

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
Arapahoe County Justice Center
7325 S. Potomac Street
Englewood CO 80112

ERIC FRASHER, an individual; KIRSTEN LAMB, an individual; SHANNON MOSHER, an individual, IGOR KAMINER, an individual; STAN ZISLIS, an individual; I&S, LLC, d/b/a CANNAMART; Plaintiffs,

v.

CITY OF CENTENNIAL, COLORADO, a Colorado Home Rule Municipality, Defendant.

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COURT USE ONLY

Case No: 2009CV_____

**EXPEDITED RELIEF
RESPECTFULLY
REQUESTED UNDER
C.R.C.P. 65 AND 57**

**VERIFIED COMPLAINT AND APPLICATION
FOR INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTION AND SUMMARY

1. This is an action for declaratory relief, injunctive relief, equitable relief, and for redress of impairment of constitutional rights of the Plaintiffs arising out of an unlawful application and interpretation of an unlawful land use ordinance, which has

been read to wholly ban medical marijuana dispensaries throughout the City of Centennial, Colorado. Plaintiff Eric Frasher is a medical marijuana patient; Plaintiff Kirsten Lamb is a medical marijuana patient; Plaintiff Shannon Mosher is a medical marijuana patient; Plaintiff Igor Kaminer is a medical marijuana primary care-giver; Plaintiff Stan Zislis is a medical marijuana primary care-giver; and I&S, LLC is a Colorado limited liability company which operates a medical marijuana wellness center under the trade name of CANNAMART.

2. Plaintiffs challenge the implementation, legality, and validity of the City's ban, as well as the issuance of the City's *Cease and Desist Letter* to Plaintiffs Kaminer and Zislis.

3. The City of Centennial's rigid policy of banning all medical marijuana dispensaries deprives qualified medical marijuana patients of the medicine promised to them by Amendment Twenty (passed in November 2000); thereby causing them wholly unnecessary pain and suffering. This arbitrary decision also harms "primary care-givers" under Colorado Law, and the policy also harms numerous directly impacted Colorado medical marijuana patients because many patients do not have the knowledge or ability to safely produce or obtain their medicine without the help of a care-giver, which seriously restricts their access to this medicine.

4. Both the Colorado Constitution and State Law prohibit the enforcement of a city ordinance in conflict with State Law, as State Law preempts the City's actions here.

5. Plaintiffs seek a temporary restraining order, preliminary injunction and permanent injunction pursuant to C.R.C.P. 65 and declaratory judgment pursuant to C.R.C.P. 57 and the Colorado Declaratory Judgment Act, C.R.S. § 13-51-101, *et seq.*

6. Given the immediate need to resolve these issues, Plaintiffs respectfully request expedited relief pursuant to C.R.C.P. 57 and 65.

PARTIES

7. Plaintiff, Eric Frasher (“Frasher”), is a Colorado state registered medical marijuana patient. Mr. Frasher suffers from Multiple Sclerosis. Mr. Frasher relies on medical marijuana to manage the multitude of side-effects associated with his medical condition. The *October 15, 2009 Cease and Desist Letter* seriously hinders his ability access medical marijuana. Mr. Frasher resides in Centennial. His physical address is 3383 E. Costilla Ave, Centennial, CO, 80122.

8. Plaintiff, Kirsten Lamb (“Lamb”), is a Colorado state registered medical marijuana patient. Ms. Lamb suffers from Multiple Sclerosis, chronic pain, and Restless Leg Syndrome. Ms. Lamb relies on medical marijuana to assist in controlling the adverse side-effects associated with her medical conditions. The *October 15, 2009 Cease and Desist Letter* seriously hinders her ability to access medical marijuana. Ms. Lamb resides in Centennial. Her physical address is 7903 S. Humboldt St., Centennial, CO, 80122.

9. Plaintiff, Shannon Mosher (“Mosher”), is a Colorado state registered medical marijuana patient and a resident of Colorado. Mr. Mosher suffers from Ankylosing Spondylitis, a progressive and degenerative disease defined by a fusion of the spine. Mr. Moser relies on medical marijuana to treat complications resulting from his condition, including vision and dental damage, severe chronic pain, muscle spasms,

thyroid disorder, and hernia from injections of immune suppression drugs. He also utilizes medical marijuana to decrease the quantity and adverse effects of traditional narcotic therapies he also uses to treat his condition. The *October 15, 2009 Cease and Desist Letter* seriously hinders his ability to access medical marijuana. Mr. Mosher lives at 2654 W. 12th Avenue Place, Broomfield, Colorado, 80020.

10. Plaintiff, Igor Kaminer (“Kaminer”), is an individual residing in the State of Colorado. Mr. Kaminer is a “primary care-giver” under the Colorado Constitution. His physical address is 8006 E. Arapahoe Rd, Suite 30, Centennial, CO 80112. Mr. Kaminer, along with Mr. Zislis, relying upon the City, entered into a multi-year lease agreement to operate a medical marijuana wellness center at 8006 E. Arapahoe Rd, Suite 30, Centennial, CO 80112.

