Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	
Transfer from the Colorado Court of Appeals, 2015CA711 Appeal from the District Court, Adams County Colorado, Case Number: 2014CV30842	
Plaintiff-Appellee: ROCKY MOUNTAIN RETAIL MANAGEMENT, LLC, d/b/a ROCKY MOUNTAIN HIGH **v.** **Defendant-Appellant:** CITY OF NORTHGLENN, acting by and through its City Council	▲COURT USE ONLY▲
Attorney for *Amicus Curiae:* Rachel L. Allen, #37819 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Phone: (303) 831-6411 Fax: (303) 860-8175 E-mail: rallen@cml.org	Case No: 2015SA215
BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLANT	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g).
   Choose one:

   [√] It contains 3,767 words.

   [ ] It does not exceed 30 pages.

2. The brief complies with C.A.R. 28(k).

   [√] For the party raising the issue:

   It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

   [ ] For the party responding to the issue:

   It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Rachel L. Allen
Rachel Allen, #37819
Attorney for the Colorado Municipal League

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COMES NOW the Colorado Municipal League ("CML" or the "League") by undersigned counsel and, pursuant to RULE 29, C.A.R., submits this brief as *amicus curiae* in support of Appellant, the City of Northglenn ("the City").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The League hereby adopts and incorporates by reference the statement of the issues presented for review in the City's Opening Brief.

STATEMENT OF THE CASE & STANDARD OF REVIEW

The League adopts and incorporates by reference the statement of the case in the City's Opening Brief, as well as the City's statement regarding the standard of review, which appears in the City's Opening Brief.

INTRODUCTION AND INTEREST OF AMICUS

The League is a statewide, voluntary association of Colorado's cities and towns, which was formed in 1923. CML's membership is comprised of 268 of Colorado's 271 incorporated municipalities, representing 99.97% of our state's population, and including every incorporated municipality allowing Medical Marijuana facilities.

CML has been filing briefs as *amicus curiae* before this court and the Colorado Supreme Court for decades in cases of importance to Colorado municipalities. In the case at bar, the League urges that reliance upon a finding of "unconstitutionally vague" in the Northglenn City Code § 18-4-1, et seq. and the Colorado Medical Marijuana Code, COLO. REV. STAT. § 12-43.3-201, et seq. (2010), ("the Act") to resolve the issues in these appeals is unsupported by the law.

SUMMARY OF ARGUMENT

ARGUMENT

The League hereby adopts and incorporates by reference the argument in the opening brief of Appellant, the City of Northglenn, and respectfully submits the following additional argument.

I. VOID-FOR-VAGUENESS IS NOT APPLICABLE BECAUSE THERE IS NEITHER A PROPERTY RIGHT TO A MEDICAL MARIJUANA LICENSE NOR A DEPRIVATION OF A STATE PROTECTED INTEREST IN THIS CASE.

The trial court correctly observed that Rocky Mountain does not have a property right at stake in this case because the plaintiff has no claim of entitlement to a medical marijuana license. Morris-Schindler, LLC v. City and County of Denver, 251 P.3d 1076 (Colo. App. 2010). Colorado courts have held that a liquor

license is a property right, but there is no property right in the *renewal* of such license). *Id.*; Order at 4. *See, e.g.*, Mr. Lucky's, Inc. v. Dolan, 591 P.2d 1021, 1023 (Colo. 1979); Order at 4.

Liquor licenses are a restricted right because of the threat they present to public health and welfare. Thus, "there is no unlimited right to a liquor license." Marijuana will be subject to regulations similar to those imposed on alcohol due to public health, safety and welfare concerns. Colo. Const. Art. XVIII § 16(1)(b). Mere desire or anticipation of ownership of a medical marijuana license does not constitute a property right.

Absent a property interest, Rocky Mountain is neither entitled to due process nor able to strike the challenged ordinance as being void-for-vagueness. In limited circumstances, a law that does not affect constitutionally protected conduct "may nevertheless be challenged on its face as unduly vague, in violation of due process." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362 (1982). The bar to succeed, however, is a high one where the complainant must demonstrate that the law is impermissibly vague in all of its applications. *Id.* In other words, before striking a statute as being unconstitutionally vague, a court should consider "whether the prescription of the statute is amenable to a limiting instruction." *Metal*

Management, Inc., 251 P.3d at 1170. The threshold rule is that *all* reasonable constructions must be considered prior to striking a statute or ordinance for vagueness. *Id.* at 1170-71 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

The Northglenn Ordinance Code § 18-14-7(h) mirrors the language in the CMMC at C.R.S. § 12-43.3-303(2) stating that the City Council may consider the "number, type and availability" of existing medical marijuana businesses located in proximity to the premises sought to be licensed. It's reasonable to interpret "availability" as the need for another medical marijuana establishment. The City's decision turned on a reasonable construction of the third availability standard by repeated inquiry into whether there was a need for another store.

