Due Process Considerations in Municipal Licensing and Regulation of Marijuana

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Circumstances before Regulation

- Prior to adoption of an ordinance regulating marijuana: approximately 80 known dispensaries operating within the City of Lansing.

Adoption of Chapter 1300 to Regulate Medical Marihuana

- Capped number of provisioning centers at 25 licenses
  - Elected to use competitive application process rather than lottery-based system
- Scoring system of applications delegated to City Clerk
- No caps on any other license type

Due Process Considerations

- 2 step appeals process before reaching circuit court
  - initial paper appeal to Clerk directly with written recommendation by independent hearing officer.
    - allows correction of any errors
    - creates a written record of any allegations by the applicant
  - second appeal to Medical Marihuana Commission
    - independent body, appointed by Mayor, representing each Ward of the City
    - allows for oral argument by applicant
- Zoning Board of Appeals
  - “Variance” from buffered uses. Contemplates existing establishments prior to regulatory framework on zoning.
- Two-Phase Licensing
  - Applicants could apply in Phase 1; if don’t receive a license, can apply in Phase 2.
  - Allow time for applicants at different stages of preparedness an opportunity to receive license.

Shutting Down Non-Compliant Operations

- Proactive approach:
  - licensure denial letters
  - cease and desist letters
  - walk and talks
- District Court Action:
  - Municipal Civil Infractions: 1st offense $750, repeat $1,000
- Circuit Court Litigation
  - Attestation E language:
  - PART B: I, the applicant, understand that I am submitting this Attestation E in compliance with the Emergency Administrative Rules. I understand that if I do not comply with the Emergency Administrative Rules and the MMFLA, I shall cease and desist operation of a proposed marihuana facility and may be subject to all the penalties, sanctions, and remedies under state and federal law, the MMFLA or the Emergency Administrative Rules.

Resulting Litigation

Case Studies from the City of Lansing

If you cap licenses, you will be sued

- Build your record before the inevitable lawsuit
- Decide what your record on appeal is going to be
- Make use of any Administrative Appeals process
- Make use of dispositive motion practice
- Use your briefs to inform Judges about this new area of law and the specifics of your municipal ordinance
- Establish the correct standard for review
- Use Orders to create persuasive authority for future cases

Barron, et al. v City of Lansing and Lansing City Clerk

- This case involved 5 local dispensaries that were operating prior to the adoption of the licensing ordinance, who were denied and did not want to cease operating while in the appeals process
- The City's first real litigation involving the denial of licensure
- Plaintiffs' sought a TRO, Preliminary Injunction, and a Writ of Mandamus
- City responded with a Motion for Summary Disposition - MCR 2.116(C)(8)
- Highly recommend drafting a 7-day Order than contains specific court findings and not just "for the reasons stated on the record"
- While not precedent, it is highly persuasive
- It is important to hit the gate running

STATE OF MICHIGAN

IN THE 30th CIRCUIT COURT FOR THE COUNTY OF INGHAM

CHELSEY BARRON D/B/A GOT MEDS, ROBERT CECIL RIBAR D/B/A GREEN MILE, OZWALD GREEN INDUSTRIES, LLC D/B/A EMERALD CITY, ANDRE BABBIE D/B/A DANK HOUSE, and HANOSH, INC. D/B/A CEDAR LEAF,

Plaintiffs,

v.

CITY OF LANSING and LANSING CITY CLERK CHRIS SWOPE,

Defendants.

Case No. 18-184-AW

Hon. James S. Jamo

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ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER, AND MANDAMUS AND GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court,
held in the Circuit Court for the
County of Ingham, State of Michigan
this 23rd day of May, 2018.

PRESENT: HONORABLE ~~JOYCE DRAGANCHUCK~~ JOYCE DRAGANCHUK

This matter having come before the Court on Defendants' Motion for Summary Disposition; the Court having reviewed the parties' written briefs; oral argument being held on May 23, 2018; and the court being otherwise fully advised in the premises;

The court held that the temporary authorization to operate a medical marihuana business conveyed via Executive Order 2017-02 and Attestation E from the State of Michigan along with an application for a license does not create a license and no possible factual development could lead to the conclusion that a license exists;

The court held that upon receipt of a denial of licensure from either the City of Lansing or the State of Michigan, an applicant must cease and desist operations immediately;

The court held that filing an appeal has no effect on the requirement to cease and desist operations after receipt of a denial of licensure;

The court found that the duties of the City Clerk pursuant to Lansing City Ordinance 1300 are discretionary and not ministerial;

The court held that Plaintiffs have an adequate remedy through the City of Lansing appeals process;

IT IS HEREBY ORDERED that, for the reasons stated on the record, Plaintiffs' Complaint is dismissed with prejudice.

