

September 8, 2020

RECEIVED
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at 10:00A
BY: KLE

I John Jerome, file this written protest with the Town of Wellington Clerk, challenging the proposed initiative(s) titled, "Ordinance Concerning the Regulation of Retail and Medical Marijuana Stores in the Town of Wellington" and "Ordinance Concerning Retail Marijuana Sales Tax in the Town of Wellington, Colorado".

I file my protest based off the findings in a memo dated September 6, 2020 from the Town of Wellington Attorney to the Board of Trustees and entered into the public record on September 6, 2020 as part of the Board of Trustees agenda and packet(attached).

John Jerome 9/8/2020
John Jerome date

3712 Wine Cup Street
Wellington CO 80549

The foregoing instrument was acknowledged before me this 8th day of September, 2020, by John Jerome.

Witness my hand and official seal.

CARMEN ALICIA NESS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134071592
MY COMMISSION EXPIRES NOV 18, 2021

My commission expires: 11.18.2021

[Signature]
Notary Public

Memo

March & Olive, LLC

TO: Kelly Houghteling, Interim Town Administrator; Krystal Eucker, Wellington Town Clerk; Wellington Town Board

FROM: Brad March
March and Olive, LLC
1312 S. College Avenue, Fort Collins, CO
970-482-4322(p); 970-482-5719(f)

RE: Initiated election petitions

DATE: September 6, 2020

This memorandum is intended to summarize the status of the citizen proposed initiated marijuana ordinances (the Initiated Ordinances) and the election likely required as a result of the filing of the initiative petitions. Unfortunately, it was discovered late Friday (9/4) that one of the timeline dates as set out in CRS § 31-10-108¹, related to scheduling a special election was not met.

The clerk has provided a list of dates which the statute keys to, dates include:

July 30, 2020 – Petition submission date
August 20, 2020 – Statement of sufficiency issued.
Nov 3, 2020 – General election date

Assuming that the Board does not adopt the citizen proposed ordinances, the statutory scheme requires that the ordinances be sent on to the voters. Based on cost considerations a recommendation was made to the board that the town schedule its own special election on the same day as the general election to allow the voters to determine whether the initiated ordinances would be adopted. The statute provides that a special election by mail in ballot may be held at the same time as the general election, but the election must be called at least 60 days before November 3rd. That is, the election needed to be called before September 4th. The clerk prepared resolutions to call the special election to be presented to the Board on September 8th, the date however was unfortunately outside the sixty (60) day limit set by the statute. As the general election date cannot be met, the election date cannot be held until 32 days after the general election or, December 7, 2020. The TABOR election cannot be held until later in 2021 and is discussed further below.

Board action of proposed ordinances or forwarding to voters. CRS 31-11-104 provides that a proposed /initiated ordinance may be adopted by the town board as an ordinance of the town within 20 days of a finding of sufficiency by the clerk. This provision allows the board to adopt the Initiated Ordinance

¹ See clerk memo for text of statute.

² 31-10-108

without alteration on or before September 8th. If the board does not act and the Initiated Ordinance is not adopted, the ordinance must be submitted to the voters not less than 60 days and not more than 150 days after the clerk's statement of sufficiency is issued.³ By y calculation this requires the election to be held no later than January 17, 2021.

Protest. By 21-11-110(1) Any registered elector who resides in the municipality may file, a protest in writing under oath with the clerk, challenge the sufficiency of the petition, setting forth specifically the grounds for such protest. The protest must be filed within 40 days after the initiative petition was originally filed with the clerk. The protest period will expire on September 8th.⁴ The grounds for a protest may include, but are not limited to, failure of the petition or circulator to meet the requirements of the article. A resolution has been prepared and will be submitted to the board on September 8th for approval, designating the municipal judge, rather than the clerk as the hearing officer to hear any protest. If a protest is filed, the hearing officer's decision can be appealed to the Larimer County courts.

