

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

21-1793 F

<p>HOLLAND BRANDS SB, LLC, Plaintiff,</p> <p>v.</p> <p>MARK FORTUNE, CHRISTINE ARAUJO, MARK ERLICH, KERRY WALSH LOGUE, TYRONE KINDELL, JR., EDWARD DEVEAU, JOSEPH RUGGIERO, KONSTANTINOS LIGRIS, JEANNE PINADO, ERIC ROBINSON, HANSY BETTER BARRAZA, BETHANY PATTEN, AND SHERRY DONG, IN THEIR CAPACITY AS MEMBERS OF THE CITY OF BOSTON ZONING BOARD OF APPEAL, Defendants.</p>
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COMPLAINT FOR JUDICIAL REVIEW

021 AUG -6 1 A 11: 44
 MICHAEL JOSEPH DOHOYAN
 CLERK / MAGISTRATE
 SUFFOLK SUPERIOR COURT
 CIVIL CLERK'S OFFICE

The Plaintiff, Holland Brands SB, LLC, is seeking judicial review, pursuant to Section 11 of Chapter 665 of the Acts of 1956 (the "Enabling Act"), of two (2) decisions (the "Decisions") issued by the City of Boston Zoning Board of Appeal denying the Plaintiff's, Holland Brands SB, LLC, applications for conditional use permits for a recreational marijuana facility at 538-550 East First Street (also known as 115 K Street), South Boston, Massachusetts (the "Subject Property").

The Subject Property is the perfect location for a cannabis facility in South Boston as it is immersed within an industrial area with a transformer field abutting two (2) sides of the existing vacant commercial building and is otherwise surrounded by other commercial and industrial property uses on its side of the street and in its zoning district. The Subject Property conforms with underlying zoning and offers an appropriately sized space to facilitate use as a retail

cannabis establishment. The City of Boston Cannabis Board is the authority established to evaluate an applicant's request for a cannabis license and is the proper authority to evaluate the proposed time, place, and manner in which such establishments are approved and operate. The Boston Cannabis Board unanimously voted in favor of the Plaintiff's application for a retail cannabis establishment license at the Subject Property after determining that there was ample parking at the Subject Property, having approved the security and operational plans, and making the determination that granting the license to the Plaintiff at the Subject Property would be appropriate in time, place, manner, and was in conformance with the Boston Cannabis Board ordinance.

A vocal minority of nearby residents are against a cannabis facility in South Boston, and spoke against the grant of the cannabis license at the Cannabis Board hearing, and did so again at the ZBA hearing. Many other South Boston residents who were in favor of the Project appeared to speak in favor of the license. In fact, the ward and precinct in which the Subject Property is located voted in favor to legalize the adult sale of marijuana by sixty-eight percent (68%), well above the City of Boston's sixty-three percent (63%) vote in favor. A retail cannabis use is one of the least intrusive potential uses at the Subject Property and imposes the least impact on the surrounding area. Any number of a myriad of different retail uses would be much more impactful upon the neighborhood, but would likely have been allowed without any opposition given the industrial location of the Subject Property. However, because the product to be sold at the cannabis facility is objectionable to some, but not all, of the residents, a vocal minority exercised their political influence and the decision of the Zoning Board of Appeal to deny the conditional use permits became a political, rather than a zoning, issue.

The decisions themselves fail to articulate any basis for the denial of the conditional use permits. Rather, each of the decisions contain boilerplate denial language and fail to identify any conditional use issue contemplated by the Zoning Code. In short, the vocal minority and their political allies have insured, thus far, that no marijuana facility is allowed to operate in South Boston. Based upon all of the facts and the criteria for conditional use permits, the decisions exceed the authority of the ZBA and must be annulled by this Honorable Court.

PARTIES

1. The Plaintiff, Holland Brands SB, LLC (the “Applicant” or “Hollands Brands”), is a Massachusetts limited liability company with an address at 55 Henshaw Street, Brighton, Suffolk County, Massachusetts.

2. The Defendants, Boston Zoning Board of Appeal and its individual members, Mark Fortune, Christine Araujo, Mark Erlich, Kerry Walsh Logue, Tyrone Kindell, Jr., Edward Deveau, Joseph Ruggiero, Konstantinos, Ligris, Jeanne Pinado, Eric Robinson, Hansy Better Barraza, Bethany Patten, and Sherry Dong (“Boston ZBA”), constitute a board established under the Enabling Act with authority to hear appeals of decisions regarding enforcement of the City of Boston’s zoning regulations. The ZBA has a usual place of business at 1010 Massachusetts Avenue, 4th floor, Suffolk County, Boston, Massachusetts.

JURISDICTION

3. The decision in Case No. BOA1026920 for a Cannabis Establishment and Accessory Uses with regard to the Subject Property was filed with the Inspectional Services Department of the City of Boston on July 28, 2021 (the “Cannabis Decision”). A true and accurate copy of the Cannabis Decision is annexed hereto and incorporated by reference herein as Exhibit “1.”

4. The decision in Case No. BOA1026937 for parking with regard to the Subject Property was filed with the Inspectional Services Department of the City of Boston on July 28, 2021 (the "Parking Decision"). A true and accurate copy of the Parking Decision is annexed hereto and incorporated by reference herein as Exhibit "2."

5. This Court has jurisdiction over this action pursuant to Section 11 of the Enabling Act.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

The Subject Property is the Perfect Location in South Boston for a Retail Cannabis Establishment.

6. The Subject Property is located in the Summer Street light industrial zoning subdistrict in the South Boston section of Boston.