11. Plaintiff, Stan Zislis (“Zislis”), is an individual residing in the State of Colorado. Mr. Zislis is a “primary care-giver” under the Colorado Constitution. His physical address is 8006 E. Arapahoe Rd, Suite 30, Centennial, CO 80112. Mr. Zislis, along with Mr. Kaminer, relying upon the City, entered into a multi-year lease agreement to operate a medical marijuana wellness center at 8006 E. Arapahoe Rd, Suite 30, Centennial, CO 80112.

12. I&S, LLC, is a Colorado limited liability company, with a trade name of CANNAMART. I&S, LLC, relying upon the City, entered into a multi-year lease agreement to operate a medical marijuana wellness center at 8006 E. Arapahoe Rd, Suite 30, Centennial, CO 80112.

13. Defendant, the City of Centennial, Colorado (the “City”), is a Home Rule municipality, located within Arapahoe County, Colorado.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this matter pursuant to C.R.C.P. 65 and the Colorado Constitution Articles II, XVIII, and XX, and Declaratory Relief pursuant to the Colorado Declaratory Judgment Act, C.R.S. § 13-51-101 et seq., and C.R.C.P. 57.

15. Pursuant to C.R.C.P. 98, venue is proper in this Court because the Defendant is located wholly within Arapahoe County, Colorado and all of the decisions and actions taken by the Defendant have occurred in Arapahoe County, Colorado.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

16. In November of 2000, the voters of Colorado passed Amendment 20 to the Colorado Constitution, codified at Colorado Constitution Article XVIII § 14.

17. Pursuant to the Colorado Constitution, Article XVIII § 14, medical use of marijuana is legal under Colorado law for those suffering from debilitating medical conditions and for their caregivers.

18. The Colorado Constitution Article XVIII § 14(6)(h)(i) provides that a patient may designate a primary care-giver to control and acquire medical marijuana on the patient's behalf.

19. The Colorado Constitution Article XVIII § 14(1)(f) defines a primary care-giver as "...a person, other than the patient and the patient's physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition."

20. Under Colorado's medical marijuana law, "Debilitating medical condition" means:

(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;

(II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

(III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Colorado Constitution, Article XVIII § 14(1)(a).

21. "Medical use" means:

the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section.

Colorado Constitution, Article XVIII § 14(1)(b).

22. The Constitution provides a legal exception or affirmative defense for patients and care-givers for the medical use of marijuana, as follows:

(2) (a) Except as otherwise provided in subsections (5), (6), and (8) of this section, a patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where:

(I) The patient was previously diagnosed by a physician as having a debilitating medical condition;

(II) The patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

This affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient's medical use of marijuana.

(b) Effective June 1, 1999, it shall be an exception from the state's criminal laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section.

23. The Colorado Constitution contains specific protections for property where the property is used for the medical use of marijuana:

(e) Any property interest that is possessed, owned, or used in connection with the medical use of marijuana or acts incidental to such use, shall not be harmed, neglected, injured, or destroyed while in the possession of state or local law enforcement officials where such property has been seized in connection with the claimed medical use of marijuana. Any such property interest shall not be forfeited under any provision of state law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense or entry of a plea of guilty to such offense. Marijuana and paraphernalia seized by state or local law enforcement officials from a patient or primary care-giver in connection with the claimed medical use of marijuana shall be returned immediately upon the determination of the district attorney or his or her designee that the patient or primary care-giver is entitled to the protection contained in this section as may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal.

Colorado Constitution, Article XVIII §14(e). This means that the Colorado Constitution specifically provides care-givers and patients a vested property interest in anything that is possessed, owned, or used in connection with the medical use of marijuana or acts incidental to such use.

24. In passing these Constitutional changes, the voters of Colorado and their Legislature have occupied the field of medical marijuana law generally, which is a matter of pressing statewide concern. Because the City's actions described below conflict with these general laws by curtailing a right of seriously ill Coloradoans to obtain the medicine

they need through the distribution channels identified by the State, the general rule of Colorado must prevail over the City of Centennial's policy/ordinance.

25. In September, 2009, Plaintiffs Kaminer and Zislis, entered into a multi-year lease to operate a medical marijuana wellness center at 8006 E. Arapahoe Road, Unit 30, Centennial, Colorado 80112. See Exhibits C and D, attached hereto.

26. Subsequently, Plaintiffs Kaminer and Zislis invested tens of thousands of dollars in the business location, with substantial additional investment planned for the property and business. Id.

27. The subject property is zoned commercial, and the use intended by these Plaintiffs is 100% legal under the Colorado Constitution and other implementing Colorado Law.

