STATE OF MICHIGAN

COURT OF CLAIMS

GREEN GENIE, INC. et al,

Plaintiffs,

v

STATE OF MICHIGAN et al.,

Defendants.
_____/

OPINION AND ORDER

Case Nos. 19-000045-MB; 19-000046-MZ; 19-000047-MB; 19-000049-MB; 19-000050-MB; 19-000051-MZ; 19-000052-MZ; 19-000053-MB

Hon. Stephen L. Borrello

Pending before the Court in these actions for declaratory and injunctive relief are defendants' motions for summary disposition. For the reasons that follow, defendants' motions are DENIED in those cases where plaintiffs have satisfied MCL 600.6431(1)'s requirements, but are GRANTED in Docket Nos. 19-000045-MB, 19-000050-MB, 19-000052-MZ, and 19-000053-MB, for the reason that plaintiffs in those cases failed to comply strictly with the notice-and-verification requirements set forth in MCL 600.6431(1). And as to cases where this procedural flaw does not exist, Docket Nos. 19-000046-MZ, 19-000047-MB, 19-000049-MB, and 19-000051-MZ, the Court GRANTS judgment in favor of plaintiffs, the non-moving parties, pursuant to MCR 2.116(I)(2). Finally, the Court DENIES as moot the motion for immediate consideration and the motion for leave to file an amicus brief in Docket No. 19-000052-MZ.

I. BACKGROUND

The circumstances leading to the filing of this lawsuit are lengthy, and an extensive recitation of the facts would be of no great benefit to any of the parties involved; for this reason, the Court will offer only a brief summary. Following the 2016 passage of the Medical Marijuana Facilities Licensing Act (MMFLA), facilities were permitted to apply for licensing as provisioning centers, growers, and processors. For reasons that are neither pertinent nor readily apparent, the licensing process and regulatory bodies were ill-equipped to timely review and rule on licensing applications. As a result, entities which met certain requirements were permitted to operate temporarily while their respective applications were being reviewed.

This temporary operating status led to the creation of various iterations of emergency rules by the Department of Licensing and Regulatory Affairs (LARA) which, among other matters, provided a regularly changing date after which the unlicensed facilities would have to cease operations. One of the problems this created was that many license applicants (hereinafter "applicant-plaintiffs") had yet to receive a ruling on their applications by the various dates chosen in the emergency rules. For reasons unknown, LARA exacerbated this problem, in fact doing so several times, leading to looming shut-down dates and concocted threats of forfeiture actions and/or criminal prosecution, all of which prompted various entities to seek relief in this Court. As a result, the Court issued, on more than one occasion, injunctive relief to those entities seeking licensure and on whose applications LARA had not yet ruled or otherwise issued final decisions.

LARA abandoned the emergency rules in late 2018. However, in January 2019, the Medical Marijuana Licensing Board took an approach similar to the former emergency rules and issued a resolution stating that it would not take disciplinary action against applicant-plaintiffs

who were temporarily operating until March 31, 2019, provided certain requirements were met. At this point, it had been well over a year since provisional operations began, and LARA still had not completed its review of many license applications.

The new deadline—March 31, 2019—was set without any apparent regard for whether LARA would rule on all of the pending applications by its passage. And, despite the passage of additional time, not all of the applications received a decision by the looming deadline. Moreover, for the applicant-plaintiffs who were denied a license, the March 31, 2019 deadline was set to expire before the process for appealing a license denial had run its course. Stated otherwise, the expiration of the deadline would have forced entities which had yet to receive rulings on their applications, as well as any appealing entities, to immediately cease operations, or face possible criminal and civil forfeiture actions. It thus became clear that the looming deadline was decided and announced, notwithstanding the ongoing application process or ongoing appellate process. Plaintiff Top Dollar Holdings, LLC, was one of those entities that faced being shut down before the appellate process had even begun. According to ¶ 49 of its complaint, Top Dollar's license application was denied on or about March 21, 2019, "with little discussion and no evidence" cited in support of the denial.

At or around this same time, the Marijuana Regulatory Agency (MRA) was created by way of Executive Order 2019-07. Effective April 30, 2019, the executive order transferred all of the "authorities, powers, duties, functions, and responsibilities" of the Medical Marijuana Licensing Board to the newly created MRA. Section 5(j) of Executive Order 2019-07 specified that the order was: "not intended to abate a proceeding commenced by, against, or before an officer or entity affected by this order. A proceeding may be maintained by, against, or before

the successor of any officer or entity affected by this order." Thus, the order preserves any ongoing proceedings involving the soon-to-be-defunct Licensing Board.

