Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-005901 07/29/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

TOTAL HEALTH & WELLNESS INC, et al. PAUL A CONANT

v.

ARIZONA DEPARTMENT OF HEALTH SERVICES GREGORY W FALLS

JERALD S CHESLER
DAVID W DOW
STEVEN M WHITE
DENNIS I WILENCHIK

UNDER ADVISEMENT RULING

Under advisement following an evidentiary hearing are Plaintiffs' and Intervenors' (collectively "the Dispensaries") applications for preliminary injunction. Based on the evidence presented, the court makes the following findings and conclusions, and issues a preliminary injunction.

I. INTRODUCTION.

The citizens of Arizona enacted the Arizona Medical Marijuana Act (the "Act") by initiative at the 2010 general election. The Act permits the sale and use of marijuana for medical purposes. It requires the Arizona Department of Health Services ("the Department") to adopt rules governing medical marijuana, but prohibits certain of those rules from imposing an "undue burden" on medical marijuana dispensaries. A.R.S. § 36-2803(A)(4).

Under the Act and the Department's regulations, "dispensary registration certificates" are issued to a finite number of medical marijuana dispensaries. Once a dispensary receives its dispensary registration certificate, it has one year to become ready to open and complete all requirements necessary to obtain an "approval to operate" from the Department. If a dispensary does not complete those requirements within a year, it cannot obtain an approval to operate. And if it does not obtain an approval to operate, it loses its dispensary registration certificate.

In this lawsuit, the Dispensaries allege that completing all requirements in one year has been either impossible or impracticable due to events beyond their control, and therefore the strict one-year requirement imposes an undue burden on them. They ask the court to issue a preliminary injunction giving them additional time to obtain approvals to operate so they do not lose their dispensary registration certificates.

II. FACTUAL AND LEGAL BACKGROUND.

A. The Act And The Rules Governing Dispensaries.

1. Proposition 203 at Arizona's 2010 general election was titled the "Arizona Medical Marijuana Act." The voters approved the Act and it is codified at A.R.S. § 36-2801 et seq.

2. The Act authorizes the sale and use of marijuana for medical purposes and establishes a regulatory scheme over medical marijuana.

3. The Act gives the Department regulatory authority over medical marijuana.

4. The Act requires the Department to adopt rules governing medical marijuana dispensaries.

5. The Act prohibits some of those rules from imposing an "undue burden" on dispensaries.

6. A.R.S. § 36-2803(A)(2) and (A)(4) states:

> A. Not later than one hundred twenty days after the effective date of this chapter, the department shall adopt rules:
>
> . . .

> 2. Establishing the form and content of registration and renewal applications submitted under this chapter.
>
> . . .
>
> 4. Governing nonprofit medical marijuana dispensaries, for the purpose of protecting against diversion and theft ***without imposing an undue burden on nonprofit medical marijuana dispensaries*** or compromising the confidentiality of cardholders, including:
>
> (a) The manner in which the department shall consider applications for and renewals of dispensary registration certificates.
>
> (b) Minimum oversight requirements for nonprofit medical marijuana dispensaries.
>
> (c) Minimum recordkeeping requirements for nonprofit medical marijuana dispensaries.
>
> (d) Minimum security requirements for nonprofit medical marijuana dispensaries, including requirements for protection of each registered nonprofit medical marijuana dispensary location by a fully operational security alarm system.
>
> (e) Procedures for suspending or revoking the DRC of nonprofit medical marijuana dispensaries that violate the provisions of this chapter or the rules adopted pursuant to this section.

(Emphasis added.)

7. The Department adopted rules governing medical marijuana dispensaries, which are set forth at Arizona Administrative Code R9-17-101 et seq. (the "Rules"). The Rules are designed to protect against diversion and theft, but they also effect other provisions of the Act and are designed to further the Act's goal of making medical marijuana available to those who need it across Arizona.

8. Under the Act, every medical marijuana dispensary must obtain a dispensary registration certificate ("DRC") from the Department in order to operate in Arizona.

