No. 22-1441

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREEN GENIE, INC. and ALVIN ALOSACHI,

Plaintiffs–Appellants,

v.

CITY OF DETROIT, CITY OF DETROIT BOARD OF ZONING APPEALS, and CITY OF DETROIT BUILDINGS, SAFETY ENGINEERING AND ENVIRONMENTAL DEPARTMENT

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan
No. 2:21-cv-10790
Honorable David M. Lawson

PLAINTIFFS-APPELLANTS' PRINCIPAL BRIEF ON APPEAL

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CORPORATE DISCLOSURE

Pursuant to 6th Cir. Rule 26.1, counsel for Appellants hereby makes the following disclosures:

1. Are Appellants a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF AUTHORITIES iv

STATEMENT IN SUPPORT OF ORAL ARGUMENT vi

STATEMENT OF JURISDICTION vii

STATEMENT OF ISSUES viii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 4

A. Relevant Factual Background 4

1. Green Genie attempts to open a lawful business 4

2. The definition of "drug-free zone" in the Detroit City Code 5

3. The unrefuted evidence confirming Green Genie's proposed facility is not within a "drug-free zone" 6

B. Relevant Procedural History 8

III. SUMMARY OF THE ARGUMENT 9

IV. STANDARD OF REVIEW 10

V. ARGUMENT 11

A. Green Genie Established a Genuine Issue of Material Fact on Its Procedural Due Process Claim 11

1. Green Genie established the deprivation of its protected property right under the Detroit City Code to have its application transferred to the MMFRC as a matter of course 12

2. The district court ignored the evidence offered by Green Genie that, when viewed in its favor as it must be,

establishes a genuine issue of material fact on the issue of whether its proposed facility met all locational specifications.....15

B. A Genuine Issue of Material Fact Exists as to Green Genie's Substantive Due Process Claim.....17

C. Green Genie's Equal Protection Claim Should Not Have Been Dismissed on Summary Judgment.....20

D. The Pending Michigan State Court Action Does Not Change the Multiple Genuine Issues of Material Fact that Exist.....25

VI. CONCLUSION.....26

CERTIFICATE OF COMPLIANCE.....27

CERTIFICATE OF SERVICE.....28

DESIGNATION OF RECORD ON APPEAL.....29

TABLE OF AUTHORITIES

CASES

Andreano v. City of Westlake,
136 F. App'x 865 (6th Cir. 2005).....17

Bluegrass Dutch Trust Morehead, LLC v. Rowan County Fiscal Court,
734 F. App'x 322 (6th Cir. 2018).....21

Brody v. City of Mason,
250 F.3d 432 (6th Cir. 2001).....18

EJS Props., LLC v. City of Toledo,
698 F.3d 845 (6th Cir. 2012).....21

G.M. Eng'rs and Assocs., Inc. v. West Bloomfield Twp.,
922 F.2d 328 (6th Cir. 1991).....17

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 21

Hasanaj v. Detroit Pub. Sch. Cmty. Dist.,
35 F.4th 437 (6th Cir. 2022).....11

Johnson v. City of Saginaw, Michigan,
980 F.3d 497 (6th Cir. 2020).....17

Kelly Servs., Inc. v. Creative Harbor, LLC,
846 F.3d 857 (6th Cir. 2017).....7

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020).....11

NOCO Co. v. OJ Com., LLC,
35 F. 4th 475 (6th Cir. 2022).....10

Ohio State Univ. v. Redbubble, Inc.,
989 F.3d 435 (6th Cir. 2021 10

Paterek v. Village of Armada,
801 F.3d 630 (6th Cir. 2015).....18

Ritz v. City of Findlay, Ohio,
No. 3:07 CV 3716, 2009 WL 1954635 (N.D. Ohio July 6, 2009)..... 13, 14, 15

Village of Willowbrook v. Olech,
582 U.S. 562 (2000) 20, 23

Weaver v. Shopsmith, Inc.,
556 F. Supp. 348 (S.D. Ohio 1982).....21

STATUTES

28 U.S.C. § 1291 vii

42 U.S.C. § 1983 8

OTHER AUTHORITIES

Detroit City Code, § 50-16-172 5

Detroit City Code, § 50-16-284 5

Detroit City Code, § 50-16-381 5

Detroit City Code, § 50-3-535 ..... passim

Detroit City Code, § 50-3-536 ..... 1, 4, 12, 14

RULES

6th Cir. R. 30(g) 29

6th Cir. R. 32(b)(1) 27

6th Cir. Rule 26.1 i

Fed. R. App. P. 32(a)(7).....27

Fed. R. Civ. P. 30(b)(6)..... passim

Fed. R. Civ. P. 56(a).....10

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff/Appellants Green Genie, Inc. and Alvin Alosachi (collectively, "Green Genie") request the opportunity to present oral argument. The facts giving rise to this dispute have spanned the course of multiple years. Oral argument would assist the panel in understanding the factual background and procedural history. This case also involves significant constitutional questions relating to the Defendants/Appellees' (collectively, the "City of Detroit") unequal application of its zoning ordinances that prevented Green Genie from opening a medical marihuana provisioning center. Given the significance of the issues involved, oral argument will assist the panel in understanding the constitutional issues at stake.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

On April 18, 2022, the district court entered its Opinion and Order Granting the City of Detroit's Motion for Summary Judgment. R. 23. On the same date, the district court dismissed Green Genie's complaint in its entirety and entered a final judgment. R. 24.