Sales tax and TABOR. Colorado law allows municipalities, in addition to charging the municipality's normally charged sales tax and taxes apportioned by the state⁵ to charge a special retail marijuana sales tax.⁶ The second proposed Initiated Ordinance provides that the Town would initially charge a 3.5% special sales tax, which could be increased by the Board to as much a 5% special sales tax. Under TABOR and the terms of the special sales tax statute tax increase measures must be approved by the voters and can only be submitted to the electorate at specified times. The TABOR amendment⁷ at part 3(a) provides:

Ballot issues shall be decided in a state general election⁸, biennial local district election, or on the first Tuesday in November of odd-numbered years. [D]istricts⁹ may consolidate ballot issues and

³ This is subject to the requirements of 31-10-108 that no special election may be called within sixty days before the date thereof, nor shall any special election be held within the thirty-two days before or after the date of the general election unless a mail ballot election is approved as a special election 60 days before the general election.

⁴ 31-11-110

⁵ Title 39, Article 28, Part 2

⁶ 29-2-15.

⁷ Constitution Article X sec 20

⁸ § 1-1-104 (17) General election" means the election held on the Tuesday succeeding the first Monday of November in each even-numbered year.

31-10-101(10) Municipal election - Regular election" means: (a) Before July 1, 2004, the election held in towns on the first Tuesday of April in each even-numbered year; the election held in cities on the first Tuesday of November in each odd-numbered year; and the election held in any other municipality at which the regular election of officers takes place; (b) On and after July 1, 2004, the election held in any municipality in accordance with paragraph (a) of this subsection (10) unless a majority of the registered electors of the municipality voting on the question have voted to hold the regular election on a date different than specified in paragraph (a) of this subsection (10) pursuant to section 31-10-109(1), in which case "regular election" means, for any particular municipality, the date on which the regular election of officers takes place as determined by the registered electors of the municipality.

⁹ For purposes of TABOR the Town is a district.

voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

The special sales tax statutory provision likewise provides:

§ 29-2-115. Retail marijuana sales tax - county - municipality - election - legislative declaration - definition

- (4) (a) Each municipality in the state is authorized to levy, collect, and enforce a municipal special sales tax upon all sales of retail marijuana and retail marijuana products...
- (b) No special sales tax shall be levied pursuant to subsection (4)(a) of this section until the proposal has been referred to and approved by the eligible electors of the municipality in accordance with article 10 of title 31. Any proposal for the levy of a special sales tax in accordance with subsection (4)(a) of this section must be submitted to the eligible electors of the municipality on the date of the state general election, on the first Tuesday in November of an odd-numbered year, or on the date of a municipal biennial election. Any election on the proposal must be conducted by the clerk of the municipality in accordance with the "Colorado Municipal Election Code of 1965", article 10 of title 31.

Because of the 31-10-108 scheduling issue surrounding the special meeting it is not possible to present the special tax to the voters at the upcoming general election. The first opportunity to place the issue of the special tax before the voters would be November 2, 2021, the first Tuesday in November of the odd-numbered year.

Circulator petitions. A question was raised with me as to whether the petitioners complied with 31-11-113. I was not asked to review the full petition submissions and do not know whether the report required by 31-11-113 was turned into the clerk at the time the fully signed Initiated Ordinances were filed with the Clerk's office or, if filed, whether the report was sufficient under the statute. The statute provides that the proponents must file a report disclosing the amount paid per signature and the total amount paid to each circulator. The filing is to be made at the same time the signatures on the Initiated Ordinance(s) are filed. I have had concerns surrounding the enforceability of the 31-11-113 requiring the report but, the statutory requirements, although perhaps suspect, remain a part of the statutory scheme for filing citizen-initiated ordinances and should have been complied with.

The validity of placing restrictions on circulators has been the subject of challenges before various courts, most notably the United States Supreme Court in *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. 636, 525 U.S. 182, 142 L.Ed.2d 599, 67 U.S.L.W. 4043 (1999). The *Buckley* case involved the state's initiative process¹⁰ and dealt with required disclosure of paid circulator identities and other paid circulator information. The legislature did not change/modify the requirements of 31-11-113 after *Buckley*.¹¹)

¹⁰ State initiative process at 1-40-101 et seq, municipal initiative process at 31-11-101 et seq.

