

Hey Dude, Don't Bogart My Doobie!
Restricting Medical and Recreational Marijuana in Common Interest Developments

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INTRODUCTION

Marijuana is an illegal Schedule I drug pursuant to the federal Controlled Substances Act, 21 U.S.C. § 801, *et seq.* As the federal government has enacted legislation outlawing the use of marijuana, in theory, states do not have authority to enact laws purporting to “legalize” marijuana. “The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is “superior to that of the States to provide for the welfare or necessities of their inhabitants,”” however legitimate or dire those necessities may be. [Citations omitted.] “ (*Gonsales v. Raich* (2005) 545 U.S. 1, 29.)

Nonetheless, there are substantial ongoing efforts at the state level seeking to end run the federal government’s ban on marijuana. Since California first decriminalized marijuana for medicinal purposes in 1996,¹ there has been an avalanche of states purporting to authorize marijuana in one form or another. This trend continued during this past November election cycle. Recreational marijuana propositions were on the ballot in five states: Arizona, California, Maine, Massachusetts, and Nevada. Medical marijuana initiatives were on the ballot of four more: Arkansas, Florida, Montana, and North Dakota. Eight of these nine propositions passed.²

As a result of the November elections, twenty-eight (28) states and Washington, D.C., now have laws putatively authorizing marijuana use in some form. Medical marijuana use, sale, and cultivation has been “decriminalized” in twenty-eight (28) states and Washington D.C.³ Eight (8) of these states have expanded such use so as to permit “recreational” adult use of marijuana.⁴

The trend to authorize marijuana use does not appear likely to abate any time soon. Already, there are efforts to put additional marijuana proposals on 2017 ballots in

¹ See, The Compassionate Use Act Of 1996, Cal. Health & Safety Code § 11362.5, *et seq.*

² Only Arizona’s Proposition 205 which sought to legalize adult recreational use of marijuana failed.

³ Medical Marijuana use now is permitted in the District of Columbia and the following states: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

⁴ Recreational use has been authorized in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington.

Oklahoma, Michigan, and Montana.⁵ Furthermore, there are many people who believe that California's authorization of recreational marijuana is the tipping point that will lead to the federal government's declassification of marijuana as a Schedule I drug.

"Approving recreational marijuana in California, the sixth-largest economy in the world, and a state that often sets the trend nationwide, is the death knell of a failed policy of prohibition," states Aaron Herzberg, an attorney and partner with marijuana product firm CalCann Holdings.⁶ This opinion is echoed by Gavin Newsom, California's Lieutenant Governor, "I think it's the beginning of the end of the war on marijuana in the United States."⁷

What does all of this mean to common interest developments? Unfortunately, the authorization of marijuana creates many nuisance issues for homeowners associations. Many people equate the purported legalization of marijuana as authority to smoke marijuana wherever and whenever they want, particularly when they claim a medical need.

In the face of the prevalence of, and public support for, marijuana, can homeowners associations prohibit or limit marijuana use? Does an asserted medical need qualify as a disability requiring compliance with fair housing laws? How do municipalities address such problems? This program addresses the impact of state marijuana laws, and the impact of potential federal legalization of marijuana, on homeowners association's enforcement rights.

As discussed herein, unless and until the federal government declassifies marijuana, homeowners associations should be able to enforce use restrictions to prohibit and/or limit its use on common areas and even in owners' separate interests. Because it is currently illegal on the federal level, an individual's ability to claim medical need (i.e., disability) protection under federal and state fair employment and housing laws is severely curtailed in most states. Even if declassified, homeowners associations and local municipalities still should be able to restrict "smoking" of marijuana due to acknowledged health risks associated with second hand smoke.

OVERVIEW OF MARIJUANA LAWS

Marijuana Is Illegal – The Federal Controlled Substances Act

The federal Controlled Substances Act ("CSA") was adopted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C. § 801, *et seq.*) in support of Richard Nixon's "War on Drugs." (*Gonsales v. Raich, supra*, 545 U.S. at 10.) Pursuant to this Act, all controlled substances are classified into five schedules each of which are subject to a distinct set of manufacturing, distribution, and use controls based

⁵ A. Wallace, "Definitive Guide to Marijuana on the 2016 Ballot: Recreational & Medical Initiatives," *The Cannabist* (July 14, 2016).

⁶ P. McGreevy, "Voters legalize pot in California. Here's what will happen next," *Los Angeles Times* (November 8, 2016).