9. Under A.R.S. § 36-2804.06, all DRC's expire one year after they are issued, but may be renewed.

10. The Act limits the number of dispensaries in Arizona as follows:

> The department may not issue more than one nonprofit medical marijuana dispensary registration certificate for every ten pharmacies that have registered under § 32-1929, have obtained a pharmacy permit from the Arizona board of pharmacy and operate within the state except that the department may issue nonprofit medical marijuana dispensary registration certificates in excess of this limit if necessary to ensure that the department issues at least one nonprofit medical marijuana dispensary registration certificate in each county in which an application has been approved.

A.R.S. § 36-2804(C).

11. To effect this requirement, and to ensure that dispensaries are dispersed across the State, the Department determined that in the beginning only one DRC would be issued for each of Arizona's 126 Community Health Analysis Areas ("CHAA's").

12. CHAA's existed before the Act for unrelated reasons. But the Department determined that they provide a convenient way to allocate DRC's so as to promote a wide distribution of dispensaries across Arizona.

13. Thus, under the Rules, only one DRC is issued per CHAA. If there are competing applications for a given CHAA, and they all satisfy the requirements for obtaining a DRC, one dispensary is randomly selected.

14. Under the Rules, obtaining a DRC is alone insufficient to permit a dispensary to operate. It must first obtain an approval to operate ("ATO") from the Department. To obtain an ATO, a dispensary must file an application with the Department that, among other things, demonstrates it is physically and legally ready to begin operating as a dispensary in its assigned CHAA.

15. The main purpose of this requirement is to ensure that the limited DRC's are held only by dispensaries that are ready and able to provide services.

16. To obtain an ATO, a dispensary must provide details about its location and facility, and submit a certificate of occupancy or other similar documentation issued by local zoning authorities.

17. This requirement prevents a dispensary from obtaining an ATO if it does not have a facility ready to open.

18. Under the Rules, dispensaries have 10 months from the issuance of their DRC's to apply for an ATO.

19. The Act does not mention ATO's. Nonetheless, the ATO requirement is a valid exercise of the Department's authority to promulgate rules governing medical marijuana.

20. The Act permits the Department to renew DRC's.

21. Under the Rules, the Department can only renew a DRC if the dispensary has (1) applied for an ATO within 10 months of issuance, and (2) obtained an ATO before the DRC expires (i.e. within one year of issuance).

22. This is a strict deadline under the Rules. Neither the Department nor its Director has discretion to renew a DRC if the dispensary has not obtained an ATO. This is so regardless of the reasons why an ATO was not obtained.

23. Thus, if a dispensary fails to have a facility ready and a certificate of occupancy (or other such documentation) within a year, its DRC will expire without renewal.

24. The Director testified at the evidentiary hearing and explained the justifications for this strict deadline. There are primarily two. First, it provides a strong incentive for dispensaries to become operational as soon as possible, thus ensuring that DRC's go to those dispensaries that have the willingness and ability to operate and provide services to customers. Second, it provides an objective basis on which to renew DRC's, thus preventing the Department from having to make individualized decisions regarding which dispensaries are diligent, prepared or able to provide services.

25. If a DRC expires without renewal, the DRC for that CHAA becomes available. The Department may then solicit applications from other dispensaries and issue a new DRC for that CHAA to another dispensary.

26. Under the Rules, if a dispensary's DRC expires, no principal officer or board member of that dispensary may ever serve as a principal officer or board member of any dispensary again. A.A.C. R9-17-322(A)(2)(C)(ii).

B. <u>The Issuance Of Dispensary Registration Certificates And Authorities To Operate</u>.

27. The first allocation process for DRC's took place in 2012.

28. For several CHAA's, there were no DRC applicants.

29. For several CHAA's, there were multiple DRC applicants. As to them, a random drawing was held to determine which applicant would get the DRC.