This Order resolves the last pending claim and closes the case.

Date: June 28, 2018

Hon. ~~Joyce Draganchuck~~ P-39417
JOYCE DRAGANCHUK
for Judge James S. Jamo

COUNTERSIGNED:

Deputy Court Clerk

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Seman Consulting v City of Lansing

- A denied Applicant moved for TRO, show cause, and Prelim Injunction
  - Prior to completing the Administrative appeals process
- Plaintiff specifically asserted a violation of due process rights
  - Asserted that City Clerk's decision was arbitrary and capricious
- The City filed a response to the Motion and a Summary Disposition motion in response to the Complaint
- Successfully argued premature
- Benefits of a robust administrative appeals process

Seman Consulting and the Quest for Injunctive Relief

- Plaintiff MUST establish that:
- (1) it has a likelihood of success on the merits of the claim,
- (2) that it will suffer irreparable injury if the injunction is not granted,
- (3) that the harm it will suffer outweighs any harm that the opposing party will suffer if the injunction is entered, and
- (4) that the injunction is in the public interest.
- Further, "[A] preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters Union Local 376 v. City of Pontiac*, 482 Mich. 1; 9; 753 N.W.2d 595 (2008)

- Plaintiff's Complaint has little success of likelihood on the merits, if for no other reason than it is fatally premature.
- An irreparable injury is one that is "both certain and great, and it must be actual rather than theoretical." *Thermatool Corp. v. Borzym*, 227 Mich App 336, 377; 575 N.W.2d 334 (1998). "Generally, irreparable injury is not established by showing economic injury because such an injury can be remedied by damages at law." *Alliance for Mentally Ill of Michigan v. Dept. of Comm. Health*, 231 Mich App 647, 664; 588 N.W.2d 133 (1998). All of the potential harms Plaintiffs cite are either speculative or strictly economical.
- The City of Lansing would suffer great harm if a Preliminary Injunction allowing Plaintiff to operate in conflict with State and local law was granted.
- There is great public interest in allowing a municipality to enforce local laws and maintain order within its jurisdiction. The public also has an interest in the efficient function of government and the efficient use of taxpayer money and city resources.

Superior/Huron Wellness v City of Lansing

- The first proper appeals to the Circuit Court
- Not uncommon for one attorney/firm to have completed multiple applications
- Denied approval by BSO for insufficient waste disposal; were not “scored”
- Establishing the Standard of Review
- Establishing the difference between the State appeals process, which must abide by the APA and the municipal appeals process

Understanding the Standard of Review

- Defendants-Appellees do not contest that the interpretation and application of a municipal ordinance is reviewed de novo. "The goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body. The most reliable evidence of that intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings." *Bonner v City of Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014).
- Thus, a de novo review as to whether the scoring and ranking procedure developed by the Lansing City Clerk is consistent with the clear and unambiguous language of Chapter 1300.6(b) would be appropriate
- However, the actual decision to deny a local license pursuant to Chapter 1300 is NOT reviewed de novo. Rather, the final decisions of administrative bodies of local government regarding licenses are reviewed as provided by the Michigan Constitution, art VI, § 28.
- Courts have consistently and repeatedly applied the standard outlined in Const 1963, art VI, § 28, for the review of the decisions of administrative bodies of local governments. *Hitchingham v Washtenaw Co Drain Comm'r,* 179 Mich App 154, 160; 445 NW2d 487 (1989); *See, e.g., Murphy v Oakland Co Dep't of Health*, 95 Mich App 337; 290 NW2d 139 (1980); *Rinaldi v Livonia*, 69 Mich App 58; 244 NW2d 609 (1976*); Alastra v City of Warren*, 68 Mich App 594, 596-97; 243 NW2d 675 (1976) ("The minimum constitutional standard establishes the scope of review.").
- "[W]here applicable, Const 1963, art 6, § 28 does not provide for or permit review de novo of final administrative decisions." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 520-21; 857 NW2d 529 (2014) (citation omitted).
- Judicial review is not de novo and (where no hearing is required) is limited in scope to a determination whether the action of the agency was authorized by law. *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 736; 383 NW2d 112 (1985); *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991).
- Pursuant to Chapter 1300, there is no hearing required as part of the administrative appeal.

