IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

SARCOXIE NURSERY CULTIVATON CENTER, LLC, et al.,	)	
Plaintiffs,	)	Case No. 19AC-CC00556
vs.	)	
RANDALL WILLIAMS, et al.,	)	
Defendants.	)	

ORDER AND JUDGMENT

This Court, having reviewed and considered the pleadings, arguments, and evidence adduced at trial, and having been fully advised of the matter, finds the following facts by a preponderance of the evidence and the following conclusions of law in favor of the Defendants.

Plaintiffs challenge the validity of 19 CSR 30-95.025(6)-(8), 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A) as promulgated by the Missouri Department of Health and Senior Services related to limits on medical marijuana facility licenses and scoring increases for applicants related to an effort to ensure positive economic impact within the state. This Court finds the regulations at issue were properly promulgated and are in compliance with Missouri's laws and Constitution.

Findings of Fact

Parties

1. Plaintiff Sarcoxie Nursery Cultivation Center, LLC unsuccessfully applied for a medical marijuana cultivation facility license from Defendant Department of Health and Senior Services ("DHSS").

2. Plaintiff Missouri Medical Manufacturing, LLC unsuccessfully applied for a medical marijuana cultivation facility license from DHSS.

3. Plaintiff GVMS, Inc. unsuccessfully applied for a medical marijuana cultivation facility license, medical marijuana infused products manufacturing facility license, and medical marijuana dispensary facility license from DHSS.

4. Plaintiff Sarcoxie Nursery Infusions, LLC unsuccessfully applied for a medical marijuana infused products manufacturing facility license from DHSS.

5. Plaintiff Missouri Medical Products, LLC unsuccessfully applied for a medical marijuana infused products manufacturing facility license from DHSS.

6. Defendant DHSS is the Department authorized by art. XIV to implement the Medical Marijuana Amendment.

7. Defendant Dr. Randall Williams is the Director of DHSS.

8. Defendant Lyndall Fraker is DHSS's Director of the Section on Medical Marijuana Regulation. (Defendants are collectively referred to as "the Department").

The Department's considerations regarding potential rules

9. The population of Missouri as of the 2010 U.S. Census was 5,988,927 inhabitants.

10. Before promulgating the regulations at issue, the Department considered both the potential positive and negative impacts of licensing

limitations with regard to medical marijuana.

11. Before promulgating the regulations at issue, the Department considered both the potential positive and negative impacts of not limiting licenses with regard to medical marijuana.

12. Before promulgating the regulations at issue, the Department considered patient access as a potential issue as related to whether or not to limit medical marijuana facility licenses.

13. Before promulgating the regulations at issue, the Department considered the potential demand in the aggregate from patients as related to whether or not to limit medical marijuana facility licenses.

14. Before promulgating the regulations at issue, the Department considered the potential supply in the aggregate to patients as related to whether or not to limit medical marijuana facility licenses.

15. Before promulgating the regulations at issue, the Department considered the potential demand of individual patients as related to whether or not to limit medical marijuana facility licenses.

16. Before promulgating the regulations at issue, the Department considered the potential supply an individual medical marijuana cultivation facility could produce as related to whether or not to limit medical marijuana facility licenses.

17. Before promulgating the regulations at issue, the Department considered the geographic access for patients as related to whether or not to limit medical marijuana dispensary facility licenses.

18. Before promulgating the regulations at issue, the Department considered patient safety as a potential issue as related to whether or not to limit medical marijuana facility licenses.

19. Before promulgating the regulations at issue, the Department considered diversion to be a potential issue as related to whether or not to limit medical marijuana facility licenses.

20. Diversion is the term used to describe medical marijuana being diverted from a lawful purpose to an illegal purpose.

21. Medical marijuana cannot be sold outside of the state.

22. Medical marijuana cannot be sold to a person or entity not licensed by the Department.

23. Before promulgating the regulations at issue, the Department considered public safety to be a potential issue as related to whether or not to limit medical marijuana facility licenses.

24. Before promulgating the regulations at issue, the Department considered the effectiveness of regulation to be a potential issue as related to whether or not to limit medical marijuana facility licenses.

25. Before promulgating the regulations at issue, the Department considered the cost of regulation to be a potential issue as related to whether or not to limit medical marijuana facility licenses.

26. Before promulgating the regulations at issue, the Department considered the cost of litigation to be a potential issue as related to whether or not to limit medical marijuana facility licenses.

27. Before promulgating the regulations at issue, the Department considered zip code based scoring increases for applications in order to effectuate the constitutional requirement to consider the potential for positive economic impact in the site community pursuant to art. XIV, § 1.3(1)(h)(vi).

28. Medical marijuana facilities are businesses that may employ Missourians from the area surrounding their locations.

29. An increase to the employment rate from a licensed facility can have a net positive impact on an economically depressed communities.

30. Before promulgating the regulations at issue, the Department considered licensing medical marijuana facilities in areas with higher unemployment statistics, relative to other comparable areas, in order to

increase the potential for positive economic impact.

31. The economic impact enhancements did not have an impact on whether or not Plaintiffs received facility licenses.

32. The Department consulted with other states where medical marijuana is legal, commissioned a market study from the chair of the economics department at the University of Missouri, consulted with the Missouri Department of Economic Development, consulted with industry experts, held public Advisory Committee meetings, and solicited input on multiple drafts of its proposed regulations before promulgating its medical marijuana rules.

