Marijuana in HOAs

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Amendment 64 to the Colorado Constitution permits the personal use, and regulation of marijuana. Amendment 64 decriminalizes possession of one ounce or less of marijuana or 6 marijuana plants for persons 21 years or older. However, the cultivation, sale, and possession of marijuana are still illegal under federal law. Amendment 64 became effective on Monday, December 10, 2012. Many associations anticipate there could be disputes arising out of marijuana use, especially in condominium and townhome communities with shared walls and close living quarters, and may look at options for regulation.

Local governments may regulate or ban marijuana activity and the operation of marijuana businesses through ordinances or initiatives so long as they do not conflict with Amendment 64. An ordinance or initiative may govern: 1) the time, place, manner, and number of marijuana establishment operations; 2) procedures for the issuance, suspension, and revocation of a local license; 3) a schedule of annual operating, licensing, and application fees for marijuana establishments; and 4) civil penalties for violation of an ordinance or regulation governing the time, place, and manner of operation of a local marijuana establishment.

I. What about HOAs? Is there any authority for HOAs to regulate marijuana in their communities? If so, what are those authorities?

A. *Language of Amendment 64*

The authority to regulate marijuana comes from the language of the Amendment itself as it gives a property owner the right to prohibit or regulate all marijuana activity on his or her property. Amendment 64 permits an HOA to regulate marijuana activity on its common areas. The exact language reads:

> NOTHING IN THIS SECTION SHALL PROHIBIT A... CORPORATION OR ANY OTHER ENTITY WHO OCCUPIES, OWNS OR CONTROLS A PROPERTY FROM PROHIBITING OR OTHERWISE REGULATING THE POSSESSION, CONSUMPTION, USE, DISPLAY, TRANSFER, DISTRIBUTION, SALE, TRANSPORTATION, OR GROWING OF MARIJUANA ON OR IN THAT PROPERTY.

What isn't necessarily clear from this language is whether the authority to regulate would extend to the interior of a condominium unit, which is not property "occupied, owned, or controlled" by the HOA.

B. Colorado's Clean Indoor Air Act - House Bill 06-1175

This act became effective March 27, 2006. As to HOAs, the act applies to the common elements of condominiums, townhomes and patio homes. This includes common restrooms, lobbies, hallways, clubhouses, mailrooms, pool locker rooms or other enclosed, shared areas, like 'entryways' ("outside of front or main doorway leading" into the restroom, lobby, hallway, and so on).

Entryways include "a specified radius outside the doorway." The "specified radius" is determined by the local authority (such as city governments, but most likely not an HOA board of directors). If the local authority has declined to specify a radius, the act provides a specified radius of 15 feet.

The act also applies to other public places and buildings, such as elevators, restrooms, theaters, museums, libraries, schools, educational institutions, retirement facilities and nursing homes. There are a number of exemptions but none that are applicable to HOAs. Violations of the act are Class 2 Petty Offenses punishable by escalating fines.

C. HOA Covenants

Most HOA covenants already have language addressing and banning nuisances in the community. Some covenants already specifically address and prohibit the smoking of tobacco. For an HOA limited to residential uses seeking to amend its covenants to address marijuana, sample covenant language for a proposed amendment might read as follows:

Covenant and Restriction on Marijuana, Distribution and Growing. No Owner or occupant of a Property in the community may utilize his Unit for the purpose of growing or distributing marijuana, including medical marijuana. This covenant and restriction may further be clarified by the Board of Directors through Rules and Regulations. Owners will be responsible for any additional costs or damage resulting from a violation of this covenant and restriction, including but not limited to increased water and utility charges.

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D. Case Law

Constitutional Rights v. HOA Restrictions: Committee for a Better Twin Rivers, et al. v. Twin Rivers Homeowners' Association, New Jersey Supreme Court, decided July 26, 2007.