No further inquiry is required as Rocky Mountain isn't arguing deprivation of a property right and there are constructions of the City's ordinance where it isn't impermissibly vague.

II. AS DEVELOPED IN THE CITY'S BRIEF, A LESSOR LEVEL OF SCRUTINY HAS BEEN APPLIED IN A VAGUENESS CHALLENGE TO ECONOMIC REGULATIONS.

We agree with the trial court that there is a lower standard for the level of scrutiny applied in reviewing a void-for-vagueness challenge depending on the nature of the enactment being challenged. *Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988); *Village of Hoffman Estates*, 455 U.S. at 498. A lesser test for void-for-vagueness, and thus less exacting standards of specificity, applies when, as here, the statute at issue regulates economic transactions. *Parrish*, 758 P.2d at 1366 (less strict scrutiny also applies to statutes imposing civil penalties or containing a scienter requirement). Conversely, the test is stricter when the regulation imposes criminal penalties or inhibits the exercise of constitutionally protected rights. *Id.* Neither criminal penalties nor fundamental rights are at issue in the case at bar, so less exacting standards of specificity should apply in this case for finding void-for-vagueness.

Here, the ordinance at issue involves regulation of economic activity – i.e. a license to sell medical marijuana. There is no potential civil or criminal penalty at stake for the failure to comply with the statute. Rather, only the receipt of a license is at stake. The statute does not affect constitutionally protected behavior; therefore, the Court appropriately applied a less strict standard level of scrutiny, and will apply less rigorous specificity standards.

Assuming arguendo there was a property interest in a medical marijuana license or no way to read the City's ordinance that wasn't void-for-vagueness, the standard of scrutiny that should be applied by a reviewing court is low and requires less exacting standards.

III. THE TRIAL COURT'S FINDING THAT NORTHGLENN'S MEDICAL MARIJUANA LICENSING ORDINANCE IS VOID-FOR-VAGUENESS WAS ERROR.

There is a high bar to challenging a legislative enactment like a municipal ordinance. This Court has explained time and again, "Legislative enactments enjoy a presumption of constitutionality, however, and the person challenging them bears the burden of proving their unconstitutionality beyond a reasonable doubt. Hartley v. City of Colorado Springs, 764 P.2d 1216, 1226 (Colo. 1988); citing People v. McBurney,750 P.2d 916, 920 (Colo.1988). Municipal ordinances, like statutes, are presumed constitutional. *Id.* (*citing E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004). A court must uphold the ordinance unless it is "prove[d] unconstitutional beyond a reasonable doubt." *Id.* (*citing E-470 Pub. Highway Auth.*, 91 P.3d at 1041).

The trial court incorrectly found that the Northglenn City Council acting as the Licensing Authority made an arbitrary and capricious decision to deny Rocky

Mountain a local medical marijuana license. The trial court cites "Judicial review under the Act is limited to consideration of whether an administrative agency's action is erroneous, or if it:

> is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise proscribed by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, or unsupported by substantial evidence when the record is considered as a whole...
>
> C.R.S. § 24-4-106.

The trial court correctly observed, "the [state] law provides wide flexibility to local governments to decide how to handle medical marijuana. (Order at 1)." The trial court goes on to explain," Local governments were empowered by the statute to create or extend a moratorium on medical marijuana facilities in their jurisdiction... C.R.S. § 12-43.3-202(1)(b)(I)." Order at 1. In fact, the Legislature set forth a dual licensing scheme where the state and local governments equally share licensing authority for medical marijuana facilities in Colorado. C.R.S. § 12-43.3-305(2.5).