28. On September 13, 2009, Plaintiffs I&S, LLC, Kaminer and Zislis – both primary care-givers under the foregoing provisions – had their application for a City of Centennial sales tax license granted. Id.

29. Plaintiffs Kaminer and Zislis, and I&S, LLC, opened a medical marijuana wellness center at said location under the d/b/a name, CANNAMART, on September 18, 2009, where they served more than 600 patients prior to being shut down. Id.

30. At the time the business was opened, it was lawfully approved by virtue of the issuance of a sales tax license within Centennial, under the applicable Centennial Land Use Code, and under Colorado Law.

31. Notwithstanding these Plaintiffs' right to furnish marijuana as "primary care-givers" under the foregoing Constitutional provisions, the City of Centennial took actions to close the business and to ban dispensaries throughout the City of Centennial.

32. Less than one month after CANNAMART opened for business, the City of Centennial delivered to Mr. Zislis an October 15, 2009 *Cease and Desist Letter*. See Exhibit A, *Cease and Desist Letter*.

33. The *Cease and Desist Letter* announced that Mr. Zislis is in “violation of [Sec. 11.1.111] the Centennial LDC...” and that he is “**ordered to immediately cease and desist operation of a medical marijuana wellness center within the City of Centennial**” (emphasis in original). Id.

34. Centennial, therefore, has deprived the Plaintiffs of vested constitutional rights without due process, hearings, or an opportunity to be heard.

35. The substance of the *Cease and Desist Letter* is that the City of Centennial does not allow for medical marijuana dispensaries anywhere within its City limits under a strained analysis of Sec. 11.1.111, LDC (*i.e.*, the “Centennial Land Development Code”), because the “federal Controlled Substance Act prohibits the sale, use, and possession of any amount or marijuana....” Id.

36. Sec. 11.1.111, LDC reads as follows:

Section 11.1.111 Overlapping Regulations

These regulations shall apply to all applications made on or after 2-16-99. To the extent there is a conflict between these regulations and any other law, ordinance, resolution, rule or regulation of any kind or with any term or condition of an approved preliminary or final development plan, the more restrictive requirements shall apply to such application, accept to the extent limited by vested property rights then in effect.

37. Centennial asserts that the fact that the “federal Controlled Substance Act prohibits the sale, use, and possession of any amount or marijuana....” constitutes a sufficient “more restrictive requirement[.]” (as specified under Sec. 11.1.111, LDC), which purportedly allows it to ban medical marijuana dispensaries throughout the City of Centennial.

38. As a result of this policy/ordinance/interpretation, these Plaintiffs have been forbidden from continuing the operation of their medical marijuana wellness center, and their patients have had to suffer financially, physically, and/or turn to the black market to obtain the medicine they need.

39. Plaintiffs submit that the City's reasoning is unsupported by adequate evidence and is flawed, as the City has no written ordinance banning or regulating medical marijuana in any way.

40. Moreover, it is United States policy and the policy of the Obama Administration that the federal government will *not* prosecute or interfere with medical marijuana patients and caregivers who are in compliance with federal and state law, as publicly stated by U.S. Attorney General Eric Holder on February 25, 2009 and, again, on March 17, 2009. See also Exhibit B, U.S. Department of Justice, Office of the Deputy Attorney General, "Memorandum: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009.

41. As stated, on October 19, 2009, the U.S. Justice Department issued "formal guidelines for federal prosecutors in states that have enacted laws authorizing the use of marijuana for medical purposes." See Exhibit B.

42. These formal guidelines echo the previous statements by U.S. Attorney General Eric Holder on February 25, 2009 and on March 17, 2009.

43. Plaintiffs Kaminer and Zislis reasonably relied on the statements made by Attorney General Holder when they opened CANNAMART and, later, on the written

policy, and upon the actions of the Colorado Department of Public Health and Environment.*

44. The Federal formal guidelines instruct U.S. Attorneys to *refrain* from using any federal resources for the investigation and prosecution of individuals who are in compliance with state laws governing the medical use of marijuana. Specifically, it is stated that “[a]s a general matter, pursuit of these priorities should not focus federal resources in your States on individuals who are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” See Exhibit B.

45. Plaintiffs Kaminer and Zislis are, and have always been, fully compliant with Colorado’s medical marijuana laws.

46. Plaintiffs Kaminer and Zislis met with the City of Centennial to discuss this matter shortly after receiving the *Cease and Desist Letter*, and were informed that the City was indeed aware of Attorney General Holder’s statements when it issued the ban and the *Cease and Desist Letter*.

47. Yet, Centennial has refused to consider the Department of Justice’s own statements in considering whether federal law bans medical marijuana in Colorado.

48. Thus, the City has banned medical marijuana businesses within its City limits.

49. The City, however, may not use federal law to deprive these Plaintiffs rights that are expressly provided for under Colorado Law.