33. The Department disseminated four draft versions of its proposed regulations before promulgating its medical marijuana rules.

34. The Department solicited and received hundreds of comments on its proposed regulations during a four month informal comment period between January and May 2019.

<u>The Department's transparency pre-promulgation</u>

35. The Department met with potential stakeholders prior to beginning the rule promulgation process for rules it was considering related to medical marijuana.

36. The Department did not turn away anyone who wanted to meet with a Departmental representative prior to beginning the promulgation process.

37. The Department held multiple public forums to receive input prior to beginning the rule promulgation process for rules it was considering related to medical marijuana.

38. The Department posted drafts of its rules to its website prior to beginning the rule promulgation process for rules it was considering related to medical marijuana.

39. The Department accepted comments regarding the rules it was considering related to medical marijuana prior to beginning the promulgation process.

40. The Department revised the rules it was considering after accepting comments regarding the rules it was considering related to medical marijuana prior to beginning the promulgation process.

The promulgation process

41. The Department filed its notice of proposed rulemaking for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 on May 24, 2019.

42. The Department filed Small Business Impact ("SBI") statements with the Small Business Regulatory Fairness Board ("Board") for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 on May 24, 2019.

43. After the Department filed the SBI statements for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 with the Board, the Department received no feedback from either the Board or any small business.

44. The Department filed its notice of proposed rulemaking with the Joint Committee on Administrative Rules ("JCAR" or the "Committee") for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 on May 24, 2019.

45. After the Department filed its notice of proposed rulemaking for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 with JCAR, the Department received no feedback from the Committee.

46. The notice of proposed rulemaking for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 were published by the Missouri Secretary of State on July 1, 2019.

47. The Department filed its emergency regulations 19 CSR 30-95.025, 19

CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 on May 24, 2019.

48. The emergency regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 became effective on June 3, 2019.

49. The emergency regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 were published by the Missouri Secretary of State on July 1, 2019.

50. The Department published a statement to justify filing emergency regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080.

51. The Department filed its final order of rulemaking for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 on October 28, 2019.

52. The final order of rulemaking for regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 were published by the Missouri Secretary of State on December 2, 2019.

53. Regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 became effective on January 30, 2020.

54. Emergency regulations 19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 were no longer effective as of February 27, 2020.

Impact of Rule 19 CSR 30-95.025(6)-(8)

55. Before promulgating rule 19 CSR 30-95.025(6)-(8), the Department consulted with the Missouri Department of Economic Development to determine the best way to measure the potential for positive economic impact in the site community.

56. The Missouri Department of Economic Development recommended the use of employment data from the US Census Bureau.

57. The Department's zip code employment data was obtained from the "U.S. Census Bureau, American Community Survey 2013-2017, Employment Status, Population 16 years and over," published by the Missouri Census Data Center.

58. Regulation 19 CSR 30-95.025(6)-(8) gives a 30-40% increase to the score in the economic impact section of applications for facilities in economically depressed zip codes.

59. These increases could only result in a change of a few points in the overall score of an application.

60. Even if all Plaintiffs had received the maximum economic impact bonuses allowed in Rule 19 CSR 30-95.025(6)-(8), they would not have received licenses.

61. Even if no applicants had received the any economic impact bonuses allowed in Rule 19 CSR 30-95.025(6)-(8), the Plaintiffs would not have received licenses.

Medical Marijuana Cultivation Facility Licenses

62. There were 582 applicants for medical marijuana cultivation facility licenses submitted to the Department.

63. On December 26, 2019, the Department issued 60 licenses for medical marijuana cultivation facilities.

Applicant Sarcoxie Nursery Cultivation Center, LLC

64. Sarcoxie Nursery Cultivation Center, LLC's application was denied by the Department.

65. Sarcoxie Nursery Cultivation Center, LLC is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-0664.

Applicant Missouri Medical Manufacturing LLC

66. Missouri Medical Manufacturing LLC applied for a medical marijuana cultivation facility license.

67. Missouri Medical Manufacturing LLC's application was denied by the Department.

68. Missouri Medical Manufacturing LLC is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-0671.

Applicant GVMS, Inc.

69. GVMS, Inc. applied for a medical marijuana cultivation facility license.

70. GVMS, Inc.'s application was denied by the Department.

71. GVMS, Inc. is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-0666.

Medical Marijuana Infused Products Manufacturing Facility Licenses

72. There were 430 applicants for medical marijuana infused products manufacturing facility licenses submitted to the Department.

73. On January 10, 2020, the Department issued 86 licenses for medical marijuana infused products manufacturing facilities.

Applicant Sarcoxie Nursery Infusions, LLC

74. Sarcoxie Nursery Infusions, LLC applied for a medical marijuana infused products manufacturing facility license.

75. Sarcoxie Nursery Infusions, LLC's application was denied by the Department.

76. Sarcoxie Nursery Infusions, LLC is currently appealing the denial of its

application at the Administrative Hearing Commission in Case No. 20-0725.

Applicant Missouri Medical Products, LLC

77. Missouri Medical Products, LLC applied for a medical marijuana infused products manufacturing facility license.

78. Missouri Medical Products, LLC's application was denied by the Department.

79. Missouri Medical Products, LLC is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-0971.

Applicant GVMS, Inc.