7. The Subject Property is situated on the commercial side of East First Street and on the outskirts of the South Boston residential neighborhood sections and is currently occupied by a large commercial/industrial building. True and accurate copies of photos of the Subject Property as it is presently utilized are annexed hereto and incorporated by reference herein as Exhibit "3."

8. The existing conditions at the Subject Property reflect that the Subject Property is immersed within an industrial area with a transformer field abutting both the west and north side of the existing building and which building is a former manufacturing building.

9. The Subject Property and the proposed retail cannabis facility is otherwise surrounded by other commercial and industrial properties on that side of the street.

10. There are residential properties nearby, although they are across a wide city street and are in an entirely different multi-family residential subdistrict.

11. The use of the Subject Property for a retail cannabis establishment with accessory uses and parking is considered a conditional use pursuant to Article 68, Section 68-13 of the Boston Zoning Code (the “Zoning Code”).

12. On June 21, 2019, pursuant to the established process within the City of Boston and the Zoning Code, Holland Brands submitted applications (the “ISD Permit Applications”) to the Boston Inspectional Services Department, Planning and Zoning Division (“ISD”) for the renovation, improvements, and minor demolition needed for the creation of the proposed retail cannabis establishment along with thirty-seven (37) parking spaces, as well as the change of occupancy from its former use to a retail cannabis establishment with accessory storage and offices, along with the necessary demolition of some existing accessory structures on the Subject Property and the parking reconfiguration to accommodate thirty-seven (37) parking spaces (the “Proposed Project”).

13. By decision of the ISD dated November 26, 2019, the ISD refused to issue the ISD permits indicating that the Applicant needed conditional use permits to establish the Proposed Project including, but not limited to, the retail cannabis establishment and proposed parking under Article 68, Section 13 of the Zoning Code (the “ISD Permit Denials”). A true and accurate copy of the ISD Permit Denial is annexed hereto and incorporated by reference herein as Exhibit “4.”

14. On or about November 26, 2019, Holland Brands appealed the ISD Permit Denials to the ZBA seeking the required conditional use permits under the Boston Zoning Code (the “ZBA Appeals”).

15. The Subject Property conforms with underlying zoning and offers an appropriately sized space to facilitate use as a retail cannabis establishment.

16. The previous use of the Subject Property was for a former construction fastener company.

17. The Subject Property is approximately one (1) acre, and the pre-existing commercial/industrial building is approximately fourteen thousand nine hundred and eleven (14,911) square feet.

18. The Proposed Project is to utilize a portion of the pre-existing main building, approximately three thousand (3,000) square feet, as the sales area for the retail cannabis establishment, with an additional fifteen hundred (1,500) square feet to accommodate internal queuing of customers.

19. A portion of the proposed building, approximately four thousand (4,000) square feet, is proposed to be provided to the community for its future use, a community benefit not offered by any other retail cannabis establishment in the City of Boston to the knowledge and belief of the Applicant.

B. Holland Brands

20. Holland Brands is a locally owned and operated cannabis business seeking to open a retail marijuana establishment at the Subject Property.

21. The Holland Brands' owners have a background in real estate development, and have been successful thus far in permitting marijuana facilities within the Commonwealth of Massachusetts, and have formed Holland Brands to develop the "Gold Standard" in adult-use cannabis business.

22. Holland Brands is owned and controlled by a father and son team who are local to the Boston area, and have over forty (40) years of construction, development, and business experience in the City of Boston.

23. Holland Brands is comprised of a diverse and experienced team of consultants.

24. Holland Brands controls the Subject Property through a written lease.

C. Boston Cannabis Board.

1. Establishment and Authority of Cannabis Board

25. In November of 2019, through the City of Boston Code, Ordinances, Chapter VIII, Section 8-13 (the "Ordinance"), the City of Boston established the "Equitable Regulation of the Cannabis Industry in the City of Boston," which gave the Mayor the power to create the Boston Cannabis Board ("Cannabis Board").

26. Section 8-13.8 of the Ordinance provides that the City shall grant licenses in an equitable manner and sets forth the criteria that the Cannabis Board must consider in evaluating an application for licensure.

27. Specifically, the Ordinance requires the Cannabis Board to evaluate an applicant's plan for the following categories, each of which carries a specific weight towards approval of the application: diversity and inclusion (25%), employment (20%), community feedback/public support (with subcategories addressing letters of support) (20%), location, safety and security (with subcategories focused on on-site security personnel, building and product security, and protecting youth from the product) (20%), and parking/transportation (with subcategories addressing access to public transportation, on-site parking, transportation and delivery of product and money) (15%).

28. The Cannabis Board promulgates its own Rules and Regulations ("Rules") controlling the granting and control of licenses in the cannabis industry.

29. The Cannabis Board is the siting for cannabis establishments and evaluates the proposed time, place and manner in which these establishments are approved, open, and operate.

30. Section 1.02(B) of the Rules provides Application Requirements for licensure, and requires all applicants to: complete an online application; file an appeal for underlying use with

the ZBA, complete a community meeting with the Mayor's Office of Neighborhood Services, and attempt to obtain a letter of support, non-opposition, or opposition from the District City Councilor.

31. The Cannabis Board uses "Score Sheets" to evaluate applications to licensure, which include the mandatory criteria from the Ordinance Section 8-13.8.

32. These Score Sheets become part of the public record.

33. Each commissioner, in evaluating each applicant, has the option to grant, conditionally grant, or deny a license.

2. Application Process for Cannabis License.

34. The City of Boston's website ("City website") sets forth the establishment of a cannabis business in Boston as six (6) steps. (See <https://www.boston.gov/establishing-cannabis-business-boston>.)