II. DISCUSSION AS TO ENTITIES SEEKING LICENSURE

Applicant-plaintiffs in these consolidated cases have asked the Court for declaratory and injunctive relief. Injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). "Stated another way, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Id*. (citation and quotation marks omitted).

The Court begins its analysis by again stating that use of its injunctive power is reserved only for the rarest of cases. And, while the underlying subject-matter of these cases gives them curb appeal, the grounds on which relief is warranted—process and procedure—are significantly less stirring. To that end, the Court agrees with the pertinent plaintiffs that the state's action in this case offends due process and the Administrative Procedures Act (APA) and entitles applicant-plaintiffs to the requested relief. Turning first to due process, "The Due Process Clause of the Fourteenth Amendment provides that '[no] State [shall] deprive any person of life, liberty, or property, without due process of law[.]' " *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 573; 892 NW2d 388 (2016). "[T]he touchstone of due process, generally, is protection of the individual against arbitrary action of government[.]" *Bonner v City of Brighton*, 495 Mich 209, 224; 848 NW2d 380 (2014) (citation and quotation marks omitted). The substantive component of due process "protects against the arbitrary exercise of governmental power, whereas the procedural component is fittingly aimed at ensuring

constitutionally sufficient procedures for the protection of life, liberty, and property interests." *Id*. (citation and quotation marks omitted). In order for the procedural protections of the due process clause to apply, a litigant must have a property or liberty interest. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 130-131; 715 NW2d 398 (2006). The source of a property interest is typically state law. *Id*., citing *Bd of Regents of State Colleges v Roth*, 408 US 564, 576-577; 92 S Ct 2701; 33 L Ed 2d 548 (1972).

Defendants first argue that plaintiffs' due process claims fail because they contend that plaintiffs have no property rights at stake, such that they cannot even petition the Court for relief. In support, they cite MCL 333.27409, which declares that a "state operating license" issued under the MMFLA "is a revocable privilege granted by this state and is not a property right." And, according to defendants, if a license cannot create a property right, the provisional interest held by applicant-plaintiffs certainly creates no property rights. The Court rejects that position, as well as the notion that any license granted under the MMFLA does not create a property right. The MMFLA cannot, by creating a license with all the traditional trappings of a property right, arbitrarily ignore those characteristics and simply declare that no property right exists. A license granted by the state to operate or to take some action is, by all accounts, a benefit. See, e.g., *Bundo v Walled Lake*, 395 Mich 679, 693; 238 NW2d 154 (1976). As explained by the United States Supreme Court in *Perry v Sinderman*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972), "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support [the plaintiff's] claim of entitlement to the benefit and that [the plaintiff] may invoke at a hearing." In other words, it is whether the benefit is protected by existing rules or understandings that is dispositive in determining whether a property right exists, not whether or how the benefit has been labeled. *Id*.

In the matters presented to this Court, a license under the MMFLA is plainly a property right. Indeed, licenses under the act are surrounded by all the traditional trappings of property rights, including notice and hearings—albeit post-deprivation or post-suspension hearings—and appellate procedures. See, e.g., MCL 333.27407(1)-(5). See also *Bundo*, 395 Mich App at 695-696 (discussing liquor licenses and property rights created thereby). In addition, as will be discussed in more detail below, the provisional licenses under which the applicant-plaintiffs operated in these cases were sufficient to create property rights as well.

With that backdrop, the Court concludes that the state's actions offended due process for the reason that they were arbitrary and capricious, they continue to be arbitrary and capricious, and because the state's actions infringed on the pertinent plaintiffs' property interests without affording plaintiff's procedural due process. At the outset, the Court notes that LARA's entire method of handling license applications has been "apt to sudden change, freakish, or whimsical[.]"[1] See *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011) (describing the arbitrary and capricious standard) (citation and quotation marks omitted). In reliance on permission and approval from LARA, the pertinent plaintiffs began operating their respective facilities pending a final decision on licensure. Plaintiffs did so with the understanding that their applications might not be granted. In fact, had the respective applications been denied and had plaintiffs had a full and fair opportunity to

[1] During oral argument the state asserted its main goal in the numerous announcements of looming deadlines was to further its regulatory goal of licensing all providers of medical marijuana. However, the state failed to provide any rationale for how the continuous setting of looming deadlines promotes a more regulated market. And to the extent that the state might continue with this variation on a theme, such deadlines, enacted under the misleading guise of proper regulation, will likely continue to be constitutionally infirm as well.

appeal those denials, this might very well be a completely different case with a completely different outcome. However, LARA has repeatedly attempted to revoke operating status—on which applicant-plaintiffs were induced by defendants to rely—before ruling on the merits of many of the applications. The shut-down date has been ever-changing, with the only constant being that the shut-down date moves without regard for whether all of the applications have received a substantive and final decision on the merits. These bait-and-switch announcements effectuated by LARA were entirely arbitrary and capricious.

