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How Legal Is It Anyway? Tips for Dealing with Recreational and Medicinal Marijuana Use in Community Associations

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1:45 – 2:45PM

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COLLEGE OF COMMUNITY ASSOCIATION LAWYERS (CCAL) PRESENTS
COMMUNITY ASSOCIATION
Law Seminar

Marijuana: How Legal Is It Anyway?

Presented by: Elina B. Gilbert, Esq., CCAL
Kevin M. Hirzel, Esq., CCAL


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Overview

- State v. Federal laws
- Medical v. recreational marijuana usage
- Issues caused by marijuana use in community associations
- Enforcement issues
- Amending documents to address marijuana

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Current Reality

State legalization

- Medicinal: 33 states and D.C.
- Recreational: 11 states and D.C.
- CBD oil (medicinal): 5 states

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Current Reality

Federal Prohibition

- Controlled Substance Act, 21 U.S.C. 801 *et seq.*
- Use, cultivation, and possession prohibited
- Marijuana v. CBD oil
- Civil and criminal penalties



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State v. Federal Law

Federal Law

- United States Constitution—Supremacy Clause
 - Kirby v. Co of Fresno, 242 Cal App 4th 940 (2015)
 - United States v. McIntosh, 833 F. 3d 1163 (9th Cir. 2016)
 - ✓ Prohibition from spending money on prosecuting state-compliant marijuana usage/sales



You Make the Call

Association is receiving numerous complaints about owner (Ms. Ima Puff) smoking marijuana in her unit and on her balcony. Ima Puff claims she is smoking it for medicinal purposes and is protected by fair housing laws. Is she right?





Medical v. Recreational Marijuana

Medical Marijuana

- Accommodation under fair housing laws?
 - FHAA—"disability" does not include illegal drug use
 - Assenberg v. Anacortes Hous Auth, 268 Fed Appx 643 (CA 9, 2008)
 - Forest City Residential Mgt. Inc., ex rel/ Plymouth Square Ltd Divident House Ass'n v. Beasley, 71 F Supp 3d 715 (ED Mich, 2014)

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You Make the Call

Governing documents prohibit illegal activity in community as well as nuisances. An owner (Mr. In Hale) smokes marijuana in unit and association has received complaints. When violation letter is sent, In Hale argues he is entitled to smoke marijuana under state law and there is nothing association can do about it.



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Nuisance and Illegal Activity

Recreational Marijuana

- Nuisance restrictions in governing documents
 - Suave v. Heritage Hills 1 Condominium Owners Association, No. 06CV1256, Colo. Dist. Court, November 7, 2006
 - Chauncey v. Bella Palermo Homeowners' Association, et al., No. 30-2011-00461681 (Cal. Sup. Ct. Mar. 2013)
- Illegal activity restrictions

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You Make the Call

Ms. Ida Grow Pot grows 12 marijuana plants for personal consumption. Ida plugs in 12 grow lamps into the same outlet and burns her condominium building down that has a \$1,000,000 replacement value. Ida obtained permission from the Association to grow the plants but the Association did not disclose this to the insurance carrier. Does the carrier have to provide coverage?



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Insurance

- Criminal Act Exclusion
 - KVG Prop, Inc. v. Westfield Ins. Co., 900 F3d 818 (6th Cir. 2018)
- Change in Occupancy or Use Provision
 - Nationwide Mut Fire Ins Co v McDermott, 603 Fed Appx 374 (6th Cir. 2015)

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You Make the Call

Association's utility bills are skyrocketing—especially water and electricity. There is suspicion an owner (Mr. L. Ike Puffing) is growing marijuana out of his home and it appears the increased utility charges were caused by L. Ike Puffing. What are the issues and how do you advise the board?

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Utility Bills

Recreational Marijuana

- Utility usage
 - Do governing documents authorize a charge back?
 - How calculate?
 - How do you prove it?



You Make the Call

Developer (Roll 'Em High, LLC) contacts you about a mixed-use community it is creating. Marijuana dispensary would like to purchase one of the commercial condominium units. What are the issues?



Commercial Activity

Recreational Marijuana

- Distribution from units
 - Do governing documents allow business activity?
 - Do governing documents allow marijuana sales?
 - Zoning issues



Mixed Use Communities

Recreational Marijuana

- Marijuana dispensaries
 - Within mixed-use communities
 - Close to, but not part of, communities
 - Impact on home values



Document Drafting

Options

- Ban growth
- Ban sales
- Ban all illegal activities



Document Drafting

Options

- Ban all forms of smoking.
- Ban all forms of cannabis
- Ban only certain types of cannabis use



Conclusions and Tips

1. Marijuana is still illegal under federal law.
2. Federal law trumps state law.
3. Community associations may restrict use/sales of marijuana in its governing documents.
4. No difference between medical and recreational marijuana usage.
5. No reasonable accommodation for medical marijuana.

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Conclusions and Tips

6. Marijuana may be deemed a nuisance and a covenant violation.
7. Marijuana dispensaries do not appear to reduce property values for homes in adjacent communities.
8. Federal law enforcement of state-compliant marijuana use/sales is highly unlikely.
9. Make sure your state fair housing laws do not protect use of medical marijuana.
10. Make sure your governing documents adequately address marijuana, nuisances, and use of electricity.

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QUESTIONS

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Marijuana: How legal is it anyway?

Tips for dealing with recreational and medical marijuana use in community associations

by

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Introduction

State and local governments are legalizing medicinal and recreational marijuana rapidly. As of 2019, the District of Columbia and thirty-three states have adopted laws that legalize medical marijuana.¹ Five other states have legalized the use of cannabidiol (“CBD”) oil for medical purposes.² As of 2019, the District of Columbia and eleven other states have legalized recreational marijuana use.³ Notwithstanding the increasing decriminalization of marijuana on a state and local level, the possession and consumption of marijuana is still illegal under federal law. Accordingly, community associations throughout the country have been struggling to deal with various issues that arise as a result of the current conflict between state and federal law with respect to marijuana. This paper will address the following issues related to marijuana use in community associations:

¹ Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington and West Virginia have legalized medical marijuana. See DISA, <https://disa.com/map-of-marijuana-legality-by-state> (last visited Oct. 4, 2019) [<https://perma.cc/6QMW-TK5Y>]; PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Oct. 16, 2019) [<https://perma.cc/9GJF-7YGJ?type=image>].

² Georgia, Indiana, Iowa, Texas and Virginia have all legalized the use of CBD oil for medical purposes. *Id.*

³ Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington all have passed laws that have legalized recreational marijuana use. *Id.*

1. Provide an overview of the current state of federal law related to marijuana and the potential civil and criminal penalties that community associations and board members could face if they permit marijuana in their communities.
2. Discuss whether there are any exceptions to marijuana use recognized under federal law related to medical marijuana use, the Federal Fair Housing Act or CBD oils.
3. Discuss the potential issues that arise as a result of marijuana use in community associations.
4. Discuss tips for amending community association documents to address marijuana related issues.
5. Discuss tips for enforcing marijuana related restrictions in governing documents.

Overview of Federal Law on Marijuana

Marijuana use has been illegal under federal law since the 1930's. Currently, the Controlled Substance Act, 21 U.S.C. § 801, et seq. (the "CSA"), makes the use, cultivation or possession of marijuana illegal under federal law. Marijuana, which is also spelled "marihuana" in various state and federal statutes, is defined as follows under the CSA:

(16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term "marihuana" does not include--

(i) hemp, as defined in section 1639o of Title 7; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.⁴

Marijuana is currently identified as a Schedule I controlled substance under the CSA.⁵ The classification of marijuana as a Schedule I controlled substance means that:

(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.

⁴ 21 U.S.C. § 802(16) (2019).

⁵ 21 U.S.C. § 812 (2019).

