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Supreme Court of Ohio Rules State Agency Must Approve or Deny a Marijuana Cultivator's Application to Expand Cultivation Area

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On March 11, 2021, the Supreme Court of Ohio ordered the Department of Commerce and the Ohio Medical Marijuana Control Program (collectively the Department) to either approve or deny a Level II medical marijuana cultivator's application to expand its marijuana cultivation area. *State ex rel. Fire Rock, Ltd. v. Ohio Department of Commerce*, Slip Opinion No. 2021-Ohio-673.

The cultivator, who is a level II cultivator already licensed to operate a cultivation area of up to 3,000 feet, had submitted an application requesting approval to expand its cultivation facility because it lacked the means to produce enough product to meet customer demand. In response, the Department notified the cultivator that it was "taking no action" on the application because the Department had not requested it. The Department took the position that, under the Department's rules, a cultivator had no ability to submit an expansion application on its own initiative, but could only submit such applications in response to a request from the Department.

The Supreme Court reviewed the relevant Department rule, Ohio Adm. Code 3796:2-1-09, and determined that divisions (A) through (C) of the rule permitted cultivators to file an application, gave the Department director the discretion to either approve or deny the application, and set forth the factors that the director should consider when reviewing the application. None of these provisions conditioned a cultivator's ability to apply for an expansion upon the cultivator first receiving a request from the Department. While division (D) of the rule did set forth a process by which the Department could request expansion applications, it did not provide the only avenue for such applications.

The Supreme Court's decision has several important implications. With many cultivators indicating that they need more space to meet demand for their product, the Department is likely to see a significant number of expansion applications. If the Department simply denies all applications across the board, without consideration of the factors enumerated in the rule, it will likely expose itself to further court review. Moreover, while the Department argued that courts should give the

Department great administrative deference when it interprets its own rules in an area where the Department has a great degree of control, the Court held that deference would be inappropriate here given the unambiguous text of the rule. Thus, the Supreme Court has signaled that it will hold the Department to the express requirements of statutes and rules regarding Ohio's medical marijuana program, and not necessarily defer to the Department's own interpretation of such rules and statutes.