On May 16, 2022, within 30 days of the final judgment, Green Genie filed this timely appeal. R. 25, Notice of Appeal, Page ID # 938–39. Accordingly, the Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Has Green Genie established a genuine issue of material fact for its procedural due process claim where: (1) the only evidence in the record confirms that Green Genie's proposed facility complies with all locational specifications; and (2) the Detroit City Code mandated transferring Green Genie's application to operate a medical marihuana provisioning center to the City's Medical Marihuana Facility Review Committee?

II. Did Green Genie establish a substantive due process claim where, at a minimum, genuine issues of material fact existed as to whether the City of Detroit acted arbitrarily and capriciously in denying Green Genie's application?

III. Should the district court have granted the City of Detroit's motion for summary judgment as to Green Genie's equal protection claim where: (1) it is undisputed (the City of Detroit admitted) that the City has treated over 66% of similarly situated applicants differently, and (2) the City of Detroit deliberately refused to "correct" what it now claims are "errors" such that genuine issues of material fact exist as to whether the uncorrected "errors" are truly errors?

I. INTRODUCTION

The district court erred in granting summary judgment to the City of Detroit on all claims for the following three reasons.

Procedural Due Process. First, the district court erred in concluding that there were no genuine issues of material fact on Green Genie's procedural due process claim. The Detroit City Code mandates that, "[u]pon a determination that the proposed location complies with the locational specifications set forth in Section 50-3-535 of this code, the Buildings, Safety Engineering, and Environmental Department [BSEED] **shall transfer** the application package to the Medical Marihuana Facility Review Committee [MMFRC]." *See* R. 18-1, Excerpts from Detroit City Code, at § 50-3-536(c), Page ID # 436 (emphasis added). Green Genie offered unrefuted evidence that its proposed facility complies with all locational specifications—specifically, that it was not within 1,000 feet of a school—and, therefore, that the City of Detroit was mandated under § 50-3-536(c) to transfer Green Genie's application package to the MMFRC. The district court ignored this altogether.

The sole **evidence** offered to prove the distance between Green Genie's proposed facility and the nearest school was over 1,000 feet is a professional survey offered by Green Genie. *See* R. 14-18, Def's. Mot. for Summ. J., Ex. Q, Campbell Surveying Professional Survey, Page ID # 329; R.18-2, Declr. of A. Alosachi, at ¶¶

3–5, Page ID # 444–45. The City of Detroit never procured any counter-survey, nor did it come forward with any **admissible evidence** contesting the accuracy of Green Genie's survey. To the contrary, prior to this litigation, the City of Detroit's Rule 30(b)(6) representative, Jayda Philson, confirmed that the professional survey "is correct in the measurement provided" and that "**[t]he measurement to the proposed provisioning center facility to the school is over 1,000 feet**." R. 18-3, 7/20/2020 Letter to BZA, Page ID # 447 (emphasis added). Ms. Philson also confirmed as much at her Rule 30(b)(6) deposition. R. 18-5, J. Philson Dep. Tr., at p. 26, ll. 10–16, Page ID # 458. *See also id.* at p. 25, ll. 14–21, Page ID # 457.

Because the only admissible evidence of record confirms that Green Genie's proposed location complies with all locational specifications, the district court reversibly erred in dismissing the procedural due process claim. At worst for Green Genie, the evidence, including the City of Detroit's admissions, creates a genuine issue of material fact on the procedural due process claim. This Court must reverse the district court's decision and reinstate the procedural due process claim.

Substantive Due Process. Second, the district court inappropriately dismissed the substantive due process claim. Green Genie offered evidence that, when viewed in a light most favorable to Green Genie, confirms that the City of Detroit acted arbitrarily and capriciously in denying Green Genie's application. The City of Detroit conceded that it did not even attempt to verify the accuracy of the

determination that Green Genie's proposed facility fell within a "drug-free zone." Instead, the City of Detroit simply looked at "Google Maps" on the Internet and "hoped" that what they were doing was correct. Such willful blindness as to whether the City of Detroit was engaging in an appropriate measurement, at a minimum, creates a genuine issue of material fact for trial. The district court erred in holding that, when the evidence is viewed in a light most favorable to Green Genie, the City of Detroit acted rationally. The only way the district court reached this erroneous conclusion is by ignoring the evidence and refusing to consider it in a light most favorable to Green Genie, as required by the Federal Rules and well settled case law.

Equal Protection. Finally, the district court erred in concluding that, because the City of Detroit purportedly "reasonably constructed" the terms of the Detroit City Code and applied them, Green Genie could not proceed with an equal protection claim. Regardless of how the City of Detroit interpreted the Detroit City Code, the undisputed evidence confirms that the City treated at least two other similarly situated applicants differently than Green Genie. In other words, the City of Detroit treated over 66% of similarly situated applicants (two out of three) differently than Green Genie. And despite now arguing that this differential treatment is the result of "mistakes" the City made, intent is a question of fact for trial. Indeed, this is especially true where Green Genie offered evidence contradicting the City's argument that "mistakes" occurred. The evidence confirms that the City of Detroit

was willfully blind to engaging in an appropriate measurement, knowingly treated 66% of similarly situated applicants differently, and, despite now knowing that applicants have been treated differently, has not done anything to fix the differential treatment. Summary judgment therefore should not have been granted on this record.