The CMMC suggests local licensing standards "may include, but need not be limited to: Distance restrictions between premises for which local licenses are issued; (II) Reasonable restrictions on the size of an applicant's licensed premises;

and (III) Any other requirements necessary to ensure the control of the premises and the ease of enforcement of the terms and conditions of the license." C.R.S. § 12-43.3-301(2)(a)(I-III). Thus, local governments have broad authority to issue their own licensing criteria pursuant to the CMMC. Northglenn set out its licensing criteria for medical marijuana applicants in Northglenn Code § 18-14-7(h) stating that the City Council may consider the "number, type and availability" of existing medical marijuana businesses located in proximity to the premises sought to be licensed. The language of § 18-14-7(h) provides:

> Before entering a decision approving or denying the application for a local license, *the local licensing authority may consider*, except where this Article specifically provides otherwise, the facts and evidence adduced as a result of its investigation, as well as any other facts pertinent to the type of license for which application has been made, including *the number, type and availability of medical marijuana centers*, optional premises cultivation operations, or medical marijuana-infused products manufacturers located in or near the premises under consideration, and any other pertinent matters affecting the qualifications of the applicant for the conduct of the type of business proposed. (Emphasis added).

The language of § 18-14-7(h) is identical to that of C.R.S. § 12-43.3-303(2) of the CMMC setting forth criteria to consider in granting or denying a medical marijuana business license. The language of § 18-14-7(h), in particular the phrase "number, type and availability of medical marijuana centers ... located in or near

the premises under consideration." NCC also requires an applicant to demonstrate some "need" for its proposed business, considering specifically, the other medical marijuana outlets, if any, already operating in the area.

To succeed on a facial challenge under the void for vagueness doctrine, the party challenging the ordinance must show that the ordinance is "incomprehensible or impermissibly vague in all its applications." Hartley v. City of Colorado Springs, 764 P.2d 1216, 1226 (Colo. 1988); *(citing People v. Shell*, 148 P.3d 162, 172 (Colo. 2006). Such interpretation of § 18-14-7(h) is hardly incomprehensible or arbitrary and capricious, rather it is grounded in law and consistent with a common sense reading of the City's regulations. The Northglenn standards for reviewing medical marijuana licenses are well within the scope of authority delegated to local governments in the CMMC.

IV. NORTHGLENN'S ORDINANCE AND MANY OTHER MUNICIPAL ORDINANCES PROVIDE "FAIR" WARNING, NOT ARBITRARY ENFORCEMENT, SO IT MEETS THE STANDARD AND NO DUE PROCESS VIOLATION OCCURRED.

Municipal officials considered myriad policy options when determining the local standards for adopting medical marijuana regulations. The CMMC and the

ordinances adopted reflect that local government officials are in the best position to determine whether their city or town allows or prohibits medical marijuana facilities, where medical marijuana facilities should be located, and what resources the city or town has to support this type of business. Northglenn isn't alone in its standards for determining local licenses. The State, the City of Northglenn and at least seven additional cities and towns in Colorado have identical language to that at issue in the case at bar.[1] No fewer than seven other municipalities rely on similar language to that of Northglenn's in their ordinance.[2] More than thirty municipal ordinances adopt the language at issue by reference to the CMMC.[3]

At issue with due process is notice and fairness, and setting out standards in the ordinance followed by two hearings with an opportunity to comment as Northglenn did for Rocky Mountain certainly satisfies due process.

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1. Breckenridge, Cortez, Englewood, Fraser, Manitou Springs, Northglenn, Silver Plume and Trinidad consider "the number, type and availability of medical marijuana centers" in their medical marijuana licensing ordinance. Copies of these ordinances are included in Appendix B.
2. Commerce City, Crested Butte, Edgewater, Glenwood Springs, Golden, Oak Creek and Red Cliff include similar language to that in the Northglenn City Code § 18-14-7(h).
3. See appendix B for a listing of thirty three municipalities that incorporate the language at issue in this case by referencing C.R.S. § 12-43.3-303(2).

Rocky Mountain has a high threshold to meet because the party assailing the constitutionality of the ordinance "has the burden of proving its invalidity beyond a reasonable doubt. *Board of County Commissioners v. Simmons*, 494 P.2d 85 (Colo. 1972). The League respectfully urges that Rocky Mountain has not met this onerous burden and that the Northglenn ordinance including language that is the same as the state statute and countless other municipal codes be given deference and not struck for being unconstitutionally vague.

The League respectfully urges that this Court resolve the issues presented without resorting to a finding of void for being unconstitutionally vague in the CMMC and the NCC.

CONCLUSION

WHEREFORE, for the reasons stated herein and in the brief of the City of Northglenn, the League respectfully urges this Court to reverse the decision of the Adams County District Court.

Respectfully submitted this 19th day of January, 2016.

COLORADO MUNICIPAL LEAGUE

/s/ Rachel Allen
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, a true and correct copy of the **BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLANT** was filed with the Court and was electronically filed and served through the E-Filing System to the parties named below:

/s/ Rachel Allen
Rachel Allen