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.⁶

Accordingly, under federal law, marijuana does not have a recognized legal purpose. Currently, it is unlawful for any person to knowingly or intentionally manufacture, distribute, dispense or possess any Schedule I controlled substance.⁷ Community associations must be aware of the potential for criminal liability for anyone that permits the manufacture, distribution or use of marijuana on their property. Specifically, the CSA prohibits the following:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful to--

(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.⁸

Civil and Criminal Penalties Under the Federal Controlled Substance Act

A community association⁹ and community association board members that knowingly permit marijuana to be used within the community association could potentially be subject to criminal penalties of 20 years in jail or a fine of up to \$2,000,000.¹⁰ The CSA also permits a civil penalty against any person that violates 21 U.S.C. § 856 in an amount that is not more than the greater of \$250,000 or two times the gross receipts, either known or estimated, that were derived from each violation that is attributable to the person.¹¹ Finally, the CSA also allows for the Department of Justice to commence an action for declaratory relief or injunctive relief to prevent

⁶ *Id.*

⁷ 21 U.S.C. § 841(a) (2019).

⁸ 21 U.S.C. § 856(a) (2019).

⁹ 21 C.F.R. § 1300.01 (2019) (“Person includes any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or other legal entity.”).

¹⁰ 21 U.S.C. § 856(b) (2019).

¹¹ *See* 21 U.S.C. § 856(d) (2019). The civil penalty related to gross receipts would unlikely be applicable in the context of a community association unless it received proceeds from an illegal marijuana operation.

further violations of the CSA.¹² While the prosecution of community associations and board members is not a high priority for the Department of Justice, the fact the Department of Justice has not prioritized marijuana-related prosecutions does not mean permitting marijuana is without risk.¹³

While marijuana is still illegal under federal law, and practitioners should advise community associations of the same, Congress is currently attempting to limit the enforcement of marijuana-related crimes under federal law. On April 4, 2019, the STATES Act was introduced in the House and the Senate.¹⁴ The STATES ACT would amend the CSA so the CSA would not apply to any person that was "...acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana."¹⁵ Accordingly, community association attorneys should continue to monitor potential changes in federal law but also be aware that while the federal government may be lax on enforcement, there are currently very harsh consequences community associations and individual board members can face.

¹² 21 U.S.C. § 856(e) (2019); 21 U.S.C. § 843(f) (2019).

¹³ See, e.g., *United States v. Heying*, No. 14-CR-30 (JRT/SER), 2014 WL 5286153, at *15 (D. Minn. Aug. 15, 2014), *report and recommendation adopted* No. CRIM 14-30(1) (JRT/SER), 2014 WL 5286155 (D. Minn. Oct. 15, 2014) ("...the Cole Memo and related memoranda do not exempt from prosecution those involved in the distribution of marijuana in states where such activity is authorized under state law. See Cole Memo; Treasury Memo; Financial Crimes Memo. Instead, they articulate several broad enforcement priorities that are intended to inform charging decisions regarding marijuana-related crimes and focus prosecutorial efforts on marijuana-related activities that implicate the most significant dangers associated with marijuana, regardless of where those activities occur. The establishment of these priorities and enforcement of the law in accordance therewith are entirely rational exercises of prosecutorial discretion....The Court also finds no merit to Defendants' argument that the rationality of federal enforcement priorities regarding marijuana-related activity is undermined by marijuana's status as a Schedule I substance."); *United States v. Zachariah*, No. SA-16-CR-694-XR, 2018 WL 3017362, at *1 (W.D. Tex. June 15, 2018) ("*United States v. Canori*, 737 F.3d 181, 184–85 (2d Cir 2013) ('Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized. See 21 U.S.C. § 903 (providing for preemption where "there is a positive conflict between [a provision of the CSA] and that State law such that the two cannot consistently stand together"). That the Department of Justice has chosen to prioritize certain types of prosecutions unequivocally does not mean that some types of marijuana use are now legal under the CSA. Rather, "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek."); *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir 2012) ('Local decriminalization notwithstanding, the unambiguous federal prohibitions on medical marijuana use set forth in the CSA continue to apply')....").

¹⁴ S. 1028, 116th Cong. (2019); H.R. 2093, 116th Cong. (2019).

¹⁵ *Id.*

Interaction Between Federal Law and State Law Related to Marijuana

A. *The Supremacy Clause*

The Supremacy Clause of Article VI of the United States Constitution states the following:

This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The CSA states it only applies to the exclusion of any state law if there is a “positive” conflict between the CSA and state law.¹⁶ The United States Supreme Court has previously interpreted the Supremacy Clause to mean the CSA trumps any state law that legalizes marijuana. Specifically, the Supreme Court held:

...limiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. 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. *Wirtz*, 392 U.S., at 196, 88 S.Ct. 2017 (quoting *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426, 45 S.Ct. 176, 69 L.Ed. 352 (1925)). See also 392 U.S., at 195–196, 88 S.Ct. 2017; *Wickard*, 317 U.S., at 124, 63 S.Ct. 82 (“ ‘[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress’ ”).

Gonzales v. Raich, 545 U.S. 1, 29 (2005).¹⁷

¹⁶ See 21 U.S.C. § 903 (2019) (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”).

¹⁷ See also *United States v. Schostag*, 895 F.3d 1025, 1028 (8th Cir. 2018) (“Although some medical marijuana is legal in Minnesota as a matter of state law, the state’s law conflicts with federal law. Where there is a conflict between federal and state law with respect to marijuana, ‘[t]he Supremacy Clause unambiguously provides ... federal law shall prevail.’ *Raich*, 545 U.S. at 29, 125 S.Ct. 2195; see also *United States v. Hicks*, 722 F.Supp.2d 829, 833 (E.D. Mich. 2010) (“It is indisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana.”). Accordingly, we conclude the district court had no discretion to allow Schostag to use medical marijuana while on supervised release.”); *United States v. Trevino*, 355 F. Supp. 3d 625, 627 (W.D. Mich. 2019) (“The advent and acceptance of medical marijuana among the states has not been matched by the federal government. While thirty or more states have legalized marijuana for medical purposes, the federal government has classified

Most state courts have also agreed the CSA preempts state laws that permit a person to manufacture, distribute, dispense or possess marijuana.¹⁸ However, while the general rule is that the CSA will preempt state law efforts to legalize marijuana, there are a few limited challenges in which courts held the CSA did not preempt state law related to marijuana. By way of example, the California Court of Appeal addressed whether local police officers were required to arrest a medical marijuana user that was permitted to possess marijuana under state law. The Court held that:

Federal conflict preemption is difficult to establish because it requires showing that it is impossible to comply with the requirements of both federal and state law. (*Wyeth v. Levine* (2009) 555 U.S. 555, 573[129 S.Ct. 1187, 173 L.Ed.2d 51]; *Anaheim, supra*, 187 Cal.App.4th at p. 758, 115 Cal.Rptr.3d 89.) In this case, it is possible for local law enforcement agencies and officers to comply with their obligation not to arrest persons with valid identification cards and comply with the federal Controlled Substances Act. The act does not require local law enforcement officers to arrest persons who possess or cultivate marijuana. Indeed, Congress does not have the authority to compel state or local officers to enforce federal regulatory programs... Consequently, a local officer can forgo making a marijuana arrest without violating federal law....

Under the test for obstacle preemption, the state law must yield if the purpose of the federal act cannot otherwise be accomplished—that is, its operation is frustrated and its provisions refused their natural effect. The marijuana provisions in the federal act are capable of being enforced by federal officials and its purpose

marijuana as a Schedule I controlled substance under the Federal Controlled Substances Act since 1970. Drugs must meet three criteria to be placed in Schedule I: (1) the drug must have a high potential for abuse; (2) the drug must have no currently accepted medical use in treatment; and (3) there is a lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812. ‘By the terms of the Act, marijuana is “contraband for any purpose,” and, if there is any conflict between federal and state law with regard to marijuana legislation, federal law shall prevail pursuant to the Supremacy Clause.’ *United States v. Walsh*, 654 F. App’x 689, 695 (6th Cir. 2016) (quoting *Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)).”

¹⁸ See, e.g., *Haumant v. Griffin*, 699 N.W.2d 774 (Minn. Ct. App. 2005) (holding that a proposed city charter amendment to establish marijuana distribution centers for patients who were prescribed medical marijuana was preempted by the CSA); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010) (holding that that a provision of the Oregon Medical Marijuana Act affirmatively authorized the use of medical marijuana and such provision was preempted by the CSA); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016) (New Mexico’s Compassionate Use Act, authorizing medical marijuana, and the New Mexico Human Rights Act, requiring an employer to accommodate employee’s use of medical marijuana, were preempted by the CSA); *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (holding that statute expressly authorizing the use of medical marijuana was preempted by the CSA); *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10 (Me. 2018) (holding that CSA preempted a state statute compelling employer to reimburse workers’ compensation claimant for medical marijuana).

accomplished even if local officers abide by their obligation under section 11362.71, subdivision (e) and refrain from arresting persons with valid identification cards. California's statutes do not require local officials (1) to interfere with federal enforcement efforts or (2) to aid and abet individuals violating the federal act. Therefore, the CUA and MMP are not obstacles to federal law under applicable preemption principles.