⁷ *Id.*

on “their accepted medical uses, potential for abuse, and psychological and physical effects on the body.” (*Id.* 545 U.S. at 13-14; 21 U.S.C. § 812.) A drug is classified as a Schedule I drug if:

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(21 U.S.C. § 812(b)(1).) A Schedule II drug also has a high potential for abuse, but it has “a currently accepted medical use.” (21 U.S.C. § 812(b)(2).)

When the CSA was adopted, marijuana was classified as a Schedule I drug as opposed to a Schedule II drug. (21 U.S.C. § 812(c)(10).) Whereas a Schedule II drug can be prescribed and distributed, it is illegal to manufacture, distribute, and possess a Schedule I drug except as part of a Food and Drug Administration (“FDA”) approved research study. (21 U.S.C. §§ 823(f), 829, 841(a)(1) & 844(a).)

The CSA provides that the schedules shall be updated and republished on a semiannual basis. (21 U.S.C. § 812(a).) In July 2016, the federal Drug Enforcement Agency (“DEA”) rejected a petition to declassify marijuana. Citing a scientific and medical evaluation and scheduling recommendation by the Department of Health and Human Services, the DEA concluded: 1) marijuana has a high potential for abuse; 2) marijuana has no currently accepted medical use in treatment in the United States; and 3) marijuana lacks accepted safety for use under medical supervision.⁸

Accordingly, marijuana remains an illegal controlled substance whether used for recreational or medicinal purposes. (*United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483, 486.)

State Marijuana Laws & Interaction With CSA

The states’ putative authorization of marijuana falls into two categories. The first category deals with medical marijuana. These statutes do not technically legalize marijuana, but rather generally decriminalize its use, cultivation and distribution under certain defined circumstances and conditions. The second category of laws essentially ignores the CSA and purports to legalize marijuana for recreational use.

⁸ See, July 19, 2016 letter from Chuck Rosenberg, Acting Administrator, posted August 12, 2016 on the Federal Register.

Understanding the scope of these state laws is the key to determining whether a homeowners association can restrict marijuana use in its community. The following questions are pertinent to an analysis of a homeowners association's enforcement rights:

1. Does the state law authorize the use of marijuana in one's home?
2. Does the state law authorize smoking of marijuana in public?
3. Does the state law restrict private enforcement of contractual or property rights that could be used to prohibit marijuana use or cultivation?
4. Does the state law prohibit discrimination based on use of marijuana?
5. Does the state law define medical need of marijuana as a "disability" so as to invoke protection under State Fair Housing Acts?

Each practitioner will need to review the specific marijuana statutes in their respective states with respect to these questions. For illustration purposes, we will discuss California's medical and recreational statutes to demonstrate how states attempt to maneuver around the CSA and how the state law affects homeowners associations' enforcement of deed of restrictions.

Medical Marijuana – The Compassionate Use Act of 1996

As referenced above, in 1996, California became the first state to adopt laws purporting to authorize the use of medical marijuana. Under the Compassionate Use Act, a "qualified patient," a patient with a written or oral recommendation from a physician, may grow limited amounts of marijuana for his/her own use or obtain it from a permitted "non-profit" collective or cooperative dispensary. (*See*, Cal. Health & Safety Code § 11362.5, *et seq.*) An authorized non-profit collective cannot subsequently convert itself into a for profit enterprise. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734.)

The Act did not "legalize" the use of marijuana. As pointed out by the California Supreme Court, "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law." (*Ross v. RagingWire Telecommunications*, (2008) 42 Cal.4th 920, 926.) Rather, it merely provided an affirmative defense against criminal prosecution for the possession, transportation, or cultivation of marijuana for medical purposes. (Cal. Health & Safety Code § 11362.5(d).)

One of the ways of establishing this defense is via a state issued patient identification card. (Cal. Health & Safety Code § 1362.71.) [At least, twenty-five states currently have a patient registry or ID card system.]⁹ **In the context of homeowners associations, it is important to note that such a card is not a license to smoke where and when the holder wants.** Rather, a card holder is expressly barred from smoking in any place prohibited by law and within 1,000 feet of a school, recreation center, or youth center (unless within a private residence). (Cal. Health & Safety Code § 11362.79) Even states such as Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, Minnesota, and

⁹ See, National Conference of State Legislatures, "State Medical Marijuana Laws," (Nov. 9, 2016).