30. On August 7, 2012, the Department issued 98 DRC's for 98 CHAA's. Thus, for 28 CHAA's, there is currently no DRC.

31. Under the Rules, the 98 dispensaries with DRC's had to apply for ATO's by June 7, 2013 and obtain ATO's by August 7, 2013 in order to have their DRC's renewed.

32. By stipulation, the court issued a temporary restraining order extending the June 7, 2013 application deadline to August 6, 2013.

33. As of the evidentiary hearing, approximately 61 dispensaries have received ATO's. Those dispensaries are now or soon will be operating and providing services to customers.

34. The Director testified that it is likely several more dispensaries will receive ATO's and have their DRC's renewed by the August 7, 2013 deadline.

C. <u>The White Mountain Lawsuit</u>.

35. In a lawsuit captioned *White Mountain Health Center Inc. v. County of Maricopa*, Maricopa County Case No. CV 2012-053585 (the "White Mountain Lawsuit"), the legality of the Act was challenged.

36. In that lawsuit, the Attorney General of Arizona and others maintained that the Act's legalization of marijuana sale and use conflicted with federal law.

37. On December 3, 2012, Superior Court Judge Michael Gordon ruled on this question, concluding that federal law does not preempt the Act. That decision is now on appeal.

38. The White Mountain Lawsuit created, and to some extent continues to create, a level of uncertainty regarding medical marijuana. Many who otherwise would invest time, money or other resources have been reluctant to do so due to this uncertainty.

39. This uncertainty has also caused many to be reluctant to sell or lease property to dispensaries.

40. This reluctance was particularly acute before Judge Gordon's ruling. Some dispensaries with DRC's either waited to proceed or proceeded slowly until that ruling, and only began preparing in earnest to open after that ruling. And some potential sellers or lessors of property would not sell or lease to a dispensary until after Judge Gordon's ruling.

41. Irrespective of the lawsuit, there is a concern among some about the federal consequences of operating a dispensary, since there is no federal medical marijuana act. This possibility, however, has not prevented dispensaries from obtaining ATO's and opening.

D. Obstacles To Obtaining Approvals To Operate.

42. There was much testimony at the hearing regarding obstacles dispensaries have encountered in their efforts to become operational and obtain ATO's. The court makes no finding that it has been impracticable or impossible for any particular dispensary to obtain an ATO before August 7, 2013. Rather, the court finds only that these are the kinds of obstacles or difficulties that dispensaries in certain CHAA's have encountered.

43. Some dispensaries have had difficulty finding a suitable location to lease within their CHAA's due to the limited number of areas that are appropriately zoned for a dispensary and the reluctance of some property owners to lease to a marijuana dispensary. Such reluctance could result from legal concerns, an owner's opposition to medical marijuana and/or business considerations.

44. Some dispensaries have had difficulty finding a suitable location to purchase within their CHAA's due to the limited number of areas that are appropriately zoned for a dispensary and the reluctance of some property owners to sell to a dispensary.

45. Some dispensaries have had difficulty obtaining a certificate of occupancy or special use permit from the relevant zoning authority due to political opposition to medical marijuana.

46. Some dispensaries have encountered zoning delays, either due to political opposition, or simply due to delays inherent in that jurisdiction's zoning process.

47. One dispensary claims delay was caused by confusion and conflicting information obtained from the Department concerning which CHAA its location was in.

48. The Director of the Department has made no determination regarding whether any of these circumstances justifies renewing any dispensary's DRC to give it more time to obtain an ATO. Under the Rules, the Director has no discretion to make such a determination. Rather, if a dispensary fails to meet the requirements for obtaining an ATO within one year, regardless of the reason, it permanently loses its DRC.