80. GVMS, Inc. applied for a medical marijuana infused products manufacturing facility license.

81. GVMS, Inc. received a score of 1320.37 and was ranked 292 out of 423 430 infused product manufacturing applicants.

82. GVMS, Inc.'s application was denied by the Department.

83. GVMS, Inc. is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-0717.

Medical Marijuana Dispensary Facility Licenses

84. There were 1,218 total applications for medical marijuana dispensary facility licenses submitted to the Department.

85. On January 23, 2020, the Department issued 192 licenses for medical marijuana dispensary facilities throughout the state

86. There were 133 applications for medical marijuana dispensary facility

licenses for the 4th U.S. congressional district of Missouri submitted to the Department.

87. On January 23, 2020, the Department issued 24 licenses for medical marijuana dispensary facilities in the 4th U.S. congressional district of Missouri.

88. The highest ranked applicant for a medical marijuana dispensary facility license in the 4th U.S. congressional district received a score of 1604.07.

89. The applicant who received the twenty-fourth license for a medical marijuana dispensary facility license in the 4th U.S. congressional district received a score of 1502.29.

Applicant GVMS, Inc.

90. GVMS, Inc. applied for a medical marijuana dispensary facility license in the 4th U.S. congressional district of Missouri.

91. GVMS, Inc.'s application was denied by the Department.

92. GVMS, Inc. is currently appealing the denial of its application at the Administrative Hearing Commission in Case No. 20-1025.

Supply and demand

93. Based on the information the Department had at the time it drafted the medical marijuana regulations, it estimated by the third year of legal medical marijuana, 3% of Missourians would be qualified patients.

94. By the time of trial, Missouri is on track to have 3% of Missourians registered as qualified patients by year 3, or approximately 180,000 Missourians.

95. Qualified patients are limited to possessing not more than three pounds of medical marijuana per year.

96. At the time it drafted the medical marijuana regulations, the

Department estimated based on Dr. Haslag's study and the experience of other states where medical marijuana is legal, that cultivators will produce an average of 0.5 pounds of marijuana per square feet per year.

97. As of trial, licensed Missouri cultivators were reporting to the Department they are producing approximately 0.5 pounds of marijuana per square feet of flowering plant canopy space per year.

98. Licensed cultivation facilities in Missouri are permitted grow up to thirty thousand square feet of flowering plant canopy space.

99. If all 60 licensed cultivation facilities grow 0.5 pounds of marijuana per square foot for all 30,000 square feet, they could produce 900,000 pounds of marijuana per year.

100. The Department estimates that there could be hundreds of thousands of pounds of excess medical marijuana produced.

101. Excess legal marijuana production creates incentives to divert marijuana from the legal market to the black market.

CONCLUSIONS OF LAW

The Department's regulations regarding limitations on licenses and economic impact scoring in 19 CSR 30-95.025(6)-(8), 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A), are valid and constitutional. Properly promulgated regulations are presumed valid and have the force and effect of law. Rules promulgated by agencies "are entitled to a presumption of validity and may not be overruled except for weighty reasons." *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 602 (Mo. banc 2012). *See also Valley Park Properties, LLC v. Missouri Dep't of Nat. Res.*, 580 S.W.3d 607, 612 (Mo. App. E.D. 2019). Plaintiffs did not present sufficient

evidence to overcome the presumption of validity or to prove the rules are inconsistent with Missouri's laws or constitution.

I. Facility License Limitations in 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19-30-95.080(1)(A) are consistent with the plain language of art. XIV of the Missouri Constitution.

The plain language of art. XIV, § 1 of the Missouri Constitution expressly contemplates licensing limitations and authorizes the Department to implement such limits, if it so chooses. Pursuant to the constitutional delegation of authority, the Department promulgated 19 CSR 30-5.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A) to limit the number of facility licenses issued. Further, should the Department determine in the future that the limits it has placed on licenses unreasonably restricts patients' access to medical marijuana, it has the constitutional authority to increase those limits, which it has addressed in the plain language of its regulations. Therefore, these regulations do not "conflict with state law." § 536.014, RSMo.

Questions of statutory interpretation begin with the plain language of the law. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc. 2012). 19 CSR 30-5.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A) conform to the plain language of art. XIV, § 1. Further, the Department's regulations fall squarely within its constitutional delegation of authority. As the regulations do not conflict with the plain language of Missouri law and Constitution, they are upheld.

A. The limit on cultivation facility licenses is consistent with the plain language of art. XIV, § 1.3(15).

With respect to limits on cultivation facility licenses, art. XIV, § 1 provides, in relevant part:

> 3. Creating Patient Access to Medical Marijuana.
>
> * * *
>
> (15) The department may restrict the aggregate number of licenses granted for medical marijuana cultivation facilities, provided, however, that the number may not be limited to fewer than one license per every one hundred thousand inhabitants, or any portion thereof, of the state of Missouri, according to the most recent census of the United States....

Mo. Const. Art. XIV, § 1.3. The Department's rule addressing the same matter states:

> (1) Cultivation Facility Licenses.
> (A) The number of cultivation facility licenses will be limited to sixty (60) unless the department determines the limit must be increased in order to meet the demand for medical marijuana by qualifying patients.

19 CSR 30-95.050(1)(A). Art. XIV, § 1.3 authorizes the Department to limit the number of cultivation facility licenses to one per every 100,000 inhabitants of the state based upon the most recent census. The most recent census of the United States lists Missouri as having 5,988,927 inhabitants, therefore a limit of 60 cultivation facility licenses is greater than the minimum limit set by the Constitution. Further, Deputy Director Amy Moore and Dr. Williams both testified that in the event the Department determines more licenses are needed

to meet the demand, the number of available licenses can be increased.