Rhode Island which prohibit discrimination against medical marijuana users, clarify that the medical marijuana user does not have an unfettered right to smoke in public places or on or near school facilities.¹⁰

Medical Need Is Not a Defense to the CSA

In the *Oakland Cannabis Buyers' Cooperative* case, the United States brought suit against a cooperative organized to distribute medical marijuana on the grounds that California's Compassionate Use Act decriminalizing medical marijuana distribution violated the CSA. The defendant argued that medical necessity was an exception to the CSA. The United States Supreme Court rejected this argument. Instead, it held that there was no implied medical necessity exception to the CSA's prohibitions on manufacturing and distributing marijuana. The state's authorization of medical marijuana did not exculpate compliance with the CSA. (*United States v. Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at 489-494)

The Supreme Court in *Gonsales v. Raich*, *supra*, 545 U.S. at 1, reiterated that medical need is not a defense to the CSA. In the *Gonsales* case, two medical marijuana patients sought an injunction prohibiting the enforcement of the CSA after the DEA seized and destroyed six marijuana plants cultivated in compliance with California's Compassionate Use Act. By classifying marijuana as a Schedule I drug, Congress found that "it has no currently accepted medical use in treatment in the United States" and has a "high potential for abuse" and "its lack of accepted safety for use . . . under medical supervision." (*Id.* at 27-29.) While noting that states that have adopted medical marijuana laws may disagree with such findings, the Supreme Court recognized that it was within Congress' legislative powers to regulate drug use. Having so regulated, CSA preempts California's attempt to characterize marijuana as acceptable for medical treatment. (*Id.* at 29)

The Cole Memo

While more states followed California's lead and began attempting to either "legalize" or "decriminalize" marijuana use, confusion and uncertainty was fomented by the federal government's intermittent enforcement of the CSA against conduct that appeared authorized under state law. (*See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at 486; *Gonsales v. Raich*, *supra*, 545 U.S. at 1.)

In August 2013, U.S. Deputy Attorney General James M. Cole sent a memorandum entitled "Guidance Regarding Marijuana Enforcement" to all U.S. Attorneys. The memorandum recognized that several states had adopted laws authorizing the possession of small amounts of marijuana and providing regulation of marijuana production, processing and sale. The memorandum set forth the following "enforcement priorities":

¹⁰ See, AZ Rev Stat § 36-2802; CT Gen Stat § 21a-408a(b)(1) & (2); DEL Code Ann. § 4904A(a)(2) & (3); 410 ILL Comp Stat Ann § 130/30 (a)(2) - (4); ME Rev. Stat. Ann. § 2426(1)(B) - (C); MINN Stat § 152.23(a)(2) - (3); NEV Rev Stat §§ 453A.300(d)(1) - (2); and RI Gen Laws Ann. § 21-28.6-7(2).

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

The memorandum went on to state that “[t]hese priorities will continue to guide the Department’s enforcement of the CSA against marijuana-related conduct.” The guidelines are based on an “expectation that states and local governments that have enacted laws authorizing marijuana related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”

Although the Cole Memorandum is not legally binding, and the enforcement priorities therein could change with a new Presidential administration, many states and individuals in the marijuana industry interpreted the memorandum as the federal government’s tacit agreement not to interfere with the state regulation of authorized marijuana provided that the operations were consistent with these priorities.

The Medical Cannabis Regulation and Safety Act

In part to comply with such guidelines, in June 2016, the California legislature enacted The Medical Cannabis Regulation and Safety Act, Business and Professions Code Section 19300, *et seq.* This Act is a comprehensive effort to regulate and license “the cultivation, dispensing, distribution, manufacturing, testing, and transportation of medical cannabis.”¹¹

¹¹ See, California Legislative Counsel’s Digest for Senate Bill 837.

Adult Use of Marijuana Act – Proposition 64

On November 8, 2016, California voters approved Proposition 64, the Adult Use of Marijuana Act (“AUMA”). AUMA purports to legalize marijuana for those over 21 years old and establishes laws to regulate, license, and tax marijuana cultivation, distribution, sale, and use. (Cal. Health & Safety Code § 11362.1.)

AUMA has a detailed regulatory system designed to satisfy the priorities of the Cole Memorandum. Unlike medical marijuana, businesses can operate, and be taxed, as for-profit entities. (Cal. Business & Professions Code §§ 26000, *et seq.*) All citizens have a right to cultivate indoors at least up to six (6) plants per residence. Cities can ban all outdoor cultivation. (Cal. Health & Safety Code § 11362.2.)

Like most recreational marijuana statutes,¹² there is no right to smoke in public,¹³ within a 1,000 feet of a school, day care center or youth center (unless within a private residence), or any location where tobacco is prohibited. (Cal. Health & Safety Code § 11362.3.)

HOW DO MUNICIPALITIES ADDRESS MARIJUANA NUISANCE ISSUES?