Kirby v. Cty. of Fresno, 195 Cal. Rptr. 3d 815, 831–32 (Cal. Ct. App. 2015).¹⁹

Accordingly, as a general rule, the CSA will preempt any state laws attempting to legalize marijuana; however, as indicated above, the federal government cannot force states to enforce the CSA and states are free to decriminalize the manufacture, distribution or possession of marijuana under state law.

In the context of community associations, the general rule likely applies as a state statute cannot expressly permit a community association to maintain, manage, control or make available for use any place for the purposes of manufacturing, storing, distributing or using marijuana. Under 21 U.S.C. § 856(a), this would be illegal under federal law, and any such statute would run afoul of the Supremacy Clause. However, like state governments, community associations have no obligation to enforce federal law. In fact, federal courts have routinely held there is no private right of action to enforce the CSA.²⁰ There is nothing illegal about a community association taking the position that it will not enforce the CSA within its own community, as it simply does not have the authority to do so. However, a community association could be in violation of the CSA, specifically 21 U.S.C. § 856(a), if the governing documents expressly permit the manufacture, storage, distribution or usage of marijuana, thus exposing the community association and individual directors to potential civil and criminal penalties.

¹⁹ See also *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 537–38 (Mich. 2014) (holding that the Michigan Medical Marijuana Act is not preempted by the CSA as it does not require a person to violate the CSA and does not prohibit punishment under federal law); *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416 (Ariz. Ct. App. 2016) (holding that a county still had the authority to impose zoning regulations for medical marijuana dispensaries as the zoning ordinance did not prevent enforcement of the CSA); *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 654–55 (Cal. Ct. App. 2011), *review granted and opinion superseded sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012) (holding that a zoning ordinance prohibiting a medical marijuana collective permit within a residential zone or within a close proximity to a school would not be preempted by the CSA).

²⁰ See *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016), *aff'd sub nom. Safe St. All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017) (“Instead, according to its plain terms, ‘[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice.’”); *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010) (“[T]he [CSA] does not permit a civil action to be brought by a private-citizen plaintiff to enforce compliance.”); *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20 (D. Mass. 2018) (“...owners lacked substantive rights under CSA.”)

B. *Can private entities restrict marijuana use even if it is decriminalized by a state?*

Generally speaking, private entities, such as community associations, can restrict the use of marijuana within the governing documents as a matter of contract. In the context of employment law, courts have considered whether a private entity has the ability to restrict the use of medical marijuana and largely determined that a private entity may restrict marijuana use.²¹ The determinative factor in these cases was that there was no express language in the state marijuana statutes protecting medical marijuana users from adverse employment action by a private entity. However, some courts have determined state statutes can prohibit discrimination by employers, schools or landlords if a medical marijuana user complies with state law.²² Accordingly, practitioners should review any applicable state statutes in their jurisdiction to determine if there are any laws prohibiting discrimination against medical marijuana users in the context of community associations.

Are There Any Exceptions that Permit Marijuana Use Under Federal Law?

A. *Are medical marijuana users immune from prosecution under federal law?*

²¹ See, e.g., *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 922–23 (W.D. Mich. 2011) *aff'd*, 695 F.3d 428 (6th Cir. 2012) (“In contrast to what the MMMA does address—potential state prosecution or other potential adverse state action—the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates.”); *Cotto v. Ardagh Glass Packing, Inc.*, No. 18-1037 (RBK/AMD), 2018 WL 3814278 (D.N.J., Aug. 10, 2018) (“Unless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions.”); *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736, 748 (2011) (Washington’s Medical Use of Marijuana Act “does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use”); *Curry v. MillerCoors, Inc.*, No. 12-2471 (JLK), 2013 WL 4494307, at *7 (D. Colo. Aug. 21, 2013) (granting motion to dismiss and stating “discharging an employee under these circumstances is lawful, regardless of whether the employee consumed marijuana on a medical recommendation, at home or off work.”); *Garcia, supra*, 154 F. Supp. 3d at 1229 (finding New Mexico’s medical marijuana law does not “combine” with New Mexico’s civil rights statute to require an employer to accommodate medical marijuana).

²² See, e.g., *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1151 (N.J. Super. Ct. App. Div. 2019) (“... we note that Connecticut and Arizona expressly prohibit, at least to some degree, employers from discriminating against employees for medical marijuana use, see *Noffsinger v. SSC Niantic Op. Co.*, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (construing Conn. Gen. Stat. § 21a-408p(b)(3)); Ariz. Rev. Stat. Ann. § 36-2813....”); Del. Code Ann. tit. 16 § 4905A(c) (West 2019) (forbidding discrimination by schools, landlords and employers); ARK CONST. AMEND. 98 § 3(f)(3)(A) (forbidding discrimination in employment decisions).

As indicated above, the CSA explicitly indicates that marijuana, as a Schedule I controlled substance, has no recognized medical use.²³ The federal courts have also made clear the following:

It is indisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana... *United States v. \$186,416.00 in U.S. Currency*, 590 F.3d 942, 945 (9th Cir.2010) (“The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act[.]”); *United States v. Scarmazzo*, 554 F.Supp.2d 1102, 1109 (E.D.Cal.2008) (“Federal law prohibiting the sale of marijuana is valid, despite any state law suggesting medical necessity for marijuana”); *United States v. Landa*, 281 F.Supp.2d 1139, 1145 (N.D.Cal.2003) (“[O]ur Congress has flatly outlawed marijuana in this country, nationwide, including for medicinal purposes.”).

... Defendant’s prediction that “[s]ome day federal law will change[.]” is conjectural and a non-factor in this Court’s decision. The CSA authorizes the Attorney General to modify the drug schedules as necessary. *See* 21 U.S.C. § 811(a). As of this writing, the Attorney General has not transferred or removed marijuana from Schedule I. As such, marijuana continues to be a Schedule I drug, and its possession remains illegal under federal law... This Court is obligated to follow the laws of the United States, including the CSA and its drug classifications, in their present form, and in doing so, it cannot speculate regarding future, hypothetical revisions to those laws.

United States v. Hicks, 722 F. Supp. 2d 829, 833–34 (E.D. Mich. 2010). Accordingly, under the CSA, there is no difference between medical marijuana and recreational marijuana.

However, medical marijuana users who *strictly* comply with state medical marijuana laws may be exempt from prosecution under federal law, even though they are technically engaging in illegal conduct. In 2014, Congress approved the Rohrabacher-Farr Amendment to an appropriations bill, which states as follows:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.²⁴

²³ 21 U.S.C. § 812 (2019).

²⁴ Wikipedia contributors, *Rohrabacher–Farr amendment*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Rohrabacher–Farr_amendment (last visited Oct. 16, 2019) [<https://perma.cc/4DNJ-W3JV>].

The Rohrabacher-Farr Amendment has been renewed each year since 2014, although it is expired as of September 30, 2019, and has not yet been renewed again as of the date this paper was drafted.²⁵ In 2016, the Ninth Circuit Court of Appeals determined the Department of Justice could be enjoined from prosecuting cases in violation of the Rohrabacher-Farr Amendment. Specifically, the Court held as follows:

DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct. We therefore conclude that, at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.

United States v. McIntosh, 833 F.3d 1163, 1176–77 (9th Cir. 2016). However, immunity from federal prosecution provided by the Rohrabacher-Farr Amendment has been construed to be a very narrow exception. In 2019, the Ninth Circuit Court of Appeals further clarified *McIntosh*, *supra*, and held the following:

We also explained that, to obtain such an injunction, the defendant must demonstrate that he has “fully complied with the laws that allow the use, distribution, possession, or cultivation of medical marijuana, not whether he would be entitled to some procedure if the state, rather than the federal government, were prosecuting him in its courts.” *Id.* To the extent *McIntosh* left any doubt, *Evans* refutes Gentile’s argument that a showing of substantial, rather than strict, compliance with California law is sufficient for *McIntosh* relief, even if such a showing would immunize him from state prosecution... The district court’s conclusion that Gentile failed to demonstrate strict compliance was not clearly erroneous. *Evans*, — F.3d at —, 2019 WL 2943492, at *4.

