DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202-5310	DATE FILED: June 9, 2016 1:19 PM CASE NUMBER: 2016CV31909
Plaintiff: CANNABIS FOR HEALTH, LLC d/b/a PIG N' WHISTLE v. **Defendants:** CITY AND COUNTY OF DENVER through its Department of Excise & Licenses; and STACIE LOUCKS, as Director of Department of Excise & Licenses, in her official capacity.	**▲ COURT USE ONLY ▲** Case No.: 2016CV31909 Courtroom 368

ORDER TO ISSUE LICENSE

This matter is before the Court on Plaintiff's Verified Complaint for Judicial Review Pursuant to C.R.C.P. 106(a)(2), filed May 26, 2016, which seeks relief in the nature of *mandamus* and injunctive relief compelling Defendants to issue to Plaintiff a Retail (recreational) marijuana license in accordance with the decision of another division of this Court in a previous case between the same parties, case number 15CV31291. Because the relief sought in the instant case is essentially enforcement of the decision rendered in the previous case,[1] this Order will set forth in some detail the proceedings in the previous case.

PROCEEDINGS IN PREVIOUS CASE

The previous case was filed on April 9, 2015. It sought judicial review of Defendants' denial of Plaintiff's application for a Retail (recreational) marijuana license under C.R.C.P. 106(a)(4). By Order dated January 29, 2016, the Court ruled that the denial decision was arbitrary and capricious, vacated it and ordered that Defendants issue the subject license.[2]

[1] Case number 15CV31291was strictly an administrative appeal pursuant to C.R.C.P. 106(a)(4). Such cases in this district are assigned to judges in both the civil and domestic divisions; 15CV31291 was assigned to a judge in the domestic division. The appeal was decided in Plaintiff's favor, but Defendants failed to comply with the Court's Order to issue a license. Plaintiff eventually moved under C.R.C.P. 107 for enforcement of the order. On May 17, 2016, the Court ruled that, because its jurisdiction in the case was strictly limited to that of an appellate court under Rule 106(a)(4), it lacked jurisdiction to "entertain or rule on" Plaintiff's motion. The Order concluded with the statement, "To the extent Appellant desires to pursue remedies, Appellant is required to seek redress in the trial court or through a separate mandamus, Rule 57 or other proceeding in Denver District Court." Plaintiff, therefore, filed the instant case.

[2] Plaintiff's companion application for a medical marijuana license for the same location had been granted in March

Defendants failed to issue the license and refused to provide Plaintiff with an inspection card, so on February 12, 2016, Plaintiff filed a Motion to Compel Compliance with Court Order. Then, on February 19, 2016, Defendants filed a Motion to Reconsider Court's Order to Grant Retail Marijuana License and a Motion for Stay of the Proceedings. By Order dated April 12, 2016, the Court denied the Motion to Reconsider and clarified its January 29, 2016 Order as follows:

> Appellees' Motion rightly contends that an applicant for a recreational marijuana license must obtain all necessary permits, licenses, and other regulatory approvals prior to the issuance of a license. D.R.M.C. § 6-210. To the extent that this Court's January 29, 2016 Order suggested that Appellant would not be required to satisfy the additional requirements necessary to finalize the licensing process, the Court hereby clarifies the Order. Once Appellant has completed the licensing process, Appellant shall be granted a license for a retail marijuana store located at 4801 Colfax Avenue. Appellees shall not hinder Appellants from completing the licensing process. The Court declines to reconsider its Order or to remand this matter for further proceedings.
>
> Consistent with this Court's January 29, 2016 Order, Appellees shall facilitate Appellant's efforts to comply with all necessary requirements to being granted the retail marijuana license. Appellees shall provide Appellant with the inspection card[3] and any other required documents within seven (7) days of the date of this Order. At such time as Appellants have satisfied the conditions set forth in D.R.M.C. § 6-210(c), Appellees shall issue the license.

The next day, April 13, 2016, a very brief (less than ten minutes) telephone hearing was held, during which the Court denied Defendants' Motion for Stay of Proceedings. The Court then explained its understanding that its jurisdiction in the case was limited by Rule 106(a)(4) to the jurisdiction of an appellate court, which left it without authority to actually compel Defendants to take any action.[4] Also on April 13, 2016, Plaintiff received its inspection card, as ordered by the Court on April 12.

2015.

[3] The reference to "inspection card" is from Plaintiff's Motion to Compel Compliance with Court Order, which complained that Defendants had refused to give it an inspection card, which Defendants' own website then described as a step in the process that was to occur only after the applicant had "satisfactorily completed" "all application forms and requirements."

[4] In their Response to Plaintiff's Motion for Temporary Restraining Order and Preliminary injunction in the instant case, Defendants state incorrectly that the Court on April 13th stated that "it does not have the power to order a license to be granted, but if [Plaintiff] had met all of the requirements of the licensing process, the license should be granted." The Court did not say that it lacked authority to order a license to be granted. The gist of its statements was that it lacked authority to enforce its order. Nothing was said about Plaintiff meeting licensing requirements. The hearing was just one day after the Court had issued an order denying Defendants' Motion to Reconsider Court's Order to Grant Retail Marijuana License, discussed above.