II. STATEMENT OF THE CASE

A. Relevant Factual Background

1. Green Genie attempts to open a lawful business

This case began with Green Genie seeking to operate a licensed medicinal marihuana production facility in the City of Detroit. *See* R. 14-3, Ex. B to Def's. Mot. for Summ. J., Medical Marihuana Facilities Application, Page ID # 220–21. To open such a facility, Green Genie was required to follow the Detroit City Code, § 50-3-536. *See generally* R. 18-1**,** Excerpts from Detroit City Code. The first step is applying through the City's application portal. *Id.* at § 536(a), Page ID # 436. Once the City receives the application, the BSEED "shall determine whether the proposed location complies with the location specification set forth in Section 50-3-535." *Id.* at § 536(b), Page ID # 436.

Here, upon an initial review of Green Genie's application, BSEED improperly determined that Green Genie's proposed facility violated § 50-3-535(b)(1) as purportedly being located "[w]ithin a drug-free zone." This resulted in BSEED

recommending, and the zoning board later agreeing, that Green Genie's application be denied as falling within 1,000 feet of the St. Clare of Montefalco School in Grosse Pointe Park. R. 14-4, Def's. Mot. for Summ. J., Ex. C, Denial Letter, Page ID # 225.

2. The definition of "drug-free zone" in the Detroit City Code

Under the applicable Detroit City Code provision, a marihuana facility cannot be located within a "drug-free zone." R. 18-1, Excerpts of Detroit City Code, at § 50-3-535(b)(1), Page ID # 435. The Detroit City Code defines, in relevant part, a "drug-free zone" as "[a]n area that is within 1,000 radial feet of the zoning lot of: . . . [a] school, as defined in Section 50-16-381 of this Code." *Id.* at § 50-16-172, Page ID # 437. A zoning lot is defined in turn as:

> A single tract of land located within a single block that at the time of filing for a building permit is designated by its owner or developer as a tract to be used, developed, or built upon as a unit under single or unified ownership or control. Such lot shall have frontage on a street, or permanent means of access to a street, other than an alley, and may consist of:
>
> (1) A single lot of record;
> (2) A portion of a lot of record;
> (3) A combination of complete lots of record, of complete lots of record and portions of lots of record, or of portions of lots of record;
> (4) A parcel of land described by metes and bounds.

Id. at § 50-16-284, Page ID # 438. As explained above, if a marihuana facility complies with the specifications set forth in § 50-3-535, then BSEED "**shall transfer** the application package to the Medical Marihuana Facility Review Committee ("MMFRC")." *Id.* at § 50-3-536(c), Page ID # 436, (emphasis added).

3. The unrefuted evidence confirming Green Genie's proposed facility is not within a "drug-free zone"

It is undisputed that Green Genie's proposed facility is not within a defined "drug-free zone" because it is not within 1,000 radial feet of the nearest school.

First, the *only* evidence on this point is a professional survey that confirms that Green Genie's proposed facility is over 1,000 feet away from the nearest school. *See* R. 14-18, Def's. Mot. for Summ. J., Ex. Q, Campbell Surveying Professional Survey, Page ID # 329; R. 18-2 Declr. of A. Alosachi, at ¶¶ 3–5, Page ID # 444–45. The City of Detroit has never offered any contrary **evidence**. The City of Detroit never obtained a professional survey or otherwise offered admissible evidence as to the measurement between the proposed facility and nearest school.

Second, not only did the City of Detroit fail to come forward with evidence that contradicts the professional survey offered as evidence by Green Genie, the City's Rule 30(b)(6) representative, Ms. Philson, confirmed in correspondence to the BZA prior to this litigation that the professional survey "is correct in the measurement provided" and that "**[t]he measurement to the proposed provisioning center facility to the school is over 1,000 feet**." R. 18-3, July 20, 2020 J. Philson Letter to BZA, Page ID # 447 (emphasis added). And at her Rule 30(b)(6) deposition, Ms. Philson admitted:

> Q. You actually wrote at the bottom of, the last sentence of your letter confirms this too. The measurements to the proposed

provisioning center facility to the school is over a thousand feet. You wrote that; right?

A. Yes, I did.

Q. And it's true, right?

A. It's over a thousand feet, yes.

R. 18-5, J. Philson Dep. Tr., at p. 26, ll. 10–16, Page ID # 458. *See also id.* at p. 25, ll. 14–21, Page ID # 457. Ms. Philson was designated as the City of Detroit's Rule 30(b)(6) designee, and, therefore, her testimony is binding on the City of Detroit. *Kelly Servs., Inc. v. Creative Harbor, LLC*, 846 F.3d 857, 867 (6th Cir. 2017) (noting that a Rule 30(b)(6) deponent's testimony is binding on the entity that produced the Rule 30(b)(6) deponent).

Third, the Wayne County Circuit Court held that the City of Detroit's proposed facility "is not within the area of a drug-free zone, not within a thousand feet if measured from the facility to the nearest lot on which the school is located." R. 18-6, 1/28/2021 Wayne County Circuit Court Motion Hearing Tr., at p. 3, ll. 18–21, Page ID # 487.

