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February 5. 2019

Via Fax (609-292-0053)
Shereef M Elnahal, MD. MBA
Commissioner
Department of Health
PO Box 360
Trenton, New Jersey 08625-0360

Re: Application for Medical Marijuana Alternative Treatment Centers

Dear Commissioner Elnahal

Compassionate Care Foundation, Inc. ("CCF") submits this motion pursuant to N.J. Court Rule 2:9-7 for a stay of the December 17, 2018 decisions of the Department of Health ("DOH") (as amended on January 31, 2019) to approve the six license applications awarded for new medical marijuana alternative treatment centers ("ATCs") while its appeal, filed on January 31, 2019, is pending. CCF's appeal is primarily motivated by the decision of the DOH to authorize MPX New Jersey LLC ("MPX") to open its dispensary on top of CCF's satellite dispensary, but its arguments will likely impact all of the new licensees.

Preliminary Statement

Despite the DOH's recent announcement that the award of six new medical marijuana licenses "**will reach patients that currently have to travel longer distances to obtain therapy**" as state law mandated -- the award to MPX New Jersey, LLC ("MPX") did not fulfill that obligation. Instead, MPX has been authorized to open its dispensary a block away from the satellite dispensary that the DOH previously authorized CCF to open in Atlantic City. The DOH's decision to place a second dispensary in one city, while there are no dispensaries

anywhere in Cape May County, Burlington County, Gloucester County and Salem County, cannot survive appellate review because it is contrary to the legislative and regulatory mandate to increase patient access throughout the state and is otherwise arbitrary and capricious.

Increasing patient access to medical marijuana has been a fundamental bedrock principle of the Compassionate Use Medical Marijuana Act ("CUMMA"), the policy goals expressed in Executive Order No.6, the DOH Executive Order No. 6 Report, and the DOH's prior standard of review of applications. The DOH has previously enforced that policy by applying a standard of "premises diversity," which ensured that ATCs and satellite dispensary sites did not overlap significantly in their service areas, to help ensure better patient access and to reduce the burden of travel on patients. By awarding MPX's application to open a second dispensary on the Atlantic City Boardwalk when most of the Southern region of the state is not serviced by a dispensary is entirely inconsistent with increasing patient access and premises diversity. Unfortunately, a second dispensary on the AC Boardwalk, contrary to the DOH's announcement, "will [NOT] reach patients that currently have to travel longer distances to obtain the therapy."

Should the Appellate Division agree with CCF's arguments and invalidate the approval of MPX's application for the Southern region, MPX would have a legitimate claim to its Central region application being granted, which in turn would impact the rights of the remaining five application winners. In addition, if the Appellate Division agrees with other arguments to be raised on the appeal that the scoring matrix was fatally flawed, all of the applications would be subject to reversal.

In addition, as of today, the DOH has not publicly released the applications of the winners nor is there any administrative record supporting why each of the six applicants were chosen. In short, there is no public record below for an appellate court to review. Thus, a stay

also would enable to the DOH time to publicly release the appropriate public record that explains its rationale for the selection of review panelists, the selection of its scoring criteria, internal training on the scoring matrix, and the rationale for the scores assigned.

Therefore, the DOH should stay the licensure process so that hundreds of thousands of dollars and countless hours of work are not wasted pursuing a process that most likely will be reversed on appeal.

Background

In 2010, New Jersey adopted the CUMMA to legalize (at the state level) medical marijuana and to facilitate patient access to medical marijuana.