United States v. Gentile, No. 17-10254, 2019 WL 3302230, at *2 (9th Cir. July 23, 2019).

If the Rohrabacher-Farr Amendment remains in effect, community associations may get arguments from co-owners that medical marijuana is “legal” under federal law and has a different

²⁵ H.R. 3055 was introduced on June 3, 2019, and if passed, would continue to defund the federal enforcement of marijuana laws. *See also Congress extends state-legal medical cannabis programs’ protections timing*, MARIJUANA BUS. DAILY (Feb. 19, 2019), <https://mjbizdaily.com/feds-extend-state-legal-medical-cannabis-protections-2019/> [<https://perma.cc/F4XG-G92V>].

status than recreational marijuana under the CSA. However, this is not accurate as the fact medical marijuana users may not be prosecuted does not mean they are engaged in legal conduct authorized by the CSA. Accordingly, given that the governing documents of most community associations contain a clause prohibiting “illegal activity”, and not a clause prohibiting “activity that is immune from prosecution”, the use of medical marijuana will likely still constitute a prohibited “illegal activity” in most community associations.

B. Are medical marijuana users entitled to a reasonable accommodation under the Federal Fair Housing Act?

With more and more states decriminalizing marijuana, residential condominium communities have felt the impact the most. With shared vertical and horizontal boundaries and ducts servicing multiple units in a condominium complex, odor tends to travel and invade neighboring units. Additionally, smoking marijuana on a balcony will most certainly end up entering a nearby open window of another unit. Hence, many residential condominium association boards are plagued with complaints about marijuana odors from neighboring units. On the other hand, marijuana users have responded with claims of usage under physicians’ care to manage symptoms of an illness or disability and claimed any actions intended to stop their usage of medical marijuana is discrimination based on disability under the Federal Fair Housing Act (“FHA”) or similar statute statutes.²⁶

The FHA prohibits community associations from discriminating against owners or occupants with a disability. In order to establish a claim for a violation of the FHA, a plaintiff must demonstrate the following:

As to persons with a “handicap” (now more commonly known as a “disability”), the FHA makes it unlawful to “refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). To state a claim of discrimination under the FHA for failure to accommodate, a plaintiff must show: (1) that the plaintiff or his associate is handicapped as defined by the FHA; (2) that the defendant knew or reasonably should have known of the claimed handicap; (3) that accommodation of the handicap may be necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that defendants refused to make such accommodation.

McFadden v. Meeker Hous. Auth., No. 16-CV-2304-WJM-GPG, 2019 WL 652598, at *10 (D. Colo. Feb. 15, 2019), citing *Arnal v. Aspen View Condo. Ass’n, Inc.*, 226 F. Supp. 3d 1177, 1183 (D. Colo. 2016).

²⁶ Shirely M. Steinback, *How Your Community Association Should Handle Marijuana Use in Light of Evolving Laws*, LERCH, EARLY & BREWER (Apr. 1, 2019), <https://www.lerchearly.com/news/how-your-community-association-should-handle-marijuana-use-in-light-of-evolving-laws> [<https://perma.cc/GSE2-6DCV>].

Accordingly, it is inevitable that with the decriminalization of medical marijuana on a state level, owners and occupants in community associations will request reasonable accommodations to use medical marijuana under the FHA. However, the FHA expressly carves out marijuana use in defining whether a person is defined as “handicap.”²⁷ At least two federal courts have held medical marijuana use does not constitute a “reasonable accommodation” under the FHA. The Ninth Circuit Court of Appeals rejected such a claim as follows:

Plaintiffs also argue that AHA was required to accommodate Assenberg by allowing him to use and possess marijuana in the Premises. Assenberg’s possession and cultivation of marijuana violated the Controlled Substances Act (“CSA”), 21 U.S.C. §§ 841(a)(1) and 844(a) (criminalizing the use and possession of controlled substances as defined by the CSA)... Plaintiffs nevertheless argue that their activities were legal because Washington Initiative 692 (“I-692”), codified at RCW 69.51A.005 *et seq.*, provides an affirmative defense to state criminal prosecution for medical use of marijuana... HUD has interpreted its regulations to preempt state medical marijuana use laws, and the Court defers to HUD’s views on that issue. *See, e.g., Grill v. Costco*, 312 F. Supp .2d 1349, 1352 (W.D.Wash.2004) (deferring to Justice Department's interpretations regarding service animals in public accommodations because it was charged with issuing, implementing, and enforcing applicable regulations)... Although plaintiffs attempt to distinguish that decision on the grounds that plaintiffs are users, not distributors, the Supreme Court foreclosed that argument: Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibition on manufacturing and distributing and the other prohibitions of the [CSA]. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is “seriously ill” and lacks alternative avenues for relief. *Id.* at n. 7. Accordingly, plaintiffs’ use and possession of marijuana were illegal under federal law. Because Assenberg was an illegal drug user, AHA had no duty to accommodate him. 42 U.S.C. § 3602(h); 42 U.S.C. § 12210(a); 29 U.S.C. § 705(20)(C)(i). “Reasonable” accommodations do not include requiring AHA to tolerate illegal drug use....

Assenberg v. Anacortes Hous. Auth., No. C05-1836RSL, 2006 WL 1515603, at *4–5 (W.D. Wash. May 25, 2006), *aff’d* 268 Fed. Appx. 643 (9th Cir. 2008).

Similarly, a federal judge in the Eastern District of Michigan performed the following analysis in determining if a request to use medical marijuana warranted a reasonable accommodation under the FHA:

²⁷ *See* 42 U.S.C. § 3602(h) (2019) (“‘Handicap’ means, with respect to a person-- (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).”).

An FHA reasonable-accommodation plaintiff must establish that the proposed modification is both reasonable and necessary. *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 540–41 (6th Cir.2014). “[T]he crux of a reasonable-accommodation... claim typically will be the question of reasonableness.” *Id.* at 541. An accommodation is reasonable when it imposes “no fundamental alteration in the nature of a program” or “undue financial and administrative burdens.” *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir.1996). An accommodation is necessary if, “but for the requested accommodation, [the plaintiff] ‘likely will be denied an equal opportunity to enjoy the housing of [his or her] choice.’ ” *Hollis*, 760 F.3d at 541 (quoting *Smith & Lee Assocs.*, 102 F.3d at 794–95).

In addition to establishing reasonableness and necessity, the plaintiff must also prove “that she suffers from a disability, that she requested an accommodation ..., that the defendant housing provider refused to make the accommodation ... and that the defendant knew or should have known of the disability at the time of the refusal.” *Hollis*, 760 F.3d at 540.

Beasley argues that her request for permission to use medical marijuana in her apartment is reasonable under the FHA because it poses no undue burden on Plaintiff. Beasley also argues that her request does not require a fundamental alteration to Plaintiff’s existing policies, practices, or procedures. Plaintiff maintains that Beasley’s request is unreasonable because it would amount to a fundamental alteration in the nature of its operations.

Forest City Residential Mgmt., Inc ex rel Plymouth Square Ltd. Dividend Hous. Ass’n v. Beasley, 71 F. Supp. 3d 715, 728 (E.D. Mich. 2014). The court went on to hold as follows:

Under federal law, marijuana is a Schedule I controlled substance with “no currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1). As previously discussed in section I, the federal Controlled Substances Act impliedly preempts the MMMA. Accordingly, to require Plaintiff to grant Defendant a reasonable accommodation to use marijuana would be to require Plaintiff to violate federal law... the Court shall GRANT IN PART Plaintiff’s Motion for Summary Judgment because the Court finds that Defendant is not entitled to a reasonable accommodation for medical marijuana use under the FHA.