35. The City website describes "Step 1" as completion of the cannabis online application.

36. The City website describes "Step 2" as applying for a conditional use permit with the City's Inspectional Services Department.

37. The City website describes "Step 3" as the "Appeals Process."

38. As part of Step 3, the City website notes that for many reasons, Inspectional Services may deny an applicant's permit (because an applicant may require a conditional use permit, as is the case here, or a variance, which is not applicable here), and if that happens, the applicant should file an appeal with the ZBA.

39. Indeed, the Cannabis Board Rules require applicants to file an appeal with the ZBA. (Rules, Section 1.02(B).)

40. As part of Step 3, the City website further states that after the City receives an appeal, Neighborhood Services and the Office of Emerging Industries will work with the applicant to begin the community review process, which includes a public meeting.

41. As part of Step 3, the City website further states that after the public meeting, the Cannabis Board will review and approve or deny an application.

42. "Step 4" of the City website states that if the Cannabis Board approves an application for licensure, the applicant then must work with the Office of Emerging Industries to negotiate a Host Community Agreement, and that once such an agreement is executed, the City will schedule a ZBA hearing date.

43. "Step 5" of the City website states that if the ZBA approves an applicant's conditional use permit, the application then moves on to the state application process.

44. "Step 6" of the City website provides that, after getting final approval from the state, the applicant may register as a business in the City of Boston.

3. Application to the Boston Cannabis Board

45. On or about February 21, 2020, during the pendency of the ZBA Appeal and prior to the commencement of the public hearing process on the ZBA Appeal, Holland Brands submitted an application to the Boston Cannabis Board for a retail marijuana establishment license (the "Cannabis Board Application"). A true and accurate copy of the Cannabis Board Application is annexed hereto and incorporated by reference herein as Exhibit "5."

46. Prior to submission of the Cannabis Board Application, Holland Brands conducted a community outreach meeting on January 29, 2020 in conformance with the City of Boston's and the Commonwealth of Massachusetts' requirements.

47. The Application to the Cannabis Board, and a Boston Cannabis Board vote approving the Cannabis Board Application, are necessary prerequisites to operate a retail cannabis establishment in the City of Boston.

48. In its Application to the Cannabis Board, Holland Brands pointed out, among other things, that in addition to seeking the Host Community Agreement to be potentially authorized by the Cannabis Board, that Holland Brands also sought to make additional contributions to local charities or organizations that target deficiencies in social empowerment, infrastructure, and anywhere that community leaders deem appropriate.

49. Holland Brands further noted that diversity, equity and inclusion were core values of Holland Brands that have been integrated into its strategic growth plan.

50. Holland Brands demonstrated that it was committed to creating opportunities for certified minority and woman owned businesses, such that more than seventy-five percent (75%) of Holland Brands' consultants with regard to the Proposed Project were women and racial minorities.

51. Holland Brands further committed to the Cannabis Board that if it were allowed to operate a retail cannabis establishment at the Subject Property, it was committed to hire employees and contractors who were local, diverse, and inclusive such that Holland Brands' employees and independent contractors would include people of color, women, and the LGBTQ+ community, as at least representative of the local community.

52. Holland Brands has committed to hire employees and contractors who are residents of South Boston, and Boston residents.

53. Holland Brands will offer competitive wages and benefits for local residents.

54. In its Application to the Cannabis Board, Holland Brands demonstrated that it had received overwhelming support from individual members of the community, including one hundred seventeen (117) letters of support, in addition to seventy (70) signatures on a support petition for Holland Brands' proposal from local residents and business owners.

55. Holland Brands further highlighted to the Cannabis Board that the particular ward and precinct in which the Subject Property is located voted in favor of the ballot initiative in 2016 to legalize the adult sale of cannabis by sixty-eight percent (68%), well above the City of Boston's sixty-three percent (63%) vote in favor.

56. As part of the overall requirements and jurisdiction of the Cannabis Board, it was a requirement that Holland Brands demonstrate the location of the proposed retail cannabis establishment was an appropriate location, and that Holland Brands would provide a safe and secure business.

57. With regard to the Subject Property, Holland Brands explained to the Cannabis Board that it committed to do extensive landscaping to make the current unattractive grounds and existing vacant building more aesthetically pleasing so as to ensure a positive addition to the neighborhood.

58. Holland Brands committed to building a well-lit, clean, and professional retail cannabis establishment that would have robust video surveillance and professional security personnel at all times.

59. Because of how Holland Brands has planned this location and its staffing, Holland Brands explained to the Cannabis Board how the retail cannabis establishment would be barely noticeable to passerby at the Subject Property and that its design and plan for the facility,

as well as avoid any cars waiting or queuing to get into the off street parking lot on the Subject Property.

60. Holland Brands confirmed to the Cannabis Board that it had partnered with Boston-based Windwalker Group LLC as the overall security management partner for the retail cannabis establishment including, but not limited to, Windwalker's leadership consisting of several former executive level security experts who have successfully operated in the federal, military, and local law enforcement, and corporate security organizations.

61. Holland Brands noted for the Cannabis Board that its facility would only be accessible to consumers twenty-one (21) years of age or older, with a verified and valid government-issued photo identification.

62. Holland Brands also attached to its Cannabis Board Application a report authored by Nitsch Engineering which studied the likely impact of the proposed retail cannabis establishment on the local street infrastructure.

63. In furtherance of its Application to the Cannabis Board, the Cannabis Board held a hearing on the Application of Holland Brands on March 10, 2021.