19 CSR 30-95.050(1)(A) is consistent with the plain language of art. XIV, § 1.3(15), is consistent with the Department's constitutional delegation of authority, does not conflict with state law, and is upheld.

B. The limit on marijuana infused manufacturing facility licenses is consistent with the plain language of art. XIV, § 1.3(16).

With respect to limits on marijuana-infused products manufacturing facility licenses, art. XIV, § 1 provides, in relevant part:

> a. Creating Patient Access to Medical Marijuana.
>
> * * *
>
> (16) The department may restrict the aggregate number of licenses granted for marijuana-infused products manufacturing facilities, provided, however, that the number may not be limited to fewer than one license per every seventy thousand inhabitants, or any portion thereof, of the state of Missouri, according to the most recent census of the United States....

Mo. Const. Art. XIV, § 1.3. The Department's rule addressing the same matter states:

> (1) Infused Products Manufacturing Facility Licenses.
>
> (A) The number of manufacturing facility licenses will be limited to eighty-six (86) unless the department determines the limit must be increased in order to meet the demand for medical marijuana by qualifying patients.

19 CSR 30-95.060(1)(A). Art. XIV, § 1.3 authorizes the Department to limit the number of marijuana-infused products manufacturing facility licenses to

one per every 70,000 inhabitants of the state based upon the most recent census. The most recent census of the United States lists Missouri as having 5,988,927 inhabitants, therefore a limit of 86 marijuana-infused products manufacturing facility licenses is greater than the minimum limit set by the Constitution. Further, Deputy Director Moore and Dr. Williams both testified that in the event the Department determines more licenses are needed to meet the demand, the number of available licenses can be increased.

19 CSR 30-95.060(1)(A) is consistent with the plain language of art. XIV, § 1.3(16), is consistent with the Department's constitutional delegation of authority, does not conflict with state law, and is upheld.

C. The limit on dispensary facility licenses is consistent with the plain language of art. XIV, § 1.3(17).

With respect to limits on dispensary facility licenses, art. XIV, § 1 provides, in relevant part:

> 3. Creating Patient Access to Medical Marijuana.
>
> * * *
>
> (17) The department may restrict the aggregate number of licenses granted for medical marijuana dispensary facilities, provided, however, that the number may not be limited to fewer than twenty-four licenses in each United States congressional district in the state of Missouri pursuant to the map of each of the eight congressional districts as drawn and effective on December 6, 2018....

Mo. Const. Art. XIV, § 1.3. As of December 6, 2018, Missouri has eight

congressional districts. The Department's rule addressing the same matter states:

> (1) Access to Dispensary Facility Licenses.
>
> (A) The number of dispensary facility licenses will be limited to one hundred ninety-two (192) unless the department determines the limit must be increased in order to meet the demand for medical marijuana by qualifying patients.

19 CSR 30-95.080(1)(A). Art. XIV, § 1.3 authorizes the Department to limit the number of dispensary facility licenses to 24 per each of the eight United States congressional districts. Therefore, a limit of 192 dispensary facility licenses is equal to or greater than the minimum limit set by the Constitution. Further, Deputy Director Moore and Dr. Williams both testified that in the event the Department determines more licenses are needed to meet the demand, the number of available licenses can be increased.

19 CSR 30-95.080(1)(A) is consistent with the plain language of art. XIV, § 1.3(17), is consistent with the Department's constitutional delegation of authority, does not conflict with state law and is upheld. As to Count I, the Court finds in favor of the Defendants.

II. <u>19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19-30-95.080(1)(A) do not violate the Right to Farm as outlined in Article I, § 35 of the Missouri Constitution.</u>

Medical marijuana facility license limitations consistent with art. XIV of the Missouri Constitution do not conflict with or violate the Right to Farm

amendment in art. I, § 35 of the Missouri Constitution. To argue that the facility license limits consistent with the plain language of art. XIV § 1 violate another article of the constitution attempts to place these constitutional provisions in conflict where there is none. The right to farm does not apply to the cultivation of marijuana.

Where two acts are seemingly repugnant they must be construed together when possible; if they are not irreconcilably inconsistent both must stand. *State v. Kraus*, 530 S.W.2d 684, 686 (Mo. banc 1975). The test for determining whether a conflict exists is whether one amendment prohibits what the other permits or vice versa. *See State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 812 (Mo. banc 1946); *Vest v. Kansas City*, 194 S.W.2d 38, 39 (Mo. 1946). Constitutional provisions are given broader construction due to their more permanent nature. *State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2d 617, 620 (Mo. banc 1982).

The courts have already addressed the issue of whether marijuana cultivation is protected by the Right to Farm amendment. In *State v. Shanklin*, the court explicitly rejected the argument that the Right to Farm was applicable to the cultivation of marijuana, stating:

> [T]he amendment expressly recognizes farming and ranching practices are subject to local government regulation, it would be absurd to conclude Missouri voters intended to implicitly nullify or curtail state and federal regulatory authority over the illegal drug trade.

534 S.W.3d 240, 243 (Mo. banc 2017), *See also United States v. White*, 928 F.3d 734, 744 n.10 (8th Cir. 2019). Marijuana, in spite of Missouri's adoption of art. XIV, is still a Schedule I controlled substance pursuant to 21 U.S.C. §812, thus the reasoning of *Shanklin* still applies. Also, the text of art. XIV, § 1 supports the limited production of marijuana for medical purposes, not the unfettered production of marijuana.