In California, prior to the adoption of AUMA, cities regulated the dispensaries primarily through two vehicles: 1) forcing compliance with the non-profit requirements; and 2) zoning.

In *Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886 (review granted and opinion ordered depublished; review subsequently dismissed on March 14, 2012), plaintiff, a member of a collective, challenged the City’s ban on marijuana dispensaries. She also challenged the City’s efforts to close down operating dispensaries that failed to comply with Compassionate Use Act’s non-profit requirements. Plaintiff asserted the City’s efforts violated patients’ rights to privacy, and generically asserted fundamental rights were implicated. Ultimately, it was held that she did not have standing to challenge the City’s zoning ordinances relating to dispensaries as a mere member of a collective.

In an attempt to avoid the standing issue, Ms. Traudt’s lawyer later filed a separate case making same arguments, on his own behalf. The Court of Appeal rejected the attorney’s claim that he had a fundamental right to control his medical care without governmental interference (*i.e.*, that he had a fundamental right to purchase medical marijuana). The Court held that he (like Ms. Traudt) did not have standing to challenge the City’s zoning regulations relating to medical marijuana. (*Schwartz v. City of Dana Point* (Filed 10/25/13; Docket No. G047633).)

¹² Smoking of marijuana in public is either illegal or unauthorized in Alaska, Colorado, Maine, Massachusetts, Oregon, and Washington. (See, AS § 17.38.040; C.R.S. § 18-18-406(4)(a) – (b); ME Rev. Stat. Ann. § 2452(5)(B); 2016 Massachusetts Ballot Question 4: Regulation and Taxation of Marijuana, Chapter 94G § 13(c); 2014 Oregon Measure 91, § 54; and 2011 Washington Initiative 502, § 21.)

¹³ AUMA does authorize the creation of licensed marijuana bars.

Other cases have suggested that there is no fundamental right to use a drug that has not been authorized by the federal government. In *People v. Privitera* (1979) 23 Cal.3d 697, 702, the California Supreme Court held that the California Constitution does not recognize a fundamental right to access drugs of “unproven efficacy” that have not been authorized by the designated federal agency. In *Raich v. Gonzalez* (9th Cir. 2007) 500 F.3d 850, 866 the court held: “Federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.”

As recreational use dispensaries in California do not need to be non-profit entities, cities will be forced to focus on zoning and licensing regulations going forward. In California, cities retain the ability to use their police and zoning powers to regulate medical marijuana dispensaries (including, for instance, requiring them to obtain business licenses). While pursuant to AUMA, cities cannot completely ban indoor cultivation, they can impose reasonable regulations governing home growing. Cities even can ban dispensaries from operating within their jurisdictions. (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729; *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116.)

As discussed above, cities can ban all outdoor cultivation of marijuana, medical or otherwise. Furthermore, cities can and do adopt ordinances prohibiting smoking. In Culver City, California, the City adopted an ordinance which bars smoking in public places and within a private unit within a multi-housing development. (See, Culver City Ordinance No. 2014-006.) Practitioners should review the local ordinances governing marijuana and smoking in their communities because, as discussed below, such ordinances may use the violation of such ordinances as a ground to restrict marijuana use or cultivation.

USE RESTRICTIONS APPLICABLE TO MARIJUANA

Associations are in effect “a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.” (*Cohen v. Kite Hill Comm. Assn.* (1983) 142 Cal.App.3d 642, 651.) “All [association] functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors clearly analogous to the governing body of a municipality.” (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475.)

There is nothing in either AUMA or the Compassionate Use Act that grants a person an unfettered right to use marijuana within one’s home. Neither Act prevents the enforcement of deed restrictions. Similarly, while in California a homeowners association cannot completely prohibit use of an owner’s background for personal agriculture, the right to cultivate “personal agriculture” does not extend to marijuana. (Cal. Civil Code §§ 4750 & 1940.10.) Thus, just as a municipality can use its zoning ordinances to restrict time, place and manner of marijuana usage and cultivation, a

homeowners association can use its deed restrictions and rules to regulate marijuana absent any contrary applicable law or public policy.

The most common applicable use restrictions that would apply to marijuana usage and cultivation are: 1) restrictions mandating compliance with laws and ordinances; 2) general nuisance restrictions; and 3) smoking restrictions.

Compliance with Laws and Ordinances

Many CC&Rs, especially in newer developments, have a provision that require residents to comply with applicable laws and ordinances. Even if the governing documents do not have more specific provisions, the mandate to comply with laws and ordinances often may be used to prevent smoking marijuana in the project and to a lesser extent the cultivation of marijuana.

