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THE CURCIO LAW FIRM

Attorney Memorandum[1]

To: Garland Doyle, Pontiac City Clerk

From: Nick Curcio, Attorney

Re: Locational Requirements for Marijuana Growers and Processors

Date: March 9, 2021

In 2019, the City of Pontiac adopted Ordinance Number 2363 to establish zoning requirements for medical marijuana facilities.[2] Among other things, the ordinance establishes three medical marijuana overlay districts (MMODs), known as the Walton Boulevard MMOD, the Cesar Chavez MMOD, and the C-2 downtown MMOD. The stated purpose of MMODs is to "provide for the placement of Medical Marihuana[3] related uses . . . with a goal of minimizing potential adverse impacts on adjacent property owners, neighbors, and the City."[4] Over the last year, questions have arisen as to whether, and in what circumstances, the zoning ordinance allows parcels outside the MMODs to be approved for marijuana-related uses. To help clarify this issue, you asked for my opinion as to whether the Planning Commission is authorized to grant a special exception permit for a marijuana grower or processor at a location outside of the MMODs. You also asked if a conditional rezoning agreement could authorize the Planning Commission to do so, without rezoning the property in question to be part of an MMOD.

For the reasons described below, I believe the answer to both of those questions is "no." If called upon to interpret the City's zoning ordinances, a reviewing court would likely conclude that the MMODs are the exclusive locations in the City where growers and processors can legally operate. While the zoning ordinance expressly allows other

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[1] This memo is one of several that you asked me to prepare as your privately retained legal counsel. During our initial consultation, you explained to me that you felt pressured to take actions in your role as City Clerk that you believed to be contrary to applicable law. Accordingly, you asked for my opinion on various legal issues to help you decide how to respond to those pressures. Please note that I do not represent or have any relationship with the City of Pontiac. Pursuant to Section 4.202(a) of the Pontiac City Charter, the City Attorney is responsible for "supervising the conduct of all the legal business of the City and its departments."

[2] The statements of fact in this opinion are based primarily on your representations to me during our initial consultation. For the most part, I have not independently verified those representations.

[3] Notably, both the City's zoning ordinance and various state statutes use an antiquated spelling of "marijuana" that includes an "h" instead of a "j." This memo uses the more modern spelling except where quoting directly from ordinance or statutory text.

[4] Pontiac Zoning Ordinance § 3.1101.

types of medical marijuana facilities to be located outside of the MMODs subject to a special exception permit, it makes no such allowance for grower and processor uses. Accordingly, the City cannot reasonably interpret the zoning ordinance to provide such an allowance, nor can it create such an allowance through a contract with a private party. Rather, the only scenarios in which a parcel that is currently outside of an MMOD could be lawfully approved for grower or processor uses would be if: (1) the parcel is rezoned to be within an MMOD; or (2) the City amends the zoning ordinance to allow medical marijuana growers and processors in other locations, either as permitted uses or special exception uses.

By way of further explanation, there are several sections of the zoning ordinance that are relevant to answering the question posed above. First, section 2.201 explains the distinction between the different designations for zoning uses in the City of Pontiac. A "permitted use" is one that is clearly compatible with a given zoning district and therefore "require[s] a minimum of limitations." Permitted uses are allowed "by right," subject only to site plan review to the extent required by section 6.202. A "special exception use," by contrast, is a use "presenting potential injurious effect upon residential and other property, unless authorized under specific imposed conditions." In particular, special exception uses require a special exception permit issued by the Planning Commission pursuant to a more rigorous review process provided in article 6, chapter 3 of the zoning ordinance. If the zoning ordinance does not authorize a defined use as either a permitted use or a special exception use in a particular zoning district, section 2.202 provides that the use is prohibited in that district.

Pursuant to section 2.204 of the zoning ordinance, a table labeled "Table 2" lists "the uses that may be permitted in each zoning district." In doing so, it uses different symbols to distinguish uses that are permitted by right from those that require a special exception permit. Among other things, Ordinance Number 2363 amends Table 2 to include five different types of medical marijuana facilities, each of which is defined and

authorized by the Michigan Medical Marihuana Facilities Licensing Act. The new sections of Table 2 appear as follows:

Commercial, Office, and Service Uses												
	Residential Districts			Commercial Districts					Industrial Districts			
	R-1	R-2	R-3	C-0	C-1	C-2	C-3	C-4	M-1	M-2	IP-1	
Medical Marihuana Grower									o	o	o	Section 2.544
Medical Marihuana Processor									o	o	o	Section 2.545
Medical Marihuana Provisioning Centers					*	o	o*	*	o	o		Section 2.546
Medical Marihuana Safety Compliance Facility					*	o	o*	*	o*	o*	o	Section 2.547
Medical Marihuana Secure Transporter					*	o	o*	*	o*	o*	o	Section 2.548