* The State’s Medical Marijuana Registry prints and issues State-approved Medical Marijuana Registry Cards bearing the Seal of the State of Colorado, which practice is issued and approved under an official State of Colorado cover letter also bearing the Seal of the State of Colorado and the name of Bill Ritter, Governor of the State of Colorado and other government officials, as well as the State Constitution.

50. In fact, it is axiomatic that state courts may not enforce the federal criminal statutes. “The State tribunals have no power to punish crimes against the laws of the United States, *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the State, in any event.” People v. Kelly, 38 Cal. 145, 150 (1869); see also People v. Grososky, 73 Cal.App.2d 15, 17-18 (1946); People v. Tilehkooh, 113 Cal.App.4th 1433, 1445-1446 (Cal.App. 3 Dist. 2003); City of Garden Grove v. Superior Court, 157 Cal.App.4th 355, 378 (Cal.App. 4 Dist. 2007); People v. Mower, 49 P.3d 1067 (Cal. 2002).

51. Moreover, states and local governments cannot do indirectly what they cannot do directly. City of Garden Grove v. Superior Court, 157 Cal.App.4th 355, 379, (Cal.App. 4 Dist. 2007); People v. Tilehkooh, 113 Cal.App.4th 1433, 1446 (Cal.App. 3 Dist. 2003).

52. It is not the job of the local government to enforce federal drug laws. City of Garden Grove v. Superior Court, *supra*.

53. Likewise, it is an axiom of federalism under the U.S. Constitution that Congress does not have the authority to commandeer the processes of states “by directly compelling them to enact and enforce a federal regulatory program.” New York v. United States, 505 U.S. 144, 161 (1992); see also State v. Nelson, 195 P.3d 826, 833 - 834 (Mont. 2008)(“trial court exceeded its statutory authority in imposing a condition that required defendant to comply with all federal laws insofar as condition related to enforcing federal Controlled Substances Act at expense of state Medical Marijuana Act...”).

54. This principle was forcefully articulated by the United States Supreme Court in Printz v. United States, 521 U.S. 898, 935 (1997), as follows:

Congress cannot compel the States to enact or enforce a federal regulatory program.... The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

55. States Courts, therefore may not, under these circumstances, use an alleged violation of the federal law as a justification for an express deprivation of rights under Colorado Law. State v. Nelson, *supra*.

56. Furthermore, a local ban ordinance or interpretation that conflicts with state statutes in an overlapping field of regulation, *i.e.*, the Colorado Constitution, is subject to preemption by State Law. See Voss v. Lundvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992); see also Northglen v. Ibarra, 62 P.3d 151 (Colo. 2003).

57. C.R.S. § 30-15-103 provides that an ordinance or other legislative enactment by a city cannot be in conflict with a state law of general application. See Hamilton v. City and County of Denver, 517 P.2d 834, (Colo. 1973); Ray v. City and Cty of Denver, 121 P.2d 886,888 (1942)(Local regulation and a state regulatory scheme impermissibly conflict if they contain either express or implied conditions which are inconsistent and irreconcilable with each other); Carbondale v. GSS Props., LLC, 169 P.3d 675, 682 (Colo. 2007).

58. Furthermore, local governments may not forbid that which the state has explicitly authorized. Johnson v. Jefferson Cty. Bd. Of Health, 662 P.2d 463, 471 (Colo. 1983).

59. While Article XX, Section 6 of the Colorado Constitution affords Home Rule Municipalities additional latitude in regulating land use matters, this power is not absolute.

60. And here, the City's Home Rule land use authority is not without bounds. Salle v. Giggall, 26 P.2d 499, 501 (1953). In particular, local land use ordinances banning an activity that a statute authorizes are subject to heightened scrutiny in preemption analysis. Colorado Mining Association v. Summit County, 199 P.3d 718 (Colo. 2009).

61. In addition, Courts are to examine with particular scrutiny and circumspection those ordinances that serve to ban certain land uses or activities instead of delineating appropriate areas for those uses or activities. See Combined Commerce Corp. v. City and Cty of Denver, 542 P.2d 79, 82-83 (1975); Exton Quarries Inc. v. Zoning Bd. Of Adjustment of West Whiteland Twp., 228 A.2d 169, 179 (1967)(cited by Colorado Mining Association v. Summit County, *supra*).

62. Though cities generally have broad land use planning authority, that authority does not include the right to ban disfavored uses from *all* zoning districts. Combined Commc'n Corp., 542 P.2d at 82-83.

63. Rather, local land use authority is to be exercised by designating appropriate areas for different land uses and placing conditions on those uses. Colorado Mining Association v. Summit County, *supra*.

64. The General assembly never contemplated that the prohibition of an entire land use could be affected through ordinance. Id. The General Assembly, when implementing the Medical Marijuana Program could have had the option to ban or preclude dispensaries, or to delegate the right to do so to local governments. Instead, it chose to vest the Colorado Department of Public Health and Environment with implementation power of the Program only, with no land use regulations proscribed.

