



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2019-6

September 4, 2019

The Honorable Tom Bates
Interim Commissioner of Health, Oklahoma State Department of Health
1000 NE 10th Street
Oklahoma City, Oklahoma 73117

Dear Interim Commissioner Bates:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:¹

As part of the citizen-approved legalization of medical marijuana in 2018, the Oklahoma Department of Health (“Department”) was tasked with issuing licenses for medical marijuana dispensaries. 63 O.S.Supp.2019, § 421. By statute, no such licensee may be located “within one thousand (1,000) feet of any public or private school entrance.” *Id.* § 425(G). In the 2019 session, the Oklahoma Legislature enacted the Oklahoma Medical Marijuana and Patient Protection Act (“OMMPPA”), which defines “school” to include preschools. 63 O.S.Supp.2019, § 427.2(58).

- 1. May the Department lawfully revoke or decline to renew the properly-issued license of a medical marijuana dispensary located within 1,000 feet of a preschool entrance once the OMMPPA becomes effective?**
- 2. Do principles of equity, namely equitable estoppel, demand that the State renew or refrain from revoking these licenses?**

I.
BACKGROUND

Through an initiative petition approved by Oklahoma voters in June of 2018, State Question 788 (“SQ 788”) established a medical marijuana program in Oklahoma. Codified in Title 63, Sections 420 through 426 of the Oklahoma Statutes, SQ 788 required a new regulatory office under the Oklahoma Department of Health (“Department”) to issue patient and business licenses to applicants who met certain criteria. 63 O.S.Supp.2019, § 420(C). SQ 788 also established certain

¹ While your request included additional questions, they will be addressed separately at a later date in light of the time sensitive nature of the questions addressed herein.

restrictions on medical marijuana dispensaries, including that “[t]he location of any retail marijuana establishment is specifically prohibited within one thousand (1,000) feet of any public or private school entrance.” *Id.* § 425(G). SQ 788 did not define “public or private school,” but Department rules define “private school” and “public school” to mean “elementary, middle, or high school” with no mention of preschools. OAC 310:681-1-4.

In the most recent legislative session, the Legislature passed the Oklahoma Medical Marijuana and Patient Protection Act, 63 O.S.Supp.2019, §§ 427.1—427.23 (the “OMMPPA”). *See* 2019 Okla. Sess. Laws ch. 11. The OMMPPA established the Oklahoma Medical Marijuana Authority to handle state operations related to medical marijuana. 63 O.S.Supp.2019, § 427.3. It provided civil and criminal protections for marijuana licensees. *See id.* § 427.8. And it set up a robust system of rules, investigatory procedures, and administrative hearings. *See id.* § 427.6. In its definitions section, the OMMPPA defines “school” as “*a public or private preschool* or a public or private elementary or secondary school used for school classes and instruction,” and specifically excludes “homeschool, daycare or child-care facilit[ies.]” *Id.* § 427.2(58) (emphasis added).²

Meanwhile, the Department has been issuing licenses to medical marijuana dispensaries since late August of 2018. It is our understanding that at least some portion of those licenses were issued based on the Department’s definition of “public school” and “private school”—*i.e.*, a definition that does *not* include preschools—so it is conceivable that a current licensee’s location is within 1,000 feet of the entrance of a public or private preschool. Because marijuana dispensary licenses expire one year from the date of issuance, *see* OAC 310:681-5-2(a), the first of these licenses are set to expire on September 1, 2019. You have asked what effect the new definition of “school” contained in the OMMPPA has on the license of a dispensary that, when the license was issued, was lawfully located within 1,000 feet of a preschool entrance.

II. DISCUSSION

A. The Nature of Professional Licenses in Oklahoma.

In Oklahoma, the state’s issuance of a business license does not give the license-holder an absolute right to continue in that particular profession, business, or trade forever.³ In the alcoholic beverage

² However, the word “school” does not appear to be used anywhere in the OMMPPA other than in the definitions section. For further discussion, *see* Section II.B, *infra*, at p. 4.

