IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

SARCOXIE NURSERY CULTIVATION CENTER, LLC,	)	
Petitioner/Plaintiff,	)	
v.	)	
RANDALL WILLIAMS, in his official capacity,	)	Case No. _____
LYNDALL FRAKER, In his official capacity,	)	Division: _____
DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
Respondents/Defendants.	)	

MOTION FOR TEMPORARY RESTRAINING ORDER AGAINST RESPONDENTS

Pursuant to Rule 92.02, Plaintiff and Relator Sarcoxie Nursery Cultivation Center, LLC, move the Court to grant a Temporary Restraining Order against the Missouri Department of Health and Senior Services, and Randall Williams and Lyndall Fraker, in their respective official capacities as Director of the Department of Health and Senior Services and Director of Medical Marijuana Division of the Department of Health and Senior Services and in support states as follows:

1. Rule 92.02(a) authorizes this Court to grant a temporary restraining order, with notice upon the party against whom relief is sought, if the petitioner demonstrates that the relief is necessary to prevent "immediate and irreparable injury, loss, or damage."

2. As required under Rule 92.02(a)(3), proper notice has been given to the Respondents.

3. Undersigned counsel first gave notice to Mr. Richard Moore, General Counsel of the Department of Health and Senior Services and counsel to the named individual Respondents, through Assistant General Counsel Patti Hageman, that Petitioner intended to seek a temporary restraining order for the reasons set forth in this motion on December 27, 2019.

4. Ms. Hageman was provided with the date and time of the hearing, once undersigned counsel confirmed the Court's availability on December 27, 2019.

5. Ms. Hageman was also served with a copy of the verified petition and the instant motion on December 27, 2019.

6. Rule 92.02(a)(2) provides that a party may support a motion for temporary restraining order with a verified petition.

7. Petitioner incorporates by reference its contemporaneously filed Petition which was verified by Dr. Paul Callicoat.

8. The verified petition filed with this case outlines objective, publically-known facts.

9. With the voter approval of Amendment 2 last year, the Department of Health and Senior Services and the named individual Respondents, (collectively the "Department" or "DHSS"), have been tasked with creating a regulatory system to accept and grant meritorious applications for licenses.

10. On May 24, 2019, nine days after the end of the General Assembly's 2019 session, the Department issued emergency and proposed rules under Chapter 95 of the Code of State Regulations that sets forth the criteria that the Department intends to utilize to evaluate applicants for all licenses under the medical marijuana program, including cultivators like Petitioner/Plaintiff.

11. Due to the fact that these rules were promulgated after the end of the legislative session, the Joint Committee on Administrative Rules (JCAR) the statutory committee created under §536.037, RSMo. to oversee executive department rulemaking to ensure that promulgated regulations made with adequate statutory authority, are not in conflict with state law, and are not "arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected," Sec, 536.010, RSMo.

12. The Department limited the award of cultivation licenses to no more than 60 licenses for cultivation facilities through promulgation of emergency Rule 19 CSR 30-95.080, filed May 24, 2019, effective June 3, 2019.

13. The Department an announced on December 5, 2019, that they would announce successful applicants of cultivation licenses on December 26, 2019, just days before the start of the 2020 session of the General Assembly.

14. The Department has created a regulatory system that will be fully effective without any oversight from JCAR—by awarding all of the cultivation licenses prior to the General Assembly 2020 session, JCAR will not be able to pass on any of the lawfulness of the application process before the process is entirely concluded.

15. In effect, the Department's timetable appears designed to completely avoid any oversight from the General Assembly, despite JCAR's oversight being mandatory under Chapter 536.

16. Moreover, there is significant reason to believe that the Department's rules regarding the licensure of Medical Marijuana Cultivation Facilities would not have survived JCAR's oversight. if the Department's regulatory scheme had been presented to the committee during the 2019 session or if the award of licenses would have occurred *after* JCAR passed on the propriety of the Department's regulatory scheme in the imminent 2020 session..

17. Specifically, at least three factors that the Department used to evaluate applications are facially unlawful, and would have been unlikely to survive JCAR scrutiny.

