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Date: December 29, 2020 at 12:41:00 PM EST
To: "Markee, Kimberly" <kmarkee@waterfordmi.gov>
Subject: Marihuana Question

Good afternoon. I have a question about Section 10-301(b)(24) of the Ordinance, and I understand that this question and the response will be posted on the website.

Does the preemptive FOIA waiver apply only if the applicant challenges a licensing decision? In other words, if applicant X applies and either obtains a license or doesn't obtain a license, but X never challenges a licensing decision, has X waived the FOIA exemption such that its application materials would be produced to anyone who requests them under FOIA?

Regards,

Kevin

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TOWNSHIP RESPONSE

In MCL 15.243(1), the Freedom of Information Act (FOIA) identifies public records that a public body may exempt from disclosure, with subsection (d) allowing exemption of records or information specifically described and exempted from disclosure by statute. The Township considers MCL 333.27205(4), which exempts information a municipality obtains from an applicant from disclosure under FOIA, to be such a statute, meaning that the Township could, but would not be required to exempt that information from disclosure if it was the subject of a FOIA request.

The Township does not know if applicants for a Township medical marihuana facility license will agree that under FOIA, MCL 333.27205(4), allows, but does not require information submitted to the Township to be exempted from disclosure. The waiver required as part of a license application under Ordinance Section 10-301(b)(24) is to protect against claims by applicants that MCL 333.27305(4) prohibits disclosure of information submitted to the Township. Such a position would be in conflict with Ordinance Sections 10-304(b) and 10-307 which provide that the application for a license is part of the record for license decisions and that the limited right of appeal from such decisions is to be based on the record.

Consistent with the purpose of the waiver, it would only be applicable if a Township decision on an applicant's license application is challenged in a court or governmental administrative proceeding. The waiver is not limited to a challenge by the Named Applicant. It would also apply if the challenge was by a person or entity other than the Named Applicant.

The waiver would not apply to just a FOIA request, with Ordinance Section 10-302(b) confirming that license applications will be exempt from disclosure under FOIA at least through the point that they are submitted to the Township Board for a meeting at which the application will be considered.

Although the waiver required by Ordinance Section 10-301(b)(24) must be unconditional, the Township will not reject a waiver as incomplete because it contains a reservation of the Named Applicant's right in any court or administrative proceeding challenging a Township decision, to seek a protective order for application information the Named Applicant maintains should not be publicly disclosed.

Finally, Ordinance Section 10-301(b)(25) allows an Application for a facility license to include, "Any other information the Named Applicant wants the Township Board or Township Personnel involved in reviewing and providing reports on the application to consider." Use of that option would be the proper manner for presentation of concerns or claims of confidentiality regarding any information being submitted in response to the application requirements of Section 10-301(b).