Id. at 730-731. However, even though the Court held that the defendant was not entitled to a reasonable accommodation to smoke marijuana, it should be noted that the court refused to grant a permanent injunction barring the defendant from smoking marijuana as the court concluded the plaintiff had failed to establish the necessary elements to demonstrate injunctive relief. *Id.* at 732.²⁸

²⁸ “Plaintiff requests that this Court issue a permanent injunction enjoining Defendant from using marijuana on its property. To establish its entitlement to a permanent injunction, Plaintiff must show ‘(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance

Accordingly, until marijuana is legalized under federal law, community associations should be aware federal courts have thus far held that users of medical marijuana are not entitled to a reasonable accommodation to use medical marijuana under the FHA. In fact, expressly authorizing the use of medical marijuana on community association property as a reasonable accommodation could potentially subject the community association and/or board members to civil and criminal penalties under the CSA.²⁹ Most states also have a civil rights or community association interest statute requiring a reasonable accommodation for those with a disability based upon state law. To the extent a state has decriminalized medical marijuana use, it should be noted that if a state statute purports to authorize medical marijuana use as a reasonable accommodation, it is likely preempted by the CSA as discussed above. Accordingly, community association counsel should perform a preemption analysis under the Supremacy Clause before recommending the grant of a reasonable accommodation based solely upon state law.

C. Is there a difference between CBD oil and marijuana?

As indicated above, thirty-eight (38) states have adopted laws decriminalizing the use of cannabidiol (“CBD”) oil in some fashion. In states permitting CBD oil to be used, it is now commonplace for CBD oil to be sold in drug stores, health food stores or supermarkets. The rise in CBD oil use has coincided with a 2018 amendment to the CSA exempting certain CBD oils from the definition of “marihuana” under the CSA. Specifically, 21 U.S.C. §802(16) now states the following:

(16)(A) Subject to subparagraph (B), the term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term “marihuana” does not include--

(i) hemp, as defined in section 1639o of Title 7,³⁰ or

of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.’ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). Plaintiff asserts, in a conclusory fashion, that all four factors are met. (Pl. Br. at 14–15). The Court finds that Plaintiff has failed to establish all four elements necessary for the Court to issue a permanent injunction in this case. Therefore, the Court shall DENY Plaintiff’s Motion for Summary Judgment to the extent that Plaintiff seeks a permanent injunction prohibiting Defendant from smoking marijuana on its premises.” This author believes this ruling was likely due to the fact that the federal court declined to exercise jurisdiction over the state law eviction claim and determined that since this was an apartment, as opposed to a community association, the remedy of an eviction in a state law proceeding provided sufficient relief to the Plaintiff.

²⁹ 21 U.S.C. § 856(a) (2019).

³⁰ 7 U.S.C. §1639o(1) (2019) defines “hemp” as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts,

(ii) the mature stalks of such plant, fiber produced from such stalks, **oil** or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. (emphasis added)

Accordingly, while there are various FDA regulations as to the growth of hemp, transportation of hemp and/or inclusion of hemp into food products, which are continually evolving, there is nothing presently illegal about using CBD oil as long it conforms to the CSA.³¹ Accordingly, while it is unlikely many community associations will want to specifically prohibit CBD oil, they should be aware this would likely require a separate restriction specifically addressing CBD oil use, as restrictions prohibiting illegal activity and/or banning marijuana likely may not be used to prohibit the use of CBD oil.

Potential Issues Facing Common Interest Communities

A. Enforcement of nuisance prohibitions

Most community associations have prohibitions on nuisances contained in their governing documents. A typical nuisance provision may read something like this:

No noisy, hazardous, noxious, illegal or offensive activity shall be allowed in the community or within a unit if such activity becomes an annoyance, a disturbance, or safety hazard to any owner or occupant in the community, or if it unreasonably interferes with the quiet enjoyment of other owners or residents in the community.

These types of provisions have been relied upon by many community associations over the years to address cigarette smoke, pipe and cigar odors in communities. In the context of marijuana smoke, a trial court judge in Augusta, Maine ordered a medical marijuana patient to stop smoking marijuana inside her home as it was deemed a nuisance to her upstairs neighbor.³²

Ashley Seile was using marijuana for medical purposes, but her upstairs neighbor, Jessica Manfre, claimed secondhand marijuana smoke sickened her. Ms. Manfre claimed she was enforcing the association covenants prohibiting nuisances and any activity on the property that

and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

³¹ CBD oils containing a delta-9 tetrahydrocannabinol concentration of more than 0.3 percent on a dry weight basis are still illegal.

³² Betty Adams, *Marijuana fumes dispute drives Augusta condo neighbors to court*, MAINE CANNABIS REP. (Aug. 3, 2018), <https://www.centralmaine.com/2018/08/03/marijuana-fume-dispute-drives-augusta-condo-neighbors-to-court/> [<https://perma.cc/F4S2-GX9V>].

proves to be a source of annoyance or interferes with peaceful possession of the property.³³ In entering a preliminary injunction, the trial court held as follows:

The Court finds that the harm to Plaintiffs' health, especially Jessica Manfre, who suffers from rheumatoid arthritis, exacerbated by coughing spasms, is immediate and irreparable. Plaintiff, Jessica Manfre's coughing spasms are caused by smoke coming from Defendant's unit into Plaintiffs' condominium. The Court finds that preventing Defendant from smoking in her unit will not cause harm to the Defendant and will enable Plaintiffs to peacefully enjoy and use their property.³⁴

In the context of cigarette smoke, other courts have issued injunctions against smoking under specific provisions in the governing documents. In *Sauve v. Heritage Hills 1 Condominium Owners Association*, No. 06CV1256, 2006 WL 4585750 (Colo. Dist. Ct. Nov. 7, 2006), a Colorado court concluded the smell of secondhand smoke and its seepage into the unit of a non-smoker represented a nuisance, justifying the condominium association's approval of a declaration amendment banning smoking in all units. In addition, a District of Columbia Superior Court issued an injunction against a homeowner from smoking cigarettes, cigars or marijuana in his home because his neighbors claimed they were being harmed by smoke that was sneaking into their home through a hole in the basement.³⁵ Similarly, in *Chauncey v. Bella Palermo Homeowners' Association, et al.*, No. 30-2011-00461681 (Cal. Sup. Ct. Mar. 2013), a jury found the association breached its governing documents by failing to address secondhand smoke. Although the association's governing documents did not contain a smoking prohibition, they did have a "nuisance" provision and other provisions requiring the association to ensure owners and residents were provided with the "quiet enjoyment" of their units.

However, not all courts have been quick to grant injunctive relief to prevent smoking based on nuisance grounds. In *Davis v. Echo Valley Condominium Association*, 349 F. Supp. 3d 645, 664 (E.D. Mich. 2018),³⁶ an Eastern District of Michigan judge held the following:

Here, the plaintiff does not point to any specific evidence of the extent or amount of secondhand smoke being generated at Echo Valley, or any evidence of the extent of harm to her body. She mentions elsewhere in her briefing that other residents have complained about smoking at Echo Valley, but she has not presented that information in such a way that would give the Court a basis to depart from the reasoning of other courts...

³³ *Id.*

³⁴ *Manfre v. Seile*, Case No. RE-18-06, Order on Plaintiff's Motion for Temporary Restraining Order & Preliminary Injunction, (Maine Sup. Ct., May 2, 2018) (**Appendix 1, Order Granting Restraining Order**).

³⁵ *Copper, et al. v. Johnson, et al.*, Case No. 2014-CA-007715-B (D.C. Sup. Ct. Mar. 2, 2015).

³⁶ As of the date this paper was drafted, this case is currently pending on appeal in the Sixth Circuit Court of Appeals.

Other courts have reached the same conclusions. See *Feinstein v. Rickman*, 136 A.D.3d 863, 864-65, 26 N.Y.S.3d 135, 137 (N.Y. App. Div. 2016) (affirming the lower court's dismissal of the plaintiff's secondhand smoke nuisance claim); *Nuncio v. Rock Knoll Townhome Village, Inc.*, 389 P.3d 370, 374-75 (Okla. Civ. App. 2016) ("We agree with Defendants that no published Oklahoma decision has addressed claims arising out of smoke migrating from a neighbor's use of tobacco in his home. Other states which have addressed these claims have almost uniformly found no right to relief.") (collecting cases); *Schuman v. Greenbelt Homes, Inc.*, 212 Md.App. 451, 69 A.3d 512, 520 (2013) ("Because GHI's members were allowed to smoke at the time the contracts were signed (and still are), the mere act of smoking in one's unit or on one's patio is unlikely to be substantially and unreasonably offensive to any person at any time.").