III. LEGAL STANDARD.

The Dispensaries ask for a preliminary injunction, so they must show:

(1) A strong likelihood of success on the merits;

(2) The possibility of irreparable harm if a preliminary injunction is not granted;

(3) A balance of hardships favoring them; and

(4) Public policy favors a preliminary injunction

Arizona Association of Providers for Persons with Disabilities v. State, 223 Ariz. 6, 12, 219 P.3d 216, 222 (App. 2009), *citing Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). The court must weigh these factors, and a preliminary injunction may issue upon proof of either (1) probable success on the merits and the possibility of irreparable harm, or (2) serious questions and that the balance of hardships tips sharply in their favor. *Id*. at 12, 219 Ariz. at 222.

Each of these factors is addressed below.

IV. THE MERITS.

A. The Court Cannot Extend The Statutory One-Year Deadline.

To the extent the Dispensaries seek an injunction extending the duration of their DRC's past one year, the court has no authority to grant that relief. The one-year deadline is statutory, so the "undue burden" requirement does not apply to it and neither the court nor the Department can extend it. A.R.S. § 36-2804.06(A).

The real crux of the Dispensaries' challenge is not that the one-year deadline is unlawful, but that the requirements for renewing a DRC impose an undue burden on dispensaries. More specifically, they argue that requiring them to obtain an ATO in order to renew their DRC imposes an undue burden if they cannot obtain an ATO due to circumstances beyond their control. These requirements are in the Rules, not the Act, so the court will consider whether they impose an undue burden on dispensaries.

B. The "Undue Burden" Provision.

The "undue burden" prohibition is in A.R.S. § 36-2803(A)(4), and the Department argues that it does not apply to the Rules governing renewal of DRC's. It does.

A.R.S. § 36-2803(A) directs the Department to adopt rules, and then lists what the rules must cover. Subsection (A)(2), which has no "undue burden" prohibition, requires rules "[e]stablishing the form and content of registration and renewal applications." Subsection (A)(4), which contains the "undue burden" prohibition, addresses rules "[g]overning nonprofit medical marijuana dispensaries, for the purpose of protecting against diversion and theft." The latter also lists specific topics the Rules must address, including the "manner in which the department shall consider applications for and renewals of dispensary registration certificates." A.R.S. § 36-2803(A)(4)(a).

The Rules governing renewal of DRC's fall under the latter provision. The substantive requirements for obtaining renewal are not simply the "form and content" of applications. Rather, they are part of the "manner in which the department" considers renewals. The "undue burden" requirement was plainly designed to ensure that the ***requirements*** for obtaining and renewing DRC's, not just the ***process*** for doing so, does not inhibit the medical marijuana program by unduly burdening dispensaries.

What does "undue burden" mean? Clearly, it means that the Rules will burden dispensaries. The requirement that dispensaries be ready to open and obtain an ATO within one year is a burden; by design, it makes opening a dispensary difficult. The Department imposed this requirement to ensure that only dispensaries having the wherewithal to provide services will possess the scarce and valuable DRC's, thus promoting the largest number of open dispensaries possible. That some dispensaries will be unable to obtain an ATO, or that some dispensaries will lose their DRC, does not alone impose an undue burden.

The Dispensaries argue that it is an undue burden if they cannot obtain ATO's, and therefore lose their DRC's, due to circumstances beyond their control and despite diligent efforts. They presented evidence of several reasons why, they argue, obtaining an ATO in certain CHAA's has been either impossible or so difficult as to be impracticable. Those circumstances are addressed below.

C. <u>Obstacles Encountered By Dispensaries</u>.

Predictably, the implementation of medical marijuana in Arizona has met resistance. There have been legal challenges, political challenges, and a reluctance or unwillingness on the part of many public officials and property owners to facilitate or participate in the distribution of medical marijuana. Some communities have been more receptive to dispensaries than others. Some have friendlier zoning requirements than others. Many dispensaries are now open, while others have struggled.

Nothing in the Act or the Rules guarantees that every dispensary with a DRC will be able to open. Nothing guarantees there will be a dispensary in every CHAA. There could be

CHAA's where, despite reasonable zoning regulations, there simply is not available property for lease or sale on which to operate a dispensary. In such circumstances, it does not impose an undue burden if the dispensary's DRC expires without renewal. Economic and market forces are part of the risks of doing business.

