

HIGH TIMES



As more states across the U.S. decriminalize the growing and use of medical and recreational cannabis, community associations must confront a variety of issues.



**BY NIGEL MENDEZ, ESQ., ELINA B. GILBERT, ESQ.,
AIMEE WINEGAR, CMCA, AMS, LSM, PCAM, AND PHAEDRA J. HOWARD, ESQ.**

Twenty states and Washington D.C., have legalized the personal use of cannabis. In addition, 18 more states permit medical use. Each year, the number of states where cannabis use is legal increases. Consequently, cannabis-related issues are becoming more common in community associations.

The use of cannabis can affect community associations in various ways, such as:

- Do current smoking regulations cover the use of cannabis on association property or in individual units?
- How will the association handle nuisance claims related to smoke and odor?
- How will the association handle reasonable accommodation requests for medical marijuana usage under the Fair Housing Act?

GETTY IMAGES / NADIA BORMOTOOVA

KNOW THE RULES

When a new right is legalized by a change in state law, homeowners may mistakenly believe they can engage in the activity despite restrictions imposed by the association. However, community associations can regulate or prohibit an activity that would be permissible outside of the association. In most states, community associations can restrict or prohibit cannabis use within the community despite the fact it has been made legal under state law.

If an association already has smoking regulations in place, the regulations should be reviewed to ensure they are broad enough to include cannabis. Regulations too narrowly drafted might need to be amended to ensure they can control the use of cannabis in the association. Even if a rule broadly prohibits all smoking, it may be best to amend it to explicitly ban or regulate the use of cannabis so there is no misunderstanding.

Community associations that do not have rules or regulations in place to regulate cannabis usage may still be able to address complaints under nuisance or quiet enjoyment provisions in governing documents. Community associations have successfully pursued nuisance claims against occupants relating to cigarette or cigar smoke. Some state cannabis statutes explicitly identify cannabis smoke as a nuisance, which will make pursuing such a claim much easier.

ADDRESS THE ISSUE

To avoid liability, associations must ensure that complaints from occupants related to cannabis odor are not ignored. Some state laws contain express provisions that allow residents to pursue

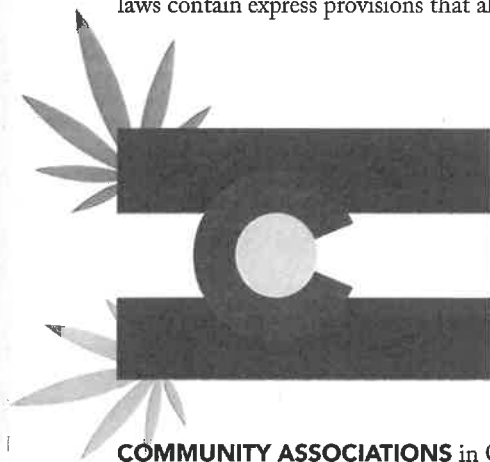
To avoid liability, associations must ensure that complaints from occupants related to cannabis odor are not ignored.

a claim for damages for not taking appropriate action on a complaint. It can be very difficult to make all residents happy. It can be even harder to determine the actual source of the nuisance.

As associations attempt to restrict or prohibit cannabis usage, requests for reasonable accommodations or exemptions under the Fair Housing Act (FHA) will likely increase. While an association might prohibit or severely regulate smoking cannabis in common areas or units, an individual who has a medical need for cannabis use may be eligible for an exemption. When confronted with such a request, the association should work with its legal counsel to ensure compliance with FHA and similar state laws. Violations of these laws can impose significant liability on an association.

Managers and board members should consult with their association attorney before making any changes to governing documents or attempting to enforce existing rules.

Nigel Mendez is with Carlson and Associates in Vadnais Heights, Minn. nmendez@carlsonassoc.com



COLORADO LIFE, LIBERTY, AND CANNABIS?

COMMUNITY ASSOCIATIONS in Colorado, where recreational use of marijuana was legalized in 2012 and officially started in 2014, have been dealing with the use, growth, and sale of cannabis for almost 10 years. In that time, we've had ample opportunity to identify real and perceived problems associated with cannabis legalization and determine practical solutions.

SMELLS LIKE TROUBLE

Communities where residents share walls, floors, ceilings, or ductwork have been hit with increased nuisance complaints since legalization. These complaints contend that marijuana odor and smoke enter from neighboring units and cause discomfort.

Additionally, communities with outdoor patios, decks, or balconies also experienced an increase in resident complaints. These complaints typically claim residents are not able to sit on their patios because of marijuana odor coming from neighbors. In the summer months, when residents like to keep their windows open, associations also receive complaints about marijuana odor entering their units through open windows.