On January 23. 2018, Governor Murphy issued Executive Order No. 6 in which he announced that far fewer patients than anticipated when CUMMA was enacted are being treated with medical marijuana. and given the importance of increasing patient access to medical marijuana he directed the DOH to undertake a comprehensive review of the implementing regulations and CUMMA

As part of Executive Order No. 6, Governor Murphy found that:

> giving patients a greater opportunity to obtain medical marijuana in accordance with State law will ensure that they are receiving a product tailored to their medical needs, and make them less likely to turn to potentially more harmful and less medically appropriate drugs such as opioids, the use of which was declared a public health crisis in Executive Order No. 219 (2017);
>
> my administration is committed to fulfilling the intent, promise, and potential of the New Jersey Compassionate Use Medical Marijuana Act by providing patients in New Jersey with a well-functioning and effectively administered medical marijuana program that best serves their medical needs

Based on those and other concerns he directed the DOH and Board of Medical Examiners to

> undertake a review of all aspects of New Jersey's medical marijuana program, ***with a focus on ways to expand access to marijuana for medical purposes***;
> [and to review]

> Any other aspect of the program within the Department or the Board's discretion that hinders or fails to effectively achieve the ***statutory objective of ensuring safe access to medical marijuana for patients in need***.
>
> [Executive Order No. 6 (emphasis added)]

The DOH then prepared its Executive Order No. 6 report (the "Report"), which consistent with the Executive Order made numerous recommendations primarily designed to increase patient access to medical marijuana. For example, the Report explained that "[t]he goal of eliminating the prohibition on satellite sites is to allow for increase in supply of, and access to, product for qualifying patients" (Executive Order 6 Report, p. 4); allowing two care-givers per patient would help "ensure patient access" (p.5); creating separate license endorsements would help increase access to medical marijuana (p.5); various statutory changes should be made to the CUMMA that currently restrict patient access (p.5-7); and allowing patients to register with more than one ATC would help increase patient access (p.6).

Those recommendations and proposals of the DOH were entirely consistent with the core principle of the CUMMA and the implementing regulations to increase patient access to medical marijuana. Even before CUMMA was adopted, the Legislature made clear that an important policy of the DOH must be to ensure patient access throughout the state. As a Senate Committee statement explained:

> DHSS is to seek to ensure the availability of alternative treatment centers throughout the State, including, to the maximum extent practicable, at least two each in the northern, central, and southern regions of the State, respectively.
>
> N.J.S.A. 24:6I-1 Assembly Health and Senior Services Committee Statements on Senate Bill No.119 (1R) (June 4, 2009)

That Legislative intent was then codified in N.J.S.A. 24:6I-7, which provides that the DOH "shall seek to ensure the availability of a sufficient number of alternative treatment centers

throughout the State, pursuant to need, including at least two each in the northern, central, and southern regions of the State." N.J.S.A. 24:6I-7.

The implementing regulations further made patient access an important priority in reviewing applications for licensure. Relevant regulations required the DOH to review the applications for licensure primarily based on three criteria, including the ability of the applicant to meet the needs of patients. N.J.A.C. 8:64-6.2 (identifying three criteria that reviewers must consider, including applicant's "Ability to meet overall health needs of qualified patients and safety of the public")

Therefore, there can be no doubt that increasing patient access to medical marijuana throughout the state is a core priority and mandate of CUMMA, its implementing legislation and of this Administration.

Consistent with that core policy of increasing patient access, in announcing the approval of the six new ATC applicants, the DOH proudly explained that "We are committed to an equitable expansion of supply to meet growing patient demand, and ***these new locations will reach patients that currently have to travel longer distances to obtain the therapy.***" (December 17, 2018 press release)

Unfortunately, the selection of two of the applicants, MPX and Verano New Jersey LLC ("Verano"), failed to serve that goal. MPX has been authorized to pursue opening its dispensary a block away from a satellite dispensary to be operated by CCF and Verano has been authorized to pursue opening its dispensary just a few miles away from the Garden State Dispensary's satellite dispensary in Union City

Their selection not only is inconsistent with the core statutory and regulatory policy of the State, but it also highlights some of the flaws in the scoring criteria adopted by the DOH.

While the application form asked applicants for information about where they wanted to site their ATC, nothing in the scoring matrix allowed reviewers to assess whether the proposed location furthered the state policy of increasing patient access to medical marijuana throughout the state That is, even though MPX was planning to open its dispensary next door to CCF's, the scoring matrix did not permit any reduction in points even though MPX's proposal clearly did not satisfy the core policy of expanding patient access to medical marijuana.