65. Here, the City's regulations impose technical conditions on the constitutional medical marijuana provisions, where no such conditions are imposed under State Law or its regulatory scheme; those City regulations expressly and impermissibly conflict with the state interest.

66. The City's ban of medical marijuana dispensaries contravenes the state's interest in implementing the medical marijuana provisions for caregivers and patients.

67. Thus, the State's interest takes precedence over the local ban. The City's ban cannot stand because it materially impedes the states goals expressed in Article XVIII, Section 14 of the Colorado Constitution.

68. A patchwork of city-level bans on medical marijuana dispensaries will inhibit what the Colorado Constitution has recognized as a necessary medical right and will impede the orderly development of the medical marijuana program.

69. In taking the above described actions, the City has also violated the Constitutional rights of Plaintiffs Kaminer and Zislis under the Colorado (Article II, Sections 3, 10, 15, 18, and 25) Constitution.

70. More importantly, CANNAMED provided lawful, safe access to the patients of Plaintiffs Kaminer and Zislis. As a result, nearly six-hundred medical

marijuana patients with debilitating medical conditions and severe pain and nausea, including Eric Frasher, Kirsten Lamb, and Shannon Mosher, are being deprived of geographically practical accessible to medical marijuana.

71. The *Cease and Desist* Letter has created great obstacles blocking Plaintiffs Frasher, Lamb, and Mosher from safe access to life-sustaining medicine and also has thwarted their collective and individual right to choose the care-giver of their choice. See Exhibits E-G, attached hereto.

72. And, as a direct and proximate result of the ban and the *Cease and Desist Letter*, Plaintiffs Kaminer and Zislis have suffered, and will continue to suffer, the loss of their respective rights to open an operate a medical marijuana wellness center to furnish medicine to qualified patients and primary caregivers, which, in turn, deprives the seriously ill of the rights promised them by the voters of Colorado through Amendment Twenty in 1999.

73. The City's actions have clearly and intentionally interfered with these Plaintiffs' rights under the Colorado Constitution, and have eliminated a lawful and enforceable state interest, as defined in Article XVII, Section 14 of the Colorado Constitution.

74. With all of that said, Plaintiffs seek relief as follows.

FIRST CLAIM FOR RELIEF
**(Declaratory Judgment pursuant to the Colorado Declaratory Judgments Act and
C.R.C.P. 57 that the Defendant's Ban on Medical Marijuana Dispensaries is
Preempted by State Law)**

75. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

76. An actual controversy exists with regard to the legality and the validity of the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

77. The rights of all Plaintiffs are adversely affected by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

78. Specifically, the private property rights of Plaintiffs Kaminer and Zislis have been adversely impacted by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

79. In addition, the rights of all Plaintiffs under Article XVIII, Section 14, have been adversely impacted by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

80. The City has exceeded its statutory and constitutional authority by adopting a ban on medical marijuana dispensaries and through its issuance of the *Cease and Desist Letter*.

81. These actions depart from permitted areas of land use regulation and intrude into areas of exclusive state regulation and oversight, as fundamental constitutional rights and issues of statewide concern are at play.

82. Constitutionally protected property interests are a matter of statewide concern and must be treated uniformly throughout the state. JAM Restaurant, Inc. v. City of Longmont, 140 P.3d 192 (Colo.App. 2006); Colorado Constitution Article II, Section 15; Colorado Constitution Article XVIII, Section 14(2)(e).

83. Furthermore, these Plaintiffs have certain rights and privileges under Colorado Constitution Article XVIII, Section 14 in relation to their debilitating medical conditions.

84. The State's interest in fulfilling its mandate to protect property rights and the accessibility of medical marijuana are sufficiently dominant to override the City's ban on medical marijuana dispensaries and the impact of the *Cease and Desist Letter*.

85. The City has waived its Home Rule powers in this instance by expressly making this a matter of statewide, or even national, concern.

86. More importantly, the City's Home Rule powers do not apply to its actions because these issues are indeed matters of statewide concern.

87. The City cannot ban disfavored uses from *all* zoning districts.

88. All Plaintiffs have acted lawfully at all relevant times.

89. The City's actions in banning medical marijuana dispensaries and issuing the *Cease and Desist Letter* sets new restrictions and limitations on property rights and on the implementation on the State's constitutionally-mandated medical marijuana program.

90. The ban and the *Cease and Desist Letter* are in direct conflict with provisions of the Colorado Constitution.

91. Accordingly, the ban and the *Cease and Desist Letter* are preempted by the State of Colorado.

92. Plaintiffs, therefore, seek declaratory relief accordingly.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment pursuant to the Colorado Declaratory Judgments Act and C.R.C.P. 57 that the Defendant's Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* are unsupported by adequate evidence, arbitrary and capricious, an abuse of discretion, and otherwise contrary to Law)

93. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

94. An actual controversy exists with regard to the legality and the validity of the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

95. The rights of all Plaintiffs are adversely affected by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

96. Specifically, the private property rights of Plaintiffs Kaminer and Zislis have been adversely impacted by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

97. In addition, the rights of all Plaintiffs under Article XVIII, Section 14, have been adversely impacted by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

98. The City has exceeded its statutory and constitutional authority by adopting a ban on medical marijuana dispensaries and through its issuance of the *Cease and Desist Letter*.

