How Low Can You Grow?

The Regulation of Marijuana Use and Cultivation in California Common Interest Developments

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Recreational v. Medical Use and Cultivation

Federal and state laws conflict in relation to *recreational* vs. *medical* marijuana. However, it is illegal to cultivate, possess, or use recreational marijuana under both federal and state law. See 21 U.S.C. 812(b)(1) and California Health and Safety Code § 11358.

What about recent changes allowing "personal agriculture" within HOAs? California Civil Code § 4750 permits owners to grow "personal agriculture" crops for eating and personal use. However, that section of the statute incorporates the definitions listed in Civil Code § 1940(a), which specifically *excludes* marijuana and any other "unlawful" crops. Thus, there is no right to cultivate marijuana under this statute.

Regarding *medical* marijuana, California permits the limited use and cultivation of marijuana for medical purposes specifically related to the treatment of "serious medical conditions." See California Health & Safety Code § 11362.5 et. seq.[1]

Regulation and Best Practices In HOAs

Many CC&Rs, Rules and Regulations, and other governing documents provide that anything illegal under state and federal law is also prohibited within the HOA. However, since there is an inconsistency in the medical marijuana context, this language may not end the analysis.

Marijuana and Nuisance

Where the use of any device/item constitutes a nuisance for any other owner, tenant or guest, it normally can be regulated. The term "nuisance" is used to describe: an activity or condition that is harmful or annoying to others and interferes with their right to "quiet enjoyment"; the harm caused by the above activity or condition; and/or legal liability that arises from the combination of these two.

Exposure to secondhand smoke (including marijuana smoke) has been deemed a "nuisance" by legislatures and courts (including juries). In 2013, for example, a jury in Orange County held a condominium association liable for secondhand cigarette smoke exposure to condominium residents. See *Chauncey v. Bella Palermo Homeowners' Association*, et al., Orange County Superior Court Case No. 30-2011-00461681.

Since secondhand smoke (including marijuana) is a nuisance, HOAs may regulate the smoking of recreational marijuana. Since federal and state law prohibit its cultivation, an association can restrict cultivation outright, except under very specific circumstances.

Updating Governing Documents

Managers and boards should review the nuisance provisions in their Governing Documents and consider amending them. You can of course utilize regular enforcement actions such as ADR/IDR, hearings and fines, small claims actions, and/or superior court actions to enforce restrictions.

Working with Law Enforcement

Where an owner or tenant is consistently violating the law, an association should work with law enforcement to assist.

Reasonable Accommodations & Medical Marijuana

"Reasonable accommodation" requests trigger disability rights and anti-discrimination statutes; thus, it is important to consult with counsel on these requests.

Generally, a person with a disability must provide a "nexus" (direct connection) between the accommodation requested and the disability. It would be unlikely that a person could show a nexus between allowing the smoking/growing of marijuana and his/her disability.

The "right" of someone with a disability to smoke medical marijuana does not trump others' rights to be free from the nuisance caused by such smoking. See *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920. Thus, if a person with a disability requests to be able to smoke marijuana as a reasonable accommodation, but such smoking causes a nuisance for another resident, an association may prohibit or otherwise regulate the smoking.

An association would likely be able to prohibit medical-related cultivation under state and federal law.

It is clear that associations have the power to regulate both use and cultivation of marijuana, and should not shy away from doing so.

[1]*Such patients must obtain a physician's recommendation for medicinal marijuana, and may only possess less than 8 ounces; they may only cultivate 6 mature/12 immature plants, maximum. Health and Safety Code § 11362.77(a).*

ABOUT THE AUTHOR

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