Curio’s letter, the Commission offered both Altus and Holistic an opportunity to respond to the allegations and challenges. Both Altus and Holistic provided responses by the deadline of December 17, 2021.

Curio was afforded the opportunity to reply to the responses from Altus and Holistic and did so by letter, with additional exhibits, on December 27, 2021.

On December 30, 2021, Altus submitted a sur-reply in response to Curio’s December 27 submission.

RECOMMENDATION: It is the recommendation from the Commission’s Office of Chief Counsel that the Commission **DENY** Curio’s request for a stay of the post-award proceedings. Counsel is not clearly and convincingly persuaded by the limited arguments made by Curio that it satisfies each of the four Crowe factors. Each Crowe factor and the reasons for denial are summarized below.

- (1) A likelihood of success on the merits of the appeal



To succeed on the merits of an appeal from an agency decision, the challenger must make “a clear showing” that the agency’s action “is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.” In re Hermann, 192 N.J. 19, 28 (2007); In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div. 2008); Worthington v. Fauver, 88 N.J. 183, 204-05 (1982).

For Curio to succeed on its appeal- that it should have been awarded a vertically integrated permit in the Central region rather than either or both of Altus and Holistic- it is required to demonstrate to the Appellate Division that the Commission’s determination on the central region vertically integrated awards was arbitrary, capricious, unreasonable, or inconsistent with governing law. There exists no evidence that the Commission’s determination was arbitrary, capricious, unreasonable, or inconsistent with governing law, nor has any been provided by Curio. As the Commissioners are aware, the Department of Health, and later the Commission, undertook a thorough and painstaking evaluation of the applications, relying on the governing statutes and regulations, as well as the standards and criteria set forth in the 2019 RFA. Both Altus and Holistic provided the Commission with a copy of their certifications as Women-owned Business Enterprises and were awarded points accordingly. To have NOT awarded points based on the criteria set forth in the RFA would have been arbitrary and capricious. The Department and Commission were not charged with vetting the Department of Treasury-issued certifications, or that Department’s process for issuing said certifications. All applicants that provided proof of Department of Treasury- issued certifications received full points which was consistent with the terms of the 2019 RFA and scoring instructions. It is highly unlikely that a Court would find that the award of those points, and ultimately the award of the permits to Altus and Holistic, was arbitrary, capricious, unreasonable, or inconsistent with governing law. Therefore, it is unlikely that Curio would succeed on the merits of its appeal.

(2) The imminence of irreparable harm

“Harm is generally considered irreparable . . . if it cannot be redressed adequately by monetary damages.” Garden State Equality, 216 N.J. at 328 (quoting Crowe, 90 N.J. at 132-33).

Even if a stay is issued in this matter, Curio would remain in the same position it was in when it was denied an award on October 15, 2021. The process implemented by the Commission, and referenced in all Final Agency Decisions, requires awardees to maintain any certification received from the Department of Treasury to remain eligible to move forward in the process and receive a license. If it is determined that Altus or Holistic cannot retain their certification, then the proposed permit award to either (or both) of those entities would be rescinded, returned to the Commission for consideration, and considered for issuance to the next highest-scoring, eligible applicant based on region. Allowing Altus



and Holistic to continue submitting necessary documentation and equipping their facilities does not put Curio in any worse a position than it would be if Altus and Holistic could not continue through the process while other matters are pending. Arguably, it is Altus and Holistic who would be harmed if they are allowed to continue with the process and then ultimately have their award rescinded due to failure to maintain certification.

(3) That the balance of the equities is in the movant's favor

As stated above, Curio is not harmed in any discernable way by the post-award process continuing. However, if Altus and Holistic's certifications are upheld, and they then are required to wait months before continuing to work with the Commission to become operational, those entities will be severely behind their competitors in entering and competing for patients in the market and creating name recognition. Most importantly, patients in the Central region will be delayed from additional access points to medicine that the data suggests is desperately needed.

(4) That the public interest will not be harmed

If the agency action "presents an issue of significant public importance," the agency should consider the public interest when evaluating whether to grant a stay. N.J. Election Law Enft Com'n v. DiVincenzo, 445 N.J. Super. 187, 196 (App. Div. 2016) Curio must prove that the "public interest will not be harmed." Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

Again, referring to and considering the above, any further delays in award and getting ATCs operational is harmful to the public interest – specifically the medicinal cannabis patient population in New Jersey.

The 2019 RFA process has contingencies attached to it if the claims made by Curio have any merit. Altus and Holistic are required by the 2019 RFA, including the clear terms of the Final Agency Decisions, to maintain their certifications. If they cannot, their awards will be rescinded and returned to the Commission. Further delay for an already slowed process, to the benefit of seemingly no party, and certainly not the public, has zero value. In fact, it would be arbitrary and capricious to stay the awards pending appeal, especially when considering the contingencies that have been put in place by the Commission.

Therefore, Curio has failed to meet the required factors of Crowe and it is in the best interest of the Commission, legally defensible and appropriate to deny the stay request.