64. At the Cannabis Board hearing, Holland Brands made a PowerPoint presentation which is annexed hereto and incorporated by reference herein as Exhibit "6."

65. Among other PowerPoint slides presented, on slide 9 Holland Brands showed the proposed location of the retail cannabis establishment at the Subject Property along with photos showing the poor current site condition, and compared existing conditions with renderings of the proposed cannabis facility, and a site plan for the retail cannabis store, the community space, and the thirty-seven (37) parking spaces.

66. The current site conditions show the now vacant current existing commercial building and an overview of the Subject Property, which shows that it is surrounded by other commercial uses, a field of transformers on three (3) sides, and frontage along K Street.

67. At the Cannabis Board hearing, some nearby residents to the Subject Property appeared, and those who were against the use of the Subject Property as a retail cannabis establishment spoke out against the Proposed Project as they did not want a cannabis establishment nearby.

68. Some nearby residents had typical NIMBY concerns about the use of the Subject Property as a cannabis facility because cannabis was not an appropriate use in their community according to the vocal minority, although they cited traffic and hours of operations as pretextual conditions.

69. There were also many South Boston residents who testified in favor of Holland Brands' Application.

70. On March 11, 2021, Holland Brands responded to the small number of NIMBY abutters and pointed out to the Cannabis Board that the purpose of the Summer Street Local Industrial Subdistrict in which the Subject Property was located stated that its purpose was to encourage the preservation of the existing manufacturing and industrial base in a manner that is sensitive to and preserves the quality of life of the surrounding residential neighborhoods, and who encouraged the development of new job opportunities within the South Boston neighborhood district. The letter further pointed out that the use of the Subject Property as a retail cannabis establishment was an allowed use under the Zoning as a conditional use, and further that the NIMBY abutters' properties or rental properties were across the street from an already established industrial subdistrict. The March 11 letter further pointed out that the

Cannabis Board “aims to issue Licenses in a way that ensures equity both in the distribution of Licenses among qualified applicants, and those communities that have been disproportionately impacted by the prior legal prohibition of cannabis and enforcement of same, **as well as to ensure that Licenses are equitably sited throughout the City of Boston.**” (emphasis supplied). A true and accurate copy of the March 11, 2021 letter to the Cannabis Board is annexed hereto and incorporated by reference herein as Exhibit “7.”

71. The March 11 letter also noted that in response to the statement to the Cannabis Board that Holland Brands had avoided meeting with area residents, that Holland Brands had held over thirty-five (35) meetings with elected officials, community and business leaders, and neighborhood associations. Additionally, Holland Brands had held over twenty-five (25) one on one meetings with direct abutters, local residents, and community meetings. In fact, Holland Brands had met inside the home of one of the NIMBY abutters in January, 2019.

72. During the pendency of Holland Brands’ Application to the Cannabis Board, and while the Cannabis Board had issued dozens of Cannabis licenses throughout the City of Boston, there have been no licenses approved for the South Boston section of Boston, and that if Holland Brands’ Application was approved, it would be the first such license to be sited within the entire South Boston section of Boston.

73. On March 17, 2021, the Cannabis Board met to deliberate and vote regarding Holland Brands’ Application noting that there existed both support and opposition for the Application for the retail cannabis establishment at the Subject Property.

74. During its deliberations, the Cannabis Board noted that Holland Brands had conducted significant community outreach regarding the proposal, and that Holland Brands had adapted its proposal based upon community input.

75. The Cannabis Board also noted the strength of the Application made by Holland Brands concerning the parking availability, the security and operations plans, the diversity and inclusion plans, as well as Holland Brands' employment plans.

76. Applying the criteria established in the Ordinances, the Cannabis Board found that Holland Brands scored highly across all criteria, and found that granting the License to Holland Brands at the Subject Property would be appropriate in time, place, and manner, and adhered to the spirit of the Ordinance.

77. Based upon all the submissions made by Holland Brands, and after all of the community outreach by Holland Brands, and a full public hearing process, the Cannabis Board unanimously voted in favor of Holland Brands' application for a retail cannabis establishment License at the Subject Property.

4. Host Community Agreement.

78. Based upon the approval of the Cannabis Board of Holland Brands' Application for a Cannabis License at the Subject Property, on April 20, 2021, Holland Brands and the City of Boston entered into a Host Community Agreement (the "HCA") whereby the City of Boston and Holland Brands agreed, subject to the conditions in the HCA, that Holland Brands would be able to operate a retail cannabis establishment at the Subject Property consistent with the HCA. A true and accurate copy of the HCA is annexed hereto and incorporated by reference herein as Exhibit "8."

D. ZBA Appeal.

79. As a result of the ZBA Appeal, the Board of Appeal scheduled a public hearing on the conditional use permits being sought by Holland Brands for the Subject Property to occur on May 18, 2021.

80. Prior to the May 18, 2021 hearing, the Cannabis Board authored and submitted a letter to the ZBA dated May 17, 2021. A true and accurate copy of said May 17, 2021 letter is annexed hereto and incorporated by reference herein as Exhibit “9.”

81. In the May 17, 2021 letter, the Cannabis Board confirmed a number of important items to the ZBA including:

- that the BCB voted on March 17, 2021 to grant a retail recreational cannabis dispensary license (the “License”) to Holland Brands for the Subject Property.
- that **“the ZBA consider this correspondence regarding the appeal by the Applicant for the Proposed Use and vote to grant the same” for the reasons set forth in the letter.** (Emphasis in the original).
- that General Laws Chapter 94G, § 3 granted Boston the authority to enact ordinances to govern the “*time, place, and manner* of marijuana establishment operations and of any business dealing in marijuana accessories . . .” and that Boston had established such ordinances.
- that General Laws Chapter 94G, § 3 established the minimum number of retail recreational dispensaries that must be sited in the City of Boston at twenty percent (20%) of the number of retail package stores, meaning that Boston was required to establish a minimum of fifty-two (52) recreational retail dispensaries.
- that the Subject Property was not located within one-half (½) mile of an existing cannabis establishment, and is not within five hundred (500) feet of any existing K-12 school providing public or private education.