On January 31, 2019, CCF filed its notice of appeal of the DOH's decisions selecting the six ATC applicants.[1] On that same day, five other applicants who were not selected by the DOH also filed appeals.

ARGUMENT

I. MOTION FOR A STAY STANDARD

The standard for the granting of a stay is discretionary and dependent upon the equities of each case *Avila v. Retails & Mfrs Distribution*, 355 N.J. Super. 350, 354 (App. Div. 2002). Indeed, where, as here, the issues on appeal are not frivolous "***courts regularly grant a stay of***

[1] Even though CCF was precluded from participating in this round of ATC applications, it still has standing to appeal and to seek a stay pending appeal. In New Jersey, "standing to seek judicial review of an administrative agency's final action or decision is available to the direct parties to that administrative action as well as anyone who is affected or aggrieved in fact by that decision." *Camden Cty v. Bd. of Trs. of the Pub. Emps. Ret. Sys.*, 170 N.J. 439, 446 "To possess standing a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." Id. at 449. *See also Elizabeth Fed. Sav. & Loan Ass'n v. Howell*, 24 *N.J.* 488, 499-504, 132 *A.*2d 779 (1957) (explaining that competitors of a party who has received a governmental approval required for a proposed business operation also have standing to appeal the approval); *Med. Soc'y of N.J. v. Bakke*, 383 *N.J.Super.* 498, 503-05, 892 *A.*2d 728 (App.Div.2006); *In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007*, 417 N.J. Super. 115, 126–27 (App. Div. 2010).

judgment pending appeal unless there is irreparable harm to the non-appealing party." Jeffrey S. Mandel, New Jersey Appellate Practice, § 25:2-2(a) (Gann 2014) (emphasis added). To decide whether to issue a stay, an agency must consider whether: (1) irreparable harm will result if the stay is not issued; (2) there exists a reasonable probability of success on the merits; and (3) in balancing the equities, the injury to the non-moving party in the absence of the stay outweighs the foreseeable harm to the opposing party. *Crowe v. DeGioia*, 90 N.J. 126, 132-34 (1982).

The DOH should stay the process of its award of the six licenses because CCF will be irreparably harmed if the stay is not granted; there is a reasonable probability of success on appeal, and the equities weigh in favor of a stay.

A. A Stay Is Required to Avoid Irreparable Harm

The Appellate Division and Supreme Court have repeatedly explained that in situations like this involving government awards, a stay should be granted at the start of the appeal to avoid the ultimate relief on appeal becoming moot. Our courts have repeatedly admonished appellants who failed to seek a stay pending appeal, and refused to issue otherwise meritorious relief simply because too much time had passed, construction was too far along to equitably stop it, or the winning party had undertaken too much effort or incurred too much expense in reliance on the award to equitably undue the award. *See, e.g., Barrick v. State, Dep't of Treasury, Div. of Prop. Mgmt. & Const.*, 218 N.J. 247, 263 (2014) (explaining that stay applications "ought to be pursued as a matter of course" in bidding disputes to avoid the award proceeding and the equities growing against granting relief as the appeal is pending); *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.*, 283 N.J. Super. 223, 233 (App. Div. 1995) (explaining that there is a need to grant stays pending appeals of a bidding process to avoid irreparable harm); *In re ABC Towing*, A-5175-13T2, 2015 WL 7558978, at *3 (N.J. Super. Ct. App. Div. Nov. 25, 2015)

(admonishing appellants that the failure to timely seek a stay of an agency decision can render the appeal moot and preclude the appellate court from issuing a remedy).

If MPX (and similarly Verano) is permitted to continue with the approval process and opens its ATC, while this appeal is pending without a stay, the foregoing precedent may preclude the Appellate Court from overturning the award even if CCF is correct on the merits because MPX and Verano would have spent too much money and time becoming operational in reliance on the DOH decision. The stay, therefore, is required to prevent this appeal from becoming moot or to prevent the Appellate Court from being unable to issue relief to CCF. *See, e.g.*, *Christiansen v. Local 680 of the Milk Drivers*, 127 N.J. Eq. 215, 219-20 (E&A 1939) (noting that "justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit, and thus the court loses the faculty of fully vindicating such right and of remedying such wrong as may be revealed on final hearing").