Had inspectors from BSEED conducted any actual investigation, they would have determined that the school was more than 1,000 away from the proposed facility, and thus not in the "drug-free zone." But BSEED inspectors could not determine the actual lot lines for the school in question because they were not within the City of Detroit, and the zoning maps they use "only lets [them] see what's in the

[C]ity of Detroit." R. 18-5 J. Philson Dep. Tr., at p. 16, ll. 20–23, Page ID # 455. In fact, BSEED inspector and Rule 30(b)(6) designee, Ms. Philson, admitted that she "never actually looked at the actual property line because [she] d[i]dn't know what it was." *Id.* at p. 17, ll. 2–4, Page ID # 455. Ms. Philson further testified as follows:

> Q. Did you do any investigation like send somebody out to go look so there's a physical reviewing of the property?
>
> A. No.
>
> Q. Did you call anyone from Grosse Pointe and say hey, can you send us a map, we need to see what the property line of the school is?
>
> A. No.

Id. at p. 17, ll. 9–16, Page ID # 455. Ms. Philson also testified that if BSEED is measuring to a property outside Detroit, such as in this case, BSEED simply engages in "a Google map search and hope[s] [it] got it right." *Id.* at p. 46, ll. 16–18, Page ID # 463.

B. Relevant Procedural History

Green Genie filed the operative complaint on April 8, 2021. R. 1, Compl. The complaint contains three counts: Count I- Violation of 42 U.S.C. § 1983 – Equal Protection under the Fourteenth Amendment; Count II- Violation of 42 U.S.C. § 1983 – Due Process under the Fourteenth Amendment; and County III- Declaratory Judgment. *Id.*

On December 3, 2021, the City of Detroit moved for summary judgment. R. 14, Defs.' Mot. for Summ. J. Green Genie filed a response, R. 18, and the City of Detroit filed a reply, R. 20. The district court also entertained oral argument on the motion. R. 22, Summ. J. Hearing Tr.

On April 18, 2022, the district court entered its Opinion and Order Granting Defendants' Motion for Summary Judgment. R. 23, Op. and Order Granting Defs.' Mot. for Summ. J. The district court dismissed the complaint in its entirety and entered a judgment on the same day. R. 24, J.

On May 25, 2022, Green Genie filed its timely notice of appeal. R. 25, Notice of Appeal.

III. SUMMARY OF THE ARGUMENT

The district court improperly granted summary judgment by ignoring the evidence and refusing to draw all reasonable inferences in favor of Green Genie as the non-moving party. This Court must reverse.

First, the district court erred in concluding that there were no genuine issues of material fact on Green Genie's procedural due process claim. Green Genie offered undisputed evidence that, when viewed in a light most favorable to it, confirms that its proposed facility complies with all locational specifications, and, therefore, that its application should have been forwarded to the MMFRC under the Detroit City Code.

Second, the district court inappropriately dismissed the substantive due process claim. Green Genie offered evidence that, when viewed in a light most favorable to Green Genie, confirms that the City of Detroit acted arbitrarily and capriciously in denying Green Genie's application.

Finally, the district court erred in dismissing the equal protection claim. The undisputed evidence confirms that the City treated at least two other similarly situated applicants differently than Green Genie. In other words, the City of Detroit treated over 66% of similarly situated applicants (two out of three) differently than Green Genie. At the very least, this should have resulted in the denial of summary judgment on this claim as there is a material question of fact as to whether the City's defense of "mistake" is viable, especially when the City never corrected its alleged "mistake."

IV. STANDARD OF REVIEW

The Court "review[s] a grant of summary judgment de novo." *NOCO Co. v. OJ Com., LLC*, 35 F. 4th 475, 481 (6th Cir. 2022) (citing *Ohio State Univ. v. Redbubble, Inc.*, 989 F.3d 435, 411 (6th Cir. 2021)). "Summary judgment is appropriate if the movant . . . 'shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). Finally, on appeal, just as the district court is required to do,

the Court "view[s] the evidence in the light most favorable to the nonmoving party." *Id.* (citing *Mays v. LaRose*, 951 F.3d 775, 783 (6th Cir. 2020)).

V. ARGUMENT

The district court's decision ignores the applicable summary judgment standard and the evidence that, when viewed in a light most favorable to Green Genie, should have resulted in denial of the City of Detroit's motion for summary judgment. The only possible way the district court's decision can be affirmed is by ignoring the evidence offered by Green Genie and drawing all inferences in favor of the moving party—the City of Detroit. This is improper and it is precisely what led the district court to inappropriately grant summary judgment in this case. The Court should reverse the district court's decision in its entirety.

A. Green Genie Established a Genuine Issue of Material Fact on Its Procedural Due Process Claim

To establish a procedural due process claim, Green Genie was required to establish "(1) [it was] deprived of a protected liberty or property interest; and (2) that the depravation occurred without adequate procedural protections." *Hasanaj v. Detroit Pub. Sch. Cmty. Dist.*, 35 F.4th 437, 447 (6th Cir. 2022). Green Genie offered evidence that, when viewed in a light most favorable to it, satisfies both elements. The district court's contrary decision must therefore be reversed.

1. Green Genie established the deprivation of its protected property right under the Detroit City Code to have its application transferred to the MMFRC as a matter of course

The district court held that Green Genie cannot prevail on a procedural due process claim because it did not identify any "constitutionally protected property interest[] of which they were deprived by the denial of their special land use application." R. 23, Op. and Order Granting Summ. J., at Page ID # 929. The district court effectively held that, because Green Genie had the opportunity to appeal to the City's zoning board and take advantage of the state court system, Green Genie was only arguing that its application "was misrouted to an improper decisionmaker." *Id.* at Page ID # 933. But this misses the mark entirely.

