

**DEPARTMENT OF EXCISE AND LICENSES
DENVER, COLORADO**

FINAL DECISION

IN THE MATTER OF THE APPLICATION OF LOST CREEK VENTURES, INC., DOING BUSINESS AS BONFIRE CANNABIS COMPANY, FOR A RETAIL MARIJUANA STORE LICENSE AT 4837 WASHINGTON ST., UNIT 100, DENVER, COLORADO (BUSINESS FILE # 2016-0007031)

Procedural History

On October 26, 2016, Lost Creek Ventures, Inc., doing business as Bonfire Cannabis Company (“Applicant”), applied to the Department of Excise and Licenses (the “Department”) for a new retail marijuana store license at 4837 Washington St., Unit 100, Denver, Colorado (the “Application”).

As part of the licensing process, the Department scheduled a public hearing on the Application pursuant to the Denver Revised Municipal Code (the “D.R.M.C.”), section 6-212, to be held on February 15, 2017.

On January 27, 2017, Parties in Interest requested a night hearing, and the Department set the hearing for March 15, 2017.

On March 15, 2017, the Applicant was afforded a public hearing on the Application, which continued to April 5, 2017 so that all Parties in Interest would be afforded the opportunity to present evidence regarding the Application.

On May 16, 2017, the Hearing Officer issued a decision recommending that the Application be approved.

On May 25 and May 26, 2017, the Department received Objections to the Recommended Decision from the following Parties in Interest (collectively, the “Opposition”):

- Ms. Nancy Grandys-Jones, business owner and President of Globeville Civic Partners (Grandys-Jones Objections)
- Mr. Joseph Henry, Treasurer of Globeville Civic Partners and business owner, Mr. John Smidt and Ms. Kari Black, business owners (Henry Objections)
- Councilwoman Debbie Ortega, Councilwoman At-Large (Ortega Objections)
- Councilman Albus Brooks, Denver City Council President, District 9 (Brooks Objections)

- Ms. Nola Miguel, Globeville Elyria Swansea, Rey Gallegos, Vice President of United Community Action Network, and Ms. Candi C. deBaca, Cross Community Coalition (Miguel Opposition)

On June 1, 2017, the Applicant submitted “Applicant’s Response to Objections to the Recommended Decision of the Hearing Officer” (Response to Objections).

Findings and Conclusions

The Director of the Department, upon review of the entire record, accepts the Hearing Officer’s factual findings, but rejects the legal conclusion that the Applicant has sustained its burden to establish that the neighborhood needs and desires that a retail marijuana store license be issued at this location pursuant to D.R.M.C. § 6-212(c).

D.R.M.C. § 6-212(c)(4) states that “[f]or new retail marijuana store licenses issued on and after January 1, 2016 . . . the applicant shall establish the need for the license by a preponderance of the evidence and the director shall also consider:

- (a) The reasonable requirements of the neighborhood and the desires of the adult inhabitants as evidenced by petitions, remonstrances, or otherwise;
- (b) The number and availability of other retail marijuana stores in or near the neighborhood under consideration; and
- (c) Whether the issuance of such license would result in or add to an undue concentration of retail marijuana store licenses and, as a result, require the use of additional law enforcement resources.”

A clear majority of witnesses who testified at the hearing opposed the issuance of the license. At the hearing, sixteen (16) individuals testified either in support or in opposition to the license. Of the sixteen (16), thirteen (13) witnesses testified on behalf of the Opposition. This number included: Councilman Debbie Ortega, At-Large; Councilman Albus Brooks, District 9; Ms. Nancy Gandys-Jones, President of Globeville Civic Partners; Vernon Hill, a member of the Executive Board of Globeville Civic Partners; Ms. Candi C. deBaca, representative of Cross Community Coalition; Mr. Rey Gallegos, Vice President of Community Action Network – Metro Denver; David Oletski, a resident in the Designated Area; Ron Rohr, Vice-President of Administration for the National Western Complex within the Designated Area; Anne Elizabeth, managing member of Managing Vectors, LLC, a business located within the Designated Area; and five neighborhood witnesses testifying *en masse*. Recommended Decision, ¶ 35-44.