¹¹ The majority opinion of the court stated - we agree with the Court of Appeals appraisal: Listing paid circulators and their income from circulation "forc[es] paid circulators to surrender the anonymity

The statute that requires the report that is to be filed with the clerk was adopted in 1995, before the Buckley decision. The statute only requires disclosure of the amount paid per signature and the amount paid to circulate and does not require that the amount paid to each circulator be disclosed. The report requirement may be enforceable after Buckley¹² ¹³

Petition deficiencies. I have reviewed the form of the petitions with an agent of the Colorado Department of Revenue Marijuana Enforcement Division who characterized the form of the petitions, specifically the petition allowing for marijuana sales, as "a mess." The most noted concern is that the Initiated Ordinance's proposed Article 14 references the Colorado's Medical Marijuana Code as being codified at Title 12 Article 43.3 and Retail Marijuana Code as being codified at Title 12 Article 43.4. At section 14-10 the Initiated Ordinance recites that Retail Marijuana and Medical Marijuana may only be sold as allowed by the "Colorado Retail Marijuana Code" and the Colorado Medical Marijuana Code. The Colorado Retail Marijuana and the Colorado Medical Marijuana Code are currently embodied in state statutes at Title 44 article 11 (as opposed to Title 12 Article 43.3) as the Colorado Medical Marijuana Code and Title 44, Article 12 (as opposed to Title 12 Article 43.4) as the Colorado Retail Marijuana Code. The Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code are to be replaced effective January 1, 2021 (the date the proposed ordinance goes into effect) and the governing statutes will be located at title 44, Article 10, and the designation as the Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code will be eliminated and the code will be titled as the "Colorado

enjoyed by their volunteer counterparts," 120 F. 3d, at 1105;^[24] no more than tenuously related to the substantial interests disclosure serves, Colorado's reporting requirements, to the extent that they target paid circulators, "fai[] exacting scrutiny."

- ¹² For other cases involving similar initiated petition circulator issues see *Independence Inst. v. Gessler*, 936 F. Supp. 2d 1256 (D. Colo. 2013), signature compensation for petition circulators violates the first amendment of the United States constitution; *Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff'd*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999); requirement that circulators be registered voters is not narrowly tailored to a compelling state interest, it unconstitutionally impinges on free expression; *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) Badge requirement is unenforceable. *Meyer v. Grant*, 108 S.Ct. 1886, 486 U.S. 414, 100 L.Ed.2d 425, 56 U.S.L.W. 4516 (1988), state may not prohibit paid circulators.

¹³ Justice Thomas in his concurrence to the Buckley decision notes: "Even assuming that Colorado has a compelling interest in identifying circulators, its law does not serve that interest. The State requires that proponents identify only the names of *paid* circulators, not *all* circulators. The interest in requiring a report as to the money paid to each circulator by name, as the majority points out, *ante*, at 201, has not been demonstrated.

Marijuana Code"^{14, 15} Throughout the Initiated Ordinance's proposed new Article 14 to the Town Code the incorrect citations are referenced. For example, the proposed Sec 14-20, C and D provide that the Local Licensing Authority adopts the minimum licensing requirements of Title 12, Article 43.4 and 43.3. No such minimum standards exist that correspond to these citations. Further, the initiated ordinance, including at Sec 14-20 provides for a Local Licensing Authority and recites actions that are being taken by the local Licensing Authority when no Local Licensing Authority has been created by the Town¹⁶. The following references are to concerning provisions of the Initiated Ordinance proposed code (identified as SEC 14-**) and corresponding concerns with the concerns indented below each quoted Initiated Ordinance section.

Proposed Sec 14-30 defines:

Colorado Medical Marijuana Code: Article 43.3 of Title 12 of the Colorado Revised Statutes, as amended, and any regulations promulgated thereto.