As explained, the plain text of the Detroit City Code **mandates** (not merely permits) that "[u]pon a determination that the proposed location complies with the locational specifications set forth in Section 50-3-535 of this code, the [BSEED] **shall transfer** the application package to the [MMFRC]." R. 18-1, Detroit City Code § 50-3-536(c), Page ID # 436 (emphasis added). Thus, Green Genie did not request, nor did it need, a discretionary "variance." Because Green Genie met all locational requirements (at a minimum, this is a question of fact), a genuine issue of material fact exists as to whether the City of Detroit was mandated to forward Green Genie's application to the MMFRC. Green Genie was forever deprived of the automatic right to have its application continue through the process to the MMFRC.

To be clear, because the ordinance at issue uses mandatory language ("shall transfer"), Green Genie had a "justifiable expectation" that its application would be forwarded to the MMFRC because the application conformed with statutory requirements. *See Ritz v. City of Findlay, Ohio*, No. 3:07 CV 3716, 2009 WL 1954635, at *6 (N.D. Ohio July 6, 2009) ("Because Plaintiffs' site plan conformed in all other respects, Plaintiffs had a justifiable expectation of its approval, giving rise to a constitutionally protected property interest that meets the threshold requirement for their Section 1983 . . . procedural due process claim[]."). Green Genie cited the *Ritz* case in the district court briefing and referenced it again at oral argument, yet it was ignored altogether by the district court.

This case is just like the *Ritz* case, which rejected the defendants' reliance on the same arguments that the City of Detroit relied on below and which the district court adopted. In *Ritz*, the court rejected defendants' argument that the City of Findlay Ohio's planning commission retained "discretion" to deny an application where an ordinance only permitted rejection of a "nonconforming" application. *Id.* at *5. The *Ritz* court explained:

> The *Triomph* court predicated its holding on the discretion reflected with the word "may" to "undercut any argument that the language in the zoning regulations vested in plaintiffs an entitlement to the special use permit being issued once the four factors in § 1266.13 were fulfilled." Findlay City Ordinance 1181.04 used the word "shall" which provides a mandate that the Commission must approve conforming applications, either with or without conditions. . . .
>
> ****

> . . . Because Plaintiffs' site plan conformed in all other respects, Plaintiffs had a justifiable expectation of its approval, giving rise to a constitutionally protected property interest that meets the threshold requirement for their Section 1983 substantive due process and procedural due process claims.

Id. at *5–*6 (internal citations omitted).

This case is no different than *Ritz*. The same mandatory language that created a "justifiable expectation" of approval in *Ritz* (and contradicted any argument that the planning commission retained discretion) exists in this case. As explained, the Detroit City Code mandates that Green Genie's application, if conforming to locational specifications, "shall" be transferred to the MMFRC. R. 18-1, Excerpts from Detroit City Code § 50-3-536(c), Page ID # 436. By using the same mandatory language, "shall," the Detroit ordinance *required* the City of Detroit to process the application if it complies with Section 50-3-535, just as the ordinance in *Ritz* gave rise to a procedural due process interest. And as explained below, Green Genie, at a minimum, offered unrefuted evidence that the district court should have viewed in a light most favorable to Green Genie on the issue of whether its facility complies with all locational specifications— evidence that included the only professional survey submitted by anyone and the City's Rule 30(b)(6) witness testimony admitting that Green Genie's proposed facility was more than 1,000 feet from the nearest school. Thus, the district court reversibly erred by holding that Green Genie did not establish the existence of a protected property interest.

The district court's conclusion that Green Genie "received all the process they were due and then some," *see* R. 23 at Page ID # 934, is flatly wrong. The cases cited on pages 21–22 of the district court's opinion, *see id*. at 933–34 do not stand for the proposition that depriving a person of a mandatory right under a clear and unambiguous ordinance is excused or fixed from a constitutional procedural due process standpoint if the municipality forces the person in a completely different trajectory. Here, Green Genie had a protected property interest under the Detroit City Code to have its application transferred to the next step of the process to the MMFRC. Green Genie was forever deprived of this right, and it did not receive adequate procedural due process by forcing it in a different direction contrary to the plain language of the Detroit City Code. *Ritz* confirms the district court's decision is erroneous.

2. The district court ignored the evidence offered by Green Genie that, when viewed in its favor as it must be, establishes a genuine issue of material fact on the issue of whether its proposed facility met all locational specifications

The district court improperly concluded that Green Genie was not entitled to any due process protection because its proposed facility was within 1,000 feet of the nearest school. *See* R. 23 Op. and Order Granting Mot. For Summ. J., Page ID # 930. At worst for Green Genie, this issue is a disputed fact that should not have been resolved conclusively against Green Genie on summary judgment.

On the issue of whether Green Genie's proposed facility is within 1,000 feet of a school, the **only evidence** in this case confirms that the proposed facility complies with the locational specifications (i.e., it does not fall within a "drug-free zone"). This evidence includes:

(1) A professional survey offered as evidence by Green Genie confirming that its proposed facility is over 1,000 feet away from the nearest school, and, therefore, not within a "drug free zone." R. 14-18, Def's. Mot. for Summ. J., Ex. Q, Campbell Surveying Professional Survey, Page ID # 329; R. 18-2, Declr. of A. Alosachi, at ¶¶ 3–5, Page ID # 444–45. The City of Detroit never contested this survey, nor did the City of Detroit offer any counter-survey as evidence. This alone should have resulted in the denial of summary judgment in favor of the City of Detroit on this issue.