- that Holland Brands had conducted significant community outreach and had adapted its proposal based upon community input and that the BCB found Holland Brands' parking plans, the security and operational plans, the diversity and inclusion plans, and its employment plans to be well done; and
- notably that Holland Brands scored highly across all criteria and found that granting the License to Holland Brands at the **Subject Property would be appropriate in time, place, manner, and adhere to the spirit of the Ordinance.** (emphasis added).

82. On May 18, 2021, Holland Brands appeared at the scheduled public hearing on the conditional use permit applications before the ZBA.

83. At the May 18, 2021 hearing, Holland Brands made a PowerPoint presentation in support of its conditional use applications, a true and accurate copy of which is annexed hereto and incorporated by reference herein as Exhibit "10."

84. In its presentation, Holland Brands established that the proposed use at the Subject Property of a retail cannabis establishment was allowed by zoning subject to a Conditional Use Permit, and presented photos of the existing conditions at the Subject Property and the nearby industrial and commercial uses, along with street views. The PowerPoint presentation further presented floor plans, as well as elevations and depictions for the proposed retail cannabis establishment.

85. In connection with the public hearing process on its conditional use permit, Holland Brands also noted that it had received a total of 195 support documents, with sixty (60) petition signatures and 135 letters of support from throughout the South Boston section of Boston, and noted the amount of community outreach that it had conducted over the course of

thirty-five (35) meetings with elected officials, neighborhood associations, local business owners, non-profit leaders, and community members and residents.

1. Criteria for a Conditional Use Permit

86. Pursuant to Article VI, Section 6-3 of the Zoning Code, which states as follows:

The Board of Appeal shall grant any such appeal only if it finds that all of the following conditions are met:

- (a) the specific site is an appropriate location for such use or, in the case of a substitute nonconforming use under Section 9-2, such substitute nonconforming use will not be more objectionable nor more detrimental to the neighborhood than the nonconforming use for which it is being substituted;
- (b) the use will not adversely affect the neighborhood;
- (c) there will be no serious hazard to vehicles or pedestrians from the use;
- (d) no nuisance will be created by the use;
- (e) adequate and appropriate facilities will be provided for the proper operation of the use;
- (f) if such appeal relates to a Development Impact Project, as defined in Section 80B-7, the applicant shall have complied with the Development Impact Project Exaction requirements set forth in Section 80B-7.3; and
- (g) if such appeal relates to a Proposed Project in an area designated a Greenbelt Protection Overlay District as defined in Section 29-2, the Applicant shall have complied with the requirements set forth in Section 29-3 and Section 29-5 and the standards set forth in Section 29-6.

a. The Subject Property is an Appropriate Location for Such Use.

87. The Subject Property is in the Summer Street Local Industrial (LI) Subdistrict within the South Boston Neighborhood District.

88. Article 68, Section 68-12 of the Zoning Code, lists the intent for the creation of the Local Industrial Subdistricts as follows:

The purpose of Local Industrial Subdistricts is to encourage the preservation of the existing manufacturing and industrial base in a manner that is sensitive to and preserves the quality of life of the surrounding residential neighborhoods, and to encourage the development of new job opportunities within the South Boston Neighborhood District.

89. The Proposed Project will create upwards of two (2) dozen full time jobs and will operate within the existing former manufacturing building located on the Subject Property.

90. There are no buffer issues relating to the Subject Property because the Proposed Project is not within 500 feet of a pre-existing public or private school, nor is it within one-half mile of another existing cannabis establishment.

91. The Subject Property is immersed within an industrial area with a transformer field abutting both the west and north sides of the building. It is otherwise surrounded by other commercial and industrial properties. The residential properties across the street are in an entirely different zoning subdistrict.

92. No evidence was presented to the ZBA that the Subject Property was an inappropriate location for such use, and rather a few nearby residents who voiced opposition against having a cannabis facility anywhere near to their residences, just as they had done before the Cannabis Board, and some used existing heavy city traffic as a pretextual reason to oppose the Proposed Project.

93. Such development opposition is typical for nearby residents but amounts to spot zoning when acted on by the ZBA given that the Subject Property is in an entirely different zoning district from the residential neighborhood and on the outskirts of, and not located within, a residential area.

94. Given the layout of the Subject Property, the significant number of parking spaces, and the amount of retail space within the building, there is no actual evidence that the use

of the Subject Property as a cannabis facility would have any noticeable impact or affect the area.

95. The Subject Property is therefore appropriately located for this use.

b. The Use Will Not Adversely Affect the Neighborhood.

96. Holland Brands engaged Windwalker Group LLC (“Windwalker”), an experienced security consultant with over 20 years of experience advising federal, state, and commercial organizations.

97. As part of its due diligence, Windwalker reviewed historic and current 911 data from the six (6) currently operating Cannabis Establishments within Boston, and Windwalker’s conclusion was that the use of a “Cannabis Establishment” does not adversely affect the neighborhood in which it sits.