Standard of Review—as Ordered

- Jurisdiction in this Court is proper pursuant to Chapter 1300.15(C), MCR 7.103(A)(3), and MI Const. 1963 Art VI, § 28. Article VI, Section 28 of the Michigan Constitution provides:
- All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.
- **As Appellant notes, where there is no hearing required at the administrative level, the circuit court's appellate review is limited to whether the action undertaken below was authorized by law.** *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991) (citation omitted). **The decision below must therefore be affirmed "unless it is in violation of statute, in excess of statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious."** *Id.* A decision is arbitrary if it is "fixed or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance," and it is capricious if it is "apt to change suddenly, freakish or whimsical." *Rosland Inn, Inc v McClain*, 118 Mich App 724, 728; 325 NW2d 551 (1982).
- Furthermore, "The reviewing court should not substitute its opinion for that of the administrative agency where there is the requisite evidence to support the administrative decision, notwithstanding that the court might have reached a different result had it been sitting as the agency." *Murphy*, 95 Mich App at 339-40 (internal citations omitted). Courts are indulgent toward administrative action to the extent of affirming an order where the agency's path can be "discerned." *Viculin v Dep't of Civil Serv*, 386 Mich 375, 406; 192 NW2d 449 (1971).

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- The first scoring denial appeal
- The Court held here that the applicable Standard of Review is:
  - Whether Appellees' decision was authorized by law, and whether the decision is supported by competent, material and substantial evidence on the whole record.
  - "Even in the most unflattering light to Appellees (which the Court notes is not the correct standard of review), the decision below is supported by the evidence, because the City Clerk and MMC conformed with the required appellate process, applied criteria in conformance with applicable statute, ordinances, and case law, and made a decision rationally based on the contents of Appellant's licensing application. Nothing in the record suggests impropriety, and the Appellee's decision is supported by competent, material, and substantial evidence."
- Procedural Due Process:
  - "Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property." *Kampf v Kampf*, 237 Mich App 377, 381-82 (1999).
  - Therefore, if no right is affected, there is no procedural due process violation.
  - Lansing Code of Ordinances, states that "[n]othing in this section is intended to confer a property or other right, duty, privilege or interest in a license of any kind or nature whatsoever including, but not limited to, any claim of entitlement." No other evidence, or any argument from Appellant, indicates an affected property or liberty right. For that reason, Appellant's procedural due process argument is unpersuasive.

Lessons Learned and Modifications to Chapter 1300 in light of the MRTMA

- Multi-step appeals
  - Pro: avoids erroneous licensure denials
  - Con: extremely long process and doesn't result in less litigation
  - Modification: Eliminate hearing officers and Medical Marihuana Commission. 1 step appeal to City Clerk for reconsideration.
- Zoning Board of Appeals
  - Pro: opportunity for applicant to locate in a good location, but for a distance issue.
  - Con: Board wanted NOTHING to do with marihuana. Variance deviated from Zoning Enabling Act.
  - Modification: Elimination of variance completely. Permit grandfathering of all existing locations.

Lessons Learned and Modifications to Chapter 1300 in light of the MRTMA

- Two-Phase Licensing
  - Pro: allows applicants opportunity to reapply if denied during earlier phase.
  - Con: longer application processing.
  - Modification: Amend to allow City Clerk to open licensing as needed. Amend to allow City Clerk to some discretion in awarding licensing.
  - "The clerk retains the right to award fewer licenses than the number available if the remaining license application scores fall below 75/100, however, no license shall be awarded to an applicant whose score falls below 60/100."
- Put heavy scoring preference to applicants who have obtained pre-qualification from the State.
- Regulate locations NOT licenses.
  - MCL 333.27959(4) If a municipality limits the number of marihuana establishments that may be licensed in the municipality pursuant to section 6 of this act and that limit prevents the department from issuing a state license to all applicants who meet the requirements of subsection 3 of this section, the municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality.

Keep An Eye Out For:

- Borello decision: Green Genie v. State of Michigan
  - Held that attestations to temporarily operate were "licenses" because it is an approval or form of permission required by law.
  - Therefore, "applicants" for a license had property interest for due process purposes.
  - Held that State could not require shutdown of failed applicants while appeal was still in-progress.
- Claims that the State appeals process must delay decision-making by a municipality.
  - Not true, MMFLA Emergency Rule 46 "An applicant denied a license by the agency may request a public hearing. . . ."
  - License from State and City are necessary. Denial from one inherently means denial from the other.