(2) The City's Rule 30(b)(6) representative confirmed both prior to this litigation and during sworn testimony that is binding on the City of Detroit, that Green Genie's proposed facility is not within 1,000 feet of a school, and, therefore, not within a "drug-free zone." R. 18-3, July 20, 2020 J. Philson Letter to BZA (emphasis added), Page ID # 447; R. 18-5, J. Philson Dep. Tr., at p. 26, ll. 10–16; p. 25, ll. 14–21, Page ID # 457–58. The district court ignored these admissions altogether instead of viewing the evidence in a light most favorable to Green Genie.

To be clear, there is absolutely no evidence in the record to contradict the professional survey that confirms Green Genie's proposed facility is not within a "drug-free zone." And there is absolutely no basis to completely ignore the City of Detroit's Rule 30(b)(6) witness' admissions of record. Simply put, the district court improperly weighed (and ignored altogether) the evidence. There is no way the district court could have granted the City's motion for summary judgment if it considered the evidence and properly viewed it in a light most favorable to Green Genie. This Court must reverse.

B. A Genuine Issue of Material Fact Exists as to Green Genie's Substantive Due Process Claim

When viewing the evidence in a light most favorable to Green Genie, a genuine issue of material fact exists as to whether the City of Detroit's actions were arbitrary and capricious, thereby giving rise to a substantive due process claim. "'Proving a violation of substantive due process requires not only that the challenged state action was arbitrary and capricious, but also that the plaintiff has a constitutionally protected property or liberty interest.'" *Johnson v. City of Saginaw, Michigan*, 980 F.3d 497, 513 (6th Cir. 2020) (quoting *Andreano v. City of Westlake*, 136 F. App'x 865, 870–71 (6th Cir. 2005)).[1] Additionally, federal courts "will not

[1] As explained, Green Genie established that it had a protected property interest. *See supra*, section V.A.1. *See also G.M. Eng'rs and Assocs., Inc. v. West Bloomfield Twp.*, 922 F.2d 328, 331 (6th Cir. 1991).

interfere with local zoning decisions unless the locality's action has no foundation in reason and is a mere arbitrary or irrational exercise of power." *Paterek v. Village of Armada*, 801 F.3d 630, 648 (6th Cir. 2015) (quotations omitted). To be arbitrary and capricious, it means "that there [was] no rational basis for the administrative decision." *Brody v. City of Mason,* 250 F.3d 432, 438 (6th Cir. 2001) (internal citation and quotation omitted).

Viewed in a light most favorable to Green Genie, the evidence confirms that the City of Detroit acted arbitrarily and capriciously. As explained, the City of Detroit's Rule 30(b)(6) representative testified that the sole action undertaken to determine whether Green Genie's proposed facility was within a "drug-free zone" was consulting "Google Maps." The City's zoning maps were useless for this determination because they "only let [the City] see what's in the city of Detroit." R. 18-5, J. Philson Dep. Tr., at p. 16, ll. 20–23, Page ID # 455.

And Ms. Philson admitted that there was no investigation completed before determining from "Google Maps" that Green Genie's facility was allegedly within a "drug-free zone." For example, the City of Detroit did not send anyone out to physically look at the property, undertake any measurement, or even consult with neighboring Grosse Pointe Park to determine where the school was located. *Id.* at p. 17, ll. 9–16, Page ID # 455. Ms. Philson also admitted that she "never actually looked at the actual property line because [she] d[i]dn't know what it was." *Id.* at p.

17, ll. 2–4, Page ID # 455. In fact, Ms. Philson candidly testified that, when measuring between a proposed facility and a property outside Detroit, such as in this case, BSEED only engages in "a Google map search and hope[s] [it] got it right." *Id.* at p. 46, ll. 16–18, Page ID # 463.

Ms. Philson's binding testimony, standing alone, creates a genuine issue of material fact as to whether the City of Detroit acted without any rational basis, or rational reason, when denying Green Genie's application. The City of Detroit's arbitrary and capricious actions, and willful blindness as to whether Green Genie's facility is within a "drug-free zone," deprived Green Genie of its constitutional property rights.

The district court's opinion contends that, at best, Green Genie only established that the City of Detroit mistakenly erred in granting other applications and that "nothing in the Due Process Clause mandates that City officials are bound to repeat the same errors in considering the plaintiffs' application." *See* R. 23, Op. and Order Granting Mot. for Summ. J., Page ID # 935; *see also* R. 14, Def. City of Detroit's Mot. for Summ. J., Page ID #185. But the district court does not address in any way the City's admissions through its designated Rule 30(b)(6) representative. Green Genie's substantive due process claim is not based on an argument that the City made a "mistake" two out of three times and should make the same "mistake" a third time. Instead, Green Genie's substantive due process rights

were violated when the City of Detroit *admittedly* simply looked at "Google Maps" without engaging in any intelligent measurement to confirm whether Green Genie's proposed facility was within a drug-free zone. The City of Detroit admittedly closed its eyes and reached a decision without engaging in any activity that makes logical sense. These actions, viewed in a light most favorable to Green Genie, are arbitrary and capricious and have no rational basis. Summary judgment should never have been granted to the City of Detroit on this record.