This code will no longer exist after 2020 and has not existed since at least 2018 at the citation reference

Colorado Retail Marijuana Code or CRMC: Article 43.4 of Title 12 of the Colorado Revised Statutes, as amended, and any regulations promulgated thereto

This code will no longer exist after 2020 and has not existed since at least 2018 at the citation reference

Direct Measurement: A straight line from the nearest property line of the school or campus to the nearest portion of the building used for marijuana sales.

CRS 44-10-311(d)(II) The distances referred to in this subsection (1)(d) are to be computed by direct measurement from the nearest property line of the land used for a school or campus to the nearest portion of the building in which medical marijuana is to be sold, using a route of direct pedestrian access.¹⁷ This measurement formula inappropriately differs from the statutory scheme.

44-10-302 references time place manner and number restrictions which may be adopted by the Town in relation to Retail Marijuana licensing.

¹⁴ Marijuana Code was re-codified in 2018 by HB1023 and is now found at Title 44, articles 11 and 22 of the Colorado statutes and in 2019 by SB 19-224 and as of January 1, 2021 will be effective at Title 44 Article 10.

¹⁵ See also references to Colorado Medical Marijuana Code and Colorado Retail Marijuana code with statutory cites as Sec 1-30 definitions.

¹⁶ By the Initiated Ordinance the Licensing Authority is created by Sec 14-150 Can the voters create the Local Licensing Authority and in the same initiated action act for the Licensing authority? Is an act of the Local Licensing Authority, a quasi-judicial body, administrative or legislative in nature?

¹⁷ See also Sec 14-70-(c) The distances referred to in this Article are to be computed by direct measurement from the nearest property line of the applicable setback parcel to the nearest portion of the Retail or Medical Marijuana Store.

License: A license or registration granted pursuant to this Article.

The Initiated Ordinance at Sec. 14-150 (1) related to the Local Licensing Authority recites that the Local Licensing Authority is authorized (according to the prior law at title 12) to issue Medical Marijuana Center Licenses. CRS 4-10-501 references the license to be issued as a Medical Marijuana Store Licenses rather than a Medical Marijuana Center License¹⁸. Medical Marijuana Center Licenses will no longer exist after January 1, 2021.

Local Licensing Authority: The Board of Trustees of the Town of Wellington.

The statute provides that the Town Board may be the local licensing authority but allows the board to designate a separate licensing authority. The Initiated Ordinance definition requires that the Town Board must serve as the licensing authority.

44-10-103(28) "Local licensing authority" means an authority designated by municipal, county, or city and county charter, ordinance, or resolution, or the governing body of a municipality or city and county, or the board of county commissioners of a county if no such authority is designated.

Local Licensing Official: The Town Clerk or other designee of the Local Licensing Authority.

The term Local Licensing official is defined in the proposed ordinance, but the term is not used otherwise in the proposed ordinance nor does it appear that the term is used in the Colorado Marijuana Code.

Person: A natural person, partnership, association, company, corporation, limited liability company, or organization, or a manager, agent, owner, director, servant, officer, or employee thereof.

44-10-103(48) defines a person as defined by 7-90-102 which adopts the definitions as "Person" means an individual, an estate, a trust, an entity, or a state or other jurisdiction.

Premises: A distinct and definite location, which may include a building, a part of a building, a room, or any other definite contiguous area.

44-10-103(49) defines "Premises" means a distinctly identified, as required by the state licensing authority, and definite location, which may include a building, a part of a building, a room, or any other definite contiguous area.

School: A public or private preschool or a public or private elementary, middle, junior high, or high school, college or principal campus of a college (and including the new Middle / High School at Wellington not open as of the adoption of this ordinance).

44-10-103(67) defines "School" means a public or private preschool or a public or private elementary, middle, junior high, or high school or institution of higher education.¹⁹

¹⁸ Medical Marijuana Center Licenses may be issued through 2020 by 44-11-401, the new Colorado Marijuana Code provides for Medical Marijuana Store Licenses, 44-10-401(2)(a). Medical Marijuana Center Licenses will no longer exist after January 1, 2021.