Accordingly, community association attorneys should be aware that courts have come out both ways on whether secondhand smoke violates nuisance prohibitions in governing documents. While there is a direct link between secondhand cigarette smoke and negative health consequences, such a link has not been made with secondhand marijuana smoke. Accordingly, with the continued trend of decriminalizing marijuana, these types of cases, which appear to be highly fact-specific and decided on a case by case basis, will only continue to become more prevalent.

B. Insurance

Most community associations have a provision in their governing documents restricting owners from engaging in activities that increase the rate of insurance for the community association. An example of such a provision is as follows:

No Co-owner will do or permit anything to be done or keep or permit to be kept on their Unit or on the Common Elements anything that will increase the rate of insurance on the Condominium without written approval of the Association and each Co-owner will pay to the Association the increased cost of insurance premiums resulting from any such activity or the maintenance of any such condition.

Community associations that do not take enforcement action against owners that either grow, use or sell marijuana should consult their insurance agent to determine whether permitting such activity will increase the association's insurance premium. Many community associations may be surprised to learn that losses related to marijuana growth or use are excluded under the association's insurance policy.

The Sixth Circuit Court of Appeals held that a commercial property owner was not entitled to insurance coverage when its tenants were growing marijuana and caused \$500,000 in damage to the property. Specifically, the court held the following:

Westfield leads with the Dishonest or Criminal Acts Exclusion. In sum, Westfield argues that KVG's tenants' conduct was criminal under either state or federal law and that these acts were the main cause of KVG's loss. We agree... Under this

exception, the core issue is whether the tenants committed a “criminal act” within the meaning of the policy. In the abstract, this is an interesting question. Cultivating marijuana is a crime under federal law, *see, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vii), but it is protected by Michigan law under certain conditions, *see* Michigan Medical Marihuana Act (“MMMA”), I.L. No. 1 (2008), Mich. Comp. Laws §§ 333.26421–333.26430... But we need not face that difficult issue today, because no reasonable jury could find that KVG’s tenants complied with Michigan law.

KVG Prop., Inc. v. Westfield Ins. Co., 900 F3d 818, 821–22 (6th Cir. 2018).³⁷

In another opinion from the Sixth Circuit Court of Appeals, the court relied on a provision in an insurance policy to deny insurance coverage that required a property owner to notify the insurance carrier of any changes related to the use of the property. The insurance policy stated, in pertinent part, the following:

... in a Michigan Amendatory Endorsement to the policy, Nationwide informed McDermott that she had “a duty to notify [Nationwide] as soon as possible of any change which may affect the premium risk under th[e] policy,” including “changes ... in the occupancy or use of the residence premises.” Nationwide reserved the right to void this policy, deny coverage under this policy, or at [Nationwide’s] election, assert any other remedy available under applicable law, if [McDermott], or any other insured person seeking coverage under this policy, knowingly or unknowingly concealed, misrepresented or omitted any material fact or engaged in fraudulent conduct at the time the application was made or at any time during the policy period.

Nationwide Mut. Fire Ins. Co. v McDermott, 603 Fed. Appx. 374, 375–76 (6th Cir. 2015). The court went on to hold that:

... according to Nationwide’s representative, had McDermott informed Nationwide of Mathews’ marijuana operation, Nationwide would have declined coverage altogether, because such an operation is an increased hazard and “an unacceptable risk.” Thus, because McDermott failed to report the change in use of the premises to Nationwide—a change in use that would have had a great impact on the premium risk—she cannot recover under the policy. To hold otherwise would make Nationwide liable for a risk it did not assume.

Id. at 378–379.

³⁷ *See also United Specialty Ins. Co. v. Barry Inn Realty Inc.*, 130 F. Supp. 3d 834, 842 (S.D.N.Y. 2015) (holding that damage caused by a marijuana grow operation was caused directly or indirectly by dishonest or criminal acts); *Anh Hung Huynh v. Safeco Ins. Co. of Am.*, Docket No. C 12-01574-PSG, 2012 WL 5893482, at *2 (N.D. Cal. Nov. 23, 2012) (holding that coverage was properly denied as the marijuana growing operation of a residential tenant was illegal).

As indicated above, the “dishonest and illegal acts” and “failure to notify” exclusions have been used to deny property loss coverages caused by fires resulting from marijuana growing operations. Community associations that turn a blind eye to marijuana growth operations and/or marijuana use risk substantial losses that may not be covered under their insurance policy. Community associations should consult with their insurance carrier to determine whether coverage exists for marijuana-related losses. Additionally, community associations may want to consider adding additional language to their governing documents precluding an owner from engaging in any activity that not only would increase the rate of insurance of the association but also would “void” insurance coverage under the association’s insurance policy.

C. Utility usage

It is common for community association documents to contain a restriction on utility usage and/or waste. An example of such a provision is as follows:

No Co-owner will commit waste or engage in any activity that will result in any increased utility charges to the Association without the written consent of the board of directors.

When residents grow marijuana inside their units, they use a great deal of water, light and heat. Ultraviolet lamps necessary to properly grow marijuana plants require massive amounts of electricity, and, in order to grow cannabis, the following is required: 24-hour indoor lighting, heating, ventilation and air conditioning. According to CBC, it is estimated that 2000 kw are required to produce a pound of cannabis, which is approximately six times the electricity that an average condominium unit uses in one month.³⁸

Based on the above, if residents of a condominium community are growing cannabis in their units, such activity will significantly increase the building’s water and electric consumption, and thereby significantly increase the cost of such utilities. If units in such condominium buildings are not separately metered, the cost increase will be absorbed by all residents in the building and not just those residents causing the surge. As a result, many associations receive complaints from residents about their increased utility charges alleging it is not equitable for them to pay for utility usage by someone growing federally illegal substances.

When receiving such complaints, it is imperative for associations to check their governing documents to determine the available remedies for excess utility usage. In some cases, the governing documents may permit a community association to turn off utilities for violations of the documents. *See, e.g., Frantz v Piccadilly Place Condo. Ass’n, Inc.*, 597 S.E.2d 354, 358 (Ga. 2004) (holding that the statute and governing documents permitted the Association to shut off the owner’s water). However, other courts have held that an association is not entitled to shut off utilities when an owner is in violation of the documents. *See, e.g., Parker v. Chimneywood*

³⁸ *Understanding Marijuana Madness for Condo Dwellers*, PRIORITY (Jan. 28, 2019), <https://prioritymeter.com/ca/article/understanding-marijuana-madness-for-condo-dwellers/> [<https://perma.cc/94QN-Q52G>].

Homeowners' Ass'n, Inc., 866 So.2d 289, 291 (La. Ct. App. 2003), *writ den* 882 So.2d 606 (“On January 22, 2001, a Temporary Restraining Order was issued on behalf of the Appellants and against Chimneywood, ‘... restraining and enjoining the continuing deprivation of plaintiffs’ water services....’”); *In re Hobbs*, 20 BR 488, 490 (1982) (holding threats by an association to cut off utility service were impermissible). The viability of this approach varies from jurisdiction to jurisdiction, and in most cases, a community association may be best served by obtaining a court order prior to shutting off any utilities.

In other instances, the governing documents may permit the association to charge back any excess utility use and associations should take advantage of that authority and utilize it to more equitably split the cost of utilities. One problem an association may encounter is the inability to determine (or estimate) how much utilities each unit uses and, thus, how to allocate the costs. Without sub-meters, it becomes a guessing game and there are no guarantees of accuracy. However, this should not stop condominium associations from pursuing claims related to excess use of utilities. In *Eastridge Condominium Association, Inc. v. McEnerney*, Docket No. CV136018957S, 2015 WL 7269857, (Conn. Super. Ct., Oct. 23, 2015), a Connecticut court determined an association could recover excess amounts paid on a water bill due to a toilet leak. In that case, the condominium was composed of three (3) buildings and the units were not individually metered. *Id.* at *1. In determining the amount that could be recovered, the court held as follows:

The court will agree that a reasonable inference may be found that the excess water charge in that bill was due to the leaks in the defendant’s unit. The question is what is the excess that should be attributed to the defendant. The court finds that when the defendant was notified of the leak she fixed it the following day. The court has evidence that the bill received after the problem was corrected was \$2,289.15 (Exhibit 5). Although Miceli testified that this bill was high, there is no credible evidence as to what was normal. The court will find that the defendant is responsible for the difference in the bill following the correction of the problem (Exhibit 5) and the bill received prior to the correction of the problem (Exhibit 4) or \$2,859.34.