98. No evidence exists, nor was any presented to the ZBA, that the use would adversely affect the neighborhood.

99. The fact that a small group of nearby residents, out of the entire South Boston area, are against any cannabis facilities in South Boston is not evidence that the use will adversely affect the neighborhood and if such feelings were an actual criteria, then perhaps no cannabis facility could be located anywhere in the City of Boston as there will always be some limited opposition to retail cannabis sales.

100. Such feelings and beliefs though, however, are not a criteria for the denial of conditional use permits under the Zoning Code.

c. There Will be No Serious Hazard to Vehicles or Pedestrian From the Use.

101. The Subject Property contains thirty-seven (37) on-site parking spaces, internal loading of product and transfer of monies within the building through a drive in garage, and has secured plans to provide employee parking off-site at ancillary lots.

102. In addition, the Applicant has agreed to allow overnight parking for nearby residents at the Subject Property.

103. The Applicant engaged Nitsch Engineering to conduct a traffic study for the area, and to advise as to the Proposed Project.

104. Nitsch Engineering determined that the Proposed Project would total approximately 392 daily vehicles and prepared a table that compared this particular use to other common uses found in the district as follows:

Type of Establishment	Project Size	Total Daily Number of Cars	Peak Parking Demand
Marijuana Dispensary	3000 SF	392	22
Fast Food (with Drive-Through)	2500 SF	589	22
Convenience Store	3000 SF	1144	16
Coffee Shop (without Drive-Through)	2000 SF	760	21

105. All other uses as presented by Nitsch Engineering show a higher number of cars per day than the proposed use.

106. Nitsch Engineering also conducted a field survey at the Subject Property to determine the current actual conditions of traffic. The survey concludes with the statement, "...in our professional opinion, the additional traffic that will be generated by the proposed site will not cause major impacts on the general traffic."

107. The use will therefore not cause a serious hazard to vehicles or pedestrians.

d. No Nuisance Will be Created by the Use.

108. Holland Brands demonstrated to the ZBA that there were no actual traffic and security issues with the proposed facility.

109. In terms of other issues that have been found to be deemed a “nuisance” such as fire access, topography, slippery road conditions, over-utilization, and parking, such conditions are not present at the Proposed Project.

110. The use will therefore not cause a nuisance.

e. **Adequate and Appropriate Facilities Will be Provided for the Proper Operation of the Use.**

111. The proposed facility is well suited for the Proposed Project.

112. The Subject Property will have thirty-seven (37) on-site parking spaces which are fenced off from the abutting properties, and accessible by a single, existing, curb-cut on East 1st Street, which is more parking than needed even at peak demand.

113. The loading of product, and pick-up of monies, will be conducted within the facility itself, through a secure garage entrance, within the fenced-in area.

114. The facility will use a portion of its floor area to service customer queuing so that no customers waiting in line will be visible from outside of the facility.

115. The use is therefore appropriately provided for by the proposed facilities to enable proper operations.

CAUSES OF ACTION

COUNT I

(to Vacate the ZBA’s Cannabis Decision)

116. Holland Brands realleges and incorporates by reference herein Paragraphs 1 through 115 above.

117. Section 8 of Chapter 665 of the Acts of 1956 (the "Enabling Act") establishes the Boston ZBA, and further authorizes the City of Boston to adopt, promulgate, and enforce zoning regulations ("Boston Zoning Code).

118. Subpart 6 of Section 38-18 of the Boston Zoning Code, which addresses conditional use regulations for the Subject Property provides that the granting of a permit for any conditional use may be authorized by the ZBA, and lists "Cannabis Establishments" as a conditional use under-Section 38-18(6)(q).

119. Section 6-1 of the Boston Zoning Code more generally permits the ZBA to grant permission for the conditional use of land.

120. The use of the Subject Property for a retail cannabis establishment with accessory uses and parking is considered a conditional use pursuant to Article 68, Section 68-13 of the Boston Zoning Code (the "Zoning Code").

121. Pursuant to Article VI, Section 6-3 of the Zoning Code, which states as follows:

The Board of Appeal shall grant any such appeal only if it finds that all of the following conditions are met:

- (a) the specific site is an appropriate location for such use or, in the case of a substitute nonconforming use under Section 9-2, such substitute nonconforming use will not be more objectionable nor more detrimental to the neighborhood than the nonconforming use for which it is being substituted;
- (b) the use will not adversely affect the neighborhood;
- (c) there will be no serious hazard to vehicles or pedestrians from the use;
- (d) no nuisance will be created by the use;
- (e) adequate and appropriate facilities will be provided for the proper operation of the use;
- (f) if such appeal relates to a Development Impact Project, as defined in Section 80B-7, the applicant shall have complied with the Development Impact Project Exaction requirements set forth in Section 80B-7.3; and
- (g) if such appeal relates to a Proposed Project in an area designated a Greenbelt Protection Overlay District as defined in Section 29-2, the Applicant shall have complied with the

requirements set forth in Section 29-3 and Section 29-5 and the standards set forth in Section 29-6.

122. On or about November 26, 2019, the Applicant appealed the ISD Permit Denials to the ZBA seeking the required conditional use permits under the Boston Zoning Code (the “ZBA Appeals”).

123. The Subject Property conforms with underlying zoning and offers an appropriately sized space to facilitate use as a retail cannabis establishment.

124. As a result of the ZBA Appeals, the Board of Appeal scheduled a public hearing on the conditional use permits being sought by Holland Brands for the Subject Property to occur on May 18, 2021.