¹⁹ Caveat, is a day care facility a pre-school?

State Licensing Authority: The Authority created for the purpose of regulating and controlling the licensing of the cultivation, manufacture, distribution, and sale of Medical and Retail Marijuana in this State, pursuant to Articles 43.3 and 43.4 of Title 12 C.R.S.

Defined according to wrong statutory citation. Should be defined by 44-10-103(69) with reference to "regulated marijuana in this State, pursuant to section 44-10-201."

14-40 Applications-Licenses.

- A. **Dual Operation.** An applicant for a Retail Marijuana Store License under this Article may co-locate a Medical Marijuana Store and a Retail Marijuana Store at the same location as permitted by the Colorado Retail Marijuana Code.

§ 44-10-313 (12) provides each license issued under this article 10 is separate and distinct. It is unlawful for a person to exercise any of the privileges granted under a license other than the license that the person holds or for a licensee to allow any other person to exercise the privileges granted under the licensee's license. A separate license is required for each specific business or business entity and each geographical location.

- B. An application for a License shall be filed with the Local Licensing Authority on forms provided by the State and Local Licensing Authority. The application shall contain such information as the State and Local Licensing Authority may require. Each application shall be verified by the oath or affirmation of the persons prescribed by the State and Local Licensing Authority. Upon receipt of notice from the State Licensing Authority of the application for a license under the Colorado Retail Marijuana Code (or the Colorado Medical Marijuana Code), the Local Licensing Authority shall determine whether the applicant qualifies for licensure under this Article. The Local Licensing Authority shall notify the state and the Applicant in writing of its determination as to whether the applicant qualifies for licensure as a Retail or Medical Marijuana Store no later than thirty (30) days from the date the application was originally received by the Local Licensing Authority.

The filing requirements seem to follow 44-10-301. The statute contains no 30-day response requirement. 44-10-302 references time place manner and number restrictions which may be adopted by the Town. Sec. 14-50, speaks to denial of licenses and it is not clear if the Town may adopt more restrictive time place manner and number restrictions beyond those set forth in the initiated ordinance

- C. If an application is denied, the Licensing Authority shall set forth in writing the grounds for denial.

This is likely compliant with the statute, § 44-10-304(3) provides that within thirty days after the public hearing or completion of the application investigation, a local licensing authority shall issue its decision approving or denying an application for local licensure. The decision must be in writing and must state the reasons for the decision. The local licensing authority shall send a copy of the decision by certified mail to the applicant at the address shown in the application.

Sec. 14-60 Persons Prohibited as Licensees.

Sec. 14-70 Restrictions for Applications for Marijuana Store Licenses.

The Local Licensing Authority hereby adopts the provisions and restrictions set forth in the Colorado Retail Marijuana Code.

After January 1, 2021, there is no longer a Colorado Retail Marijuana Code. By this section the Initiated Ordinance purports to act on behalf of the Local Licensing Authority.

A(1) Until it is established that the applicant is, or will be, entitled to possession of the premises for which application is made under a lease, rental agreement, or other arrangement for possession of the premises or by virtue of ownership of the premises;

Seems to comply with § 44-10-311 (2) § 44-10-313(1)(b) and (8)(b)

A(2) Retail or Medical Marijuana stores and establishes 2000 foot setback form schools, (500) feet of: parcels zoned P (Public District) or another Retail or Medical Marijuana store; and two-hundred (200) feet of: parcels zoned R-1 (Residential District), R-2 (Residential District) or R-4 (Residential District)

Is this violative of single subject rules.

Zoning: § 44-10-311(d)(1) allows medical marijuana distancing at 1000' or greater if set by Town by ordinance or resolution.

The State Constitution at Article XVIII Section 16, (5) (f) allows a municipality to enact ordinances or regulations not in conflict governing time place manner, number of establishment operations and establishing procedures for issuance suspension and revocation of licenses.

Are these administrative actions that should be left to the Town, as provided for in the Colorado's Marijuana Code and are the provisions therefore improper to include in the Initiated Ordinance?