As discussed above, marijuana remains illegal under federal law. (21 U.S.C. § 812(b)(1).) Certainly, in any state that has not authorized the use of marijuana, a provision mandating compliance with laws and ordinances could be used to regulate marijuana use and cultivation. In states that have authorized medical and/or recreational marijuana, notwithstanding the federal illegality of the conduct, it seems doubtful that a court would invoke this type of use restriction if the owner or resident was in compliance with the state law. However, such a restriction arguably could be used to compel compliance with the state law or local ordinances governing the use and cultivation of marijuana.

For example, in California, pursuant to AUMA, smoking marijuana in public is illegal. (Cal. Health & Safety Code §§ 11357 & 11362.1(a)(1).) As referenced above, smoking marijuana in public is either illegal or unauthorized in most states.¹⁴ Thus, a person smoking marijuana in a homeowners association common area in any such state is violating a public smoking prohibition. Accordingly, a homeowners association could use a restriction mandating compliance with laws to enjoin such conduct. In those municipalities like Culver City which have adopted an ordinance prohibiting smoking in a multi-housing development,¹⁵ a homeowners association can use a compliance with laws and ordinance restriction to enjoin smoking within a condominium or townhouse.

Pursuant to AUMA, an adult may not cultivate more than six (6) plants within his private residence. (Cal. Health & Safety Code § 11362.2) A homeowners association can use this statute to prohibit the cultivation of more than six (6) plants within a separate interest if it has a compliance with laws restriction in its governing documents. As most marijuana statutes have similar limitations on the amount of plants that can be cultivated,

¹⁴ See, e.g., AS § 17.38.040; C.R.S. § 18-18-406(4)(a) – (b); AZ Rev Stat § 36-2802; CT Gen Stat § 21a-408a(b)(1) & (2); DEL Code Ann. § 4904A(a)(2) & (3); 410 ILL Comp Stat Ann § 130/30 (a)(2) - (4); ME Rev. Stat. Ann. §§ 2426(1)(B) - (C) & 2452(5)(B); 2016 Massachusetts Ballot Question 4: Regulation and Taxation of Marijuana, Chapter 94G § 13(c); MINN Stat § 152.23(a)(2) – (3); NEV Rev Stat §§ 453A.300(d)(1) – (2); 2014 Oregon Measure 91, § 54; RI Gen Laws Ann. § 21-28.6-7(2); and 2011 Washington Initiative 502, § 21.

¹⁵ See, Culver City Ordinance No. 2014-006.

practitioners can use the applicable statute in their state to restrict the amount of plants that can be cultivated.

General Nuisance – Smoking Marijuana Can Constitute A Nuisance

Virtually every set of CC&Rs contains a nuisance provision. In most states, a homeowners association should be able to use such general nuisance provisions to restrict marijuana smoking.

Nuisance provisions typically prohibit any act or omission that unreasonably interferes with the right of other owners and residents to live in and enjoy their own separate interest, exclusive use common area, and the project's common areas. Marijuana odor is strong and pungent. Such odor wafting into a neighbor's unit or on to the common area could constitute an unreasonable annoyance or disturbance that interferes with another resident's use and enjoyment of his/her property. Furthermore, second hand smoke is a recognized health risk which certainly would support a finding that environmental marijuana smoke constitutes a nuisance.

In 1992, the Environmental Protection Agency issued a report on the "Respiratory Effects of Passive Smoking: Lung Cancer and Other Disorders." The EPA concluded that second hand tobacco smoke "presents a serious and substantial public health impact." The EPA attributed "3,000 lung cancer deaths annually in U.S. nonsmokers" to second hand smoke.¹⁶ The EPA also concluded that second hand smoke was causally associated with 150,000 to 300,000 cases of children contracting bronchitis and pneumonia, and that 200,000 to 1,000,000 asthmatic children.¹⁷ The Surgeon General concluded that there is no safe level of exposure to second hand smoke.¹⁸ The U.S. Department of Health and Human Services, Center for Disease Control and Prevention, asserts that people in multi-unit dwellings can be exposed to second hand smoke through doorways, cracks in walls, electrical lines, plumbing and ventilation systems.¹⁹

Fueled by such findings, states and local municipalities (e.g., Culver City) have adopted laws restricting and, in some cases, prohibiting smoking. The California legislature has made a specific finding that "tobacco smoke is a hazard to the health of the general public." (California Health & Safety Code § 118880.)