³ In the area of professional licensing, courts generally define a *vested right* as an absolute, unconditional right as opposed to a *conditional right* which is subordinate to the state’s police power. For example, in *Kirschner v. McCracken*, the Oklahoma Supreme Court said:

It is generally held . . . that a license may be revoked for due cause at any time by the licensing authorities; and since a license is a mere privilege, and neither a contract nor a property or vested right, a statute or ordinance authorizing or providing for its revocation does not violate constitutional provisions, as depriving the licensee of property, immunity, or a privilege.

1937 OK 192, ¶ 18, 68 P.2d 793, 796 (citations omitted); *cf. Dep’t of Health & Mental Hygiene v. VNA Hospice of Maryland*, 933 A.2d 512, 523 (Md. App. 2007), *vacated*, 961 A.2d 557 (Md. 2008) (“[L]ike other professional licenses, a license to deliver home-based hospice is not an absolute vested right, ‘but only a conditional right which is

context, the Oklahoma Supreme Court held that “there was no vested property right enjoyed” by the holder of a corporate distribution license because “[n]o one has an absolute or inherent right to a license to sell intoxicating liquor.” *Brown Distrib. Co. v. Oklahoma Alcoholic Beverage Control Bd.*, 1979 OK 101, ¶ 4, 597 P.2d 324, 326-27. Therefore, the license “may be extended, limited, or denied without violating any constitutional right.” *Id.* The Court reasoned that business licenses are granted “as a matter of legislative grace” and “[t]he state maintains the inherent power to abolish all liquor traffic within its boundaries if it so chooses, anything less than total prohibition is the result of legislative prerogative.” *Id.*

The proposition that professional licensing “confers upon the licensee neither contractual nor vested rights” is also well accepted in other states. *See, e.g., Rosenblatt v. California State Bd. of Pharmacy, Dep’t of Prof’l & Vocational Standards*, 158 P.2d 199, 203 (Cal. App. 1945). The Utah Supreme Court made this point in no uncertain terms:

[A] license is not a contract, . . . it does not in itself create any vested right, or permanent right, and that free latitude is reserved by the legislature to impose new or additional burdens on the licensee, or to alter the license, or to revoke or annul it. And this is the general rule notwithstanding the expenditure of money by the licensee in reliance thereon, and regardless of whether the term for which the license was given has expired.

Riggins v. Dist. Court of Salt Lake Cty., 51 P.2d 645, 658 (Utah 1935); *cf. Application of Herrick*, 922 P.2d 942, 951 (Haw. 1996). Moreover, Oklahoma recognizes that the law on this is controlling and admits no equitable consideration of investment or reliance. *See Wright v. Oklahoma Alcoholic Beverage Control Bd.*, 1973 OK 104, ¶ 4, 516 P.2d 245, 247 (denying equitable claim based on the amount of time and money invested in licensee’s business).

Central to a state’s sovereignty is the police power “to regulate business and professions in order to protect the public health, morals and welfare.” *Hansson v. Arizona State Bd. of Dental Examiners*, 985 P.2d 551, 554 (Ariz. Ct. App. 1998) (citations omitted); *see also Missouri Real Estate Comm’n v. Rayford*, 307 S.W.3d 686, 691 (Mo. Ct. App. 2010). “The granting of a license to practice certain professions is the method taken by the State, in the exercise of its police power, to regulate and restrict the activity of the licensee. He takes the same, subject to the right of the State, at any time, for the public good to make further restrictions and regulations.” *Dantzler v. Callison*, 94 S.E.2d 177, 188 (S.C. 1956); *see also Wright*, 1973 OK 104, ¶¶ 9-10, 516 P.2d at 247. To be sure, “a professional license is a legally protected property interest and the license holder is entitled to due process before its revocation.” *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 7, n.9, 976 P.2d 545, 548 n.9. But, in granting a license, the state “reserves the right to exercise its police power and place additional regulatory burdens on license holders.” *Kennedy v. Hughes*, 596 F.Supp. 1487, 1495 (D.Del. 1984). Therefore, licensing “laws and regulations may impose criteria

