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Mary Jane, Maui Wowie, Cannabis, Oh My!

On November 8, 2016, Californians voted to approve Proposition 64, which legalized recreational marijuana for adults and established regulation of cultivation, sale and taxation of the drug. In doing so, the personal use and cultivation of marijuana became legal on November 9, 2016. While marijuana is available for those who use it for medical purposes, recreational marijuana will not be available for legal sale until 2018. As it becomes more readily available, volunteer directors, managers and attorneys will need to start thinking about how marijuana smoke will impact residents within homeowners associations.

The new regulations regarding marijuana are found primarily in *California Health and Safety Code* section 11262.1. They begin with the basic principal that it is not a violation of state or local law for any person 21 years of age or older to smoke or ingest marijuana or marijuana products. However, there are a number of notable exceptions. Section 11362.3 provides that a person may not smoke or ingest marijuana or marijuana products in a "public place," with some exceptions. The term "public place" is not defined, leaving room to question whether the common areas of a homeowners associations are considered public or private spaces under the law. Further, there are restrictions related to consumption near schools, daycare centers, and youth centers, even when the location of consumption is not public.

In places where the law describes the right to cultivate or grow marijuana, the law provides that cultivation may be performed in a private dwelling or on the "grounds" of the private dwelling. The term "grounds" is not used in the context of consumption, only in the context of cultivation. Thus, it is not clear whether the law was intended to allow smoking in private outdoor spaces. It is more likely that if it is a private space, marijuana consumption will be allowed. In contrast, a shared space, like the common area, is likely considered a "public place," meaning that marijuana ingestion could likely be prohibited in common areas. Unfortunately, with the ambiguous language used in the new laws, it is difficult to know with certainty, and perhaps as the new law is implemented we will see clarification of this issue.

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The law allows an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 on the individual's or entity's privately owned property." This presumably means that while it may be legal to use marijuana on private property, it is not a "right" and thus can be taken away via contract. Thus, a landlord can prohibit a tenant from using marijuana on the leased premises. While likely not contemplated by the drafters of the new law, presumably a homeowners association should be able to provide restrictions, including restrictions or a ban on consumption in the common area.

The use of marijuana for medicinal purposes has been permitted in the past and will be permitted in the future. Thus, restrictions on the properties may not apply in the same manner to those with disabilities that require marijuana as part of a treatment.

Historically, the courts have been reluctant to provide community associations with control over activities within the confines of individual homes and private spaces (like private patios), unless the conduct is clearly unlawful, or otherwise specifically prohibited in the Association's governing documents. In recent years, local courts have repeatedly acknowledged the safety concerns related to second-hand smoke of cigarettes and presumably the same would apply to marijuana smoke.

An association's rule-making authority is often set forth in the governing documents and may provide a board the authority to draft rules that the board deems necessary for the management of the association. Clearly, if an association has the ability to adopt rules regarding the use of the common area, an association is able to adopt rules prohibiting consumption of marijuana by anyone in the common areas.

The more difficult question is whether consumption can be restricted by the association in privately-owned homes, yards or patios. The spirit of the law is to allow people to consume marijuana in the privacy of their own homes. Thus, absent some extraordinary circumstance (*e.g.,* shared ventilation systems between homes), there is some risk that a *rule* banning the use throughout the entire community may not be upheld. The results may be different if the members of an association adopted an amendment to the CC&Rs providing for a complete ban.

This is an emerging area of law and it is reasonable to expect that some of the concerns regarding how the law will be interpreted will be resolved in the next months or years. Until then, managers and directors should consider working with legal counsel to adopt rules that best meet the needs of the residents in light of the legalization of marijuana.

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