> This section is intended to make only those changes to Missouri laws that are necessary to protect patients, their primary caregivers, and their physicians from civil and criminal penalties, and to allow for the limited legal production, distribution, sale and purchase of marijuana for medical use. This section is not intended to change current civil and criminal laws governing the use of marijuana for nonmedical purposes.

Mo. Const. Art. XIV § 1.1.

Even if these two provisions were in conflict, the ability to limit medical marijuana facility licenses in art. XIV, § 1 was passed after the Right to Farm amendment in art. I, § 35. "Where an irreconcilable conflict exists between constitutional sections, the section passed last in time prevails." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 264 (Mo. banc 1996). The Right to Farm amendment was passed in 2014, whereas the Medical Marijuana amendment was passed in 2018. As Medical Marijuana was passed last in time, it would prevail.

The imposition of license limits is constitutionally authorized and

intended to limit the legal production of marijuana for medical use as outlined in art. XIV, § 1. The two constitutional provisions are not in conflict as the right to farm, based on precedent from the Missouri Supreme Court, is not applicable to marijuana cultivation, and nothing in art. XIV is inconsistent with this clearly established law. For these reasons, as to Count II, the Court finds in favor of the Defendants.

III. Facility License Limitations in 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19-30-95.080(1)(A) each have a rational basis to a legitimate governmental interest and are not arbitrary and capricious.

The Department has placed limits on the number of licenses issued as related to medical marijuana cultivation, manufacture, and dispensing in order to limit crime, effectively regulate the medical marijuana market, avoid costs due to excess marijuana, and ensure patient safety. Testimony of Deputy Director Moore, Dr. Williams, and Dir. Fraker as well as the comments and drafts demonstrated these limits were put in place after thoughtful deliberation of both their constitutionality and practical effect. Those limits bear a rational relationship to legitimate government interests.

Plaintiffs ask this Court to declare the Department's rules are "so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected." §§ 536.014(3), 536.050.1, & 536.053, RSMo. It cannot do so.

> Arbitrary and capricious has been defined in the context of rules and regulations as willful and unreasoning action, without consideration of and in disregard of the facts and circumstances.

Psych. Healthcare Corp. of Mo. v. Dept. of Soc. Servs., 100 S.W.3d 891, 900 (Mo. App. W.D. 2003) (citations omitted). It is not enough that a rule be burdensome to a particular party. *Id.* "Rules and regulations are to be sustained unless unreasonable and plainly inconsistent with the act, and they are not to be overruled except for weighty reasons." *Foremost-McKesson, Inc., v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972). If the rule bears a rational relationship to a legitimate state interest, it is neither arbitrary nor capricious. *Psych. Healthcare*, 100 S.W.3d at 900.

> [U]nder the rational basis test, the Court does not have to determine whether the legislature 'should have' done something different or whether there is a better means to accomplish the same goal, and certainly not whether the chosen means is the best method.

Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513, 516 (Mo. banc 1999). "Administrative rules should be reviewed in light of the evil they seek to cure and are not unreasonable merely because they are burdensome." *Foremost-McKesson, Inc.*, 488 S.W.2d at 197-98.

The rules limiting the number of facility licenses related to cultivation, manufacture, and dispensing of medical marijuana are authorized by art. XIV, which enables the Department to promulgate such rules. Further, such limits are rationally related to many legitimate state interests. Mo. Const., art. XIV

§ 1.3(15)-(17).

A. Purpose and intent of the law.

The purpose of the medical marijuana amendment to Missouri's constitution is to ensure access to patients who qualify due to "serious illnesses and medical conditions." Mo. Const., art. XIV § 1.1. The amendment makes "only those changes to Missouri laws that are necessary to protect patients, their primary caregivers, and their physicians..." *Id.* The amendment allows "for the ***limited*** legal production, distribution, sale and purchase of medical marijuana for medical use." *Id.* (Emphasis added). It is expressly ***not*** the intent of the law to change current civil and criminal laws regarding marijuana for nonmedical purposes. *Id.*

B. The Department's authority.

Art. XIV empowers the Department to carry out its purpose and intent through regulation and the promulgation of rules.

> In carrying out the implementation of this section, the department shall have the authority to ... promulgate rules ... necessary for the proper regulation and control of the cultivation, manufacture, dispensing, and sale of marijuana for medical use and for the enforcement of this section so long as patient access is not restricted unreasonably and such rules are reasonably necessary for patient safety or to restrict access to only licensees and qualifying patients.

Mo. Const., art. XIV § 1.3(1)(b). In addition to the intent of the amendment to limit access to marijuana generally, art. XIV also expressly provides as to what

limits can be imposed:

- The Department may restrict the total number of cultivation facility licenses to one license per every one hundred thousand inhabitants (60 to date). Mo. Const., art. XIV § 1.3(15); 19 CSR 30-95.050(1)(A).
- The Department may restrict the total number of manufacturing facility licenses to one license per every seventy thousand inhabitants (86 to date). Mo. Const., art. XIV § 1.3(16); 19 CSR 30-95.060(1)(A).
- The Department may restrict the total number of dispensary facility licenses to twenty-four licenses per each U.S. Congressional District in the state. (192 to date). Mo. Const., art. XIV § 1.3(17); 19 CSR 30-95.080(1)(A).

