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Deciphering the Municipal Recreational Cannabis Licensing 'Competitive Process' Requirement

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The Michigan Regulation and Taxation of Marihuana Act (MRTMA) decriminalized the possession and use of cannabis, and provides for the legal production and sale of it.

MRTMA allows municipalities to completely prohibit or limit the number of cannabis establishments within their borders. MCL 333.27956(1).A municipality may also adopt ordinances that "are not unreasonably impracticable and do not conflict with [MRTMA] or with any rule promulgated pursuant to [MRTMA]." MCL 333.27956(2), (3). That includes ordinances "regulat[ing] the time, place, and manner of operation of marihuana establishments…" MCL 333.27956(2)(b). If a municipality limits the number of cannabis establishments within its borders, "the municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with [MRTMA] within the municipality." MCL 333.27959(4).

For those municipalities preferring a tempered approach to welcoming cannabis establishments into their communities by capping the number of available licenses, litigation by unsuccessful license applicants often follows. Often, those unsuccessful applicants frame their claims under the Michigan Open Meetings Act (claiming parts of the process improperly took place behind closed doors), the equal protection clause, and the due process clause. While those theories have largely been rejected by the Michigan Court of Appeals, what remains somewhat murky is the question of what a competitive process must look like in order to comply with MRTMA.

What factors can a municipality consider in its competitive process?

In several cases, unsuccessful applicants challenged the very criteria being considered by a municipality, arguing that the municipality could only consider those criteria bearing directly on the applicant's ability to comply with MRTMA. Those applicants argued that criteria like an applicant's potential environmental impact, how much it would pay its employees, or the amount of proposed investment in the community had no relation to the applicant's ability to comply with MRTMA and thus could not be considered. However, the Michigan Court of Appeals has rejected that argument.

In doing so, the appellate court has described this interpretation of MRTMA as too narrow because it ignores the full language of MRTMA which requires municipalities to "decide among competing applications by a competitive process intended to select applicants who are best suited to operate in

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compliance with [MRTMA] *within the municipality*." MCL 333.27959(4) (emphasis added).

The appellate court has concluded the "within the municipality" qualifier "permit[s] a municipality to craft criteria suited to its own local concerns, provided that the criteria conform to the other provisions of the MRTMA." *Yellow Tail Ventures, Inc v City of Berkley*, --- Mich App --- (2022). In *Yellow Tail*, the appellate court held that it was not improper for the city of Berkley to consider factors such as green infrastructure, sustainability, aesthetics and economic goals.

What must a competitive process look like, and how must a municipality make its decision?

With the question of what factors may be considered resolved, litigation has shifted its focus to the way in which a municipality's competitive process is designed and carried out. Issues often arise where the municipality employs the use of a scoring paradigm, typically a rubric of some sort with a number of factors and point values.

Applicants often challenge the point values awarded and, in those instances where the municipality does not award licenses based solely on scoring rank, the municipality's ultimate licensing decision. The claim is typically that the process was not truly competitive because the municipality made erroneous decisions on the awarding of points and/or made licensing decisions irrespective of scoring rank.

Importantly, MRTMA makes no mention whatsoever of scoring. That omission is important because in other states with legal cannabis where the intent was to have licensing decisions made solely on the basis of scoring criteria, that intent was made clear in the statute. See e.g. Nev. Admin. Code 453D.272(2) (requiring licenses be issued "to the highest-ranked applicants until the Department has issued the number of licenses authorized for issuance"); Mo. Code Regs. Ann. tit. 19, § 30-95.025(D)(1) (providing that "[w]hen the numerical scoring system is used, the highest ranked facilities for each type of facility and, for dispensaries, in each congressional district, will receive licenses or certifications"); Code Ark. R. 006.28.1-V(f) (providing that "[t]he highest ranking applicants in each zone, equal to the amount of available licenses in each zone, shall have the first opportunity to submit the required license fee and post the performance bond required under these rules for the available licenses").

The few opinions from the Michigan's appellate court on this topic have a common theme–deference to municipalities and a reluctance to second-guess their licensing decisions. Courts have essentially approved of any process that allows rival companies to apply for a limited number of licenses with the goal of selecting the applicants best suited to operate in compliance with MRTMA within the municipality. In a recent decision, the appellate court held that errors in the scoring of applications "is not an issue that a court may review" due at least in part to the fact that "the scoring of licensing

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applications is both a fact-intensive and discretionary process." *Blue Water Cannabis Company, LLC v City of Westland*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2023 (Docket No. 359144).

This same appellate court held that "[t]he weight given to each factor… and how the City Council eventually arrived at its decisions are not the type of matters that should be judicially reviewed. While the MRTMA provides that the licensing process before a municipality should be competitive, it does not establish standards that a court could apply that would not involve injecting itself into a municipality's discretionary evaluation of the applications."

Alternatives to developing a competitive process?

Despite the appellate court signaling a position of substantial deference to both the factors a municipality may consider and the way in which it creates and carries out its MRTMA-required competitive process, municipal officials often ask what options are available to both limit the availability of recreational marihuana establishments within a municipality while avoiding the competitive process requirement altogether.

If your community falls into this category, the best option employed to date has been to control through zoning. That is, the ordinance permitting cannabis establishments would contain no limitation on the number of licenses, but the municipality's zoning ordinance would limit establishments to certain zoning districts and include buffer-zone requirements. For example, that would prohibit establishments from being within a certain proximity of schools, churches, or other marihuana establishments.

Provided those zoning ordinance regulations do not otherwise conflict with MRTMA, this is a viable option and it is ostensibly the preferred approach as of late.

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