The above findings support a homeowners association's authority to restrict smoking. Multiple cases have held that second hand smoke is a nuisance. In *Birke v. Oakwood* (2009) 169 Cal.App.4th 1540, 1543, a court held that second hand smoke could be deemed a nuisance because it was harmful to one's health. Furthermore, the court held that a property manager could be held liable for such a nuisance by failing to take

¹⁶ See, "Respiratory Effects of Passive Smoking: Lung Cancer and Other Disorders," *Summary and Conclusion*, 1-1.

¹⁷ *Id.*

¹⁸ See, U.S. Department of Health and Human Services, "Protection From Exposure To Secondhand Tobacco Smoke – Policy Recommendation," Geneva: World Health Organization, 2007.

¹⁹ See, U.S. Department of Health and Human Services, Center for Disease Control and Prevention, "Healthy Homes Manual – Smoke-Free Policies in Multiunit Housing," p. 9.

steps to abate smoking in the common area. (*Id.* at 1548-1552.) In an unpublished California case, *Babbit v. DiPuzo* (2004) Cal.App.Unpub., Lexis 4679, a court applied such an analysis in the context of a homeowners association to permit a homeowner to sue a neighbor for nuisance arising out of cigar smoke emanating from a neighbor's balcony.

“Despite public awareness that tobacco secondhand smoke (SHS) is harmful, many people still assume that marijuana SHS is benign.”²⁰ A study, “One Minute of Marijuana Secondhand Exposure Substantially Impairs Vascular Endothelial Function,” published in the July 2016 *Journal of the American Heart Association* suggests that second hand smoke from marijuana exerts similar adverse cardiovascular as tobacco second hand smoke.²¹ The State of Colorado and the State of California have reached similar conclusions.

On the State of Colorado's website information page regarding “Marijuana,” it discloses “[s]econd hand smoke from marijuana has many of the same chemicals as smoke from tobacco. This includes some chemicals linked to lung cancer.”

In 1986, California approved Proposition 65, the Safe Drinking Water and Toxic Enforcement Act. Proposition 65, California Health & Safety Code § 25249.5, *et seq.*, requires the State to publish a list of chemicals known to cause cancer or birth defects or reproductive harm. The list must be updated at least once a year. (Cal. Health & Safety Code § 25249.8.) The current list published by the Office of Environmental Health Hazard Assessment on October 21, 2016 includes “Marijuana smoke” as a known cause of cancer.

As second hand tobacco smoke has been recognized as a potential nuisance, and marijuana smoke has been identified as a health risk, a homeowners association should be able to use a general nuisance provision to regulate its use if it is determined that the smoke itself is wafting in to neighboring units or common areas.

Smoking Restrictions

The health and liability concerns discussed above prompted many community associations to adopt restrictions expressly prohibiting smoking. If the Association has a specific smoking restriction, it could be used to bar or restrict the smoking of marijuana. Some states expressly recognize the rights of owners to restrict marijuana smoking on private property.²²

Regardless of the existence of such expressed statutory authorization, the reasonableness and enforceability of smoking bans recently was recognized by the

²⁰ X. Wang, R. Derakhshandeh, J. Liu, et al., “One Minute of Marijuana Secondhand Exposure Substantially Impairs Vascular Endothelial Function,” *Journal of American Heart Association*, 2016.

²¹ *Id.*

²² See, e.g., 2016 Nevada Ballot Question 2: Initiative to Regulate and Tax Marijuana, § 4(c); DEL Code Ann. § 4907A(a)(2); 410 ILL Comp Stat Ann § 130/40 (a)(1); ME Rev. Stat. Ann. § 2423-E(2).

federal government. In November of 2016, the Department of Housing and Urban Development (“HUD”) adopted a rule “Instituting Smoke-Free Public Housing.”²³ Effective January 1, 2017, the “rule requires each public housing agency . . . to implement a smoke-free policy . . . banning the use of prohibited tobacco products in all housing living units, indoor common areas in public housing”²⁴ In doing so, HUD recognized that “[t]here is no ‘right’ to smoke in a rental home, and smokers are not a protected sub-class under anti-discrimination laws.”²⁵

As second hand smoke is an acknowledged public safety danger and homeowners associations typically have obligations to maintain common areas and enforce the governing documents, a smoking ban is rationally related to the operation and purpose of Common Interest Developments. Therefore, a smoking restriction is likely to be held enforceable unless the restriction violates public policy. (See, e.g., California Civil Code § 5975(a); *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) As long as marijuana remains illegal on the federal level, it is difficult to contemplate a circumstance under which a smoking restriction enjoining marijuana smoking would be held to violate public policy.