*Special Exception Permit Uses outside the Medical Marihuana Overlay Districts

o Principal Permitted Uses in the Medical Marihuana Overlay Districts

As shown above, the rows in the table for grower and processor uses are identical, with both having a circle symbol (○) in the M-1, M-2, and IP-1 columns. According to the key below the table, that symbol indicates that a use is a principal permitted use in the MMODs. In otherwords, when a parcel is zoned M-1, M-2, or IP-1 with an MMOD overlay designation, grower and processor uses are permitted by right. Notably, the rows in the table for grower and processor uses do not include any asterix symbols (*), which indicate that a use can be authorized via special exception permit for parcels outside the MMODs. By contrast, the rows for the other three types of medical marijuana uses contain asterix symbols in various columns.

In addition to Table 2, there are several other sections in the zoning ordinance that are potentially relevant to the question posed. For each use type, Ordinance Number 2363 creates a new zoning section that provides locational and other regulatory requirements. For example, section 2.544 pertains to grower facilities, and states in a subsection entitled "Licensing" that "Medical Marihuana Grower uses are not permitted

outside the Cesar Chavez and Walton Blvd Medical Marihuana Overlay Districts." Section 2.545 pertains to processors and has a nearly identical provision. By contrast, sections 2.546, 2.547, and 2.548, which pertain to provisioning centers, safety compliance facilities, and secure transporters, respectively, state that each of those uses may be located outside of the MMODs. For example, section 2.546 states: "No More than five (5) Provisioning Centers shall be established in the C-1, C-3, and C-4 zoned properties combined outside the Medical Marihuana Overlay Districts." Sections 2.547 and 2.548 include similar language.

The final relevant section of Ordinance Number 2363 is section 3.1106, which provides: "Medical Marihuana uses outside the Medical Marihuana Overlay Districts are subject to Planning Commission approval following the Standards for Approval of Section 6.303 for Special Exception Permits, and Article 2, Chapter S, Development Standards for Specific Uses."

In my opinion, these sections collectively indicate that growers and processors can only be located in the MMODs, where they are permitted by right. I understand that some have suggested otherwise, asserting that section 3.1106 allows all five types of medical marijuana uses to locate outside of the MMODs if the Planning Commission approves a given location by issuing a special exception permit. This reading of the ordinance is contrary to two principal rules of legal interpretation, and therefore is not legally viable. First, when possible, courts must "give every word meaning, and should seek to avoid any construction that renders any part of a statute surplus or ineffectual."[5] As the Supreme Court has explained, "when there is tension, or even conflict, between sections of a statute, this Court has a duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them."[6] Here, if section 3.1106 is read to allow all five types of medical marijuana uses to locate outside of the MMODs, the sections of the ordinance that expressly prohibit growers and processors from locating outside of the MMODs (*i.e.*, Table 2 and sections 2.544 and 2.545) would be superfluous and ineffectual. On the other hand, all of the relevant sections can be easily harmonized by reading section 3.1106 more narrowly, so that its reference to "Medical Marihuana uses outside the Medical Marihuana Overlay Districts" refers only to the

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[5] *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 2003).
[6] *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002).

three specific types of uses that are expressly allowed to locate outside of the MMODs pursuant to other sections (*i.e.*, provisioning centers, safety compliance facilities, and secure transporters). This reading is perfectly consistent with the text of the ordinance, in that it does not require giving any words or phrases irregular meanings.

A second relevant principal of interpretation is that when two sections of a statute or ordinance are in conflict with each other, the more specific provision takes precedence over the more general one.[7] This rule is thought to help courts give effect to the legislature's intent, on the theory that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."[8] Here, to the extent that the various provisions of the zoning ordinance are in conflict with each other, the provisions that directly address the locational requirements for growers and processors are more specific than section 3.1106, which refers to medical marijuana uses more generally. Accordingly, a court would likely find that the more specific provisions that prohibit growers and processors from locating outside of the MMODs take precedence over any language in section 3.1106 that might suggest otherwise.