Sec. 14-80 Transfer of Ownership.

- A. A State or Local License granted under the provisions of this Article shall not be transferable except as provided below, but this Section shall not prevent a change of location as provided in C.R.S. § 12-43.4-309.

As of January 1, 2021, transfers of licenses will be addressed by 44-10-312.

- B. For a transfer of ownership, a License Holder shall apply to the State and Local Licensing Authorities on forms prepared and furnished by the State Licensing Authority. The Local Licensing Authority must allow any proposed transfer approved by the State Licensing Authority, but may charge a fee not to exceed \$1,000 to process such transfer.

44-10-803(3) provides: A local jurisdiction in which a license under this article 10 may be permitted may adopt and impose operating fees in an amount determined by the local jurisdiction on marijuana businesses and establishments located within the local jurisdiction. Is this an administrative act and improperly taken in the Initiated Ordinance?

Requiring that the Local Licensing Authority must allow any proposed transfer invades the Local Licensing Authority's responsibilities under state law.²⁰

²⁰ See 44-10-901 discussed below in relation to disciplinary action.

Sec. 14-90 Review and Approval of License.

The Local Licensing Authority adopts the provisions and restrictions set forth in C.R.S. §12-43.4-309 and this Article.

This statute is no longer in existence and as of January 1, 2021 is at Article 44, title 10.

Sec. 14-100 Licensing Renewal.

- A. A Licensee shall apply for the renewal of an existing License to the Local Licensing Authority not less than thirty (30) days prior to the date of expiration. A Local Licensing Authority shall not accept an application for renewal of a License after the date of expiration, except as provided in subsection (B) of this Section. The State Licensing Authority may extend the expiration date of the License and accept a late application for renewal of a License provided that the applicant has filed a timely renewal application with the Local Licensing Authority. All renewals filed with the State Licensing Authority and subsequently approved by the State Licensing Authority shall next be processed by the Local Licensing Authority. The Local Licensing Authority, in its discretion, subject to the requirements of this Article and based upon reasonable grounds, may waive the thirty (30) day requirement set forth in this Article. The Local Licensing Authority may hold a hearing on and/or denial of the application for renewal only if the State Licensing Authority rejects the renewal application.

This section appears to be contrary to 44-10-314 and seems to invade the local licensing authority's ability to refuse a license if the licensing authority determines good cause exists.²¹

Sec. 14-110 Fees.

Every Retail and Medical Marijuana Store shall pay an operating fee at the time of its initial application for licensure and a renewal fee at the time of each application for License renewal. This fee is imposed to offset the cost of administering this License. The initial application fee and renewal fee shall be determined by the Board of Trustees and set by Resolution, but in no event shall either fee exceed one thousand five-hundred dollars (\$1,500.00).

This section and 14-100 B and C limit the ability to charge fees, 44-10-803(3) provides A local jurisdiction in which a license under this article 10 may be permitted may adopt and impose operating fees in an amount determined by the local jurisdiction on marijuana businesses and establishments located within the local jurisdiction.

Sec. 14-120 Hours of Operation.

A Retail or Medical Marijuana Store may engage in the sale of marijuana or marijuana products between the hours of 8:00 a.m. and 9:00 p.m. daily; provided, however, that the Board of Trustees may at its discretion extend, but not further limit, such hours of operation.

Article XVIII Section 16, (5) (f) allows a municipality to enact ordinances or regulations not in conflict governing time place manner, number of establishment operations and establishing procedures for issuance suspension and revocation of licenses

Sec. 14-130 Disciplinary Actions: Suspension-Revocation-Fines.

²¹ See 44-10-901 discussed below in relation to disciplinary action.

B. The grounds for the Local Licensing Authority to take disciplinary action are limited to a situation where the Licensed Premises have been consistently operated in a manner that adversely affects, and creates an ongoing emergency regarding, the public health, welfare or the safety of the immediate neighborhood in which the establishment is located. Evidence to support such a finding must at least include: (i) a continuing pattern of convictions for offenses against the public peace, or (ii) a continuing pattern of convictions for criminal conduct under state or local law directly related to or arising from the Licensed Premises.

