

CITY OF BERKLEY
Marihuana Business Ordinance
Recommendation of Hearing Officer

Applicant: **Bud McCool, Inc.**

File No. **PMA20-0002**

Date and Time
of Hearing: **December 10, 2021, 10:00 a.m.**

Points Awarded: **281**

Introduction.

The above appeal was heard at the Berkley City Council Chambers on December 10, 2021. Representing the City were Matthew Baumgarten, City Manager, and John Staran, City Attorney. Representing the Applicant was Brian Etzel and William DiSessa of Williams, Williams, Rattner & Plunkett.

Section 9 of the Michigan Regulation and Taxation of Marihuana Act, Initiated Law 1 of 2018 (MRTMA) requires a municipality that limits the number of marijuana establishments within its jurisdiction to decide among competing applications “by a competitive process intended to select applications who are best suited to operate in compliance with (MRTMA)...”. In furtherance of this statutory direction, the City adopted its Marihuana Businesses Ordinance (“Marihuana Ordinance”) and, within the Ordinance, provided for a merit point system. The purpose of the merit point system was to allow the City to draw meaningful distinctions between applicants as to the various point categories. Additionally, Code Section 30-806(c)(16) indicates that the point-based system shall include “other criteria” as indicated important for our consideration by any appropriate department of the city administration”. To that end, the City Manager, as an administrative agent of the City, has some discretion to make interpretations of the various criteria, to determine which applicants were best suited to operate in Berkley. This discretion should be upheld, unless the City Manager’s interpretation constitutes an abuse of discretion. It is generally accepted that administrative interpretations of statutes and ordinances are entitled to deference, based upon the expertise of the agency or individual charged with interpreting and administering the statute. As the legislative body which enacted the ordinance, of course, the City Council

ultimately must determine if the City Manager properly interpreted the criterion and properly exercised discretion.

Summary of Appeal.

The applicant requests points for the following:

- Marijuana operating experience in other jurisdiction – 5 points
- Eliminates or brings into compliance an existing nonconforming use or structure – 14 points (“nonconforming use”);
- Incorporates Green Infrastructure into Stormwater management plan, Green Roof – 4 points (“storm water management - green roof”);
- Other Scientifically backed storm water infrastructure systems – 2 points; and
- Does not require any zoning map amendments or variances at time of applications - 9 points (“no variances required”)

Summary of Recommendation.

The scoring of the City Manager should be affirmed.

Basis for Recommendation.

1. Marijuana Operating Experience in Other Jurisdiction.

The applicant was awarded twenty-one of a possible twenty-six points in the overall category for successful operation of a marijuana business but was denied these 5 points. The applicant contends that the resumes for Mr. Asmar and Mr. Lehr confirm their experience in operating marijuana establishments in California. The City responds that the materials provided demonstrate that Mr. Lehr and Mr. Asmar were able to demonstrate their history operating a marijuana business in Michigan but that the information regarding California was more limited to the development and licensure process and did not indicate proof of operating management experience for a period of at least one year. The information for Mr. Lehr demonstrates that he has been an advisor to licensing applications for sites in California. The resume provided (Exhibit B), similarly, indicated that he performed work for licensing applications. The letter from Keith Johnson (Exhibit C) similarly only states that Mr. Lehr assisted in licensing and ensuring regulatory compliance-not operations. None of this information demonstrates experience with operation for a period of at least one year in California. As to Mr. Asmar, the information submitted only indicates that he assisted Mr. Lehr in various operations, without reference to a jurisdiction, and assisted in setting up and licensing a grow operation in California under the ownership of Keith Johnson. As with

Mr. Lehr, this information does not demonstrate involvement with operations for a period of one year or more as required by the criteria. Accordingly, the City Manager did not abuse his discretion in failing to award points for this category.

2. *Nonconforming Use.*

This appeal puts a different twist on typical nonconforming use arguments. Generally, it is the City that is arguing against nonconforming use status, while the property owner seeks to establish same. Here, though, the City's position is that the use is not nonconforming, that the Blarney Stone's commercial use is clearly conforming and that the residential use has not been active in over two decades. The City is correct in that it is the burden of the property owner to establish nonconforming use status. The property owner must demonstrate that the residential use was in place prior to any changes in the Zoning Code that made that use illegal. While the applicant has indicated that the residential use continued for a period of years and provided evidence that at some point the property was so used, it provided no evidence as to when the change in Zoning Code was adopted or the status of the property at that point in time. Thus, for purposes of this appeal, the Hearing Officer accepts the City's determination that the property is currently conforming, and the City Manager did not abuse his discretion in failing to award points.

3. *Storm Water Management - Green Roof.*

The applicant contends that Bud McCool's proposed an environmentally mindful roofing system to replace the existing flat black roof, which satisfies Energy Star rating standards and includes spaces for mounted planters and plants, along with solar panels – some to be implemented now and some in the future. Because of these elements, the applicant claims it is entitled to the four points for the green roof.

The City agrees that the energy efficient white roof and solar panels are proposed; however, these elements were already considered in awarding the applicant thirteen points in the category of utilizing sustainable building materials and energy efficient elements. The use of the green roof in this portion of the Scoring System is under the heading of "Incorporates Reading Infrastructure into Stormwater Management Plan." In this regard, there were no details regarding a green roof related to stormwater management. Thus, the City Manager did not abuse his discretion in failing to award these points

4. *Other Scientifically Backed Infrastructure.*

The applicant contends that it is entitled to these points and references the stormwater management elements within its plans. City responds by saying that the applicant was awarded eleven points in other categories for these items. The applicant claims that nowhere did the City indicate that points could be awarded in only one category. However, given the intent to draw meaningful distinctions between applications, and that the standard of only allocating points in one category for one improvement was applied to all applicants, the Hearing Officer finds that the City Manager's

determination to award points in only one category for the same improvement was appropriate and not an abuse of discretion.

5. *No Variances Required.*

This is a very difficult issue. The applicant concedes that it erroneously presented materials that indicated that the top of the cupola exceeded the allowable height and would thus require a variance. Subsequently, it was determined that that notation on the original plans was in error, and, in fact, no variances were required. The applicant provided in its appeal materials from its architect clarifying the true height which would not require a variance. The applicant states that the error was obvious, and that the City should not rely on a proven typographical error.

Although this is a difficult factor, the City was justified in basing its scoring decisions on the materials that were submitted with the original application, erroneous or not. Many other applicants claimed errors in their original application that they sought to correct, and the City indicated that in all cases these attempts at corrections were denied. The City was required to review thousands of pages of materials in making its initial determinations and, in that context, it is reasonable for them to rely on the information provided by the applicants, whether erroneous or not. All the appeals and the determinations were based upon the original application materials. Additional post-application materials were not considered, and this process was utilized for all applicants. Accordingly, the City Manager did not abuse his discretion in declining to award these points.

Summary.

For the reasons set forth herein, my recommendation is that the City Manager's scoring be affirmed.

Respectfully submitted,



Gregory K. Need
Marihuana Hearing Officer

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