The following day, April 14, 2016, Defendants filed a motion seeking a stay from the Colorado Court of Appeals, which was denied on April 21, 2016. In their motion, Defendants admit that a stay is necessary to prevent issuance of the license: "without a stay on the proceedings, the Appellee will be licensed and legally allowed to operate a retail marijuana store at the proscribed location. If the City prevails on the appeal, additional litigation must then occur to revoke the Appellee's license, and preserve due process rights."

On May 4, 2016, Plaintiff submitted the completed inspection card, which had been signed as "Approved" by five City inspectors, including the Excise and Licenses inspector. This would normally have been the last step in the licensing process, resulting in Plaintiff receiving its license on the spot. Instead, the inspection card was accepted and kept, but Plaintiff was informed that the license would not be issued.

The next day, May 5, 2016, Plaintiff filed its Motion to Compel Compliance with Court Order and Motion for Contempt Pursuant to C.R.C.P. 107, seeking enforcement of the Court's prior orders. Defendants argued in their Response that Plaintiff had to satisfy an additional requirement for a second public hearing, at which Plaintiff would be required to prove some new factors that had not been required when its public hearing was held on January 21, 2015. Defendants had never mentioned an intention to impose this new requirement upon Plaintiff in any of the numerous motions and briefs they had filed in the case, both in the district court and in the Colorado Court of Appeals.

On May 17, 2016, the Court entered the order described in footnote 1, *supra*, declining to rule on Plaintiff's motion because of its limited jurisdiction.

THE INSTANT CASE

Procedural Posture

Plaintiff did as suggested by the Court and, on May 26, 2016, filed its Verified Complaint for Judicial Review Pursuant to C.R.C.P. 106(a)(2), together with its Motion for Temporary Restraining Order and Preliminary Injunction Pursuant to C.R.C.P. 65.

This Court held a hearing on May 27, 2016. Although originally intended as a hearing on Plaintiff's Motion for Temporary Restraining Order, discussions with counsel quickly revealed that, because of the unusual procedural posture of the dispute, the entire case can be decided as a matter of law, without any evidentiary hearing or trial. The parties agreed that there are no factual issues to be decided. They further agreed that there is only one legal issue to be resolved: whether the new requirement in D.R.M.C. § 6-212(c)(4) concerning proof of "needs and desires" that became effective on January 1, 2016, can be imposed upon Plaintiff retrospectively to require a second public hearing under the circumstances of this case. *See* Minute Order dated

May 27, 2016. The issue has been fully briefed, as agreed by the parties. Thus, there is no need for interim injunctive relief or an eventual "trial on the merits."[5]

Applicable Legal Standards

Mandamus

Mandamus relief may be granted "to compel performance by public officials of a plain legal duty imposed upon them by virtue of the office that they hold when (1) the plaintiff has a clear right to the relief sought; (2) the defendant government agency or official has a clear duty to perform the act requested; and (3) no other adequate remedy is available to the plaintiff." *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife,* 100 P.3d 508, 517 (Colo. App. 2004) (internal quotations and citations omitted).

Plaintiff argues that mandamus relief is appropriate here because the orders of the Court in the previous case (the first one ordering Defendants to issue the subject license[6], and the second one ordering Defendants to issue the subject license once the requirements of D.R.M.C. §6-210(c) were satisfied (which they were)), followed by denials in both the district court and the Court of Appeals of Defendants' motions for stay pending appeal, confer upon Plaintiff a clear right to issuance of the license, and confer upon Defendants a clear duty to issue the license.

The Court agrees that mandamus is the appropriate relief under the unusual circumstances of this case, unless the new requirement can properly be imposed upon Plaintiff. This dispositive issue is discussed below.

There is no other adequate remedy available to the Plaintiff because the Court in the previous case held itself to be without jurisdiction to provide a remedy for Defendants' failure to comply with its orders.

Retroactive Application of a Change in the Law

Defendants argue that they must require Plaintiff to undergo a second public hearing because of a change in D.R.M.C. § 6-212(c) that occurred long after Plaintiff's license would have been issued in March or April of 2015, but for what a court has determined to be arbitrary

[5] Plaintiff has also asserted a request for sanctions, which the Court will not address in this Order. Otherwise, it is the final decision in this case.

[6] It is well-settled in Colorado that, where a court finds that an agency's denial of a license was arbitrary and capricious, the court can order issuance of the license. *See Linder v. Copeland,* 320 P.2d 972 (Colo. 1958) (affirming trial court's order that a license be issued where agency's denial was improper); *McNertney v.Colorado State Bd. Of Examiners of Architects,* 342 P.2d 633 (Colo. 1959) (Supreme Court reversed the trial court's affirmance of an agency's denial of a license application, finding the denial arbitrary and capricious, and remanding to the trial court with directions to order issuance of the license "as of the date requested."); *Fazio v. Town of Estes Park,* 533 P. 2d 512, 514 (Colo. App. 1975) ("Courts do not issue or deny licenses. However, where licensing authorities have acted beyond their jurisdiction or exceeded their authority, courts can order issuance or denial of licenses.")

and capricious conduct by Defendants. Plaintiff argues that such retrospective application of a change in the law to its detriment is improper. The Court agrees with Plaintiff on this point.