Yet the Act does require that local zoning requirements be reasonable. A.R.S. § 36-2806.01. There could be local jurisdictions that, by law or by practice, provide nowhere for a dispensary to be located, or that so restrict dispensary locations as to not be "reasonable." There could be local jurisdictions that, contrary to the Act and the will of the electorate, outright refuse to permit dispensaries. If a dispensary cannot obtain an ATO due to a local jurisdiction's violation of the Act, then the Rules do impose an undue burden.

There was evidence presented at the hearing regarding such jurisdictions. Those jurisdictions were not represented at the hearing, and the court makes no finding regarding whether any local authority has acted contrary to the Act, or whether any particular jurisdiction's zoning requirements are unreasonable. It concludes only that rules which are impossible to comply with due to arbitrary or unlawful government action, and which impose the drastic consequences that the Rules impose for failing to obtain an ATO, unduly burden dispensaries.

The Dispensaries argue that uncertainty created by the White Mountain Lawsuit delayed their efforts to open. In part, this delay was for business reasons: who wants to devote the resources necessary to develop and open a dispensary if medical marijuana may turn out to be illegal? In part, many property owners understandably did not want to risk leasing or selling to a dispensary when the legality of medical marijuana was in question.

But these are the risks of pioneering in a new field, and they were well known to those who chose to be in the first generation of medical marijuana dispensaries. Based on the number who applied for the first DRC's, many deemed the potential rewards worth the risks. Delays caused by the White Mountain Lawsuit do not impose an undue burden on dispensaries.

There have been other obstacles, and in many cases it is not clear whether the cause was government action, lack of diligence on the dispensary's part, market forces beyond anyone's control, or just plain bad luck. It would be inappropriate for the court to determine diligence or impossibility as to individual dispensaries where the Department has not made such determinations in the first instance.

Yet the Rules prevent the Department from making those determinations. They forbid the Department from renewing a DRC when the dispensary fails to obtain an ATO, regardless of the reason. They provide no mechanism for the Director to consider individual circumstances, and no discretion to renew DRC's based on unique or extenuating circumstances, even if the failure to obtain an ATO resulted from governmental violations of the Act.

This imposes an undue burden on dispensaries.

D. <u>The Rules Unduly Burden Dispensaries By Giving The Director No Discretion To Consider Individual Circumstances</u>.

The hard and fast deadline in the Rules for obtaining an ATO, and the fact that individual circumstances are not considered, has significant advantages, as the Director testified. It provides a strong incentive for dispensaries to work diligently to be up and running, thereby preventing dispensaries from sitting on their DRC's while others more willing or able to open wait on the sidelines. And it avoids a situation in which the Department has to make individualized determinations regarding diligence, ability and the reasons for delay.

This latter point is not just a matter of resources, but of fairness. Any system that requires an administrative agency to decide who is diligent or qualified or justified in their delays carries a risk of inconsistent results, real or perceived. And it carries a risk of subjectivity or favoritism. Developing fair and objective criteria for deciding who's DRC should be renewed despite their failure to obtain an ATO is no small task.

But the alternative allows dispensaries to lose their DRC's, with the accompanying drastic consequences, even when government violations of the Act have made obtaining an ATO impossible. As challenging as individualized decision-making is for the Department, the alternative is fundamentally unfair, and therefore violates the prohibition against rules that impose an undue burden on dispensaries.

Based on the foregoing, the court finds that Dispensaries have demonstrated a strong likelihood of success on the merits.

V. IRREPARABLE HARM.

Having determined that the Dispensaries are likely to prevail, will they possibly suffer irreparable harm if a preliminary injunction is not issued? They will. *See Arizona Association of Providers for Persons with Disabilities*, 223 Ariz. at 12, 219 P.3d at 222 (injunction may issue if there is a possibility of irreparable harm and a strong likelihood of success on the merits).