99. The City relies on its LDC, Section 11.1.111, to support its ban on medical marijuana dispensaries. Section 11.1.111 states:

Section 11.1.111 Overlapping Regulations

These regulations shall apply to all applications made on or after 2-16-99. To the extent there is a conflict between these regulations and any other law, ordinance, resolution, rule or regulation of any kind or with any term or condition of an approved preliminary or final development plan, the ***more restrictive requirements*** shall apply to such application, ***accept*** [sic] ***to the extent limited by vested property rights then in effect.***

(Emphasis added).

100. This ordinance is vague, and both it and its application, violate State law.

101. Because the United States Department of Justice has stated that it will ***not*** prosecute medical marijuana dispensaries, as set forth above, the City's reliance on this

“more restrictive requirement” is baseless, arbitrary, and an abuse of the City’s discretion.

102. In addition, the City has violated its own ordinance by taking these actions where the Plaintiffs (under Colo. Constit. Article XVIII, Section 14) have “vested property rights then in effect,” which acts as an exception to LDC 11.1.111, per its own terms.

103. The City’s actions in banning medical marijuana dispensaries and issuing the *Cease and Desist Letter* are: unsupported by adequate evidence, arbitrary and capricious, an abuse of discretion, and contrary to its own ordinance.

104. Plaintiffs, therefore, seek declaratory relief on these issues to construe this ambiguous and improperly applied LDC provision.

THIRD CLAIM FOR RELIEF

(Equitable Estoppel and/or Declaratory Judgment pursuant to the Colorado Declaratory Judgments Act and C.R.C.P. 57 that the Defendant’s Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* are not enforceable because the City is equitably estopped from enforcing the ban and *Cease and Desist Letter*)

105. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

106. In the Fall of 2009, Plaintiffs Kaminer and Zislis, entered into a multi-year lease to operate a medical marijuana wellness center at 8006 E. Arapahoe Road, Unit 30, Centennial, Colorado 80112.

107. Subsequently, Plaintiffs Kaminer and Zislis invested tens of thousands of dollars in the business location, with plans for substantial additional investment in the property and business.

108. The subject property is zoned commercial, and the use intended by these Plaintiffs is 100% legal under the Colorado Constitution and other implementing Colorado Law.

109. The City has no ordinance banning or regulating medical marijuana facilities.

110. In October, 2009, Plaintiffs Kaminer and Zislis – both primary caregivers under the foregoing provisions – applied for and received a City of Centennial sales tax license to operate a medical marijuana wellness center within the City of Centennial at 8006 E. Arapahoe Road, Unit 30, Centennial, Colorado 80112.

111. In doing so, these Plaintiffs relied on unmistakable representations from the City that their business was properly operated in the subject commercial zone district, and that the business was not banned or prohibited within the City limits.

112. Plaintiffs Kaminer and Zislis ultimately opened the medical marijuana wellness center at said location under the d/b/a name, CannaMart.

113. At the time the business was opened, it was lawful under the applicable Centennial Land Use Code, and under Colorado Law.

114. These Plaintiffs promptly paid their sales tax and any required licensing fees. The City accepted these monies.

115. After opening for business, the City of Centennial delivered to Mr. Zislis an October 15, 2009 *Cease and Desist Letter*. See Exhibit A, *Cease and Desist Letter*.

116. The *Cease and Desist Letter* announced that Mr. Zislis is in “violation of [Sec. 11.1.111] the Centennial LDC...” and that he is “**ordered to immediately cease**

and desist operation of a medical marijuana dispensary within the City of Centennial.” (emphasis in original). Id.

117. After issuing the *Cease and Desist Letter*, the City insisted on collecting additional sales tax from these Plaintiffs.

118. These Plaintiffs relied on the representations and actions of the City.

119. These Plaintiffs were misled.

120. Plaintiffs seek declaratory relief from the Court stopping the Defendant from enforcing its ban and the *Cease and Desist Letter*, as it pertains to the subject medical marijuana wellness center.

FOURTH CLAIM FOR RELIEF

(Declaratory Judgment pursuant to the Colorado Declaratory Judgments Act and C.R.C.P. 57 that the Defendant’s Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* are in violation of C.R.S. §38-1-101(3)(a))

121. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

122. An actual controversy exists with regard to the legality and the validity of the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

123. The rights of Plaintiffs Kaminer and Zislis are adversely affected by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

124. Specifically, the private property rights of Plaintiffs Kaminer and Zislis have been adversely impacted by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

125. The City has exceeded its statutory and constitutional authority by adopting a ban on medical marijuana dispensaries and through its issuance of the *Cease and Desist Letter*.