Id.

As evidenced by *Eastridge, supra*, the governing documents do not always provide authority to a community association to allocate utility charges based on usage and, instead, such charges are to be allocated equally or based on some other criteria. Generally, these types of problems may be addressed through an amendment to the governing documents, providing the board with the discretion to reasonably estimate the utility usage and calculate chargebacks. An amendment may also require anyone growing cannabis to use alternative methods of electricity and water or prohibit the growth of marijuana plants in the community entirely. This is discussed further *infra*.

D. Marijuana distribution from residential units

Many communities and residents have objections to the sale of marijuana out of a unit in a community. Sometimes the objections are based on a perception that “bad” people will be entering the community to purchase the product. Others simply point to governing documents that prohibit businesses from being run out of the units. Sometimes marijuana sales directly from units violate local zoning or other ordinances. If this is the case, the activity may be reported to the local municipality for enforcement. On the other hand, if there is no violation of ordinances, an association must rely on the content of their governing documents.

It is common for community association governing documents to have a restriction on “commercial use.” An example of a commercial use provision is as follows:

Units will be used for residential purposes only. No Co-owner will carry on any business enterprise or commercial activities anywhere on the Common Elements.

If the governing documents do not contain prohibitions on commercial use, businesses in the home or otherwise prohibit the sale of cannabis out of individual units, an amendment may be the best option for an association. The amendment could add either (or both) of these prohibitions to the governing documents, which would be recommended, as courts have adopted broad application to commercial use provisions.³⁹

E. Commercial Marijuana Businesses

As states decriminalize marijuana, more and more marijuana dispensaries are popping up around communities that may not expect to see that line of business. However, as official state-compliant businesses, dispensaries have become more prevalent and are in all types of communities regardless of economic class. In mixed-use communities, where there are both residential and commercial units, residents struggle with marijuana distribution and sales businesses the most, as such businesses are located directly within the communities and are part of their associations. Many owners allege their property values have diminished as result of marijuana businesses opening in their communities. The belief held by most is that allowing marijuana businesses in, or close to communities, increases crime and lowers property values; however, studies have found the opposite to be true.

According to research, on average, in states where recreational marijuana is legal, cities with retail dispensaries saw home values increase \$22,888 more than cities where marijuana is

³⁹ See, e.g., *Terrien v. Zwit*, 467 Mich. 56, 64; 648 N.W.2d 602, 606–07 (2002) (“ ‘Commercial’ is commonly defined as ‘able or likely to yield a profit.’ *Random House Webster’s College Dictionary* (1991). ‘Commercial use’ is defined in legal parlance as ‘use in connection with or for furtherance of a profit-making enterprise.’ *Black’s Law Dictionary* (6th ed). ‘Commercial activity’ is defined in legal parlance as ‘any type of business or activity which is carried on for a profit.’ *Id.* ‘Business’ is commonly defined as ‘a person ... engaged in ... a service.’ *Random House Webster’s College Dictionary* (1991). ‘Business’ is defined in legal parlance as an ‘[a]ctivity or enterprise for gain, benefit, advantage or livelihood.’ *Black’s Law Dictionary* (6th ed).”).

illegal from 2014 to 2019.⁴⁰ Per a CATO Institute study, homes close to retail dispensaries (within 0.1 miles) increased in value approximately 8.4 percent compared to those further away from the dispensaries.⁴¹ This effect appears to bring up the entire city's home values at a rate higher than the national average.

Colorado's first retail dispensaries opened in January 1, 2014, and medical and recreational sales have generated over \$948,000,000 in tax revenue.⁴² Denver has 180 dispensaries, the most of any Colorado city, and its housing market has seen unprecedented growth since recreational legalization in 2012. Colorado and Washington, the first states to legalize cannabis for recreational use, have both seen above-average home values since opening their first dispensaries in 2014. Colorado home values have increased 58% and Washington home values have increased 57% in the five years since legal commercial sales began. A chart setting forth the home value percent increase of real estate since January 2014, when commercial sales of marijuana were first legalized, is attached as **Appendix 2**.⁴³ The chart demonstrates that an argument exists that retail dispensaries do not negatively impact home values but actually increase them.

Additionally, dispensaries are not without their own challenges. Many marijuana businesses cannot get financing from lending institutions to open their doors. Banks have traditionally not been keen on lending money to businesses violating federal laws. On July 23, 2019, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing about the availability of banking services to marijuana businesses. Marijuana advocates insisted the federally illegal classification of marijuana creates operational problems for state-legal marijuana businesses,⁴⁴ such as a lack of access to banking funds and the inability to take tax deductions standard for other types of businesses.

Congress has drawn up a bill for the SAFE Banking Act that seeks to protect financial institutions from prosecution and civil actions for serving state-legal marijuana businesses. Additionally, a spending bill was introduced in the House in May 2019 that would prevent federal

⁴⁰ *Housing Data*, ZILLOW, <https://www.zillow.com/research/data/> (last visited Oct. 4, 2019).

⁴¹ James Conklin, et al., *Contact High: The External Effects of Retail Marijuana Establishments on House Prices*, CATO INST. (July 18, 2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/research-brief-122.pdf> [<https://perma.cc/MS7C-2XJX>].

⁴² Marijuana Tax Data, COLO. DEP'T. OF REVENUE, <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> (last visited Oct. 4, 2019) [<https://perma.cc/2XH9-6CGA>].

⁴³ *Housing Data*, *supra*, at 46.

⁴⁴ Julia Cardi, *Operations Challenges for Marijuana Businesses Get Attention in Congress*, LAW WEEK COLO. (July 30, 2019), <https://lawweekcolorado.com/2019/07/operations-challenges-for-marijuana-businesses-get-attention-in-congress/> [<https://perma.cc/FK39-VY6J>].

regulators from punishing financial institutions for keeping accounts with state-legal marijuana businesses.

As a result, it seems the federal government is creating some exceptions to its rules in order to allow state-legal dispensaries to survive and even thrive. Therefore, mixed-use communities may have a struggle on their hands when it comes to avoiding marijuana businesses in their communities. Nevertheless, there is always the option of presenting an amendment of the governing documents to the owners for approval prohibiting marijuana businesses from purchasing units in a commercial or mixed-use condominium.

Document Drafting Considerations and Tips

The most utilized method for addressing marijuana usage, growth and sales in communities is revision of the governing documents. Even if state law does not prohibit the use of marijuana, generally speaking, community associations may prohibit such use and/or regulate it by revising or adding provisions to their governing documents. Owners and residents of common interest communities are required to comply with their association's governing documents, which can be more restrictive than state law.

Below are some options to consider when preparing amendments or revisions to an association's governing documents. In order to ascertain which option will work best, it is imperative to discuss these options with the pertinent boards to ensure the directors are clear on what each option entails and the pros and cons of the same.

a. Ban all forms of smoking

One option is to add a prohibition on smoking of any type—this includes marijuana, cigarette, cigar and other forms of smoking. This ban may be limited to smoking in common areas or may encompass the entire community (including unit interiors).

b. Ban all forms of cannabis

Oftentimes boards are hesitant to touch cigarette/cigar smoking due to large smoking populations in their communities and prefer to only focus on marijuana. As with the smoking ban, this ban may also be limited to using cannabis in the common areas or could prohibit it inside units as well.

c. Ban only certain types of cannabis use

Although marijuana is oftentimes utilized in a smoking form, it also may be utilized in many other forms such as edibles, lotions, oils, pills, sprays, drinks, chewing gum and patches, just to name a few.⁴⁵ Many of these other forms of cannabis do not produce an

⁴⁵ *24 Ways to Consume Marijuana – Smoking, Edibles, Lotions & More*, ARDENT (June 13, 2018), <https://ardentcannabis.com/blog/ways-to-consume-marijuana/> [<https://perma.cc/N8Z3-RHWD>].

odor when used. If an association is primarily concerned with odor, it should consider banning the smoking of marijuana and any other usage that produces an odor and allowing consumption methods that do not cause odors.

d. Ban on growth of marijuana

Another concern for community associations is the growth and sales of cannabis in the boundaries of the community. As discussed previously, marijuana growth requires a great deal of water and electric use, which can cause utility costs to increase for other owners if utilities are not separately metered or paid.

e. Ban on sales of marijuana

The sale of marijuana typically goes hand-in-hand with growth, but some communities may not mind the growth if there are not any sales. This presents the option of amending the governing documents to only prohibit sales of cannabis but still allowing growth. As discussed previously, it is also possible to ban marijuana companies from purchasing units in a mixed-use community through an amendment.

f. Ban all illegal activities

Because marijuana usage and sales are illegal under federal law, a provision in the governing documents prohibiting ANY illegal activity will have the effect of banning marijuana usage, growth, and sales in a community. The downside to this option, though, is that boards will need to get versed in many laws that may impact their community to ensure they consistently enforce this prohibition.

g. Provide rule-making authority to the board if marijuana is legalized in the future

In the event the manufacture, distribution, possession or use of marijuana becomes legal under federal law in the future, community associations may want to authorize the board of directors to create rules related to marijuana within the condominium.

