DEPARTMENT OF EXCISE AND LICENSES
DENVER, COLORADO

FINAL DECISION

IN THE MATTER OF THE APPLICATION OF COLORADO HEALTH CONSULTANTS, LLC, DOING BUSINESS AS STARBUDS FOR RENEWAL OF ITS RETAIL MARIJUANA CULTIVATION LICENSE FOR THE PREMISES KNOWN AND DESIGNATED AS 4690 BRIGHTON BOULEVARD, DENVER, COLORADO (BUSINESS FILE # 1068931)

Procedural History

On April 25, 2016 a hearing was held for the annual renewal of the retail marijuana cultivation ("RMC") license held by Colorado Health Consultants, LLC, doing business as Starbuds, (the "Applicant") at the premises known and designated as 4690 Brighton Boulevard, Denver Colorado (the "Premises").

On May 10, 2016, the Hearing Officer issued a Recommended Decision recommending that the renewal application be denied.

On May 19, 2016, the Applicant submitted Objections to the Recommended Decision.

Findings and Conclusions

The Director of the Department of Excise and Licenses (the "Director"), upon review of the entire record, finds no factual or legal grounds to overturn the Hearing Officer's findings or recommendation.

In the Objections, the Applicant contends that the Department should reject the Recommended Decision on the grounds that the Department granted the retail marijuana cultivation license pursuant to the Denver Revised Municipal Code (the D.R.M.C.) section 6-214(a)(1), and therefore, the Application is not subject to public hearing requirements. Objections ¶ C. The Applicant also contends that the Hearing Officer erred in finding that the Opposition established, by a preponderance of evidence, the requirements of D.R.M.C. 6-214(a)(3). Id.

1. The renewal of the Applicant's RMC license is subject to the provisions of D.R.M.C. § 6-214(a)(3)

As an initial matter, the Director finds that the Hearing Officer properly determined that the renewal of Starbuds license is subject to the hearing provisions of D.R.M.C. §6-214(a)(3), instead of the provisions of D.R.M.C. §6-214(a)(1).

D.R.M.C. § 6-214(a)(1) states that "[a] local retail marijuana cultivation facility license may be issued in any *zone district where*, at the time of application for the license, *plant husbandry is authorized as a permitted use under the zoning code*." (Emphasis added).

It is undisputed that the Premises are located in an I-MX-3 zone district, where plant husbandry is not permitted under the Denver Zoning Code. Recommended Decision, ¶ 8; Recommended Decision, ¶ 13; *See also* Denver Zoning Code §9.1-32.

The Applicant concedes that it has never had a zone use permit for plant husbandry as a "primary use." Objections ¶ A.1.a. However, the Applicant claims it nonetheless holds a zone use permit that allows for plant husbandry as an accessory use. Id. As proof, the Applicant points to the zone use permit submitted with its renewal application. Recommended Decision. ¶ 3, 14.

Contrary to Applicant's claims, however, the zone use permit makes no mention of "plant husbandry," but instead lists only "retail sales" as the proposed use. Furthermore, under the Denver Zoning Code, all unlisted uses are prohibited unless the Zoning Administrator specifically permits the unlisted use in the form of a Zoning Code Interpretation. Denver Zoning Code §§9.1-33 and 11.10.1.1. To this date, the Applicant has failed to produce any evidence that it applied for a Zoning Code Interpretation to allow plant husbandry as an unlisted accessory use in an I-MX-3 zone district, pursuant to the specific procedures set forth in the Denver Zoning Code. Denver Zoning Code §9.1.4.1; *See also* Denver Zoning Code §12.4.6.1.

Finally, the Applicant contends that the Department would not have issued the license in the first place if a plant husbandry use were not permitted at the Premises. Objections ¶ C. Whether this statement is true is irrelevant. The present evidentiary record before the Department indicates that, in its application for a marijuana cultivation license, the Applicant submitted a zone use permit that allows only retail sales and makes no mention of plant husbandry. Further, the Applicant has failed to produce convincing evidence suggesting that plant husbandry is a permitted use in the I-MX-3 zone district. Accordingly, the Hearing Officer properly found that the Applicant is subject to the hearing pursuant to D.R.M.C. § 6-214(a)(3).

2. Grounds for non-renewal of the Applicant's RMC license

The Director also finds that the Hearing Officer correctly determined that the Opposition proved by a preponderance of evidence that the Applicant is ineligible for renewal pursuant to D.R.M.C. §§ 6-214(a)(3)a, b, d, and e.

D.R.M.C. § 6-214(a)(3) provides that the Director may schedule a renewal hearing for a Retail Marijuana Cultivation license on a zone lot where plant husbandry is not a permitted use but is already occurring as a non-conforming use if a party in interest requests a hearing. Parties in interest timely requested a hearing on the renewal of Applicant's license on March 23, 2016. Opponent's Exh. O-2.