18. Those factors are the "geographic bonus," the standard-less "variance" powers granted by regulation, and the hard-cap of 60 cultivation licenses that the Department decided to award.

THE GEOGRAPHIC BONUS IS AN UNLAWFUL "SPECIAL LAW"

19. Beyond the "minimal standards for licenses" set forth in 19 CSR 30-95.025(4)(A), the criteria delineated within Article IV, Section 3(h), were also promulgated as Rules for the evaluation of applicants. 19 CSR 30-95.025(4)(B).

20. For the Article IV, Section 3(h), criteria the Department purports to create a "numerical score" which will be totaled together, creating an overall "application score." 19 CSR 30-95.025(4)(C).

21. Presumably, the applicants who meet the minimal standards under Section (A) and achieve the highest total score under Section (B) were to receive licenses under the Department's application scheme.

22. However, the Department also provided two significant factors, or an "eleventh criteria" that outweighs any of the other criteria provided for by the Article XIV.

23. Under 19 CSR 30-95.025(4)(C)(6)(A) the Department provides that:

> Any facility seeking a license to locate within a zip code area that has an employment rate of eighty-five percent to eighty-nine and nine tenths percent (85- 89.9%) will receive a scoring increase of thirty percent (30%) of the average initial score of all applicants of the same facility type within the evaluation criteria topic regarding potential for positive economic impact in the site community.

24. 19 CSR 30-95.025(4)(C)(6)(B) provides an even more favorable geographic bonus:

> Any facility seeking a license to locate within a zip code area that has an employment rate of zero to eighty-four and nine tenths percent (0-84.9%) will receive a scoring increase of forty percent (40%) of the average initial score of all applicants of the same facility type within the evaluation criteria topic regarding potential for positive economic impact in the site community.

25. The regulation then goes on to provide a list of these favored zip codes as an attachment to 19 CSR 30-95.025.

26. The Department's list of favor geographical zip codes was only promulgated *after* initial applications were filed by potential licensees like Petitioner, and *after* Petitioner, and those similarly situated, paid non-refundable application fees to the Department.

27. The 30% and 40% bonuses offered by 19 CSR 30-95.025(4)(C)(6)(A) and (B) are so significant that they override any of the other criteria that the Department has put forward, in effect making geography the dispositive factor in evaluating application.

28. Beyond the geographical bonuses of 19 CSR 30-95.025(4)(C)(6)(A) and (B) Department provides other geographical standards for applicants of dispensaries.

29. In 19 CSR 30-95.025(4)(C)(8), the Department states that a bonus will be provided for each application that meets the following geographical criteria:

- "the highest scoring dispensary facility in each of the one hundred sixty-three (163) Missouri House of Representatives districts"
- "any dispensary facility applicant with a location more than twenty five (25) miles, measured in a straight line, from any other dispensary facility applicant or existing dispensary facility"

30. Unlike the bonuses in 19 CSR 30-95.025(4)(C)(6), the geographical bonus that will be awarded under subsection (4)(C)(8) is not precisely known. Instead, the Department provides that:

> Scoring increases due to geographic location will be equal to five percent (5%) of the average initial score of the top twenty-four (24) ranked facilities in each congressional district that has at least twenty-four (24) dispensary facility applicants; and
>
> In cases where a house district is segmented by the boundary lines of two (2) or more congressional districts, for purposes of the adjustments in this paragraph, only the segment of that house district with the highest population, as of the 2010 United States Population Census, will be utilized…

31. These geographical bonuses all violate the special law provision of Article III, Section 40(28) of the Missouri Constitution which provides that:

> The general assembly shall not pass any local or special law...granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track.

Mo. Const. Art. III, § 40

32. "The test employed to determine if a statute is a special law is whether the statute's applicability is based on open-ended or closed-ended characteristics." *City of Normandy v. Greitens*, 518 S.W.3d 183, 191 (Mo. banc 2017).