THE APPLICATION OF FAIR HOUSING AND DISABILITY LAWS

The issue that is often raised is whether medical need for marijuana constitutes a disability giving rise to a need to provide reasonable accommodations under any of the federal or state disability protections. The pertinent acts in connection with this analysis are:

1. Federal Fair Housing Act (42 U.S.C. § 3601, et seq.);
2. The Americans With Disabilities Act (“ADA”) (42 U.S.C. § 12101, et seq.);
3. Rehabilitation Act (29 U.S.C. § 791, et seq.); and
4. State Fair Employment and Housing Acts (e.g., California Government Code § 12900, et seq.).

Of these four, most homeowners associations only are going to be concerned with state and the federal Fair Housing Acts.

The Rehabilitation Act applies to employment. People creating nuisances by smoking marijuana typically would not be a homeowners association’s employee.

The ADA ordinarily does not apply to homeowners associations as it governs discrimination in places of “public accommodation.” As a homeowner association is a private entity, a common interest development is not a place of “public accommodation.” (*Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn.* (CD Cal. 2005) 426 F. Supp.2d 1061, 1067.) If a common interest development provides a

²³ See, 24 CFR Parts 965 and 966.

²⁴ *Id.* at p. 1.

²⁵ *Id.* at p. 14.

“public accommodation” it would be subject to the ADA. However, there are multiple cases holding that the mere fact that common areas in common interest developments are accessible to the public does not make them “public accommodations” so as to subject the association to the ADA. (See, *Carolyn v. Orange Park Community Assn.* (2009) 177 Cal.App.4th 1090 [recreational trail system is not public accommodation notwithstanding that the association placed no barriers to non-member’s use of the trails].)

Because Marijuana Is Illegal, There Is No Need to Provide Medical Accommodation under the Federal Fair Housing Act.

The state laws governing fair housing tend to be modeled after the federal Fair Housing Act (“FHA”) which protects individuals with a physical or mental impairment that substantially limits one or more of their major life activities. In a nutshell, the federal and state Fair Housing laws make it unlawful to discriminate in connection with housing based on a disability or handicap. (42 U.S.C. § 3604(f); California Gov. Code § 12927(c)(1).)

The fair housing laws apply to common interest developments and homeowners association’s governance of them. (See, *Auburn Woods I Homeowners Assn. v. Fair Employment Housing Comm.* (2004) 121 Cal.App.4th 1578; *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn.*, *supra*, 426 F. Supp.2d at 1067.) If the individual has a disability or handicap, as defined by these acts, a homeowners association must make reasonable accommodations for the disability or handicap. (42 U.S.C. § 3604(f); California Gov. Code § 12927(c)(1).)

Currently there is no protection for marijuana medical need under the federal disability statutes. To the contrary, the FHA’s definition of “handicap” expressly excludes “illegal use of a controlled substance.” (42 U.S.C. § 3602(h).) The ADA and the Rehabilitation Act have similar exclusions. (42 U.S.C. § 12210(a); 29 U.S.C. § 705(20) (C)(i).) As marijuana remains an illegal controlled substance under the CSA, a homeowners association need not provide an accommodation for a purported medical need under federal law. (See, *Gonsales v. Raich*, *supra*, 545 U.S. at 27-29.)

Whether A Reasonable Accommodation Must Be Provided Is Governed By State Law.

As long as marijuana remains a Schedule I illegal drug, the obligation to provide reasonable accommodation for its use will be governed by the state fair housing laws. The California Supreme Court, in *Ross v. RagingWire Telecommunications*, *supra*, 42 Cal.4th at 926, held that the marijuana medical need is not protected under the state Fair Employment and Housing Act. Although *Ross* is an employment case, the Supreme Court’s rationale is instructive.

In *Ross*, the plaintiff’s physician recommended that plaintiff use marijuana to treat chronic pain. Plaintiff was fired when a pre-employment drug test required of new employees revealed his marijuana use. The Supreme Court stated that FEHA did not

require employers to accommodate the use of “illegal” drugs. The Court held that because marijuana remained illegal under federal law, there was no duty to provide a reasonable accommodation for its use. (*Id.* at 924-927.)

In doing so, the Court rejected the plaintiff’s argument that the Compassionate Use Act “created a broad right to use marijuana without hindrance or inconvenience, enforceable against private parties such as employers.” (*Id.* at 928.) The Court found that the Act imposes no obligation to accommodate use of medical marijuana at home, and did not constitute a bar to enforcement of legal rights by private parties.²⁶ (*Id.* at 930-931.) Rather, the Act merely provided a defense against criminal prosecution. (*Id.* at 928.)