Ms. Grandys-Jones testified that Globeville Civic Partners directly represents twelve (12) members, and Mr. Hill testified that there are approximately one thousand (1,000) households in the neighborhood organization. Ms. Grandys-Jones and Mr. Hill explained that the four-member Board of Directors for Globeville Civic Partners and the five-member Executive Board *both* voted unanimously to oppose the Application. Recommended Decision, ¶ 39-40. Ms. de Baca testified that Cross Community Coalition represents approximately two thousand (2,000) members, and voted unanimously (15-0) to oppose the Application. Recommended Decision, ¶ 41. Mr. Gallegos testified that the Community Action

Network represents six (6) active members. Hearing Recording #2 at approximately 33:50. While the Community Action Network did not hold a formal meeting regarding the Application, Mr. Gallegos explained that each member had expressed an opinion opposing the Application, and further testimony clarified that the consensus was to oppose the Application. Hearing Recording #2 at approximately 38:00 – 39:00.

Mr. Oletski testified that he has resided in the Designated Area for 52 years, and he believes the existing marijuana outlets are sufficient to meet the needs of the area for the purchase of recreational marijuana; therefore, he does not believe there is a neighborhood need for an additional outlet with a retail marijuana store license. Mr. Oletski also stated that, while he believes there are some people in the area who desire an additional retail marijuana store outlet, he believes that most do not, and he personally does not desire that the retail marijuana store license be issued in this case.

Mr. Rohr testified that the National Western Complex owns various parcels of land in the designated area and is partially physically situated in the Designated Area. He testified that the National Western organization does not believe there is a neighborhood need for an additional outlet with a retail marijuana store license, and does not desire that the retail marijuana store license be issued to the Applicant. He stated that decisions for the non-profit are made by the Board of Directors, which meets monthly, but noted that since he is not a member of the Board of Directors, he does not know if a meeting was held to discuss this license application or if a vote was taken. However, Mr. Rohr testified that he was given instructions by the Board and the President of the National Western organization to attend the public meeting and testify in opposition.

The testimony and evidence proffered by Opposition witnesses makes clear that the existing marijuana facilities sufficiently meet the needs and desires of the neighborhood residents. Id; Grandys-Jones Objections, p. 5; Miguel Objections, p. 2; Ortega Objections, p. 1; Brooks Objections; p. 1; Henry Objections, p. 1. Councilman Albus Brooks testified that there are five (5) active medical and retail marijuana licenses in the area and “people can have their choice of retail and have their choice of medical marijuana.” Mr. Brooks stated, “we do not need another store nor do we desire another store in another five-block area.” Hearing Recording #1 at approximately 1:02:40-1:02:53. Mr. Brooks explained that he had been contacted by eighty-seven (87) constituents who opposed the Application, and that he had not been contacted by anyone in favor of the Application. Hearing Recording #1 at approximately 59:45 and 1:04:10; Recommended Decision, p. 22 (part C). Anne Elizabeth, a business owner in the Designated Neighborhood, testified that she did not sign any petitions for or against the issuance of the license. Ms. Elizabeth also affirmatively stated that “there is not a need for another retail marijuana store.” Hearing Recording #1 at approximately 5:02:31. In fact, upon cross-examination, every witness for the Opposition affirmatively stated that the needs of the neighborhood were currently being met by the existing retail marijuana outlets.

In contrast, three (3) witnesses testified on behalf of the Applicant, only one (1) of whom was not an employee of the Applicant. The Applicant presented only one witness to support the needs and desires of the neighborhood. That sole “needs and desires” witness, Mr. Molfese, owns a marijuana infused products manufacturer that distributes marijuana products to “dispensaries” and conducts business in the same building as the Applicant. Hearing Recording #1 at approximately 1:33:20; Recommended Decision, ¶ 34. Mr. Molfese also stated that he once employed one of the Applicant’s managing members. Hearing

Recording #1 at approximately 1:39:26. The Applicant's employees also testified in support of issuance. Recommended Decision, ¶ 32-34.