The question of irreparable harm is really a question about the adequacy of the Dispensaries' legal remedy. There is no dispute that dispensaries unable to obtain ATO's by August 7 will lose their DRC's. But the Department argues that they have an adequate administrative and judicial appeal remedy in which they can raise the same "undue burden" argument they raise here. To appeal, a dispensary would have to apply for an ATO and a renewal of its DRC, then appeal from the denial. Denial of either an ATO or a DRC would be an

appealable decision under Arizona's Administrative Procedures Act. *See* A.R.S. § 12-901(1) (defining "administrative decision" and "decision"); A.R.S. § 12-904(A) (prescribing the means for appealing a "final administrative decision").

But although this remedy is available to the Dispensaries, it is inadequate for three connected reasons. First, it will delay the determination of the legal issue raised in this matter. An administrative appeal likely would take months, which means that the legal issue raised here likely would not be in court until well into 2014. During that time, the Dispensaries would be in limbo, compelled to spend resources to be ready to open, while not knowing when or if they ever would be able to open. Some may be unable to financially withstand that delay.

As the Department rightly points out, delay and cost alone do not make a legal remedy inadequate. Here, however, the finite number of DRC's presents an additional problem. Under the Rules, for every DRC not renewed, the Department may issue one of the finite DRC's to a new applicant. If it denies a DRC renewal and the dispensary files an administrative appeal, would the Department refrain from issuing another DRC pending the appeal, so as to preserve a slot for the appealing dispensary in the event it prevailed? Or would it allocate that DRC to another dispensary? If it chooses the latter, what happens if the appealing dispensary wins its appeal only to find that the maximum number of dispensaries has been reached so that there is no legal room for another dispensary?

It is not clear which of these paths the Department would take, but the chance that it would take the latter makes irreparable harm possible. In this unique regulatory scheme, with a finite number of DRC's, an administrative appeal remedy normally considered adequate is not adequate.

Third, the administrative remedy is futile. This is because, under the Rules, the Department has no choice but to deny an ATO and a DRC renewal to any dispensary that has been unable to get its facility up and running, or unable to obtain a certificate of occupancy or similar authorization, irrespective of the reason why. Although futility alone does not make an administrative remedy inadequate, it does lend weight to the other reasons why irreparable harm is possible, and it weakens the justification for requiring administrative review. *See, e.g., Medina v. Arizona Dept. of Transportation*, 185 Ariz. 414, 417, 916 P.2d 1130, 1133 (App. 1995) (purpose of requiring exhaustion of administrative remedies is "to allow an administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies"), *quoting Parisi v. Davidson*, 405 U.S. 34, 37 (1972).

VI. BALANCE OF HARDSHIPS AND PUBLIC POLICY.

The balance of hardships weighs in favor of the Dispensaries. If a dispensary is unable to obtain an ATO by the August 7 deadline, the Department will deny renewal of its DRC. For the reasons stated above, this will cause hardship to the Dispensaries.

The Department has no real hardship irrespective of the ruling. Its role is to administer the medical marijuana program, and it has no interest apart from ensuring that the program is administered consistent with legal requirements, public safety and the purposes of the Act.

The interests of the public must be considered. Having approved the Act, and having established a public policy that marijuana should be available for legitimate medical purposes, the public's interest is in having dispensaries open throughout the State. What is not clear is whether a preliminary injunction would further or hinder that interest. It could be expected, as the Dispensaries argue, that allowing additional time for dispensaries already close to opening will result in more open dispensaries in the near term. On the other hand, it might be anticipated that enforcing the strict one-year deadline will, as the Department argues, ensure that only the most capable dispensaries have DRC's, and will free up DRC's for other dispensaries that may be more fit to operate. The court cannot determine which scenario is more likely. They are both sufficiently plausible that hardship to the public does not weigh either for or against a preliminary injunction.