As for procedural due process, the Court concludes that applicant-plaintiffs in this case had a provisional license, as the term "license" is understood under the APA. Indeed, MCL 24.205(a) defines a "license" as "the whole or part of an agency permit, certificate, *approval,* registration, charter, *or similar form of permission required* by law." During the pendency of the application process, plaintiffs plainly had approval and permission from LARA to operate their respective facilities. The existence of this provisional license is significant, because it brings into play MCL 24.291(2) of the APA, which states that:

> When a licensee makes timely and sufficient application for renewal of a license or *a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order* or a later date fixed by order of the reviewing court. [Emphasis added.]

Here, the provisionally licensed plaintiffs applied for "new" licenses with reference to an activity of a continuing nature. As a result, the APA forbids LARA from revoking these provisional

licenses "until a decision on the application is finally made by the agency[.]"[2] Hence, LARA cannot impose an arbitrary deadline and force applicant-plaintiffs to cease operations regardless of whether it has made a decision on their applications. The imposition of the March 31, 2019 deadline by way of the Board resolution is thus contrary to MCL 24.291(2).

As for the "final agency" decision contemplated by MCL 24.291(2) in this case, the Court turns its attention to the MMFLA. The MMFLA states at MCL 333.27407(2) that the soon-to-be-replaced Medical Marijuana Licensing Board "shall comply with the administrative procedures act" (APA) "when denying, revoking, suspending, or restricting a license or imposing a fine." In addition, MCL 333.27407(3) states that, if the Board denies a license, it "shall, upon request, provide a public investigative hearing at which the applicant is given the opportunity to present testimony and evidence to establish its suitability for a license."[3] As a result, the APA mandates that applicant-plaintiffs in these cases must be permitted to continue operating and that their provisional licenses do not expire until: (1) in the case of an application that is granted, the day of the agency's final determination; and (2) in the case of an application that is denied, "until the last day for applying for judicial review of the agency order[.]" MCL 24.291(2). The

[2] The Court's ruling should not be understood as prohibiting LARA from taking action against these provisionally licensed entities should LARA determine the entities are in violation of the law in any other respects. However, it appears there are no such allegations with respect to applicant-plaintiffs at this time.

[3] The allegations in plaintiff Top Dollar's complaint include that LARA denied its application without citing any facts or evidence and with little discussion. A review of the complaints filed by applicant-plaintiffs reveals that these allegations sound a common refrain. If true, such allegations sound in the nature of an arbitrary and capricious denial, and could very well be grounds for reversal of the initial licensure denial and/or may be indicative of the notion that the applicant has satisfied its obligation of establishing eligibility for licensure under the act. See Mich Admin Code, R 333.293(8) (discussing the burden an applicant for licensure must meet under the MMFLA). Indeed, the lack of rationale provided for the application denial would appear to go directly to the heart of the strength (or lack thereof) of the case against licensure.

MMFLA does not expressly provide for judicial review; instead, it points to the APA. "The APA's procedure for judicial review of an agency's decision states that 'a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham County.' " *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 567; 884 NW2d 799 (2015), quoting MCL 24.303. The time for seeking judicial review in circuit court under the APA is 60 days "after the date of mailing notice of the final decision or order of the agency[.]" MCL 24.304(1).

In light of the above, LARA is prohibited from arbitrarily revoking the provisional licenses held by applicant-plaintiffs until it issues a decision and, if the application is denied, until 60 days after the date of mailing notice of the final agency decision. See MCL 24.291(2). To this end, defendants are enjoined and restrained from enforcing the March 31, 2019 shut-down date with respect to all applicants—whether named as plaintiffs in these actions or otherwise—until 60 days post-issuance of the final licensing decision denying licensure.[4] The injunctive relief granted by this Court will remain in effect for 60 days after the date of mailing notice to the respective applicants of any final agency decision denying licensure.

For the avoidance of doubt, this Court's order only restrains and enjoins defendants from enforcing the March 31, 2019 shut-down date set forth in the January 2019 Board resolution. All other matters covered in the January resolution, such as those pertaining to testing of products, are not the subject of this Court's grant of injunctive relief, for the reason that there have been no

[4] If that time period has already expired for applicants and seeking judicial review in circuit court is no longer an option, then those applicants are not entitled to any relief under this Court's opinion and order.

meritorious issues raised with respect to the same. Instead, those matters remain subject to LARA's decision-making and rule-making authority, with which this Court will not interfere.