Once these questions are answered, it becomes easier to prepare provisions addressing the specific issues a board is seeking to address.

There are numerous ways to draft amendments to governing documents in order to address marijuana concerns. Below are several examples of such provisions.

- No Owner or occupant of a Unit may utilize such Unit for the purpose of commercial growth or distribution of marijuana or medical marijuana. This prohibition may further be clarified by the Board of Directors through Rules and Regulations.
- No Owner or occupant of a Unit may utilize his/her Unit for the purpose of growing, distributing, selling, transferring, or transporting marijuana, including medical

marijuana. This restriction also prohibits growing, manufacturing, selling, transporting, and distribution of all Schedule 1 substances as currently defined by the United States Drug Enforcement Administration (DEA). This restriction does not include growing marijuana for personal use in quantities that may be allowed by current laws.

- Smoking is prohibited everywhere on the property including, but not limited to, the individual units and all indoor and outdoor common areas. No owner shall smoke or permit smoking by any owner, occupant, agent, tenant, contract worker, household worker, guest, friend, or family member.
- By purchasing a unit in the _____ Association, Owner agrees and acknowledges that the Unit is in a no-smoking community. Owner and members of Owner's household shall not smoke or cultivate anywhere in the Unit or the building where the Unit is located or in any of the common areas or adjoining grounds of such building or other parts of the community.
- Smoking is prohibited in all common areas of the _____ community, whether indoors or outdoors. Without limiting the generality of the foregoing, this prohibition applies to all common areas in the community. This includes, but is not limited to the clubhouse, swimming pool area, walking and bike trails, community gardens, playgrounds, common hallways, elevators, patios, decks, and parking garage. Smoking is defined as including carrying, burning or otherwise handling or controlling any lighted or smoldering product containing tobacco or other substance such as marijuana, including, but not limited to, cigarettes, cigars or pipes. Each owner is responsible for the compliance with this rule by the owner and all residents within the owner's unit, and for all guests and invitees of such owner. Violations of this rule may result in a fine pursuant to the Association's fine schedule as adopted and amended from time to time by the Board of Directors.

Enforcement of Marijuana Restrictions

Other communities amend their governing documents, as discussed previously, to prohibit or otherwise limit the use of cannabis. Regardless of what method an association uses to address cannabis, what steps should it take to then enforce its restrictions once they have been adopted?

Some associations have reached out to their local police departments for assistance with enforcement. However, at least in Colorado, that does not seem to get any traction.⁴⁶ As a result, associations, in most instances, must enforce their marijuana regulations in the same manner as

⁴⁶ See Carlos Illesacs, *HOAs and pot use, cultivation likely to be volatile mix*, DENVER POST (Jan. 13, 2014), <https://www.denverpost.com/2014/01/13/hoas-and-pot-use-cultivation-likely-to-be-volatile-mix/> [<https://perma.cc/BGP6-2PN7>] (“Enforcing a pot smoking ban is a different matter altogether. When the issue of HOAs possibly banning pot use came up in Aurora [Colorado], Police Chief Dan Oates said he wasn’t going to waste the time of police officers who are summoned to an HOA on a complaint that someone is smoking marijuana.”).

they enforce other regulations. Some states have statutes specifically setting forth an enforcement process, while others contain guidelines. Some states do not have statutes addressing the enforcement issue at all. Therefore, it is imperative to review the pertinent state laws before commencing enforcement.

A generic enforcement strategy an association might utilize may look something like this:

- a. Investigate complaints and attempt to verify;
- b. Send notice to noncompliant individual;
- c. If complaints continue to come in, impose a fine. Some states require notice and hearing prior to imposing fines.
- d. If the fine(s) do not work, the file is turned over to the association's legal counsel to take appropriate enforcement steps, such as commencing legal action against the violator.

Regardless of the strategy utilized, it is important for associations to treat marijuana violations the same as any other violations or run the risk of being accused of inconsistent enforcement or discrimination.

Final Takeaways for Dealing with Marijuana Issues in Community Associations

1. **Marijuana is still illegal under the CSA.** Community associations and board members could be subject to harsh civil and criminal penalties if they expressly authorize the manufacture, distribution or possession of marijuana on community association property. Until marijuana is legal under the CSA, community associations should not expressly authorize marijuana use.
2. **Federal law trumps state law with limited exceptions.** The CSA will control over any state laws that decriminalize the manufacture, distribution or possession of marijuana under the Supremacy Clause of the United States Constitution. While there have been a few limited exceptions to this rule related to the state enforcement of the CSA, none of these exceptions are likely to apply to community associations.
3. **Private entities, such as community associations, are generally free to restrict marijuana as a matter of contract.** In the context of employment law cases, most courts have held that private entities are free to restrict marijuana use. Some states have started adopting statutes prohibiting discrimination based on marijuana use in the context of schools, employment and rental properties. This trend could be expanded to apply to community associations in the future.
4. **There is really no difference between medical marijuana and recreational marijuana in the context of community associations as immunity from prosecution does not equate to legal conduct.** All marijuana is illegal under the CSA. There are no exceptions for medical marijuana use, but Congress has defunded criminal prosecutions of medical marijuana users for several years.
5. **A medical marijuana user is not entitled to a reasonable accommodation under the Fair Housing Act.** Federal courts have thus far held that a person with

a disability is not entitled to a reasonable accommodation to use marijuana under the Fair Housing Act. However, community associations should be aware that as of 2018, the CSA was amended to permit use of certain types of CBD oils.

6. **Courts are split on whether marijuana smoke constitutes a “nuisance.”** Most community association documents contain provisions prohibiting an owner from engaging in an activity that constitutes a “nuisance.” Courts are split on whether smoking constitutes a “nuisance” and whether they will grant an injunction to prevent marijuana smoke. Accordingly, these cases are highly fact-specific and will vary as to the outcome.
7. **Community associations should consult with their insurance agents to determine if marijuana distribution, manufacture or use will impact the association’s insurance coverage.** Many insurance policies will not provide coverage of illegal or dishonest acts. Courts have relied on these provisions to deny coverage to property owners relating to losses caused by marijuana operations. Additionally, many insurance policies will require property owners to notify the insurance carrier if marijuana-related activities are occurring on the premises. The failure to provide such notification to the insurance carrier may result in a denial of coverage.
8. **Community associations need to be prepared to deal with the increased demands on utilities if marijuana is grown in the community association.** Growing marijuana often causes common area electrical and/or water bills to greatly increase. Community associations should have provisions in their governing documents permitting them to recoup excess costs associated with owners that grow marijuana.
9. **Commercial use restrictions can be used to prevent the distribution and sale of marijuana from condominium units.** If a community association is having difficulty amending their documents, a commercial use restriction may be employed to prevent marijuana from being grown in large quantities and/or sold from units in most circumstances.
10. **Community associations should update their governing documents in anticipation of marijuana-related issues that are becoming more prevalent.** Many community association documents were drafted at a time that marijuana legalization was not contemplated. Similarly, many documents drafted by developers do not anticipate marijuana-related issues. Community associations should review their governing documents to ensure they have provisions that address smoking, insurance, utility use and/or commercial use.