The Department not only has express authority to regulate the medical marijuana market, but also has the express authority to limit licenses related to that market.

C. Legitimate state interests.

There are numerous legitimate state interests, both set out by art. XIV and Missouri law, that bear a rational relationship to limiting the number of medical marijuana facility licenses permitted in Missouri. These bases were the subject of deliberation by the Department, as well as the subject of an independent study the Department commissioned, reviewed, and scrutinized when coming to a decision as to whether or not to exercise its power to impose

a license limitation. Legitimate state interests include preventing illicit activities, preventing costs associated with excess supply, the effectiveness of governmental oversight and regulation, and patient safety.

i. Preventing illicit activities and excess medical marijuana are legitimate governmental interests.

Marijuana is a Schedule I controlled substance in the state of Missouri. § 195.017, RSMo. Save the narrow exceptions set out by art. XIV and the rules promulgated thereunder, it is illegal in this state to possess, transport, cultivate, manufacture, or sell marijuana in this state. Ch. 579, RSMo. Art. XIV § 1 "is not intended to change current civil and criminal laws governing the use of marijuana for nonmedical purposes." Mo. Const., art. XIV § 1.1.

The purpose of the medical marijuana amendment is to ensure only Missouri citizens who qualify due to "serious illnesses and medical conditions" have access. Therefore the Department promulgated rules to restrict access to only licensees and qualifying patients. Dr. Haslag, Deputy Director Moore, and Dir. Williams all testified that the risk of allowing unfettered production creates an excess of legally produced marijuana, which may be diverted to the black market. Even at the constitutionally approved minimum number of facility licenses, the capacity for legal marijuana production will greatly exceed the demand for medical marijuana based on both the projected and actual numbers of licensed qualified patients. Allowing production and distribution

above the license limitation would only exacerbate the risk of diversion into a black market.

Limiting facility licenses is rationally based in the legitimate government interest of ensuring that those licensees are not incentivized to sell excess marijuana and thereby break laws related to transporting marijuana across state lines to other markets or related to the illegal sale of marijuana within the state.

ii. The State's need to remove excess medical marijuana from the marketplace is a legitimate governmental interest.

As testified to by Deputy Director Moore, excess marijuana supply would create additional costs for the State, such as additional enforcement activity to ensure the product is not sold illicitly and further regulation of the destruction of excess product. Article XIV contemplates that state revenue derived from medical marijuana is intended to fund the regulation of the medical marijuana market and veterans programs. Mo. Const., art. XIV § 1.4.

Therefore, limiting the number of licensees reasonably restricts supply so that the government does not ultimately have to incur costs for excess marijuana – a legitimate government interest.

iii. Protecting patient safety is a legitimate governmental interest.

As the number of licensees increase, the effectiveness of governmental oversight and regulation decreases, and patients are put at risk. When

promulgating regulations, the Department considered not only whether such a rule unreasonably restricted access for patients, but also patients' safety. Mo. Const., art. XIV § 1.3(1)(b). Therefore, limiting the number of licenses available for cultivation, manufacture, and dispensing of medical marijuana allows for the proper and active regulation of the controlled substance within the medical marijuana marketplace from cultivation to manufacture to dispensing. This ensures patient safety. Conversely, removing limits on the number of licenses related to medical marijuana requires a finite amount of governmental resources to regulate an ever- expanding field of licensees. This harms patient safety.

Furthermore, the medical marijuana system requires the ranking of applicants in excess of licensing caps. Mo. Const., art. XIV § 1.3(1)(h). Based upon the components of the ranking system, applicants that are more qualified will receive licenses. If there were no licensing limitations, then progressively less qualified applicants would become licensees. As the number of licensees grows beyond the current licensing caps and as the qualifications of the licensees diminish, the finite government resources tasked with regulating the marketplace stretches thinner. As the government's regulatory resources strain, patient safety is potentially imperiled. Therefore, limiting the number of licenses issued is reasonably related to the dual interests of proper regulation and patient safety.

Because the regulations in question support numerous legitimate state interests, such regulations are not arbitrary or capricious. The regulations are upheld as valid. As to Count III, the Court finds in favor of the Defendants.

IV. Plaintiffs relief is denied.

The court has found that the administrative rules challenges as to Count IV, relief is denied.

Plaintiffs are not entitled to relief under § 536.150, RSMo, because neither Dr. Williams and Dir. Fraker have rendered a decision which has demonstrated a rational relationship to a legitimate state interest. As such relief under writs of prohibition and mandamus are denied.

V. The Department properly promulgated its rules pursuant to Chapter 536.

19 CSR 30-95.025, 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 were properly promulgated. Plaintiffs failed to present any evidence the Department neglected to submit small business impact statements ("SBI statements") to the Small Business Regulatory Fairness Board ("Board") regarding the rules that place licensing limits on cultivation, manufacturing, and dispensing of medical marijuana. This Court finds the Department did file the SBI statements with the Board and those statements are legally sufficient.

During the promulgation of the regulations imposing limits on medical marijuana facility licenses, the Department submitted an SBI statement for

each rule to the Board in compliance with § 536.300, RSMo. After the Department filed the SBI statements for regulations 19 CSR 30-95.050, 19 CSR 30-95.060, and 19 CSR 30-95.080 with the Board, the Department received no feedback from either the Board or any small business. Each rule was then formally promulgated and published by the Secretary of State.