subordinate to the police power of the State to protect and preserve the public health.” (citations omitted)). As described herein, the issuance of a business license in Oklahoma creates a conditional right. Sometimes, however, courts use the term “vested” in another sense: to describe when due process protections attach to a business license. *See, e.g., Derby Refining Co. v. Bd. of Aldermen of Chelsea*, 555 N.E.2d 584, 587 (Mass. 1990) (stating that a license is a vested property right of the licensee and revocation thereof must comport with due process). Here, we use the term “vested” in the former sense because it is not disputed that due process guarantees are applicable.

for eligibility, both initially [and] following licensure, may require annual or other renewals, and may impose conditions on a license's continued viability tied to standards of conduct." *Rayford*, 307 S.W.3d at 691.

B. A marijuana dispensary that is located within 1,000 feet of a preschool entrance is in violation of Title 63, Section 425(G) and the Department has the authority to revoke or decline to renew its license.

As an initial matter, we note that the word "school" is defined in the OMMPPA,⁴ which is a separate act from the statutory provisions adopted through SQ 788. Nevertheless, the two enactments are inextricably linked, and in any event, "[w]henver the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." 25 O.S.2011, § 2. Accordingly, it is appropriate to interpret the OMMPPA definition of school as modifying the prohibition on a marijuana dispensary being located within 1,000 feet of "any public or private school entrance." 63 O.S.Supp.2019, § 425(G).

In your first question you ask whether the Department may lawfully revoke or decline to renew current licenses held by dispensaries that, while located legally prior to the effective date of the OMMPPA, will be in violation of statute once it becomes effective. In light of the legal framework described above, your question will turn on whether the Legislature redefining "school" in the OMMPPA is a valid exercise of the State's police power. We conclude that it is.

Police powers are those "of government inherent in every sovereignty," *Thurlow v. Com. of Mass.*, 46 U.S. 504, 583 (1847), "to promote the order, safety, health, morals, and general welfare of society," *Jack Lincoln Shops v. State Dry Cleaners' Bd.*, 1943 OK 28, ¶ 5, 135 P.2d 332, 335 (citations omitted). With few limitations, these determinations are within the domain of the Legislature and will not be set aside unless they are unreasonable, arbitrary, or capricious. *Application of Richardson*, 1947 OK 347, ¶ 7, 184 P.2d 642, 644. Laws designed to promote health and safety by prohibiting conduct within a set distance from schools are commonplace. *See, e.g., J. Brotton Corp. v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n*, 1991 OK 126, ¶ 5, 822 P.2d 683, 686 (interpreting a law that prohibited alcohol sales within 300 feet of a "public school"). And, far from arbitrary, the prohibition on marijuana dispensaries being located within 1,000 feet of a preschool entrance sets forth objective, measurable criteria for its enforcement.

Based on the foregoing, the Department has the authority to revoke or decline to renew the license of a marijuana dispensary located within 1,000 feet of a preschool entrance. *See* 63 O.S.Supp.2019, § 427.6 (setting forth disciplinary authority of the Department). As with alcohol, "[t]he state maintains the inherent power to abolish all [marijuana] traffic within its boundaries if it so chooses, anything less than total prohibition is the result of legislative prerogative." *Brown*, 1979 OK 101, ¶ 4, 597 P.2d at 326. Indeed, Oklahoma criminalized all forms of marijuana until last year. The

⁴ Specifically, the OMMPPA defines "school" in the following terms: "As used in *this act*: . . . 'School' means a public or private preschool or a public or private elementary or secondary school used for school classes and instruction. A homeschool, daycare or child-care facility shall not be considered a 'school' as used in this act[.]" 63 O.S.Supp.2019, § 427.2(58) (emphasis added).

federal government still does. 21 U.S.C. § 812. And, like alcohol, “[n]o one has an absolute or inherent right to a license to sell” marijuana. *Brown*, 1979 OK 101, ¶ 4, 597 P.2d at 326.