33. "A law based on closed-ended characteristics—e.g., historical facts, *geography*, or constitutional status—is facially special and presumed to be unconstitutional as others cannot come into the group nor can its members leave the group." *Id.*

34. Since the bonus points are only based upon "geography" is a facially special law under the Missouri Constitution.

35. The fact that the geographic is a "facially special law" means that Petitioner is likely to prevail on the underlying merits of its preliminary injunction, or at the very least, the Court should grant temporary relief until such time as a preliminary injunction hearing made be had on the matter.

36. That is due to the fact that under clear Missouri Supreme Court precedent, "[t]he party defending the facially special statute must demonstrate *a 'substantial justification'* for the special treatment." *City of St. Louis v. State of Missouri,* 382 S.W.3d 905, 915 (Mo. banc 2012).

37. This standard is far beyond the normal "rational basis" test set forth under general principals of due process or equal protection.

38. It is also likely that JCAR would have found the geographic bonus to be otherwise contrary to state law, namely Article III, Sec. 40.

39. Indeed, from the initial announcement by the Department, it is clear that the geographical preferences pushed out otherwise meritorious applications.

40. Of the sixty (60) successful applications, over thirty-five (35), fifty-eight 58%, were awarded bonus points based upon the "geographical bonus".

41. The geographically skewed results strongly suggests that the "geographical bonuses" were dispositive of the award of more than half of the licenses and hijacked every other consideration the Department sought to make.

42. Additionally, beyond the facial "special law" problems with the geographical bonuses set forth in the Department's regulatory scheme, the Department would have been unlikely to demonstrate to JCAR how any geographical criteria, even if based on economic distress, falls within the constitutional promulgation authority which limits the Department's rule making authority to those only those rules "necessary for the proper regulation and control of the cultivation, manufacture, dispensing, and sale of marijuana for medical use and for the enforcement of this section so long as patient access is not restricted unreasonably and such rules are reasonably necessary for patient safety or to restrict access to only licensees and qualifying patients." Art. XIV, Sec. 1.3(1)(b).

43. There is reason to believe that JCAR would not approve the facially unlawful geographic bonuses promulgated by the Department.

THE DEPARTMENT'S UNILATERAL GRANT OF AUTHROITY TO ITSELF TO ISSUE "VARIANCES" IS UNLAWFUL

44. Beyond the geographical bonuses, the other Department regulation that would have drawn JCAR scrutiny is the "waiver" and "variance" provision 19 CSR 30-95.025(2), which provides "[t]he department may waive, for good cause, provisions of this chapter on its own initiative or by request." The provision provides no standards, criteria or any other factor that would imply any predictability when or why the Department would grant such a variance.

45. Additionally, this grant of authority to broadly issue variances is not restricted—the Department purports to grant itself the authority to alter any rule or requirement in response to a request, or even on its own accord. This presumably would include the scoring criteria identified above.

46. "An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence." *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.,* 34 S.W.3d 266, 281 (Mo. Ct. App. 2000). "Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable." *Id.* "To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling'." *Barry Serv. Agency Co. v. Manning,* 891 S.W.2d 882, 893 (Mo. App. 1995). "An agency must not act in a totally subjective manner without any guidelines or criteria." *Id.* at 893–894.

47. Indeed, under the variance regulation, the Department is effectively free to make any decision it wants—it is an exception that swallows the entire regulatory scheme. The standards for granting or denying a waiver can be whatever the Department chooses.

48. Moreover, there is no way for the Petitioner, and other similarly situated, to avail themselves of any "waiver" or "variance" that the Department choses to grant to another applicant, even if the Petitioner's situation is identically or substantially similar situated to that of an applicant to whom the Department choses to grant such a waiver.

49. Indeed, unlike the normal rule making process which expressly provides notice and comment to the public, any "variances" and "waivers" which granted by the Department will only be known by the Department and the applicant seeking variance. While 19 CSR 30-95.025(2) provides that denials of requests for "variances" or "waivers" are to be made in writing, there is no countervailing provision requiring grants of variances to also be in writing.