D.R.M.C. § 6-214(a)(3) also provides that a Retail Marijuana Cultivation license issued in a non-conforming location is ineligible for renewal if it is shown by a preponderance of the evidence that:

a. "The existence of the retail marijuana cultivation facility on the licensed premises has frustrated the implementation of the city's comprehensive plan and any adopted neighborhood plan applicable to the subject property;

b. The existence of the retail marijuana cultivation facility on the licensed premises has negatively affected nearby properties or the neighborhood in general, including by way of example any adverse effects caused by excessive noise, odors, vehicular traffic, or any negative effects on nearby property values;

c. The existence of the retail marijuana cultivation facility has caused crime rates to increase in the surrounding neighborhood;

d. The continued existence of a licensed retail marijuana cultivation facility in the subject location will have a deleterious impact on public health, safety and the general welfare of the neighborhood or the city; or

e. The applicant or any person from whom the applicant acquired a retail marijuana business failed to meet one (1) or more of the requirements specified in paragraph (2) of this subsection (a)."

Pursuant to the D.R.M.C. § 6-214(a)(2), referenced in D.R.M.C. § 6-214(a)(3)e above, the Department may renew a Retail Marijuana Cultivation license at a location where plant husbandry is not a permitted use, but is occurring as non-conforming or compliant use under the Denver Zoning Code if:

a. "A zoning permit for plant husbandry was applied for upon the same zone lot on or before July 1, 2010;

b. The applicant can show that an optional premises cultivation license upon the same zone lot was applied for with the state medical marijuana licensing authority on or before August 1, 2010, in accordance with § 12-43.3-103(1)(b), 32 C.R.S; and

c. The applicant can produce to the satisfaction of the director documentary or other empirical evidence that the cultivation of medical marijuana had commenced on the zone lot prior to January 1, 2011."

The Director adopts the Hearing Officers findings and conclusions, and hereby finds that the Applicant is ineligible for renewal pursuant to D.R.M.C. § 6-214(a)(3)a, b, d, and e.

<u>The Applicant does not meet the requirements of D.R.M.C. § 6-214(a)(2)</u>

The Applicant fails to demonstrate compliance with D.R.M.C. § 6-214(a)(2) in the Objections, as it believes the requirements of this section are not applicable to it. <u>Objections ¶ C.</u> As stated above, the renewal of the Applicant's Retail Marijuana Cultivation license is subject to the requirements of D.R.M.C. § 6-214(a)(3), and therefore the requirements of D.R.M.C. § 6-214(a)(2). The

Applicant has failed to present any evidence that it satisfies the requirements of D.R.M.C. § 6-214(a)(2), and is therefore ineligible for renewal pursuant to D.R.M.C. § 6-214(a)(3)e.

The Applicant's cultivation facility frustrates the neighborhood plan

The Applicant contends that there is no evidence that the Applicant's cultivation facility frustrates the Elyria and Swansea Neighborhood Plan. Objections ¶ C. However, numerous neighborhood witnesses presented testimony that the Applicant's cultivation facility interferes with the neighborhood's ability to achieve the vision of the neighborhood plan. *See* Recommended Decisions ¶ 28-42. The Opponents presented testimony that the Applicant's cultivation facility impeded the creation of a unique and strong neighborhood with an abundance and variety of businesses. Recommended Decision ¶ 36, 42. Neighborhood witnesses further testified that the plan called for the creation of buffer zones between industrial and residential areas, and that the Applicant's cultivation facility was currently located in one of these zones marked for change. Recommended Decision ¶ 33-36, 39, 42.

The Applicant failed to provide testimony of a single resident within the neighborhood that contradicts the concerns of the neighbors. Instead, the Applicant dismissed their concerns by contending that the testimony is merely "general opinion." Objections ¶ C. Such an assertion is inadequate to rebut or even address the evidence presented by the Opponents concerning the frustration of the plan by the continued existence of the cultivation facility. Moreover, the Applicant also failed to present any rebuttal evidence that the cultivation facility would not frustrate the Neighborhood Plan. Accordingly, the Director adopts the conclusion of the Hearing Officer that the Applicant is ineligible for renewal pursuant to D.R.M.C. § 6-214(a)(3)a, as the continued existence of its cultivation facility at the Premises would frustrate the Elyria and Swansea Neighborhood Plan.

The Applicant's cultivation facility has negatively affected nearby properties and the neighborhood in general

The Director also concludes that the Hearing Officer properly found that the Applicant's cultivation facility negatively affects nearby properties and the neighborhood in general, particularly due to odor issues. Recommended Decision ¶ 71. Multiple neighborhood witnesses testified to the pungent and nuisance odors emitted from the Applicant's facility. *See* Recommended Decision ¶ 45-50. The Applicant contends that the testimony should not be considered as it is based on speculation and not on scientific measurements. However, it is proper for neighborhood witnesses to testify as lay witnesses about their perceptions and about the impact of the Applicant's business on their neighborhood. Testimony that is speculative in nature, and based exclusively on what "might" occur if the license were granted, is not entitled to any weight. Southland Corp. v. City of Westminster, 746 P.2d 1353, 1356 (Colo.App. 1987). The Opponents' testimony is not speculative as to what "might" happen if the cultivation facility license were renewed but rather, the testimony involved detailed descriptions of the actual adverse effects caused by the cultivation facility to the neighborhood. Recommended Decision ¶ 45-50.