Aside from the interpretive issue involving section 3.1106, some have suggested that the Court of Appeals's decision in *Reilly v Marion Township*[9] empowers the Planning Commission to grant special exception permits for growers and processors outside of the MMODs, even if the text of the ordinance does not do so. This suggestion is based on a fundamental misunderstanding of the holding in *Reilly*. In that case, the Court considered a narrow issue of interpretation involving the Marion Township zoning ordinance: whether the zoning board was authorized to grant a special exception permit for a commercial trucking operation even though commercial trucking was not specifically listed in the zoning ordinance as a special exception use permitted in any zoning district.[10] The court concluded that the zoning board had the power to do so, because language in the ordinance specifically "empowered [the board] to add to the list

[7] *See, e.g.*, *Bruwer v Oaks* (On Remand), 218 Mich App 392, 396; 554 NW2d 345 (1996).
[8] Scalia & Garner, Reading Law: The Interpretation of Legal Texts (St. Paul: Thomson/West, 2012), p 183.
[9] 113 Mich App 584, 317 NW2d 693 (1982).
[10] *Id.* at 588-589.

of special use exceptions those exceptions deemed necessary to protect adjacent properties, the general neighborhood, and its residents and workers."[11]

There are at least three reasons why the decision in *Reilly* has no bearing on the question you posed above. First, unlike the ordinance in *Reilly*, the Pontiac Zoning Ordinance is not silent as to whether the various medical marijuana facilities are allowed as special exception uses. Rather, Table 2 and other sections of the ordinance specifically indicates that some are and some are not. This fact alone distinguishes the present circumstance from *Reilly*. Second, also unlike the ordinance in *Reilly*, the Pontiac Zoning Ordinance does not include any language indicating that the Planning Commission can add to the list of uses that are permitted by special exception permit. Third, it is questionable whether *Reilly* remains good law after the passage of the Michigan Zoning Enabling Act (MZEA). In *Whitman v Gallien Township*,[12] the Court of Appeals held that the MZEA, which was enacted in 2006, "require[es] that a zoning ordinance specifically enumerate the land uses and activities that are eligible for special-use status."[13] In doing so, the court seemed to indicate that the open-ended list of special exception uses at issue in the *Reilly* may not comply with the new requirements in the MZEA.[14]

Finally, some have suggested that the City can allow growers and processors to locate outside of the MMODs by entering into conditional rezoning agreements wherein the City agrees to rezone a parcel to a zoning designation that does not ordinarily allow growers or processors (*i.e.*, a zoning designation outside of the MMODs), but then provides in the agreement that the parcel can be used as a grower or processor via a special exception permit. In my opinion, the MZEA does not allow this type of arrangement. The relevant provision of the MZEA authorizes conditional rezoning agreements by providing that "[a]n owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map."[15] When used in the zoning context, the word "condition" refers to a "limitation[] on the use of the land and to protect nearby owners."[16] Accordingly, the purpose of a conditional rezoning

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[11] *Id.* at 588.
[12] 288 Mich App 672; 808 NW2d 9 (2010).
[13] *Id.* at 17.
[14] *Id.*
[15] MCL 125.3405.
[16] *City of Troy v Aslanian*, 170 Mich App 523, 528; 428 NW2d 703 (1988).

agreement is to place ***additional limitations*** on a specific parcel that would not otherwise exist under the zoning designation to which the property is being rezoned. For example, a community might choose to rezone a residential parcel to a commercial designation, but then provide by agreement that the parcel can only be used for a lower-intensity commercial use, like an ice cream store, rather than for any of the commercial uses ordinarily permitted in the district.[17] Importantly, nothing in the text of the statute indicates that a rezoning agreement can authorize a property owner to engage in uses that are not allowed in the zoning district to which the parcel is being rezoned. Such an arrangement is inconsistent with the common understanding of the word "condition," which refers to imposition of additional limitations rather than granting of additional rights. Therefore, if the City wishes to use conditional rezoning to allow growers or processors in new locations, the only permissible way to do so would be to rezone the parcel in question to an MMOD zoning designation. A reviewing court would likely determine that a rezoning agreement that rezones a parcel to a different zoning designation, outside of an MMOD, cannot authorize grower or processor uses to operate via special exception permit.

I hope this memo sufficiently answers your question. Please let me know if there is anything further I can do to assist with this issue.

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[17] As one prominent commentator has explained, "To reduce controversy or concerns the applicant might volunteer to condition the zoning amendment to restrict the use of the parcel(s) to only a specific certain land use. For example an ice cream store rather than all the possible land uses in a commercial district. If the zoning amendment is approved something like a deed restriction is placed on the parcel so that only the restricted uses of the parcel are possible." Kurt H. Schindler, Michigan State University Extension, "All zoning does not have to include everything in the Michigan Zoning Enabling Act," August 19, 2015