50. There is also no provision which mandates that the Department's waivers or variances are actually published or otherwise made publically available. Indeed, given the Department's prior positions under the Sunshine Law in *St. Louis Post-Dispatch v. Missouri Department of Health and Senior Services,* (19AC-CC00053), where the Department broadly treated the entire application process under the medical marijuana program as a closed record, it is unlikely that Petitioner, any other applicant, or the public would ever be able to obtain information regarding the waivers or variances that the Department choses to issue. Certainly, applicants like Petitioner could not have learned of such information by the time the Department announces the 60 successful cultivation licenses this week.

51. But any proposed variances could have been brought before JCAR, if the Department had waited to award licenses until after the Committee had considered *how* the

Department intended to utilize the power. JCAR, with subpoena power, would have been able to obtain this information, and would have been unlikely to pass in favor of such a standard less grant of authority.

THE DEPARTMENT'S ARTIFICIAL LIMIT OF 60 CULTIVATION LICENSES IS UNLAWFUL AND CONTRARY TO THE CONSTITUTION

52. The final regulatory decision of the Department that would have been unlikely to survive JCAR scrutiny was the Department's inexplicable choice to limit the number of cultivation licenses to only 60. 19 CSR 30-95.050(1)(A) states that:

> The number of cultivation facility licenses will be limited to sixty (60) unless the department determines the limit must be increased in order to meet the demand for medical marijuana by qualifying patients.

53. Article XIV, the codification in the Missouri Constitution of Amendment 2, does not set any cap on the total number of facility licenses to be issued, instead, the article places a *miminum* number of licenses that the Department must issue. Mo. Const. Art. XIV, Sec. 1.3(15).

54. Further, the Constitution is clear that rules may only be promulgated "so long as patient access is not restricted unreasonably and such rules are reasonably necessary for patient safety or to restrict access to only licensees and qualifying patients." Mo. Const. Art. XIV, Sec. 1.3(1)(b).

55. Additionally, for cultivation facilities, an unreasonable cap of the licenses to cultivate medical marijuana offends the Missouri Constitution's guarantee of the Right to Farm, found in Article I, Sec. 35 which states:

> [T]he right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

56. Again, if the Department had allowed JCAR the opportunity to review the proposed rules, rather than promulgating them in an emergency fashion, and awarding licenses prior to JCAR's review, the General Assembly would have been able to pass on the reasonableness of restricting the number of licenses to only 60.

REQUESTED RELIEF

57. While the Department has announced some of the successful applicants, the Department has not yet issued any license for medical marijuana cultivation.

58. A temporary restraining order, subject to renewal, will allow enough time to give the JCAR an opportunity to pass on the propriety of the "geographical bonus," the "variance" powers of the department, and the violation of the "right to farm" by the promulgation of a hard cap of 60 cultivation licenses, prior to the issuance of the licenses, and before there has been any detrimental reliance by awardees.

59. The relief sought will be short in duration—if the JCAR choses to forgo any meaningful review of the Department's regulations, then that indication will be known very quickly at the start of the 2020 session.

60. Unless immediately restrained, one entire branch of state government will be denied a chance to provide the regulatory oversight, oversight agreed to by the Legislative and Executive branches as evidenced by Chapter 536 RSMo, of what are facially unlawful regulations issued by the Department.

61. There is little countervailing harm to Respondents in granting this immediate relief as a Temporary Restraining Order may be in the best interest of judicial economy if the JCAR and the Legislature agrees with the Petitioner, the Rules can be rescinded without judicial action and could obviate the need to litigate the Petition.

62. If further judicial action is necessary after the JCAR action, the Court will be free to conduct a trial on the merits of the Petition.

WHEREFORE, Petitioner prays that the Court:

a. Restrain the Respondents from issuing any licenses for marijuana cultivation facilities unless and until the Joint Committee on Administrative Rules approves the Department of Health and Senior Service's proposed emergency rules found in Title 19, Division 30, Chapter 95 of the Code of State Regulations; and

b. Such further relief as deemed just and proper by the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did on this 27th day of December, 2019, deliver a copy of the foregoing Request for Production of Documents by e-filing and electronic mail to:

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/s/Joseph P. Bednar, Jr.