44-10-901(1) grants the local licensing authority the authority to suspend or revoke a license issued by the authority for a violation by the licensee or by any of the agents or employees of the licensee of the provisions of this article 10, or any of the rules promulgated pursuant to this article 10, or of any of the terms, conditions, or provisions of the license issued by the state or local licensing authority. The subject provision dramatically limits this provision. As an example, if the licensing authority imposes conditions on a license issuance, does violation of the condition rise to an ongoing emergency? If the licensee violates operating hours, does an emergency arise? If it does not the licensing authority's ability to enforce is emaciated.

Sec. 14-130, C. 1. The Local Licensing Authority may, in its sole discretion, issue a fine in lieu of a suspension. When determining whether to impose a fine in lieu of a suspension, the Local Licensing Authority may make findings that:

44-10-901(3) addresses fines in lieu of suspension and this section is largely in keeping with the statute, except C.1.c allows a fine in lieu so long as there has been no suspension or revocation in the last 12 months, 44-10-901(3)(a)(III) provides that a fine in lieu is appropriate if there has been no suspensions or revocation in the last 2 years. Affording the ability to grant fines in lieu for the shorter period is contrary to state law.

Sec. 14-130, C.2. provides

The fine accepted shall be: (a) not less than five-hundred dollars (\$500.00) nor more than two thousand five-hundred dollars (\$2,500.00) for license infractions of a minor nature that do not directly impact the public health, safety, or welfare which shall include but are not limited to failure to display badges, unauthorized minor modifications of premises of a minor nature, minor clerical errors in inventory tracking procedures; and (b) not less than one-thousand dollars (\$1,000.00) nor more than ten-thousand dollars (\$10,000.00) for violations that have an immediate impact on the public health, safety, or welfare, including, but not limited to, a violation of C.R.S. §12-43.4-901(4)(e).

The Initiated Ordinance should reference 44-10-901

Administrative vs Legislative nature of petitions and challenges to Initiated Ordinance.

Ordinance must comply with State Law. There are initial concerns with the Initiated Ordinances in that in cases, as outlined above, are not in line with the state statutes. As a statutory municipality, Wellington's laws may not deviate from the laws of the state. Voters, initiating an ordinance, have no greater power than the Town Board to adopt an ordinance that is contrary to state law. To the extent that the Initiated Ordinance is contrary to state law, the Ordinance is invalid.

Initiated Ordinance is not properly the subject of the right of initiative and referendum.

In *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013) (2013) involved a protest filed under 31-11-110. The protesters in *Vagneur* filed written objections to the initiative petitions contending that the proposals **(1) contained administrative matters that are not subject to the initiative power; (2) included more than a single subject; and (3) contained misleading ballot titles.**

The hearing officer concluded that the proposed ordinances "encroached upon the administrative processes reserved to the administrative staff of the City of Aspen as authorized by City Council," and that "allowing citizens through the initiative process, to either dictate or negate administrative actions normally undertaken by city staff is a misuse of the process" and contrary to the initiative rights established by the Aspen City Charter. The hearing officer declined to sever any impermissible portions of the initiative because Proponents had testified that they believed the conditions were necessary to understand their proposals

The *Vagneur* court reviewed whether a citizen initiative is administrative or legislative in character, and whether an administrative initiative is a proper exercise of the initiative power.²² The court defined and set forth numerous tests from prior court decisions as to whether an ordinance was administrative or legislative in character. The court acknowledged that decisions surrounding the administrative/legislative determination needed to be made on a case by case basis. It can be argued that the question of whether the town should allow the sale of medical and retail marijuana is a legislative decision but the enforcement and implementation including time place manner and number restrictions are administrative in nature. Further, to the degree that the Initiated Ordinance has the Local Licensing Authority, which does not exist until the Ordinance is adopted, adopting positions, that action is likewise administrative. "When in a matter of state-wide concern, such as Marijuana Licensing,