Public policy considerations cut both ways, but on balance they favor a preliminary injunction. First, denying a preliminary injunction will result in a number of dispensaries filing administrative, and ultimately judicial, appeals. The prospect of multiple appeals runs a risk of inconsistent administrative and judicial rulings. Although any inconsistency could be ameliorated through consolidation, there still is a chance that the Department would be subject to conflicting, or at least different, directions.

Second, requiring the Dispensaries to pursue appeal remedies will delay resolution of the legal issue raised in this matter. The question of whether the Rules impose an undue burden on dispensaries is a legal one, and its ultimate resolution may be by an appellate court. Until that issue is finally resolved, the Department is in the difficult position of not knowing whether it should issue more DRC's. This, in turn, will limit the number of dispensaries available to provide services. The sooner this issue is resolved, the sooner that uncertainty will be removed, the Department can move forward, and more dispensaries can be open to the public.

There is a contravening public policy. The Act entrusts regulation of the medical marijuana program to the Department. For this reason, and for separation of powers reasons, courts should be loath to second-guess the Department's Rules. But by including "undue

burden" language in the Act, the voters clearly contemplated that there would be limited judicial review, as a check to ensure that the Rules do not, wittingly or unwittingly, unduly burden dispensaries. *See, e.g., U.S. Parking Systems v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989) (although deference is given to agencies charged with implementing a statute, courts are the final authority on questions of statutory interpretation).

Finally, the Department argues that A.R.S. § 12-1802 precludes an injunction. It does not. That statute states in material part that an injunction shall not be granted "[t]o prevent enforcement of a public statute by officers of the law for the public benefit," or "[t]o prevent the exercise of a public or private office in a lawful manner by the person in possession." A.R.S. § 12-1802(4), (6). The injunction here does neither of these things. A.R.S. § 12-1802 does not prevent a court from issuing an injunction necessary to effect the requirements of a statute.

VII. ORDER.

Based on the foregoing, the court will grant a preliminary injunction that precludes the Department from denying a timely application for renewal of a DRC for failure to obtain an ATO until it has a mechanism in place by which individual circumstances can be considered consistent with this order. The court will not dictate the process, criteria, or burden of proof by which such determinations should be made. Rather, the Department is in the best position to decide those questions.

IT IS ORDERED granting a preliminary injunction as follows.

IT IS FURTHER ORDERED that the Department of Health Services shall establish, by Rule if necessary:

1. A process by which the Department, in connection with an application to renew a dispensary registration certificate, may consider the reasons why a dispensary has not obtained an approval to operate.

2. Criteria by which to decide whether a dispensary registration certificate should be renewed despite the dispensary not receiving an approval to operate.

IT IS FURTHER ORDERED that the Department of Health Services shall not deny any timely filed application for renewal of a dispensary registration certificate on the ground that the applicant has not obtained an approval to operate unless and until the Department:

1. Has established the above-specified process and criteria; and

2. Has made a determination regarding the dispensary under that process and those criteria.

IT IS FURTHER ORDERED setting an **in-person** status conference on **September 20, 2013 at 9:15 a.m.** (time allotted: **15 minutes**) in this division for the purpose of determining what further proceedings are necessary in this matter. Counsel shall have their calendars available for this proceeding.

The Honorable Randall H. Warner
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IT IS FURTHER ORDERED that in no less than **five (5) days** prior to the status conference set herein, the parties shall submit a joint status report to the court that includes (1) a very brief description of the case; (2) the status of discovery and other pertinent matters; (3) a list of pending motions or other matters, whether at issue or not; (4) the status of alternative dispute resolution; (5) when the parties anticipate the case will be ready for trial; and (6) how many trial days the parties estimate will be needed.

NOTE: All court proceedings are recorded by audio and video method and not by a court reporter. Any party may request the presence of a court reporter by contacting this division (602-372-2966) three (3) court business days before the scheduled hearing.

FILED: Exhibit Worksheet

/ s / RANDALL H. WARNER

JUDGE OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.