126. These actions depart from traditional areas of land use regulation and intrude into areas of exclusive state regulation and oversight, as fundamental constitutional rights and issues of statewide concern are at play.

127. Constitutionally protected property interests are a matter of statewide concern and must be treated uniformly throughout the state. JAM Restaurant, Inc. v. City of Longmont, 140 P.3d 192 (Colo.App. 2006); Colorado Constitution Article II, Section 15; Colorado Constitution Article XVIII, Section 14(2)(e).

128. C.R.S. §38-1-101(3)(a) wholly prevents the City from enforcing its ban and the *Cease and Desist Letter*.

129. C.R.S. §38-1-101(3)(a) states that:

(3) (a) Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.

130. This statute was enacted to protect and defend fundamental civil rights of persons to property and to ensure that persons throughout the State are not unjustly deprived of their property rights.

131. In fact, the Legislature expressly identified termination of uses as a problem that should be dealt with in a uniform manner throughout the State.

132. Here, as stated above, the use of the subject land was permitted by the City at the time the sales tax license was issued, and when the sales taxes and fees were paid to and accepted by the City.

133. At all times, these Plaintiffs operated at the subject location lawfully.

134. But here, the City did not even afford these Plaintiffs an opportunity to amortize the business prior to its required shut down; instead, it issued a cease and desist letter without due process or an opportunity to be heard.

135. The City took an otherwise lawful use and decided to shut it down by all-of-a-sudden determining it to be a nonconforming use.

136. But, even if the City did afford these Plaintiffs with the opportunity to amortize the business prior to shutdown, its actions are wholly inconsistent with C.R.S. §38-1-101(3)(a).

137. Thus, Plaintiffs seek declaratory relief that the City's actions violate C.R.S. §38-1-101(3)(a).

SIXTH CLAIM FOR RELIEF
(Violation of the Colorado Constitution, Article II, Section 15 – Regulatory Taking)

138. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

139. Article II, Section 15 of the Colorado Constitution states that property shall not be taken or needlessly disturbed without just compensation.

140. Plaintiffs Kaminer and Zislis possess certain property rights in the subject property, in addition to property rights in the medical marijuana provided by them at the subject property (through Article XVIII, Section 14).

141. The City's ban and *Cease and Desist Letter* constitutes an impairment or "taking" of these rights.

142. Zoning, since it restricts an owner's right to use his property, constitutes a partial taking, but it is constitutionally permissible, however, so long as it is reasonable. Serv. Oil Co. v. Rhodus, 500 P.2d 807 (1972).

143. The City's actions here constitute a taking under Article II, Section 15 of the Colorado Constitution because its actions are in direct contravention of State Law, and are unreasonable, accordingly.

144. Thus, Plaintiffs seek redress and compensation for this taking under the Colorado Constitution.

SEVENTH CLAIM FOR RELIEF

(Due Process Violation Under the Colorado Constitution – the Defendant's Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* Constitute a Deprivation of Plaintiffs' Vested Constitutional Rights Without Due Process)

145. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

146. An actual controversy exists with regard to the legality and the validity of the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

147. The rights of all Plaintiffs are adversely affected by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

148. Specifically, the vested constitutional private property rights of Plaintiffs Kaminer and Zislis under Article II, Section 15, Colo. Constit., have been taken away without due process of law.

149. In addition, the rights of all Plaintiffs under Article XVIII, Section 14, have been taken away by the City without due process of law.

150. The City has exceeded its statutory and constitutional authority by depriving the Plaintiffs of these rights.

151. Plaintiffs seek relief prohibiting the City from depriving the Plaintiffs of these vested constitutional rights.

EIGHTH CLAIM FOR RELIEF

(Equal Protection Violation Under the Colorado Constitution – the Defendant’s Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* Constitute a Deprivation of Plaintiffs’ Vested Constitutional Rights Without Due Process)

152. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

153. An actual controversy exists with regard to the legality and the validity of the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

154. The rights of all Plaintiffs are adversely affected by the Centennial ban on medical marijuana dispensaries and the *Cease and Desist Letter*.

155. Specifically, the Equal Protection Clauses of the state constitution requires that all persons subject to legislation shall be treated alike under similar circumstances; it requires that individuals within a certain class be treated equally and that there exist reasonable grounds for the classification.

156. Here, the City has instituted a policy and specific directive that deprives these Plaintiffs Constitutionally guaranteed rights within the City of Centennial.

157. These Plaintiffs should be treated uniformly both inside the City of Centennial and outside the City of Centennial under the tenets of the equal protection clause.

158. Here, Plaintiff have not been treated the same under the laws and policy of the City of centennial. Therefore, the City has violated the equal protection clause.