- The New Jersey Supreme Court case denied owner claims that an association's actions violated individual rights protected by the New Jersey State Constitution, and determined the association's private property interests outweighed the owners' rights to express themselves.
- The New Jersey Constitution applies to public property, not private property in a homeowners association. Because HOAs are private communities, constitutional claims do not apply to them.
- The court determined the community's private property interests outweighed the owners' individual rights of expression, and therefore did not violate the owners' state constitutional rights.
- HOA restrictions are enforceable as they are not against public policy.

Although this case is not binding precedent in Colorado, it could be persuasive in Colorado if an owner attempted to challenge an association's regulation of marijuana use or cultivation in the community. The association could argue, as was argued in Twin Rivers, that the Colorado Constitution, and therefore Amendment 64, does not apply to it and that the association is able to pass reasonable restrictions on marijuana activities in the community.

Enactment a smoking ban through amendment of covenants: Christensen v. Heritage Hills I Condominium Owners Association, (Jefferson County District Court, unreported, nonprecedential), decided November 7, 2006:

- 4 unit condominium community
- Court evaluated an association's restrictive covenant banning smoking within the boundaries of the condominium.
- Court determined smoking to be a nuisance due to smoke seepage and impact on owners and tenants.
- Court determined ban to be reasonable and not arbitrary or capricious. Extensive efforts to ameliorate the impact of the smoke were undertaken, to no avail, prior to passage of the restrictive covenant.
- Ban did not violate public policy or any fundamental right of the owners.

Enforcement of a smoking ban once enacted: America v. Sunspray Condominium Association, et al., 2013ME19 (Maine Supreme Judicial Court), decided February 12, 2013:

- Owner sued his association and members of the board of directors claiming they had failed to effectively enforce the association's smoking ban.
- Owner also claimed the board failed to investigate or take action in response to violations, or when they did, did so ineffectively.
- Court disagreed and applied the business judgment rule in finding that the board did not refuse to enforce the ban, but rather enforced in a manner that the owner found insufficient. This was not enough to prove bad faith or establish liability ("Disagreement is not bad faith.").
- Court also found that mere exposure to secondhand smoke outside of the owner's unit was not a legally

cognizable injury; a more particularized injury would need to be asserted in the pleadings and proven at trial.

This decision conferred broad deference upon the association's actions and omissions in enforcing a smoking ban already in effect in the community.

II. If the Association can in fact regulate marijuana activities in the community, should the Association do so?

Most associations are concerned with the value and exterior appearance of properties. Associations are not generally interested in what happens inside units unless it has an adverse effect on other owners, like secondhand smoke or offensive odors. Regulation of marijuana activities is therefore most likely to appeal to condominium and townhome communities.

Smaller communities sharing common ventilation systems may be the most interested in adopting covenants or rules restricting marijuana activities. Marijuana restrictions are also likely to be popular where many owners are affected. For instance, with a 10 unit condominium community, if the odor of growing or the smoking of cannabis is affecting five people, then that community may be more inclined to restrict it by covenant or rule. But in a 100 unit community, with the same number of people who are affected, that association might not view it as something that's broad enough to justify adding a restrictive covenant or rule.

Not surprisingly, there is no reported case law involving an owner challenge to an association's marijuana regulations. However, that fact scenario is likely to arise in Colorado in the future. A challenge to marijuana regulations would be more likely to succeed if the regulations were enacted via a rule rather than covenant, as a rule can be overturned if it is unreasonable, vague, unfair, or unrelated to the operation and purpose of the community. A covenant, on the other hand, is presumptively valid and would only be overturned if deemed to be unreasonable and/or against public policy.

It is also plausible that marijuana regulations in a single-family community might be more susceptible to challenge as there is not as clear a nexus between the regulations and the community's operation and purpose as there would be in a condominium community. Without a quantifiable effect on the community, health or value-wise, marijuana regulations could be challenged as being unreasonable, too severe, or overly broad.

In sum, prospective marijuana covenants, rules and guidelines should reflect common sense and community values. Determine what is valued by owners and what is in the best interests of the community as a whole. Pursue regulation and enforcement that enhance, support and preserve community values and interests, including the property values of the owners.