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**SENT VIA EMAIL:** Members, Denver City Council

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Re: Council Bill 13-0736

Members of the Denver City Council:

I appreciated the opportunity on October 14 to provide comments on proposed Council Bill 13-0736, titled “Proposed Amendments to City Ordinances Concerning the Possession and Consumption of Marijuana.” I write now to provide the substance of those comments in writing, and to provide some additional comments.

The council has already heard multiple objections to the proposed definitions of “open and public” consumption, which unreasonably threaten to re-criminalize consumption of marijuana on one’s own property or in one’s own home. In this letter, I will focus on the other provisions of Council Bill 736.

In portions of this letter, I will refer to Section (3) of Amendment 64, which is titled “Personal use of marijuana.” I will quote this section in its entirety as it now appears in Article XVIII, Section 16 of the Colorado Constitution:

(3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years or older:

- (a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.
- (b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.
- (c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.
- (d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.
- (e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this section.

Colorado Constitution, Article XVIII, Section 16(3).

### **Display**

Proposed section 38-175(b) of Council Bill 736 would make it unlawful “for any person to openly and publicly *display* or consume one (1) ounce or less of marijuana.” (emphasis added.) This proposed prohibition on display violates Section (3)(a) of Amendment 64. That provision states, emphatically, that certain specified acts are not unlawful and “shall not be an offense under Colorado law or the law of any locality within Colorado.” The specified acts that are not unlawful include “possessing, using, *displaying*, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.” (Emphasis added.) Thus, Amendment 64 legalizes display of marijuana, just as it legalizes possession.

In proposing to make it unlawful for any person to openly and publicly display or consume marijuana, Council Bill 736 relies on the following language of Amendment 64: “[N]othing in this section shall permit consumption that is conducted openly and publicly.” Colo. Const. Art. XVIII, Section (3)(d). While this provision of Amendment 64 allows regulation of open and public *consumption*, it does not permit Denver to regulate the mere *display* of marijuana.

### **Council Bill 736 is not justified by Section 6(d)’s “carve-out” provision**

Council Bill 736 proposes an addition to Section 39-10 of the Denver Municipal Code that would make it unlawful to possess or display marijuana “at or within any park, parkway, mountain park, or other recreational facility.” This proposal would make it unlawful to walk through a park or a parkway with a small quantity of marijuana in one’s pocket. According to Mr. Broadwell’s presentation to the council on October 14, a “carve-out” provision in Section (6) of Amendment 64 allows this prohibition. The “carve-out” reads as follows:

Nothing in this section shall prohibit . . . any . . . entity who occupies, owns or controls property from prohibiting or otherwise regulating the possession, consumption, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.”

Colo. Const. Art. XVIII, Section (6)(d). According to the rationale of Council Bill 736, Denver owns the properties that comprise the parks and the parkways, and therefore the “carve-out” provision allows Denver to recriminalize the possession and display of marijuana on these Denver-owned properties.

I cannot believe that Section (6)(d) can be interpreted so broadly. Denver also owns the streets and the sidewalks. If Section (6)(d) were as broad as Mr. Broadwell suggests, then Denver could re-criminalize the possession of marijuana on all the streets and the sidewalks of the city. Such an interpretation of Amendment 64, however, would be unreasonable. Amendment 64 clearly contemplates that adults will legally be able to purchase marijuana in licensed retail establishments, and it also assumes that these adults will be able to transport the marijuana to their homes. (Indeed, Section (3)(a) states specifically that “transporting” of marijuana shall not be an offense.) Amendment 64 surely did not include a “carve-out” that was so broad as to allow a city to ban possession on the streets and sidewalks that adults must use to transport the legal marijuana from the legal point of purchase to their homes, a legal place of possession and consumption.

Although Council Bill 736 does not attempt to prohibit possession on the streets and sidewalks, it does propose prohibiting possession on “any parkway.” At the council meeting on October 14, the council members were told that “any parkway” includes the grassy or landscaped city-owned strip that frequently lies between the curb of a street and the sidewalk. Most persons who have no driveway and must park on the street will find that they must inevitably walk across a city-owned parkway in order to reach their home. If Council Bill 736 were to become law, then persons who legally purchase marijuana and legally transport it as far as a parking space in front of their home would become criminals when they carry their purchase across the city-owned parkway on the way to their residence. The “carve-out” provision of Section (6)(d) cannot be interpreted so broadly as to allow Denver to re-criminalize possession on “any parkway.”

The proposed ban on possession or display on “any parkway” also extends, apparently, to all of the 31 “designated parkways” listed in Section 49-16 of the Denver Revised Municipal Code. Thus, Council Bill 736 would prohibit possession of marijuana while moving along such frequently-travelled thoroughfares as Speer Boulevard, Federal Boulevard, Montview Boulevard, or Monaco Street. See D.R.M.C., Section 49-16 (10), (15), (17), (20). The definition of “parkway” in Section 49-16 is not limited to the grassy parkway medium; it appears to include the entire street on which vehicles travel, and it may include the sidewalks as well. Thus, if Council Bill 736 were to become law, persons legally buying marijuana and hoping to transport it to their home without violating the law would need to consult a city map to ensure that their route avoids all 31 of the “designated parkways” listed in Section 49-16 of the city code. The “carve-out” provision of Section (6)(d) cannot be interpreted so broadly as to allow Denver to re-criminalize possession on any portion of these 31 designated parkways.

### **Sixteenth Street Mall**

The Sixteenth Street Mall is a public right of way. Just as the “carve-out” of Section 6(d) cannot be read to be broad enough to allow re-criminalization of possession on the streets and sidewalks, it cannot be broad enough to allow Denver make criminals of persons who walk along the Sixteenth Street Mall with a small quantity of marijuana in their purses or pockets.

### **Section 6(d) does not authorize property owners to make possession “unlawful”**

Even on properties where the “carve-out” of Section (6)(d) justifiably applies, it does not allow Denver to turn possession or display into a crime or an offense. In legalizing possession, display, and consumption, Section (3)(a) states emphatically that these acts “are not unlawful” and “shall not be an offense.” In contrast, the “carve-out” of Section (6)(d) allows only “prohibiting” or “regulating” possession or display. Thus, even where the “carve-out” applies, it

does not allow a property owner to brand possession or display as “unlawful,” nor does it allow a property owner to make possession or display into a crime or an offense.

**Repeal of 2007 language**

Council Bill 736 would repeal the 2007 declaration that enforcement of laws prohibiting possession of small quantities of marijuana shall be the lowest law enforcement priority. The purported rationale is that Amendment 64 makes the 2007 language obsolete. The language is most decidedly *not* obsolete, however, as evidenced by other proposed provisions that would re-criminalize possession of small quantities of marijuana in various locations. Moreover, repealing the declaration would send an unfortunate and erroneous message to law enforcement that it should return to the days when marijuana enforcement was a priority.

Sincerely,

A handwritten signature in cursive script that reads "Mark Silverstein".

Mark Silverstein  
Legal Director, ACLU of Colorado

cc: David Broadwell, Assistant City Attorney – [david.broadwell@denvergov.org](mailto:david.broadwell@denvergov.org)