C. Green Genie's Equal Protection Claim Should Not Have Been Dismissed on Summary Judgment

The district court improperly dismissed the equal protection claim on summary judgment. Green Genie offered evidence confirming that, out of *only* three similar candidates (including Green Genie), the City of Detroit treated the two other applicants differently. This amounts to Green Genie being treated differently than everyone else in the same position, and a differential treatment rate of over 66%. This alone should have resulted in the denial of the City of Detroit's motion.

To succeed on an equal protection claim, Green Genie was required to show that it has "been intentionally treated differently from others similarly situated and that there is not rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). "[A] plaintiff can establish the lack of a rational basis if it either (1) negates every conceivable basis which might support the government action or (2) demonstrates that the challenged government

action was motivated by animus or ill-will." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 865 (6th Cir. 2012) (internal quotation and citation omitted) (cleaned up).

This Court has explained that, "[w]e have often held that summary judgment is inappropriate in cases in which a defendant's state of mind is in issue because plaintiffs in such cases must primarily rely on circumstantial evidence and reasonable inferences drawn from the defendant's conduct." *Bluegrass Dutch Trust Morehead, LLC v. Rowan County Fiscal Court*, 734 F. App'x 322, 328 (6th Cir. 2018). And the Supreme Court has established that "questions of subjective intent so rarely can be decided by summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Where state of mind, intent, and credibility are at issue, summary judgment is not appropriate. *See Weaver v. Shopsmith, Inc.*, 556 F. Supp. 348, 353 (S.D. Ohio 1982) ("Questions of intent are rarely resolvable on a motion for summary judgment.") (citation omitted). In a case where a defendant's state of mind is at issue, summary judgment is *only* appropriate *if* the plaintiff rests "merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Bluegrass Dutch Trust Morehead*, 734 F. App'x at 328.

Here, there is circumstantial evidence that both: (1) supports that the City of Detroit acted intentionally and (2) negates any conceivable basis for treating Green Genie differently than similarly situated applicants.

First, Green Genie has been treated differently than two similarly situated applicants (Mack Wellness and Detroit Roots), including one that is located on the same street as Green Genie's proposed facility, where the measurement is to the same school in Grosse Pointe Park. *See* R. 18-13, Defs.' Resp. to Req. for Admins. Nos. 4 and 5, Page ID # 827–28. The City of Detroit admits that, had they employed the same measurement used in Green Genie's case with Mack Wellness the facility, which had its application approved, would be within 1,000 feet of a prohibited use, and, therefore, within a "drug-free zone." R. 18-5 J. Philson Dep. Tr., at p. 44, ll. 11–16, Page ID # 462. *See also* R. 22, Tr. of Oral Arg., Page ID # 892–94 (City's counsel conceding that Mack Wellness and Detroit Roots are within 1,000 feet of a prohibited use). Thus, out of the only three similarly situated applicants, which includes Green Genie, the City of Detroit has treated everyone else differently than Green Genie, amounting to an "error" percentage of over 66%.[2] At a minimum, this constitutes direct and circumstantial evidence of the City's intent relative to Green Genie.

[2] The district court tried to distinguish Detroit Roots by reasoning that, at the time Detroit Roots' application was reviewed, it followed the drug-free zone requirements and only later became in non-compliance when a property split was processed. Again, the district court's discounting of evidence and weighing it on summary judgment instead of viewing it in a light most favorable to Green Genie constitutes reversible error.

Second, the City of Detroit is now aware that it treated Mack Wellness and Detroit Roots differently but has not done anything to correct the differential treatment (nor do they plan to do so). Mack Wellness and Detroit Roots continue to operate, while Green Genie's application remains denied. When someone makes a "mistake," they fix it—or at least they try to fix it. The City's failure to fix two mistakes (coincidentally the only other two similarly situated applicants as Green Genie) constitutes circumstantial evidence of the City's intent and refutes the City's factual argument that it made a "mistake."

Third, as explained, the City of Detroit was, at best, willfully blind as to whether it was engaging in an appropriate measurement under the City's ordinances as it relates to Green Genie. The City conferred with "Google Maps" on a computer and "hoped" that what it was doing was right, without any effort to verify the accuracy of the measurement, including that the City's Rule 30(b)(6) representative readily admitted that she did not even know where the applicable property lines were located. *See supra*, at section II.A.3.

At a minimum, based on these facts, and the facts explained in section II.A.3 above, viewed in a light most favorable to Green Genie, the City of Detroit had no conceivable or rational basis to support its action. Green Genie was entitled to form a "class of one" equal protection challenge. *See, e.g., Olech*, 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,'

where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."). The district court's ruling that this case does not involve a "target class" ignores that equal protection challenges may be appropriately brought, as in this case, as a "class of one" by a party that has been treated differently than similarly situated persons without any rational basis. R. 23, Op. and Order Granting Mtn. for Summ. J., Page ID # 926–27.