The testimony and exhibits presented at the hearing also established that two (2) retail marijuana stores operate within a few blocks of the proposed licensed premises in the Designated Neighborhood. Recommended Decision, ¶¶ 4, 35-44; Grandys-Jones Objections, p. 5; Miguel Objections, p. 2; Ortega Objections, p. 1; Brooks Objections, p. 1; Henry Objections, p. 1. As stated above, the Director is required to consider "the number and availability of existing marijuana outlets" in or near the neighborhood. D.R.M.C. § 6-216(c)(4); *See also Rocky Mountain Retail Management, LLC v. City of Northglenn*, 393 P.3d 533, 542 (Colo. 2017). Where the neighborhood contains one or more licensed outlets, the Applicant has the affirmative obligation to show with some degree of clarity that the existing outlets are inadequate to serve the needs of the neighborhood. *See e.g. Jennings v. Hoskinson*, 382 P.2d 807, 809 (Colo. 1963); *Bd. of Cty. Comm'rs of Jefferson Cty. v. Evergreen Lanes, Inc.*, 391 P.2d 372, 373 (Colo. 1964). "The proximity of the proposed outlet to the existing outlet is of course an important factor properly to be considered by the licensing authority." *Big Top, Inc. v. Hoskinson*, 407 P.2d 26, 27 (1965). Use of the word "near" suggests that the Director may consider the number of outlets "close by" or "not far from" the neighborhood. *See e.g. Anderson v. Spencer*, 334, 426 P.2d 970, 973 (Colo. 1967). "Lack of proof of the fact that the neighborhood is not adequately served precludes the issuance of a license (citations omitted)." *Hauf Brau v. Bd. of Cty. Comm'rs of Larimer Cty.*, 359 P.2d 659, 660 (Colo. 1961).

The Applicant has failed to show that the existing outlets in and near the neighborhood are inadequate as required by ordinance. The Applicant did not produce *any* evidence showing that the "availability" of retail marijuana in the neighborhood was at issue. Applicant's sole "needs and desires" witness, Mr. Molfese, simply testified that people had asked if he sold retail marijuana. Hearing Recording at approximately 1:45:11. Recommended Decision, ¶ 34. The Applicant broadly stated that his store would draw people from all over the state, and all over the world. Hearing Recording at approximately 2:02:30. However, "[t]he licensing authority must determine both the reasonable requirements of a neighborhood and the desires of its inhabitants. Thus, in making a licensing decision, the relevant consideration is neither the needs of the applicant, nor even the desires of the patrons (citations omitted)." *Canjar v. Huerta*, 566 P.2d 1071, 1072 (Colo. 1977); *Compare Tavella v. Eppinger*, 383 P.2d 314, 315 (1963) and *Potter v. McClearn*, 467 P.2d 54, 56 (Colo. 1970) (stating that the convenience of *patrons* does not establish a thirst need in the neighborhood, but the convenience of inhabitants may be relevant).

Mr. Molfese's testimony lacked any specificity or detail, and certainly did not establish that the neighborhood needs or desires more marijuana outlets. The Applicant failed to produce any direct testimony from residents or business owners stating that there are not enough retail marijuana outlets in the neighborhood. Conversely, the Opposition put forth direct testimony from several witnesses indicating that the neighborhood's existing retail marijuana outlets satisfied current demand. Recommended Decision, 35-44. While the Applicant stated that the "traveling" public may support a need in the neighborhood, the Applicant has failed establish the basis for such a claim through any objective evidence; therefore, the Director finds that claim to be speculative at best. *See Hauf Brau*, 359 P.2d at 663 (stating that the Applicant's opinion of need was properly rejected where such an opinion was not predicated on fact); *see also Southland Corp v. City of Westminster*, 746 P.2d 1353, 1356 (stating that testimony that is speculative in nature, and based exclusively on what "might" occur if the license were granted, is not entitled to any weight). In short, no witness presented objective evidence indicating that the Designated Neighborhood lacked sufficient retail marijuana outlets or that the neighborhood had an unmet demand for retail marijuana.