Furthermore, the Department properly promulgated 19 CSR 30-95.025(6)-(8), 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A) as both emergency and permanent rules. This Court finds that it would not have been possible for the Department to promulgate rules through the standard rulemaking process between December 6, 2018, when the Medical Marijuana Amendment went into effect and June 4, 2019, when the first applications were mandated to be made public by art. XIV, § 1(3)(6)-(7). Instead, the Department, in compliance with § 536.026, RSMo, solicited comments from the public on the rules they considered proposing. § 536.026.1 ("In addition to seeking information by other methods, an agency may solicit comments from the public on the subject matter of a rule that the agency is considering proposing."). After significant comments were received and considered, the Department filed the identical text of its regulations as both emergency and permanent rules. The final rules codified in the Code of State Regulations for 19 CSR 30-95.025(6)-(8), 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A), and 19 CSR 30-95.080(1)(A) are identical to the rules in place by

the June 4, 2019, deadline.

As the Department complied with the statutory prescription during the promulgation process, the rules are valid. For these reasons, the Court find in favor of the Defendants on Count V.

VI. "Economic Impact Enhancements" are not special laws.

Plaintiffs attempt to attack what they have termed the "zip code bonuses" and "geographic bonuses" (collectively defined by the Department as the "economic impact enhancements") associated with scoring applications for medical marijuana facility licensure. Plaintiffs do not have standing to bring these attacks because they are not aggrieved by the rule. Further, the art. III, §40 prohibition against special laws is not applicable to executive agencies. Finally, even if rules could be deemed special laws, the State has a legitimate government interest in improving the economic conditions of communities within the state.

A. Plaintiffs lack standing to challenge 19 CSR 30-95.025(6)-(8) as they were not aggrieved by the economic impact enhancements.

Plaintiffs lack standing to contest the economic impact enhancements promulgated in 19 CSR 30-95.025 as they are not an aggrieved party under § 536.053, RSMo. Regardless of whether they received zip code or geographic based scoring increases, Plaintiffs would not have received licenses. Even if Plaintiffs had received such bonuses, or if the bonuses were taken away from

all the applicants who received them, the rankings would not change such that Plaintiffs would fall within the group of applicants that were awarded a license. Because the zip code and geographic bonuses have no effect on Plaintiffs, they cannot be aggrieved. As they cannot be aggrieved, they do not have standing under § 536.053, RSMo, to bring this count.

B. Article III, §40 of the Missouri Constitution only applies to the General Assembly.

Article III, §40, the special laws provision of the Missouri Constitution, is not applicable to rules promulgated by agencies. Any question of statutory interpretation must begin with the plain language of the law. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo banc. 2012). The plain language of the constitution states the "***general assembly*** shall not pass any local or special law..." Mo. Const., art. III, §40 (emphasis added). The Department is not the General Assembly, which is the legislative branch of state government created by art. III, § 1 of the Missouri Constitution. Rather, the Department is an agency of the executive branch created by § 192.005, RSMo.

As the Department, rather than the General Assembly promulgated 19 CSR 30-95.025, the prohibition against special laws set out in art. III, §40 does not apply.

C. The economic impact enhancements have a rational relationship to the legitimate government interest of reinvigorating economically depressed areas of the State.

Even if Plaintiffs had standing and art. III, §40 applied, the economic impact enhancement would still stand as they are not special laws. The test to determine whether or not the zip code and geographic bonuses are a "special law" is determined using a rational basis test. *City of Aurora v. Spectra Commun. Group, LLC*, 593 S.W.3d 764 (Mo. banc 2019). Under *City of Aurora*, every law is entitled to a presumption of constitutional validity by the Court and, so long as there is a rational basis for the law, the law is not local or special and the analysis ends. *Id.* at 780. Under a rational basis test, the law "will survive judicial scrutiny if the state's purpose in creating the classification is legitimate and if any statement of facts reasonably may be conceived to justify the means chosen to accomplish that purpose." *Linton*, 988 S.W.2d 515-16. "Once a legitimate interest can be articulated, all that remains is whether the means chosen is rationally related to achieving that purpose." *Id.* at 516. If the question of "judgment remains at least debatable, the issue settles on the side of validity." *Id.* Rules promulgated by an agency "with properly delegated authority have the force and effect of law." *United Pharmacal Co. of Mo. Inc. v. Mo. Bd. of Pharm.*, 159 S.W.3d 361, 365 (Mo. banc 2005). "The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Foremost-McKesson, Inc.*, 488 S.W.2d at 197.

Art. XIV authorizes the Department, in implementing the regulatory scheme for medical marijuana to:

> Establish a system to numerically score competing medical marijuana licensee and certificate applicants, on in cases where more applicants apply than the minimum number of license or certificates as calculated by this section, which scoring shall be limited to an analysis of the following:
>
> ***
>
> vi. The potential for positive economic impact in the site community[.]

Mo. Const., art. XIV§ 1.3(1)(h)(vi). In implementing this provision, the Department promulgated rules related to scoring adjustments for applications that would potentially have a positive economic impact for the community in which the facility would be located. The "zip code" bonus, as characterized by the Amended Petition, is codified in 19 CSR 30- 95.025(4)(C)(6)(A), which states:

> Any facility seeking a license to locate within a zip code area that has an employment rate of eighty-five percent to eighty-nine and nine tenths percent (85-89.9%) will receive a scoring increase of thirty percent (30%) of the average initial score of all applicants of the same facility type within the evaluation criteria topic regarding potential for positive economic impact in the site community[.]

