MONTANA
Department of
REVENUE

Governor Greg Gianforte
Director Brendan Beatty

June 2, 2022

Economic Affairs Interim Committee
Montana State Legislature
PO Box 201706
Helena, Montana 59620-1706

RE: Department testimony at April 20, 200 meeting

Committee Members,

I am writing in response to some apparent confusion regarding whether the holder of a combined use license may increase its canopy tier level. This committee asked Cannabis Control Division Administrator Kristan Barbour questions during its April 20, 2022 interim committee meeting about a combined use licensee's ability to increase beyond a tier one. Ms. Barbour's testimony attempted to navigate what she understands this committee would like to see happen with combined use licensees, versus what is codified in statute. During her testimony, Ms. Barbour may have mistakenly led this committed to believe that combined use licensees must be treated in the same manner as other licensees as it relates to increasing a combined use license beyond tier one. Regardless of this committee's stated desire to allow combined use licensees to increase beyond a tier one, the statute is clear and unambiguous and limits a combined use licensee to a single tier one canopy license.

The Department of Revenue is an executive branch agency charged with implementing HB 701, The Marijuana Regulation and Taxation Act, codified in Sections 16-12-101 *et.seq.*, MCA. When administering laws passed by the Montana Legislature, the executive branch agencies must implement the will and intent of the legislature. The legislature's will and intent is embodied in statute.

Determination of whether a combined use licensee may apply to increase its tier level presents an issue of statutory construction. "In the construction of a statute, the intention of the legislature is to be pursued if possible." Section 1-2-102, MCA. It is well established that "[t]he legislative intent is to be ascertained in the first instance from the plain meaning of the words used." *Western Energy Co. v. Mont. Dep't of Revenue*, 1999 MT 289, ¶ 11, 297 Mont. 55, 900 P.2d 767. Statutory construction is a holistic endeavor, and must account for the statute's text, language, structure and object. *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819. When the legislature has not defined a statutory term, it is afforded its plain and ordinary meaning. *State v. Alpine Aviation, Inc*., 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035. If the statutory language is clear and unambiguous, no further interpretation is required. Legislative history—including

legislators' remarks—are only considered when legislative intent cannot be determined from the plain wording of the statute. *Clarke v. Massey*, 271 Mont. 412, 897 P.2d 1085 (1995).

The language used by the legislature in creating the combined use license statute is unquestionably clear and unambiguous. It specifically provides that a "combined-use marijuana license *consists of one tier 1 canopy license* and one dispensary license allowing for the operation of a dispensary. Cultivation and dispensary facilities must be located at the same licensed premises." Section 16-12-225(2), MCA (emphasis added).

"Consists" means "to be made up of." A plain language reading of the combined use statute compels the conclusion that a combined-use license is made up of one tier one canopy license and one dispensary license. Were the Department to allow a combined-use licensee to increase its canopy tier level to something other than a tier one, the combined use license would no longer consist of one tier one canopy license in violation of the plain language of § 16-12-225(2), MCA.

While I do not personally know the reason why the legislature chose to impose restrictions on a combined use license that do not exist for other license holders, those restrictions clearly exist in the statute. In addition to the tier one restriction, combined use licensees are the only license holders that are limited to one dispensary license, that must operate their cultivation and dispensary in the same location, that have a geographic limitation to where they can operate, and that do not have the option to manufacture. Sections 16-12-225(2) and (3), MCA. While combined use licensees are afforded the benefit of entering the marijuana market during the moratorium provided for in § 16-12-201, MCA, there are clearly enumerated limitations to their operations set forth in the statute.

At this committee's request, the Department amended ARM 42.39.415 – Combined Use Licenses – to include the following language: "a combined use licensee is subject to the marijuana laws, including 16-12-223, MCA." Section 16-12-223, MCA, governs cultivator licensees. However, this rule does not allow the Department to ignore the plain language of § 16-12-225, MCA. "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as a usurpation of constitutional powers vested only in the major branch of government. *Bell v. Department of Licensing,* 182 Mont. 21, 22-23, 594 P.2d 331, 332 (1979). Courts have uniformly held that administrative rules are "out of harmony" with legislative guidelines if the: (1) engraft additional and contradictory requirements on the statute, or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature. *Bell*, 182 Mont. at 23, 594 P.2d at 333.

Here, reading ARM 42.39.415 to allow a combined use licensee to increase its tier level would be engrafting additional, contradictory requirements on the combined use statute and would thus exceed the Department's rulemaking authority. In other words, the Department cannot "amend" clear statutory language through rulemaking to arrive at a different outcome than what the statute plainly provided.

Regardless of how Ms. Barbour's comments made at the April 20, 2022 Interim Committee meeting may be interpreted, the combined use statute that the Department is charged with implementing is clear and unambiguous. Until such time as the Legislature amends § 16-12-225, MCA, to allow for combined use licensees to increase their canopy tier level, the Department will implement the statute as written.

Sincerely,

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