Finally, the district court improperly held that Green Genie did not negate every conceivable reasoned basis for the permit denial. R. 23 at Page ID # 926. The district court explained that "[t]he undisputed facts lead ineluctably to the conclusion that the City's denial of the plaintiffs' permit application was based on a straightforward application of the zoning ordinance and the City's reasonable interpretation of its measuring rules." *Id.* But this conclusion ignores the City's Rule 30(b)(6) representative admissions that: (1) all the City did was consult with "Google Maps" to determine that Green Genie's facility was within a drug-free zone; (2) the City's mapping software was useless because it could not measure to neighboring Grosse Pointe, where the school was located, (3) the City did not send anyone out to actually measure the property and did not even know where to look because they did not know where the property lines were, and (4) the City simply "hoped" that it reached the right conclusion. *See supra,* at section II.A.3. None of

this amounts to "undisputed facts" that lead "ineluctably to the conclusion that the City's denial" was based on a "straightforward application of the zoning ordinance." To the contrary, viewed in a light most favorable to Green Genie, the City of Detroit closed its eyes and acted with willful blindness in an arbitrary and capricious manner.

D. The Pending Michigan State Court Action Does Not Change the Multiple Genuine Issues of Material Fact that Exist

Green Genie expects that the City of Detroit will point out that the Michigan Court of Appeals has now interpreted the Detroit City Code in a manner that permits the City to measure the distance between a proposed facility and a church that is on the same "tax parcel ID" as a school. Green Genie has filed an application for leave to appeal this decision to the Michigan Supreme Court, which is still pending. *See* https://www.courts.michigan.gov/c/courts/coa/case/356583. In any event, the state court action does not change the genuine issues of material fact that exist in this case.

First, the City of Detroit's motion for summary judgment did not raise any res judicata arguments, and the City's counsel recognized that res judicata was inapplicable to this case. R. 22, Hearing Tr., at Page ID # 879, l. 8–880, l. 9. Therefore, the state court action does not have any impact on this case.

Second, the district court judge, in oral argument on the City's motion for summary judgment, acknowledged that the plain language of the Detroit City Code did not support the City's argument that it could measure to a "tax parcel ID." R.

22, Hearing Tr., at Page ID # 891–892. Therefore, at worst for Green Genie, this constitutes a genuine issue of material fact in this case.

Third, even if the Michigan Supreme Court affirms the Michigan Court of Appeals or denies considering Green Genie's application for leave to appeal, it still does not change the fact that, on the evidence in *this case*, genuine issues of material fact exist. It does not change the fact that the City of Detroit applied the Detroit City Code differently to everyone else in a similarly situated position, amounting to a differential treatment rate of over 66%. And it does not change the material facts set forth above that include an unrefuted professional survey and the many admissions by the City's Rule 30(b)(6) witness that confirm, at the very least, that Green Genie's due process claims should not have been dismissed on summary judgment.

VI. CONCLUSION

Green Genie respectfully requests that this Honorable Court reverse the district court's grant of summary judgment and remand this matter to the district court for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)

Attorneys for Appellants certify pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure that this brief was prepared using the Microsoft Word program. That program has a function that can calculate the total number of words in a document. According to that program function, there are 6,863 words in this brief, excluding the sections specified in 6th Cir. R. 32(b)(1), and a total of 26 pages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Plaintiffs/Appellants' Principal Brief on Appeal to be served on all counsel of record via the appellate CM/ECF system on this 11th day of July 2022.

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DESIGNATION OF RECORD ON APPEAL

Pursuant to 6th Cir. R. 30(g), Appellants designate the following filings in the district court for inclusion in the Record on Appeal:

DESCRIPTION OF ENTRY	DATE FILED	RECORD ENTRY NO.
Complaint and Jury Demand	04/08/2021	ECF No. 1, Page ID ## 1–25
Defendant City of Detroit's Motion for Summary Judgment	12/03/2021	ECF No. 14, Page ID ## 157–195
Plaintiffs' Medical Marihuana Facilities Application	12/03/2021	ECF No. 14-3, Page ID ## 220–223
BSEED Letter Denying Plaintiffs' Application	12/03/2021	ECF No. 14-4, Page ID ## 225–226
Property Survey Sketch of Plaintiffs' Property	12/03/2021	ECF No. 14-18, Page ID # 329
Plaintiffs' Response in Opposition to Defendants' Summary Judgment Motion	01/07/2022	ECF No. 18, Page ID ## 401–433
Excerpts from Detroit City Code	01/07/2022	ECF No. 18-1, Page ID ## 435–442
Declaration of Alvin Alosachi	01/07/2022	ECF No. 18-2, Page ID ## 444–445
J. Philson Letter to BZA	01/07/2022	ECF No. 18-3, Page ID # 447
Jayda Philson Rule 30(b)(6) Deposition Transcript	01/07/2022	ECF No. 18-5, Page ID ## 451–483
1/28/2021 Wayne County Circuit Court Hearing Transcript	01/07/2022	ECF No. 18-6, Page ID ## 485–494
Defendants' Answers to Plaintiffs' First Requests for Admissions	01/07/2022	ECF No. 18-13, Page ID ## 824–831
Defendants' Reply in Support of Summary Judgment Motion	01/21/2022	ECF No. 20, Page ID ## 846–858
Transcript of Hearing on Motion for Summary Judgment	03/24/2022	ECF No. 22, Page ID ## 872–912

DESCRIPTION OF ENTRY	DATE FILED	RECORD ENTRY NO.
Opinion and Order Granting Defendants' Motion for Summary Judgment	04/18/2022	ECF No. 23, Page ID ## 913–936
Judgment	04/18/2022	ECF No. 24, Page ID # 937
Notice of Appeal	05/16/2022	ECF No. 25, Page ID ## 938–939