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- ²² In *City of Idaho Springs v. Blackwell*, 731 P.2d 1250 (1987) the court stated: An ordinance which shows an intent to form a permanent rule of government until replaced is one of permanent operation." 5 E. McQuillin, *Municipal Corporations* § 16.55, at 194 (3d ed. 1981) (emphasis added) (footnote omitted). Second, acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative. *Witcher*, 716 P.2d at 449-50; *Margolis*, 638 P.2d at 303; *Zwerdinger*, 194 Colo. at 196, 571 P.2d at 1077.

In the *Blackwell* case Idaho Springs asserted: (1) that the petitions, although styled as "petitions for initiated ordinances," were actually petitions for referenda that were untimely (2) that the petitions addressed administrative rather than legislative matters and were therefore improper;

- The court noted The proposed initiated ordinances also must be classified as administrative matters when viewed under the second "test." The choice of location and structure for the new city hall is an act "necessary to carry out" the existing legislative policy to build a new city hall. See *Witcher*, 716 P.2d at 449; *Margolis*, 638 P.2d at 303; *Zwerdinger*, 194 Colo. at 196, 571 P.2d at 1077. The decision to raise tax revenues to be used in part for city hall construction was made in 1977 and approved by the majority of Idaho Springs voters in a special election. Implementation of the 1977 policy decision in the ordinance is administrative or executive and is not a proper subject for an initiated ordinance.

the state legislature has specifically delegated particular authority to the governing board, courts have uniformly held that the initiative processes do not ordinarily apply.” McQuillan, Law of Municipal Corporation §16.52 (3rd Ed.).

Usurpation of Administrative and enforcement Power. The Initiated Ordinance improperly limits enforcement powers which by statute are afforded to the liquor licensing authority. Particularly Sec. 14-13 limits the Local Licensing Authorities statutory ability to take disciplinary action, limiting the enforcement powers to situations where the Licensed Premises have been consistently operated in a manner that adversely affects, and creates an ongoing emergency. Limitation of the authority’s quasi-judicial powers afforded by state law is not an appropriate exercise of the initiative power.

Impossibility of Implementation. It can be argued that implementation of the Initiated Ordinance is virtually impossible as the ordinance is presented. As noted, the Initiated Ordinance cites to laws that no longer exist. As a general rule-initiated matters, once adopted may not be changed, the initiated Ordinance as proposed adopts state laws that are no longer in place and will become increasingly difficult to enforce and implement as time goes on.

Initiative vs. Referendum. Questions were raised whether the proponents may by initiative overturn the prior actions of the Town board in prohibiting the sales of medical and retail marijuana within the limits of the Town or if this action had to be filed as a referendum within the requisite time after the town board, as allowed by the state constitution, adopted ordinances precluding local marijuana sales.

Article XVIII Section 16, (5) (f) of the constitution allowed the Town by ordinance to prohibit retail marijuana stores. Having done so the ordinance had to be challenged by referendum to be changed?

Possible Alternative Ordinances. There is some authority that suggests that the proponents could withdraw the Initiated Ordinances.²³ I tentatively made a suggestion to the proponent’s attorney that if the flawed Initiated Ordinances were withdrawn and single question ordinances along the form being submitted to the Board were alternate ordinances could be submitted. ²⁴ Initially the attorney appeared to be interested in the proposal to withdraw, and advised he would get back to me. I followed up late Friday and was advised that he had not received a client response. We exchanged cell phone numbers, as of late Sunday I have not been contacted. The Board could elect to present an alternative ordinance to be considered by the voters at the same election as the Initiated Ordinances are presented. The Board needs to evaluate whether this causes confusion.

²³ The ability to withdraw the petitions at this point is subject to legal questions.

²⁴ § 31-11-104 (2) Alternative ordinances may be submitted at the same election, and, if two or more conflicting measures are approved by the people, the one that receives the greatest number of affirmative votes shall be adopted in all particulars as to which there is a conflict.