The ordinance at issue is D.R.M.C. § 6-212(c)(4). There are two levels of retroactivity to consider because (1) the ordinance as enacted in 2013 contained a change that was to become effective only with respect to "new retail marijuana store licenses issued on and after January 1, 2016," and (2) the ordinance was amended in ways adverse to Plaintiff on February 8, 2016, *after* the Court's ruling that denial of Plaintiff's license was arbitrary and capricious.

Prior to February 8, 2016, the ordinance provided in pertinent part:

> (2) Before entering any decision approving or denying the application, the director shall consider, except where this article specifically provides otherwise, the facts and evidence adduced as a result of its investigation and the public hearing required by this section, and any other pertinent matters affecting the qualifications of the applicant for the conduct of business as a retail marijuana store.
> (3) For new retail marijuana store licenses issued on and after January 1, 2016, in addition to the standards set forth in subsection (c) of this section, the director shall also consider:
> a. The reasonable requirements of the neighborhood and the desires of the adult inhabitants as evidenced by petitions, remonstrances, or otherwise;
> b. The number and availability of other retail marijuana stores in or near the neighborhood under consideration; and
> c. Whether the issuance of such license would result in or add to an undue concentration of retail marijuana store licenses and, as a result, require the use of additional law enforcement resources….

On February 8, 2016, the underlined language was added to the ordinance:

> (4)For new retail marijuana store licenses issued on and after January 1, 2016, in addition to the standards set forth in subsection (c) of this section, <u>the applicant shall establish the need for the license by a preponderance of the evidence and</u> the director shall also consider . . . .

Legislation is presumed to operate only prospectively, unless there is legislative intent to the contrary. The legislative intent for retroactive application must be clear in order to overcome the presumption. *See, e.g., City of Golden v. Parker*, 138 P.3d 285, 289-90 (Colo. 2006). This rule applies to local ordinances, as well as to state statutes. *Id.*

Defendants argue that the fact that the ordinance's new factors refer to licenses "issued" after January 1, 2016, without an exception for pending applications, implies that the new factors must be applied retrospectively. The Court does not agree, for a number of reasons. First, the absence of an express statement that a new law is *not* intended to be applied retrospectively does not imply that it *is* intended to be applied retrospectively. That would turn the presumption on its

head.

Second, the ordinance states that the director must take the new factors into account in making her final decision. This means that the information must be available to her before she makes the decision. Here, the director made her final decision to deny Plaintiff's license application on March 12, 2015. There would be no purpose in requiring a hearing to obtain information about new factors when such information would have no use. Clearly, the new factors were not intended to apply with respect to any application on which the director had already made a final decision.[7]

Third, throughout § 6-212, it is clear that only one public hearing is contemplated for every application for a retail marijuana store. As a matter of statutory interpretation, there is nothing in the language of the ordinance, including in either version of § 6-212(c)(3-4), to suggest that a second public hearing is required or even contemplated. Similarly, the original version of § 6-212(c)(3) does not imply that the new factors the director is required to consider in making her decision to approve or deny an application after January 1, 2016, must be the subject of a public hearing at all. On the contrary, the ordinance expressly states that the director "shall consider … the facts and evidence adduced as a result of its investigation and the public hearing required by this section, and any other pertinent matters…." Moreover, the new factors, themselves, imply that information about them will come to the director from sources other than the public hearing—the director's investigation and petitions and the like from inhabitants of the neighborhood, and any other source.

The change to the ordinance that was enacted nine days after the Court's January 29, 2016 decision ordering issuance of Plaintiff's license adds a few words that could perhaps be construed to imply that there will be a hearing: "the applicant shall establish the need for the license by a preponderance of the evidence and…." But it does not change the analysis of the original language, above. The ordinance already expressly requires a public hearing, so the addition of language implying the need for one adds nothing. It certainly does not imply that two hearings will be required. Nor does it change the ordinance's express statements concerning the various sources of information that can be considered by the director, or expressly state or imply that the new factors can somehow be taken into account by the director in making a decision that she has already made.

CONCLUSION AND ENTRY OF JUDGMENT

In light of the foregoing, the Court concludes that the presumption against retrospective application of the new factors set forth in D.R.M.C. § 6-212(c)(4) has not been overcome and the Defendants cannot apply them to Plaintiff under the circumstances of this case. Thus, Plaintiff has a clear right to issuance of the retail marijuana license that is the subject of this and the previous case, and Defendants have a clear obligation to issue that license.

[7] The Court does not decide whether the new factors should be applied to applications on which the director has not made a final decision.

JUDGMENT HEREBY ENTERS in favor of Plaintiff and against Defendants on Plaintiff's First Claim for Relief. Defendants shall issue the license to Plaintiff as soon as possible, and no later than Noon on June 10, 2016.

Dated this 9th day of June, 2016.

BY THE COURT:

Judge Catherine Lemon
District Court Judge