B. There Is A Reasonable Chance of Success on Appeal

CCF respectfully submits that the RFP process was fatally flawed and the DOH should begin now to fix the process, rather than waiting for the Appellate Division. There are at least three fundamental reasons why the RFP process will not withstand appellate review.

1. DOH Failed to Disclose the Basis For Its Decision

First, the DOH has not developed a record nor articulated the reasons for its decision to award the licenses to the six winners. Without an administrative record, there is nothing available for the Appellate Division to review to determine if the decisions were arbitrary and capricious, or inconsistent with law or policy. It is well settled that when an agency fails to provide a basis to support its decision, the Appellate Division should reverse the decision and remand it to the DOH for further proceedings.

As the Appellate Division has repeatedly explained: "it is incumbent on the agency to explain its decision in sufficient detail to assure us that the agency actually considered the evidence and addressed all of the issues before it. Failure to address critical issues, or to analyze the evidence in light of those issues, renders the agency's decision arbitrary and capricious and is grounds for reversal." *Green v. State Health Benefits Comm'n*, 373 N.J. Super. 408, 414–15 (App. Div. 2004); *see also Mainland Manor Nursing & Rehabilitation Center v. New Jersey Dept. of Health & Senior Services*, 403 N.J. Super. 562, 571, 959 A.2d 885 (App. Div. 2008) (appellate courts cannot exercise their duty of review unless they are advised of considerations underlying administrative agency determination); *Atl. City Med. Ctr. v. Squarrell*, 349 N.J. Super. 16, 25 (App. Div. 2002) (reversing and remanding to agency to set forth basis for its decision); *Blackwell v. Department of Corrections*, 348 N.J. Super. 117, (App. Div. 2002) (Findings must be sufficiently specific to enable the reviewing court to intelligently review the decision and ascertain if the facts on which it is based afford a reasonable basis for the decision, a mere cataloging of evidence followed by an ultimate conclusion of liability, without a reasonable explanation based on specific findings of fact is not sufficient to enable an appellate court to properly perform its review function.); *Balagun v. New Jersey Dept. of Corrections*, 361 N.J. Super. 199, (App. Div. 2003) (An appellate court cannot accept without question an agency's conclusory statements, even in the exercise of its expertise, because it is obligated "to tell us why.").

The New Jersey Practice Series aptly summarizes the problem here given the lack of any administrative record:

> In order for an appellate court to apply these standards, it must have the benefit of the administrative agency's thinking. There can be no meaningful appellate review, no deference can be given, and due process would be lacking, if the administrative agency fails to disclose to the party aggrieved and to the reviewing court the basis for its

> decision. In such situations, the administrative decision is likely to be reversed and remanded with appropriate instructions. Indeed, it has been stated that "a determination predicated on unsupported findings is the essence of arbitrary and capricious action."
>
> § 4.16.Generally, 40 N.J. Prac., Appellate Practice and Procedure § 4.16 (2d ed.)

As of today, the only public administrative record are the decision letters and summary score sheets recently released by the DOH, but those documents wholly fail to give the Appellate Division the "benefit of the agency's thinking." Given the lack of any substantive administrative record, the Appellate Division will have no choice but to reverse and remand the award to the six applicants.

2. **The Decisions Violate Clear State Policy and the DOH's Own Standards**

The award to MPX to open a dispensary just a block from CCF's dispensary on the Atlantic City Boardwalk, while five counties in the Southern region of the State remain without a single dispensary, directly conflicts with the clear state policy to expand patient access to medical marijuana throughout the state. With only six licensed dispensaries spread across the state, there can be no justification for allowing one of the next six dispensaries to open in the same neighborhood as another dispensary when so much of the state is completely unserved.

