

**IN THE CITY OF KEY WEST, BEFORE THE CITY COMMISSION SITTING AS THE
BOARD OF ADJUSTMENT FOR THE CITY OF KEY WEST, FLORIDA**

DISPENSARY MANAGEMENT,
LLC, a Florida limited liability
company,

Appellant,

v.

CITY OF KEY WEST,

Appellee.

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CITY OF KEY WEST
KEY WEST, FLORIDA

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that DISPENSARY MANAGEMENT, LLC, a Florida limited liability company (“Appellant” or “Company”), hereby appeals to the Board of Adjustment of the City of Key West, Florida, the administrative decision of the Chief Building Official of the City of Key West, Florida rendered on August 9, 2017, (“Denial Letter”). The Denial Letter being appealed is an administrative decision of the Chief Building Official (“CBO”) denying five separate applications for business tax receipts to operate retail sales of medical marijuana dispensaries with respect to the properties located at 300 Front Street, 326-330 Duval Street, 423 Duval Street, 513 Duval Street, and 901 Duval Street, Key West, Florida 33040 (collectively “BTR Applications”). The five properties are located in the HRCC-1 (300 Front Street, 326-330 Duval Street, 423 Duval Street, 513 Duval Street) and HRCC-3 districts (901 Duval Street).

The Denial Letter states that the basis for denying the BTR Applications is [section 205.194, Florida Statutes \(2017\)](#) (“Section 205.194”). Under Section 205.194, in order to obtain a local business tax receipt for a business that is regulated by the State of Florida, an applicant

must first exhibit an active State certificate, registration or license. §205.194(1), Fla. Stat.

The CBO erred in his denial of the BTR Applications because, at the time the BTR Applications were filed, there was no State licensure, certificate, or registration scheme in existence to regulate the operation of a medical marijuana dispensary. Accordingly, Section 205.194 cannot serve as a basis for denial of the requested BTRs and, pursuant to section 66-96 of the Key West Municipal Code (2017), the CBO was required to approve the BTR Applications at the time they were submitted.

Company has standing to bring this appeal pursuant to section 90-430, Key West, Florida, Municipal Code (2017), because Company is affected by the decision rendered by Chief Building Official.

FACTUAL HISTORY

1. On November 8, 2016, Florida passed the constitutional amendment allowing the sale and use of medical marijuana (“Amendment 2”). Fla. Const. Art. X, Sec 29.

2. Amendment 2 took effect on January 3, 2017. Amendment 2 also provided for the State of Florida to draft and implement regulations for cultivation and distribution of medical marijuana no later than 6 months from January 3, 2017.

3. On June 23, 2017, Chapter 232, 2017, Florida Laws, took effect, amending Sec. 381-986, Florida Statutes, and setting forth a regulatory scheme for the cultivation and distribution of medical marijuana as authorized under Amendment 2, and providing for the licensure of dispensaries.

4. Accordingly, between January 3, 2017 and June 23, 2017, there were no state regulations in effect for the operation of a medical marijuana dispensary.

5. On January 3, 2017, Appellant filed the five (5) BTR Applications with the City of Key

West (“City”).

6. The City accepted and retained the BTR Applications, but failed to either approve or deny them.

7. On May 15, 2017, Appellant filed a Petition for Writ of Mandamus with the Circuit Court in order to obtain an order requiring that the City make a determination on the BTR Applications. The Circuit Court subsequently entered an Alternative Writ of Mandamus, ordering the City to show cause why the City should not be compelled to make a determination on the five applications, and set the matter for hearing.

8. On August 9, 2017, the day of the hearing, the City delivered to Appellant the Denial Letter. This appeal ensues.

MEMORANDUM OF LAW

I. The City cannot rely on the absence of a State license or registration when there was no requirement for such a license or registration at the time the BTR Applications were submitted.

The City and the City Manager had a clear legal duty to make a determination on the BTR Applications when they were filed. Had the City timely carried out this duty, the BTR Applications would have been approved as is required by the City Code. Section 66-96, Key West, Florida, Municipal Code (2017) (“Section 66-96”) mandates:

Upon receipt of the amount of license tax specified in [section 66-109](#) and compliance with all other requirements contained in this Code, the city manager shall issue a business tax receipt to each person, provided a business tax receipt application form has been completed and filed with the city manager.

Id. The operative language is “shall.” The City Manager does not have discretion.

The plain language in Section 66-96 provides that the City Manager “shall” issue the business tax receipt. *Id.* If Section 66-96 allowed the City Manager discretion it would provide

“the City Manager *may* issue a business tax receipt”, but it does not. There is simply no reasonable way to construe Section 66-96 to authorize the City Manager to perpetually refuse to perform his duty. Additionally, the City of Key West “. . . had a ministerial duty to consider the request and at its discretion, either grant or deny it” in a *timely fashion*. *Nairn D. Newell v. Fla. Dept. of Corrections*, 2017 Fla. App. LEXIS 2951, 42 Fla. L. Weekly D 538 (Fla. 1st DCA 2017)(emphasis supplied). The City Code directs him to issue a business tax receipt “[u]pon receipt of the amount of license tax specified in section 66-109 and compliance with all other requirements contained in this Code.” *Id.*