Moreover, the Applicant failed to submit any contradictory evidence to suggest that the cultivation facility does not negatively affect nearby properties or the neighborhood in general. The Applicant

indicates that it has not made any changes to its grow operation since 2015. Objections ¶ C. This failure to mitigate any odor issues despite the fact that residents of the neighborhood have voiced concerns over odors emanating from the Premises for at least one year. Recommended Decision ¶ 51. Contrary to his assertions, the Applicant has known at least since February 2015 that odors emitted by its facility were a problem within the neighborhood, and yet has failed to take any steps to address the problem. Indeed, by acknowledging that he has installed odor mitigation technology at the Boulder facility, the Applicant clearly demonstrated his awareness that marijuana cultivation facilities can present odor problems to surrounding neighborhoods. Id. Finally, the Applicant claims that he will work with the neighbors now to alleviate the issues; however, the Director cannot rely on such speculative testimony about what "might" happen if the license is granted, therefore this testimony is not entitled to any weight. Moreover, the Applicant was aware of the problem last year and did nothing to work with the neighbors at that time. It is difficult to believe that anything will be different this year. The testimony and evidence presented indicates that the Applicant's facility causes adverse effects on nearby properties, the Applicant had notice of those effects, and the applicant failed to remedy the harm. For all these reasons and those set forth in the Recommended Decision, the Director adopts the conclusion of the Hearing Officer that the Applicant is ineligible for renewal pursuant to D.R.M.C. § 6-214(a)(3)b, on the grounds that the Applicant's cultivation facility has negatively affected nearby properties and the neighborhood in general.

The continued existence of the Applicant's cultivation facility will have a deleterious impact on the public health, safety, and general welfare of the neighborhood.

The Director also concludes that the Hearing Officer properly found that the continued existence of the Applicant's cultivation facility will have a deleterious impact on public health and welfare of the neighborhood. Recommended Decision ¶ 71. The Opponents presented direct testimony regarding the cultivation facility's frustration of the Health Impact Assessment incorporated into the 2015 Elyria and Swansea Neighborhood Plan. As stated in the Recommended Decision, the Assessment explains that "nuisance odors do not necessarily cause direct toxic effects but may affect wellbeing by reducing the desire to go outdoors and by causing stress." Recommended Decision ¶ 40. Similarly, the Assessment suggests that these nuisance odors can cause short term health effects. The testimony at the hearing indicated that residents in the neighborhood are discouraged from going outdoors and have experienced short-term health effects such as throat irritation and headaches. The Applicant has failed to present any evidence suggesting that steps have already been taken to address these effects on public health.

Moreover, the record contains competent evidence that the cultivation facility will have a deleterious impact on the general welfare of the neighborhood. As stated above, the existence of the facility frustrates the goals of creating buffers between industrial and residential areas, development of the National Western Plan, and the creation of a neighborhood with an abundance and variety of local businesses. *See generally* Recommended Decision. It is important to note that the Applicant failed to present any direct testimony from other residents of the neighborhood to contradict this evidence. Petitions in favor of the renewal were the sole evidence submitted by the Applicant. And, as noted by the Hearing Officer, the 23 signatures that remained after 28 of them were declared invalid, the Director finds that these Petitions carry little weight. Even the Applicant itself "does not dispute that signatures on a petition have very little probative value[.]" Objections

¶ B.5.c. Accordingly, the Director adopts the conclusion of the Hearing Officer that the Applicant is ineligible for renewal pursuant to D.R.M.C. § 6-214(a)(3)d, as the continued existence of the Applicant's cultivation facility will have a deleterious impact on the public health, safety, and general welfare of the neighborhood.

For the reasons set forth above, the Recommended Decision is adopted as the Final Decision of the Department to the extent that it is consistent with the findings and conclusions herein. These findings and conclusions are supported by competent evidence produced at the hearing and found in the record.

Therefore, the application of Colorado Health Consultants, LLC doing business as Starbuds, to renew the Retail Marijuana Cultivation Facility license for the premises known and designated as 4690 Brighton Blvd., Denver, Colorado is **hereby DENIED** pursuant to D.R.M.C. § 6-214(a)(3); however, the license is hereby administratively continued for 30 days from the date of this order during which the Applicant may care for, maintain, and harvest marijuana plants that **are currently on-site**. After the date of this order, the Applicant may not begin any new plants or clones. Any destruction or transfer of plants, plant material, and/or clones must be completed according to all applicable laws and regulations.

SO ORDERED this 23rd day of June, 2016.

Stacie Loucks, Director
Department of Excise and Licenses

CERTIFICATE OF MAILING

The undersigned hereby states and certifies that one true copy of the foregoing Final Decision was sent via email on the 23rd day of June, 2016 to the following:

Jim McTurnan, Attorney for the Applicant
starbudsjim@gmail.com

CERTIFICATE OF INTER-OFFICE MAILING

The undersigned hereby states and certifies that one true copy of the foregoing Order was deposited in the City and County of Denver inter-office mails system on the 23rd day of June, 2016 to the following:

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Dept. of Excise and Licenses