159. The City has exceeded its statutory and constitutional authority by depriving the Plaintiffs of these rights.

160. Plaintiffs seek relief prohibiting the City from depriving the Plaintiffs of these vested constitutional rights.

NINTH CLAIM FOR RELIEF

(Preliminary Injunction and Temporary Restraining Order Pursuant to C.R.C.P 65)

161. Plaintiffs incorporate the foregoing paragraphs and allegations as if fully set forth herein.

162. Plaintiffs Frasher, Lamb, and Mosher are registered medical marijuana patients who rely on medical marijuana to help manage and treat life-threatening symptoms resulting from several diagnoses, including multiple sclerosis, Ankylosing Spondylitis, Restless Leg Syndrome, and nerve degeneration. Medical marijuana has dramatically improved the quality of their lives as individuals living with chronic, progressive, and incurable conditions. Benefits of medical marijuana include decreased dependency on narcotic therapies and other prescription drugs, more effective pain management, increased appetite, better quality sleep, decreased nerve pain, and decreased muscle spasms.

163. Denying these Plaintiffs access to medical marijuana causes an immediate and irreparable injury that can be prevented by a temporary restraining order stopping the enforcement of the City's ban and the *Cease and Desist Letter*.

164. If not enjoined by the Court, Defendant will continue to implement the City's policy in derogation of Plaintiffs' respective rights, others similarly situated, and qualified medical marijuana patients. Such will impose irreparable injury on the Plaintiffs and these other persons.

165. Plaintiffs have no other plain, speedy, or adequate remedy at law.

166. The attached affidavits, incorporated herein, verify the immediate and irreparable harm the ban and the *Cease and Desist Letter* pose to these Plaintiffs.

167. Plaintiffs ask the Court for a Preliminary Injunction and Temporary Restraining Order Pursuant to C.R.C.P 65.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

- A. Enter judgment in Plaintiffs' favor and against Defendants in an expedited manner pursuant to C.R.C.P. 65 and 57(m);
- B. Grant Plaintiffs Declaratory Judgment finding that the City's ban on medical marijuana dispensaries and the enforcement of the *Cease and Desist Letter* are precluded and preempted by State Law (Article II, Section 15 and Article II, Section 14 of the Colorado Constitution), and that the ban and the *Cease and Desist Letter* are, therefore, unenforceable;
- C. Grant Plaintiffs Declaratory Judgment finding that the City's ban on medical marijuana dispensaries and the enforcement of the *Cease and*

Desist Letter are precluded and unenforceable for failure to follow its own LDC guidelines set forth in 11.1.111;

- D. Grant Plaintiffs Declaratory Judgment finding that the City’s interpretation of LDC 11.1.111 is unsupported by adequate evidence, is arbitrary and capricious, is an abuse of discretion, and is otherwise contrary to the Law;
- E. Grant Plaintiffs Declaratory Judgment finding that the City is equitably estopped from enforcing the ban and the *Cease and Desist Letter* with respect to the Plaintiffs here;
- F. Grant Plaintiffs Declaratory Judgment finding that the Defendant’s Ban on Medical Marijuana Dispensaries and Actions in Issuing the *Cease and Desist Order* are in violation of C.R.S. §38-1-101(3)(a));
- G. Grant Plaintiffs Declaratory Judgment finding that the City’s ban on medical marijuana dispensaries and the enforcement of the *Cease and Desist Letter* constitutes a total ban of all such uses within the City of Centennial and that such is impermissible under Colorado Law;
- H. Grant Plaintiffs Declaratory Judgment finding that the City’s ban on medical marijuana dispensaries and the enforcement of the *Cease and Desist Letter* constitutes an impermissible use and enforcement of federal law by the City of Centennial, Colorado;
- I. Find that the City’s ban on medical marijuana dispensaries and the enforcement of the *Cease and Desist Letter* has deprived Plaintiffs Kaminer, Zislis, Frasher, Lamb, and Mosher of their vested constitutional

rights under Article II, Section 15 and/or Article XVIII, Section 14 of the Colorado Constitution without due process of law;

- J. Find that the City's ban on medical marijuana dispensaries and the enforcement of the *Cease and Desist Letter* has violated the equal protection rights of Plaintiffs Kaminer, Zislis, Frasher, Lamb, and Mosher;
- K. Determine that the Defendant has affected a regulatory taking against Plaintiffs Kaminer and Zislis in violation of Colorado Constitution, Article II, Section 15 and Article XVIII, Section 14, and award appropriate relief;
- L. Enter a temporary and permanent injunction ordering the Defendant, and all those acting in concert with them, to cease and desist from enforcement of the ban and the *Cease and Desist Letter*;
- M. Award Plaintiffs reasonable attorney fees and costs; and,
- N. Grant Plaintiffs any and all other relief the Court deems proper.

DATED: November 30, 2009

Respectfully submitted,

/s/ Robert T. Hoban

Robert T. Hoban, Esq.

/s/ Robert J. Corry

Robert J. Corry, Jr.