The Applicant similarly failed to produce any evidence that the neighborhood needs or desires a unique product, or that he would provide anything different to the neighborhood. The Applicant's sole neighborhood witness simply said that the existing retail outlets "were not very good," and under cross-examination, he could only say that it was his "personal opinion" that the neighborhood desires another retail marijuana store. While Mr. Molfese said that he had talked to other neighbors, he failed to describe with any specificity what those neighbors needed or desired, or how the marijuana products of existing stores in the area were not meeting the needs of the neighborhood. Hearing Recording #1 at approximately 1:38:10 – 1:39:00; and 1:43:00-1:45:20. Such a "perceived need" holds little weight, especially when considered against the direct testimony of residents, businesses and RNOs who testified clearly that they did not need or desire an additional license in the Designated Area. Furthermore, even if he had shown that the neighborhood needs unique or different marijuana products, the Applicant did not produce any evidence indicating that he would offer such a product. The Applicant simply testified that the other retail marijuana stores sell "low quality" product and that his store would provide "variety" and his "brand" is different than the other stores in the neighborhood. Hearing Recording #1 at approximately 2:02:30, 2:12:30 and 2:14:00; See also Recommended Decision, ¶¶ 32, 34. As stated above, the Applicant has the affirmative responsibility to establish that the current needs of the neighborhood are not being met by existing facilities. In this case, the Applicant failed to show that residents need or desire more marijuana, that they need or desire more variety in their marijuana choices, or that the Applicant could offer any unique marijuana products. Therefore, the Applicant has failed to show by a preponderance of evidence how the existing stores are inadequate. *See e.g. Bd. of Cty. Comm'rs of Adams Cty. v. Bova*, 385 P.2d 590, 591 (Colo. 1963)(noting that testimony from patrons solely supporting a license application did not establish that existing stores were inadequate).

In addition to live testimony, the Department received twenty-two (22) petition signatures in support of the Application and fourteen (14) signatures in opposition. Recommended Decision, ¶ 10, 14. While more signatures were received in support of the Application, petition signatures are one factor that the Department considers in whether the neighborhood needs and desires that the license be issued. *See e.g. Vigil v. Burrell*, 404 P.2d 147, 148 (Colo. 1965); *See also Goehring v. Bd. of Cty. Comm'rs of Larimer Cty.*, 469 P.2d 137, 138 (Colo. 1970). The additional petition signatures fail to remedy the lack of evidence regarding the inadequate service of the neighborhood. The Director gives more weight to the testimony of live witnesses as opposed to signatures on a petition. Live witnesses are sworn in and testify under oath, are subject to cross-examination, can fully expound on their position, and have taken the time to attend a public hearing about issues that they care deeply about. The Applicant's only live witness has an interest in selling marijuana products to retailers like the Applicant, is located in the same building as the Applicant, and even employed one of the Applicant's managing members. The Applicant's witness gave broad, general testimony regarding a vague need for better quality marijuana. Weighed against the testimony of thirteen neighborhood witnesses who state that the neighborhood is sufficiently served by the existing facilities, the Director finds that the evidence at the hearing, and in the record, shows that the neighborhood does not need and desire an additional retail marijuana store license. The Applicant has failed to demonstrate how the existing outlets are inadequate. That lack of evidence precludes the Department from issuing an additional retail marijuana store license in the neighborhood.


Finally, the Director notes that the Applicant has expressed a willingness to work with the neighborhood, has shown a strong commitment to contribute to its community, and has shown that it will comply with all laws and regulations, regardless of whether or not this license was issued. While the

Applicant's statements and intentions are admirable, the Applicant nonetheless bears the burden of establishing the need and desire for its license by a preponderance of the evidence.

Thus, after reviewing the evidence adduced at a hearing, and after consideration of the factors laid out in D.R.M.C. § 6-212(c), the Director finds that the Applicant failed to sustain its burden pursuant to D.R.M.C. § 6-212(c)(4), and further finds that the reasonable requirements of the neighborhood and desires of the adult inhabitants are sufficiently met by the existing retail marijuana stores in the neighborhood.

For the aforementioned reasons, the application of Lost Creek Ventures, LLC, doing business as Bonfire Cannabis Company, for a new retail marijuana store license at 4837 Washington St., Denver, Colorado is hereby DENIED. This Final Decision constitutes a final agency action subject to judicial review in Denver District Court.

SO ORDERED this 24th day of July, 2017.


Ashley Kilroy, Executive Director
Department of Excise and License

CERTIFICATE OF MAILING

The undersigned hereby states and certifies that one true copy of the foregoing Final Decision was sent via email on the 25 day of July, 2017 to the following:

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