The "geographic bonus," as characterized by the Amended Petition, is codified in 19 CSR 30-95.025(4)(C)(6)(B), which states:

> Any facility seeking a license to locate within a zip code area that has an employment rate of zero to eighty-four and nine tenths percent (0-84.9%) will receive a scoring increase of forty percent (40%) of the average initial score of all applicants of the same

> facility type within the evaluation criteria topic regarding potential for positive economic impact in the site community[.]

The plain language of each of these rules is to apply a scoring increase to applications where facilities are located in areas where employment rates are lower relative to the average employment rate of the state. As illustrated through the testimony of Deputy Director Moore, facilities are businesses and businesses potentially provide employment and positive economic impacts to the areas in which they are located through employment. That potential for the positive economic impact increases in areas that are suffering economically. The Department carefully considered how to measure this effect by consulting with the Department of Economic Development to find employment data to use in developing this regulation. Furthermore, these adjustments only applied to the economic impact portion of the application and generally resulted in less than a 3% change to the overall application score.

Not only does the plain language of art. XIV authorize the Department to consider geographic areas through the lens of economic impact, but these regulations also bear a rational relationship to the legitimate governmental interest of employing its citizenry and increasing the economic status of depressed communities throughout the state.

For all of these reasons, as to Count VI, the Court finds in favor of the Defendants.

VII. Economic Impact Enhancements are consistent with art. XIV of the Missouri Constitution.

The economic impact enhancements do not impermissibly impair patient access. By making this argument, Plaintiffs attempt to pit two separate provisions of art. XIV against each other. Plaintiffs lack standing to assert this argument and the two provisions Plaintiff seek to contrast do not conflict.

A. The "zip code" rule does not create an unreasonable restriction.

The economic impact enhancements Plaintiffs dubbed the "Zip Code Rule" do not violate art. XIV and are contemplated by the plain language of the constitution.

Any question of statutory interpretation must begin with the plain language of the law. *Orr*, 366 S.W.3d at 540. Art. XIV authorizes the Department, in implementing the regulatory scheme for medical marijuana, to:

> Establish a system to numerically score competing medical marijuana licensee and certificate applicants, on in cases where more applicants apply than the minimum number of license or certificates as calculated by this section, which scoring shall be limited to an analysis of the following:
>
> ***
>
> vi. The potential for positive economic impact in the site community[.]

Mo. Const., art. XIV§ 1.3(1)(h)(vi). In response to the art. XIV mandate to create a scoring system that addresses the scenario where more applications

are submitted than there are licenses available, the Department promulgated a rule to address the scoring and ranking process. The required analysis under art. XIV, § 1.3(1)(h)(vi) is provided in 19 CSR 30-95.025(4)(C)(6) to address and consider how to award licenses to facilities that could potentially provide for a positive economic impact in those communities. The Department set zip code and employment data as its standards.

There is nothing – with regard to placing a cultivation or manufacturing facility in an area that would benefit economically from such placement – that causes an unreasonable restriction to patient access. Patients do not have access to cultivation or manufacturing facilities. Mo. Const., Art. XIV § 1.2(7)-(9). Rather, patient access is restricted to purchasing through dispensaries. *Id.* Further, while economic impact enhancements do apply to dispensaries, those dispensaries are required to be placed within a federal, congressional district and such districts equally divide the state. Mo. Const., art. XIV § 1.3(18) & 19 CSR 30-95.025(4)(C)(6). Moreover, each district has a minimum of 24 dispensaries. Mo. Const., Art. XIV § 1.3(18). While Plaintiffs have argued that there is some price impact based on the location of cultivation or manufacturing facilities, no evidence supported that contention.

B. The economic impact enhancements are valued along with patient safety and ensuring access is restricted to licensees and qualifying patients.

Because the economic impact enhancement rule effectuates the primary objective of the economic impact to be considered when ranking applicants, it is a factor to be considered along with patient safety or restricting marijuana access to only licensees and qualifying patients.

> Rules employed in construction of constitutional provisions are the same as those employed in construction of statutes. Crucial words must be viewed in context, and courts must assume that words were used purposefully. The selection of words as arranged by the drafters is indicative of the significance of the words employed. This Court is required to give due regard to the primary objectives of the constitutional provision under scrutiny, as viewed in harmony with all related provisions.

State ex rel. Upchurch v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991).

The primary objective of art. XIV, § 1.3(h)(vi) is to ensure that positive economic impact on a community is a consideration when ranking applicants for licensure. This objective is effectuated through the economic impact enhancement. Therein, applicants seeking to place a facility in more economically depressed communities, as determined through zip codes and employment statistics, receive a percentage bonus, which can potentially affect the applicants' ultimate ranking. These considerations are in addition to rules promulgated to address patient safety or restrict access to medical marijuana to the legal marketplace.

For all of these reasons, as to Count VII, the Court finds in favor of the Defendants.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that this Court finds for the Defendants and against the Plaintiffs on all counts of the First Amended Petition for Declaratory Judgment, Temporary Restraining Orders, Preliminary and Permanent Injunctions, Writs of Mandamus/Prohibition, and other relief. Court costs assessed to the Plaintiffs.

Judge Patricia Joyce

12-21-20
Date