125. In its May 17, 2021 letter, the Cannabis Board confirmed a number of important items to the ZBA including:

- that the BCB voted on March 17, 2021 to grant a retail recreational cannabis dispensary license (the “License”) to Holland Brands for the Subject Property.
- that **“the ZBA consider this correspondence regarding the appeal by the Applicant for the Proposed Use and vote to grant the same”** for the reasons set forth in the letter. (Emphasis in the original).
- that General Laws Chapter 94G, § 3 granted Boston the authority to enact ordinances to govern the “*time, place, and manner* of marijuana establishment operations and of any business dealing in marijuana accessories . . .” and that Boston had established such ordinances.
- that General Laws Chapter 94G, § 3 established the minimum number of retail recreational dispensaries that must be cited in the City of Boston at twenty percent (20%) of the number of retail package stores, meaning that Boston

was required to establish a minimum of fifty-two (52) recreational retail dispensaries.

- that the Subject Property was not located within one-half (½) mile of an existing cannabis establishment, and is not within five hundred (500) feet of any existing K-12 school providing public or private education.
- that Holland Brands had conducted significant community outreach and had adapted its proposal based upon community input and that the BCB found Holland Brands' parking plans, the security and operational plans, the diversity and inclusion plans, and its employment plans to be well done; and
- notably that Holland Brands scored highly across all criteria and found that granting the License to Holland Brands at the **Subject Property would be appropriate in time, place, manner, and adhere to the spirit of the Ordinance.** (emphasis added).

126. In its presentation, Holland Brands demonstrated to the ZBA that the proposed use at the Subject Property of a retail cannabis establishment was allowed by zoning subject to a Conditional Use Permit, and presented photos of the existing conditions at the Subject Property and the nearby industrial and commercial uses, along with street views. The PowerPoint presentation further presented floor plans, as well as elevations and depictions for the proposed retail cannabis establishment.

127. In connection with the public hearing process on its conditional use permit, Holland Brands also noted that it had received a total of 195 support documents, with sixty (60) petition signatures and 135 letters of support from throughout the South Boston section of Boston, and noted the amount of community outreach that it had conducted over the course of

thirty-five (35) meetings with elected officials, neighborhood association, local business owners, non-profit leaders, and community members and residents.

128. The Subject Property is in the Summer Street Local Industrial (LI) Subdistrict within the South Boston Neighborhood District.

129. Article 68, Section 68-12 of the Zoning Code, lists the intent for the creation of the Local Industrial Subdistricts as follows:

The purpose of Local Industrial Subdistricts is to encourage the preservation of the existing manufacturing and industrial base in a manner that is sensitive to and preserves the quality of life of the surrounding residential neighborhoods, and to encourage the development of new job opportunities within the South Boston Neighborhood District.

130. There are no buffer issues relating to the Subject Property because the Proposed Project is not within 500 feet of a pre-existing public or private school, nor is it within one-half mile of another existing cannabis establishment.

131. The Subject Property is immersed within an industrial area with a transformer field abutting both the west and north sides of the building. It is otherwise surrounded by other commercial and industrial properties. The several residential properties across the street are in an entirely different zoning subdistrict.

132. No evidence was presented to the ZBA that the Subject Property was an inappropriate location for such use, and rather a few nearby residents who voiced opposition against having a cannabis facility anywhere near to their residences, as they did before the Cannabis Board, and some used existing heavy city traffic as a pretextual reason to oppose the Proposed Project.

133. Such development opposition is typical for nearby residents but amounts to spot zoning when acted on by the ZBA given that the Subject Property is in an entirely different

zoning district from the residential neighborhood and on the outskirts of, and not located within, a residential area.

134. If existing heavy traffic were a basis to deny a conditional use permit, then virtually no conditional use would ever be allowed again on any property in the City of Boston.

135. Given the layout of the Subject Property, the significant number of parking spaces, and the amount of retail space within the building, there was no actual evidence that the use of the Subject Property as a cannabis facility would have any noticeable impact or affect the area, including upon traffic.

136. The Subject Property is therefore appropriately located for this use.

137. Holland Brands engaged Windwalker Group LLC (“Windwalker”), an experienced security consultant with over 20 years of experience advising federal, state, and commercial organizations.

138. As part of its due diligence, Windwalker reviewed historic and current 911 data from the six (6) currently operating Cannabis Establishments within Boston, and Windwalker’s conclusion was that the use of a “Cannabis Establishment” does not adversely affect the neighborhood in which it sits.

139. No evidence exists, nor was any presented to the ZBA, that the use would adversely affect the neighborhood.

140. The fact that a small number of nearby residents, out of the entire South Boston area, are against any cannabis facilities in South Boston is not sufficient evidence or facts that the use will adversely affect the neighborhood. If such feelings were an actual criteria, then perhaps no cannabis facility could be located anywhere in the City of Boston as there will always be some limited opposition to retail cannabis sales.

141. Such feelings and beliefs though, however, are not a criteria for the denial of conditional use permits under the Zoning Code.

142. The Applicant engaged Nitsch Engineering to conduct a traffic study for the area, and to advise as to the Proposed Project.

143. Nitsch Engineering determined that the Proposed Project would total approximately 392 daily vehicles and prepared a table that compared this particular use to other common uses found in the district as follows:

Type of Establishment	Project Size	Total Daily Number of Cars	Peak Parking Demand
Marijuana Dispensary	3000 SF	392	22
Fast Food (with Drive-Through)	2500 SF	589	22
Convenience Store	3000 SF	1144	16
Coffee Shop (without Drive-Through)	2000 SF	760	21

144. All other uses as presented by Nitsch Engineering show a higher number of cars per day than the proposed use.

145. Nitsch Engineering also conducted a field survey at the Subject Property to determine the current actual conditions of traffic. The survey concludes with the statement, "...in our professional opinion, the additional traffic that will be generated by the proposed site will not cause major impacts on the general traffic."