The term “upon” means at the time of, and plainly does not mean several months later. For example, the Florida Supreme Court has concluded that a statute authorizing the Governor to reinstate a suspended state officer “‘upon satisfactory evidence that the ... charges ... are untrue’ may and should be given their natural meaning.” *State ex rel. Kelly v. Sullivan*, 52 So. 2d 422, 427 (Fla. 1951). The Court concluded that that the phrase “may be read and understood to mean ‘as soon as he has received’” the information, and it therefore rejected the contention that the Governor lacked the power to immediately reinstate the subject officer. *Id.* Indeed, a wide variety of Florida decisions consistently interpret the word “upon” to mean at the same time of, as opposed to some point in time significantly earlier or sooner. *E.g.*, *Rogers v. Bandy*, 182 So. 281, 283 (Fla. 1938); *Dean v. Crews*, 81 So. 479, 480 (Fla. 1919); *Careerxchange, Inc. v. Unemployment Appeals Com’n*, 916 So. 2d 68, 70 (Fla. 4th DCA 2005); *Lawyer v. Munro*, 118 So. 2d 654, 656 (Fla. 1st DCA 1960); *see also Gordon v. State*, 901 So. 2d 399, 403 (Fla. 2d DCA 2005) (interpreting the word in its special sense, but noting that the word “is ‘regularly employed as a simple equivalent of *on*, in all the varieties of meaning which that proposition has developed” (quoting XIX *Oxford English Dictionary* 299, 300 (2d ed. 1989)).

On August 9, 2017, more than seven months after the BTR Applications were submitted to the City, the BTR Applications were denied, relying on Section 205.194, Florida Statutes (2017). Section 205.194(1) states that:

Any person applying for or renewing a local business tax receipt to practice any profession or engage in or manage any business or occupation regulated by the Department of Business and Professional Regulation, the Florida Supreme Court, or any other state regulatory agency, including any board or commission thereof, must exhibit an active state certificate, registration, or license, or proof of copy of the same, before such local receipt may be issued. Online renewals may provide for electronic certification by an applicant to meet this requirement.

On January 3, 2017, the date the BTR Applications were presented to the City, there were no regulations in place and no licenses required by the State for the operation of a medical marijuana dispensary. The Florida statutory scheme for approving medical marijuana dispensaries did not take effect until June 23, 2017. Accordingly, Section 205.194, Florida Statutes, could not serve as a basis for denial of the BTR Applications at the time they were submitted because there was not provision in State law for the licensure of a medical marijuana dispensary.

II. Appellant must secure a physical location in order to obtain a State License to operate a Medical Marijuana Dispensary and, therefore, a BTR must be obtained before the Appellant can apply to the State for approval to commence operations.

Under Section 381.986, Florida Statutes (2017), from and after June 23, 2017, a person may not dispense medical marijuana without a State license. However, to obtain a State license, the applicant must first secure a physical location. §381.986, Fla. Stat. (2017). The City's decision to deny the BTR Applications has made it impossible for the Appellant to apply for the State license. As a result, Appellant cannot obtain a physical location, and thus, cannot submit a completed application to obtain a state license. The City is attempting to put the proverbial cart

before the horse because Appellant cannot satisfy a state licensing requirement of identifying a location without obtaining a BTR for that location. Appellant recognizes that, even with the issuance of a BTR by the City, Appellant cannot lawfully begin operation of a medical marijuana dispensary without full compliance with all applicable State laws and regulations.

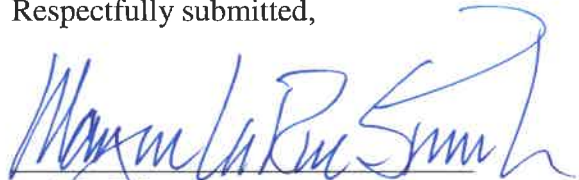
CONCLUSION

For the foregoing reasons, DISPENSARY MANAGEMENT, LLC respectfully requests the Board of Adjustment to enter a decision as follows:

- a. Overrule the decision of the Chief Building Official of the City of Key West, Florida rendered on August 28, 2016;
- b. Require that the Chief Building Official approve the BTR Applications submitted by Dispensary Management, LLC on January 3, 2017; and
- c. For such other relief as the Board of Adjustment deems just and proper.

Dated this 21 day of August, 2017.

Respectfully submitted,



WAYNE LaRUE SMITH

Florida Bar No. 0031410

BRETT TYLER SMITH

Florida Bar No. 0085412

THE SMITH LAW FIRM,

a professional association

Counsel for Appellant

509 Whitehead Street

Key West, Florida 33040

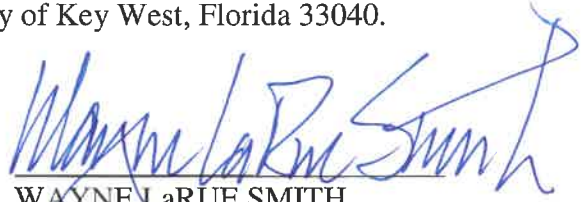
T: (305) 296-0029

F: (305) 296-9172

E: Court-Filings@thesmithlawfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2017, a true and correct copy of the foregoing was personally served on Cheri Smith, Clerk of the City of Key West, Florida 33040.



WAYNE LaRUE SMITH

Florida Bar No. 0031410

BRETT TYLER SMITH

Florida Bar No. 0085412

THE SMITH LAW FIRM,

a professional association

Counsel for Appellant

509 Whitehead Street

Key West, Florida 33040

T: (305) 296-0029

F: (305) 296-9172

E: Court-Filings@thesmithlawfirm.com

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THE SMITH LAW FIRM A PROFESSIONAL ASSOCIATION



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DATE: August 21, 17
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1304 White Street
Key West, Florida 33040

EXPLANATION: Appeal

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PAY TO THE ORDER OF: City of Key West 1304 White Street Key West, Florida 33040		 AUTHORIZED SIGNATURE 
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