In addition, consistent with its mandate, prior to these awards, the DOH has applied a standard of "premises diversity" to ensure that ATC service areas, including their satellite sites, did not unduly overlap with other facilities. The DOH has rejected requests by existing ATCs to open facilities in various locations because the DOH determined they would be too close to existing or planned facilities That premises diversity correctly helped ensure that patient access across the state would be met. Unfortunately, the process adopted with this round of applications failed to apply that same "premises diversity" standard and resulted in the award of a second dispensary on top of CCF's satellite dispensary.

As a result, the decision to approve MPX's proposal exceeded the authority of the DOH and must be invalidated on appeal. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562 (1978) (explaining that an administrative agency only has authority to take action consistent with "the powers expressly granted which in turn are attended by those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation"); *GE Solid State. Inc. v. Dir., Div of Taxation*, 132 *N.J.* 298, 306, 625 *A.*2d 468 (1993) (explaining that an administrative agency cannot take action beyond what the statutory language permits); *Lewis v. Catastrophic Illness in Children Relief Fund*, 336 *N.J.Super.* 361, 369–70, 764 *A.*2d 1035 (App.Div.2001) (explaining that to be valid, regulatory action must be "within the fair contemplation of the delegation of the enabling statute").

3. **The Scoring Criteria, and Scoring Thereof, Was Arbitrary and Capricious**

The publicly available scoring criteria demonstrate that the criteria, and the application of the criteria, were arbitrary and capricious. The scoring matrix was too vague and failed to set reasonable standards by which the applicants would be judged. There can be no clearer evidence of that than the scoring results for many applicants for whom some members of the review panel gave the applicant a perfect score, while other panel members gave the same application a zero score There is clearly a fundamental flaw in the scoring criteria and/or scoring process when the reviewers can reach conclusions fundamentally at odds with each other.

Moreover, the failure to include criteria to permit the applications to be judged based on their ability to expand patient access to medical marijuana across the state is fundamentally at odds with the State's clear policy and the regulatory requirement that applications be reviewed to ensure ability to meet patient needs. *See* N.J.A.C. 8:64-6.2. As noted above, even though the applications disclosed the proposed location of each new ATC, nothing in the scoring matrix

allowed reviewers to take into consideration whether the proposed location would serve the fundamental state policy of increasing patient access to medical marijuana.

As a result, the scoring criteria and/or application of those criteria was arbitrary and capricious.

C. **The Equities Favor the Stay During the Appeal**

It would be entirely inequitable to allow the winning applicants to spend hundreds of thousands of dollars to continue with the remaining process of approvals and opening their ATCs only to have the Appellate Division reverse the decision. Also, even if the Appellate Division only reverses the decision to approve MPX's Atlantic City location, MPX was the highest scorer in the central region and presumably would demand to have that application approved. The state would then need to revoke one of its prior approvals of a lower scoring application in the Central region. Maintaining the status quo will avoid that waste of time, expense and need to unscramble those types of eggs.

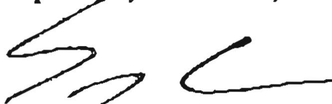
Moreover, CCF, which is a non-profit entity without access to funding from investors, unlike MPX, has had to borrow money to fund the opening of its new satellite dispensary. It is inequitable to force CCF to compete with MPX for exactly the same patients in and around Atlantic City while this appeal is pending.

Perhaps most importantly, it is in the public's interest – in the interest of those patients in the five currently unserved counties in Southern New Jersey – to stop a second dispensary opening in one eastern city. Patients across the state have waited nine years for the possibility of new ATCs opening closer to where they live. Waiting a few more months while this appeal proceeds will make little difference, especially when the result should be to deliver on the DOH's promise to reduce the distance patients must travel to obtain this therapy.

Conclusion

For the foregoing reasons, CCF respectfully requests that the DOH stay the licensure process until its appeal is resolved. CCF further requests that the DOH rule on this application no later than February 11, 2019, so that, if needed, it may timely move the Appellate Division for a stay.

Respectfully submitted,



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