146. The use will therefore not cause a serious hazard to vehicles or pedestrians.

147. Holland Brands demonstrated to the ZBA that there were no actual traffic and security issues with the Proposed Project.

148. In terms of other issues that have been found to be deemed a "nuisance" such as fire access, topography, slippery road conditions, over-utilization, and parking, such conditions are not present at the Proposed Project.

149. The use will therefore not cause a nuisance.

150. The proposed facility is well suited for the Proposed Project.

151. The Subject Property will have thirty-seven (37) on-site parking spaces which are fenced off from the abutting properties, and accessible by a single, existing, curb-cut on East 1st Street, which is more parking than needed even at peak demand.

152. The loading of product, and pick-up of monies, will be conducted within the facility itself, through a secure garage entrance, within the fenced-in area.

153. The facility will use a portion of its floor area to service customer queuing so that no customers waiting in line will be visible from outside of the facility.

154. The ZBA may not unreasonably deny an application for a Conditional Use Permit.

155. Although the ZBA is not compelled to grant a permit, it cannot use its discretionary powers to deny an application for reasons which are unreasonable, whimsical, capricious, arbitrary, or based upon legally untenable ground.

156. The proposed cannabis retail sales was the reason for some limited opposition, but the pretext used was traffic and noise.

157. The traffic and noise already exist, and are not a basis to stop all further development and conditional uses in this area of South Boston.

158. South Boston is virtually the only neighborhood in Boston without a Cannabis Establishment.

159. The ZBA has granted many conditional uses permits for Cannabis Establishments in the City of Boston in (1) residential areas, (2) sites without parking, (3) sites near facilities which serve vulnerable populations, and (4) sites that had neighborhood opposition.

160. M.G.L. ch. 94G, § 3(a) states, “[a] city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter.”

161. M.G.L. ch. 94G § 1 defines unreasonably impracticable as follows:
 "Unreasonably impracticable, that the measures necessary to comply with the regulations, ordinances or by-laws adopted pursuant to this chapter subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.”

162. Based on all of the evidence presented to the ZBA, the ZBA’s decision to deny the permit did not align with the plain language definition of “unreasonably impracticable.”

The Code requires that uses within Subdistricts shall be uniform.

163. Of the 42 Cannabis Establishments currently approved within the city, South Boston is virtually the only neighbored to be without an approved facility as shown in this table:

Neighborhood	Cannabis Establishments
East Boston	4
Charlestown	2
West End/North End/Downtown	4
Back Bay/Beacon Hill	4
Allston/Brighton	4
Mission Hill	1
Fenway/Kenmore	2
South End	1
Roxbury	2
Dorchester	8
Jamaica Plain	3
Roslindale	3
Hyde Park	1
Mattapan	2
West Roxbury	1
South Boston	0

164. The lack of equitable distribution of these licenses is not in keeping with the Code.

165. The Enabling Act dictates that the “regulations and restrictions shall be uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout the district.”

166. At the conclusion of the May 18, 2021 hearing, the ZBA voted 6 to 1 to deny Holland Brands’ Applications.

167. The ZBA’s decision was arbitrary for, among other reasons, because it has approved other Cannabis Establishments at locations with far less amenities and at sites inferior to the Subject Property.

168. The ZBA was also unfair at its hearing as it denied many South Boston residents who appeared an opportunity to speak in favor of the requested permits.

169. Because of certain technical and other issues which arose at the hearing, a further public hearing was noticed and held on July 13, 2021 on Holland Brands’ request for a conditional use permit.

170. At the July 13, 2021 hearing, the ZBA essentially voted to deny Holland Brands’ Applications for Conditional Use Permits by not reconsidering the May 18 vote, although the reconsideration motion received a majority vote in favor, but did not pass because a supermajority vote (5 of 7) was required.

171. The Cannabis Decision in Case No. BOA1026920 was filed with ISD on July 28, 2021.

172. The ZBA’s denial of the Conditional Use Permit to operate a cannabis facility and accessory uses, as set forth in the Cannabis Decision, exceeded the authority of the ZBA,

constituted an error of law, was arbitrary and capricious, constituted an abuse of discretion, and consequently should be annulled.

COUNT II
(to Vacate the ZBA's Parking Decision)

173. Holland Brands realleges and incorporates by reference herein Paragraphs 1 through 172 above.

174. The Parking Decision in Case No. BOA1026937 was filed with ISD on July 28, 2021.

175. The ZBA's denial of the Conditional Use Permit, as set forth in the Parking Decision, exceeded the authority of the ZBA, constituted an error of law, was arbitrary and capricious, constituted an abuse of discretion, and consequently should be annulled.

PRAYERS FOR RELIEF

WHEREFORE, the Plaintiff, Holland Brands SB, LLC, respectfully requests that the Court:

1. annul the Decision of the Boston Zoning Board of Appeal denying Plaintiff's Conditional Use Permit Application for Cannabis Establishment with accessory uses, as set forth in the written decision attached hereto as Exhibit 1;
2. annul the Decision of the Boston Zoning Board of Appeal denying Plaintiff's Application for a Conditional Use Permit for parking, as set forth in the written decision attached hereto as Exhibit 2;
3. remand the matter to the Boston Zoning Board of Appeal with instructions that the two Conditional Use Permit Applications be granted; and
4. grant such other and further relief as justice and equity may require.



HOLLAND BRANDS SB, LLC

By Its Attorneys,
RIEMER & BRAUNSTEIN LLP

Dated: August 6, 2021

2770274.2

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