In drafting the OMMPPA, the Legislature chose not to “grandfather” or exempt current marijuana license-holders from following the preschool rule. That is its prerogative. In issuing medical marijuana licenses, the State “reserve[d] the right to exercise its police powers and place additional regulatory burdens on license holders.” *Kennedy*, 596 F.Supp. at 1495. And the marijuana license-holders’ stake in their licenses is subordinate to this right of the State. *Dantzler*, 94 S.E.2d at 188. To be clear, a state-issued business license is valuable property and the license holder may not be deprived of it without due process of law. *See, e.g., Hedrick v. Comm’r of Dep’t of Pub. Safety*, 2013 OK 98, ¶ 23 n.50, 315 P.3d 989, 1007 n.50. But here that means only that licensees are entitled to adequate notice and opportunity to be heard before the Department revokes their license based on proximity to a preschool. *See, e.g., Kiespert v. Jenkins*, 1958 OK 92, ¶ 1, 324 P.2d 283, 284. And the OMMPPA provides for such safeguards. *See* 63 O.S.Supp.2019, § 427.6(I), (J). So long as the Department complies with those provisions, due process is satisfied.

C. A marijuana dispensary that was legally located within 1,000 feet of a preschool entrance prior to the OMMPPA taking effect is not protected by equitable estoppel or other principles of equity from having its license revoked or renewal denied.

The application of equitable estoppel “depends on the facts and circumstances of each case.” *Apex Siding & Roofing Co. v. First Fed. Sav. & Loan Ass’n of Shawnee*, 1956 OK 195, ¶ 6, 301 P.2d 352, 355. Equitable estoppel precludes a party from asserting a right inconsistent with a prior promise when the person relying on the promise “ha[s] been induced to act or alter his position to his detriment or injury[.]” *Fite v. Van Antwerp*, 1948 OK 263, ¶ 8, 200 P.2d 439, 442 (quoting *St. Louis Trading Co. v. Barr*, 1934 OK 273, 32 P.2d 293). The Oklahoma Supreme Court identifies the elements of equitable estoppel as follows:

First, there must be a false representation or concealment of facts. *Second*, it must have been made with knowledge, actual or constructive, of the real facts. *Third*, the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts. *Fourth*, it must have been made with the intention that it should be acted upon. *Fifth*, the party to whom it was made must have relied on or acted upon it to his prejudice.

Lacy v. Wozencraft, 1940 OK 383, ¶ 10, 105 P.2d 781, 783 (quoting *Flesner v. Cooper*, 1917 OK 104, 162 P. 1112) (emphasis added). None of the elements are present here. Fatal to any equitable estoppel claim is the lack of any representation or promise. As described above, it is presumed that the Legislature reserves the right “to impose new or additional burdens on the licensee.” *Riggins*, 51 P.2d at 658. Additionally, there can be no reasonable reliance by the licensee because the licensee takes the license with full knowledge that the rules may change. Moreover, “this is the general rule notwithstanding the expenditure of money by the licensee in reliance thereon, and regardless of whether the term for which the license was given has expired.” *Id.*

It is, therefore, the official Opinion of the Attorney General that:

1. **The Health Department has the authority to revoke or decline to renew the license of a medical marijuana dispensary located within 1,000 feet of a preschool entrance. See 63 O.S.Supp.2019, §§ 425(G), 427.2(58). However, the licensee would be entitled to due process before such action may be taken. See, e.g., *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 7, n.9, 976 P.2d 545, 548 n. 9; 63 O.S.Supp.2019, § 427.6(I), (J).**
2. **Principles of equity, including the doctrine of equitable estoppel, do not protect a retail marijuana establishment that was legally located within 1,000 feet of a preschool entrance prior to the OMMPPA taking effect from having its license revoked or renewal denied.**



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