III. ANALYSIS AS TO LICENSED PLAINTIFF, THE CURING CORNER LLC

As for matters within the province of LARA and which there have been no meritorious grounds raised which would permit this Court to interfere with LARA's authority, one of the plaintiffs in these consolidated cases, The Curing Corner, LLC (Docket No. 19-000052-MZ), asks this Court for declaratory relief of a different nature. Chiefly, plaintiff Curing Corner asks this Court to essentially require LARA to extend previous iterations of now-expired emergency rules. There are numerous reasons why the Court declines to grant the relief requested by plaintiff Curing Corner. Firstly, as defendants correctly note, plaintiff Curing Corner failed to comply with the unambiguous condition precedent set forth in MCL 600.6431(1) for commencing its action against the state. The complaint was neither signed nor verified, and plaintiff's subsequent attempts to cure that deficiency are ineffective. *Progress Mich v Attorney General*, 324 Mich App 659, 673-674; 922 NW2d 654 (2018). As a result, the complaint filed by plaintiff Curing Corner must be dismissed and summary disposition must issue in defendants' favor pursuant to MCR 2.116(C)(7). See *id.*[5] Secondly, the Court is without authority to grant

[5] This same procedural flaw exits in Docket Nos. 19-000045-MB, 19-000050-MB, and 19-000053-MB, as outlined in defendants' briefing in those cases. And, because plaintiffs in those cases failed to follow the unambiguous notice-and-verification requirements contained in the Court of Claims Act, the Court is bound to dismiss those cases as well. *Progress Mich*, 324 Mich App at 673-674. Nevertheless, the relief granted in this case will work to the benefit of the plaintiffs in those dismissed cases, notwithstanding their lack of compliance with the necessary conditions precedent for suing the state in this Court. Lastly, as it concerns compliance with § 6431, the Court disagrees with defendants' assertions that the respective plaintiffs in Docket Nos. 19-000047-MB, 19-000049-MB, and 19-000051-MZ failed to strictly comply with the statute. Rather—as to Docket Nos. 19-000049-MB and 19-000051-MZ—the Court concludes that the verification pages attached to the respective complaints, which bear signatures by

the relief plaintiff Curing Corner requests and it will not dictate to LARA procedures for the sale of medical marijuana. This Court is not the appropriate forum for plaintiff Curing Corner to address those concerns. Thirdly, plaintiff Curing Corner has failed to present any evidence or expert testimony to substantiate the alleged harm(s) necessary to state a prima facie case for injunctive relief. Hence, even if plaintiff had complied with the requirements of MCL 600.6431(1), the Court would decline to grant the relief requested by plaintiff Curing Corner.

individuals who aver to be members capable of signing the verification in representative capacities and who aver that the allegations in the complaint are true to the best of their knowledge and belief, satisfy § 6431. And as it concerns Docket No. 19-000047-MB, it appears the states' briefing has overlooked the signed and verified notice of intent filed by the plaintiff in that case.

IV. CONCLUSIONS

IT IS HEREBY ORDERED that defendants' motions for summary disposition are GRANTED in Docket Nos. Docket Nos. 19-000045-MB; 19-000050-MB; 19-000052-MZ; and 19-000053-MZ, with the dismissals in Docket Nos. 19-000045-MB; 19-000050-MB; and 19-000053 being solely occasioned on the failure to comply with MCL 600.6431. Nevertheless, the injunctive relief granted in the following paragraph of this order will apply to those plaintiffs, and to all similarly situated plaintiffs in this state.

IT IS HEREBY FURTHER ORDERED that judgment is GRANTED to plaintiffs, the non-moving parties, in the cases where the failure to comply with MCL 600.6431 does not exist, Docket Nos. 19-000046-MZ, 19-000047-MB, 19-000049-MB, and 19-000051-MZ, for the reason that defendants' actions offend due process and violate the APA. The provisional licenses granted to applicant-plaintiffs remain in effect until a final decision is made on the applications, and if an application is denied, for 60 days after the denial in accordance with MCL 24.291(2). Defendants are hereby ENJOINED and RESTRAINED from enforcing any shut-down date before ruling on the applications and before the time period for seeking judicial review in circuit court expires.

IT IS HEREBY FURTHER ORDERED that the motion for immediate consideration and the motion to file an amicus brief in Docket No. 19-000052-MZ are DENIED as moot.

This order resolves the last pending claim and closes these consolidated cases.

Dated: April 30, 2019

Stephen L. Borrello, Judge
Court of Claims