Most states follow California’s approach that employers and landlords need not make a reasonable accommodation as purported marijuana medical need is not recognized as a disability. New York conversely expressly recognizes “a certified [medical marijuana] patient” as having a “disability.”²⁷ At least eight other states, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, and Rhode Island prohibit employer and/or landlord discrimination based on medical marijuana use.²⁸ Such anti-discrimination statutes could give rise to a need to provide a reasonable accommodation under their state fair employment and housing laws.

Even if a Reasonable Accommodation Must Be Provided for Medical Need, Homeowner Associations Should Be Able to Restrict Marijuana Smoking and Cultivation.

If the federal government were to declassify marijuana, or your state recognizes a medical need for marijuana that includes the right to use marijuana in one’s home, a homeowners association may have to provide reasonable accommodations for medical marijuana use.

An obligation to provide a reasonable accommodation, however, does not necessarily mean that a homeowners association will have to permit smoking. As pointed out by Amanda Reiman, an instructor at the University of California-Berkeley and the “Expert” on the Drug Policy Alliance’s blog, there are many effective options available for medical marijuana patients when faced with a smoking ban including edible preparations, vaporization (“heating the plant material to a temperature at which the active ingredients are released as a vapor that can be inhaled”), and topical preparations

²⁶ One of the Justices disagreed with this conclusion. In her dissent, Justice Kennard argued that “[t]he majority’s holding disrespects the will of California’s voters” Based on testimony from some of the legislators who supported the Act, Justice Kennard felt that the purpose of the Act would at the very least include the right to use marijuana in one’s own home. (42 Cal.4th at 934.)

²⁷ See, N.Y. Pub. Health Law §3369(2).

²⁸ See, AZ Rev Stat § 36-2813; CT Gen Stat §§ 21a-408a(a) & 21a-408p; DEL Code Ann. §§ 4903A(a) & 4905A(a)(1) ; 410 ILL Comp Stat Ann § 130/40 (a)(1); ME Rev. Stat. Ann. § 2423-E(1); MINN Stat § 152.32(3)(a); NEV Rev Stat § 453A.800(3); and RI Gen Laws Ann. § 21-28.6-4(a).

such as creams and salves. (A. Reiman, “Are There Alternatives to Smoking for Medical Marijuana Patients Like Me?” Drug Policy Alliance Blog, August 13, 2015.)

Similarly, unless the state expressly authorizes an unfettered right to cultivate marijuana, the Association should be able to adopt restrictions on cultivation consistent with the applicable law authorizing marijuana use (e.g., in California the right to cultivate six (6) plants inside a home). Absent specific statutory authority to the contrary, a homeowners association may not have to permit a right to grow as there are reasonable alternative methods to obtaining medical marijuana (i.e., the dispensaries).

Thus, in most circumstances, the Association still should be able to adopt time, place, and manner restrictions and enforce general nuisance restrictions, so as to limit or prohibit smoking and regulate cultivation.

CONCLUSION

While the recent elections continued the trend of states authorizing marijuana use in one form or another, the Presidential election added to the uncertainty as to whether the federal government will continue to stand on the sidelines while states arguably thumb their nose at marijuana’s classification as an illegal Schedule I drug. Each year it seems that there is an effort to declassify marijuana, administratively and legislatively. Whether the newly elected administration will take up such a cause, or instead resume enforcement of the CSA against states, growers, dispensaries, and marijuana users, remains to be seen.

President-elect Donald Trump has been quoted as supporting medical marijuana.²⁹ However, many of his closest political allies, Vice-President Elect Mike Pence, New Jersey Governor Chris Christie, and former New York Mayor Rudolph Giuliani are seen by some as being hostile to marijuana legalization.³⁰ President-elect Trump’s choice for Attorney General, Senator Jeff Sessions, has been quoted as saying “[w]e need grownups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized.”³¹ Regardless of what happens, homeowners associations should be able to continue to prohibit and/or limit smoking of marijuana on common areas and in owners’ separate interests due to acknowledged health risks of second hand smoke and the availability of alternative methods for meeting any putative medical need.

²⁹ J. Berke, “Here’s where Donald Trump and Hillary Clinton stand on marijuana legalization,” *Business Insider* (Nov. 5 2016).

³⁰ J. Berr for CBS News, “Will Team Trump bust the marijuana business?” *msn.com* (Nov. 11, 2016).

³¹ P. McGreevy, “Marijuana Advocates Prepare For A Showdown,” *Los Angeles Times* (Dec. 1, 2016).