Another problem experienced by communities since legalization is the significant increase of water and electricity costs associated with growing marijuana. These increases present problems for communities not separately metered and when utility use is collectively billed and equally assessed to all owners.

When communities are required by their governing documents to assess owners equally for utilities, all owners see a surge in their assessments because some units happen to be growing marijuana. And in many cases, even if the association can determine which unit is growing the plant, it can't assess a higher fee for utilities because the covenants do not authorize assessments based on use or benefit.

PROHIBITING USE

Typically, associations can adopt rules regulating the use of and conduct in common elements. In most instances, rules may be adopted by boards without owner approval if they do not contradict the covenants.

This means associations can adopt rules prohibiting use of cannabis (and smoking) in common areas such as parking lots, clubhouses, pools, and playgrounds. If balconies and patios are designated as limited common elements, associations may prohibit cannabis use in these areas as well. Regulating use of cannabis or smoking inside units through rules is likely not enforceable due to its intrusive nature concerning owners' rights inside their units. Such restrictions must be contained in the covenants.

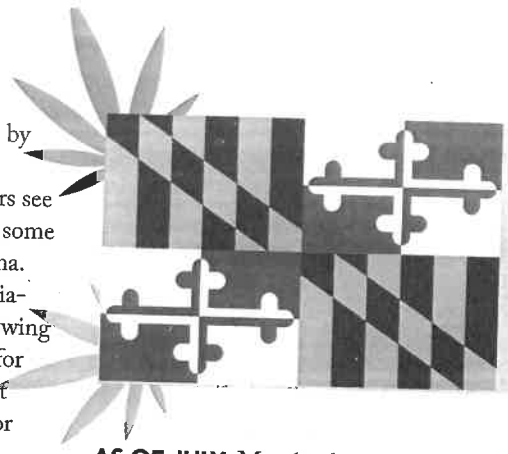
AMENDING COVENANTS

Covenant amendments may be drafted to prohibit use, growth, or sale of cannabis inside units, and many Colorado communities have done exactly that.

Covenants also may be amended to address increased utility charges by allowing associations to assess utility charges to owners based on use. This is difficult to do if units are not separately metered.

Typically, covenant amendments require owner approval. The exact number of owners who must approve a covenant change is typically contained in the covenants, but sometimes there also are statutory regulations.

Elina Gilbert is with Altitude Law in Lakewood, Colo., and a fellow in CAI's College of Community Association Lawyers. egilbert@altitude.law



MARYLAND DOWN IN THE WEEDS

AS OF JULY, Maryland passed legislation permitting recreational marijuana use.

Under the law, adults ages 21 years and older may legally possess up to 1.5 ounces of cannabis. Possession of up to 2.5 ounces will no longer be considered a criminal act but will carry a \$250 civil fine.

Possession of these amounts will not result in arrest, jail time, or a criminal record. Individuals younger than 21 may be cited but will primarily be recommended for drug treatment. In addition, adults over 21 also may grow up to two cannabis plants per house on property owned by the grower. The plants must be out of public view and secured so they are not accessible by unauthorized individuals or anyone under 21.

Beyond possessing these small quantities of marijuana, Maryland law also permits residents over 21 to smoke marijuana within their homes and on private property. The law prohibits the use of marijuana in motor vehicles.

PRACTICAL APPLICATIONS

What does this mean for an association resident who may live next door to a marijuana user? Or a manager who must face complaints from parents who do not want their children smelling smoke from their next-door neighbor?

It means we are entering uncharted waters. As a Maryland manager, I have called the police to report someone smoking in a car only to have the police take little action because the car was parked at the time.

Until the vehicle moved, they said it is considered private property and a legal location for use. The police were not willing to stick around waiting for the vehicle to move to cite the driver.

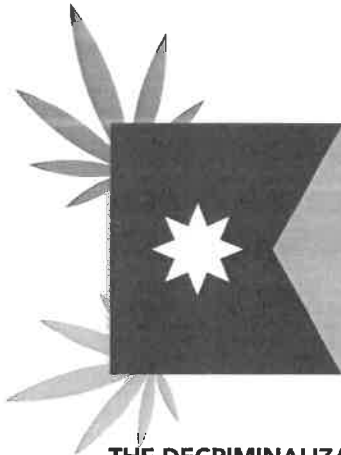
The Maryland law does permit managers and association leaders these options:

- Associations may prohibit the use of marijuana on community property and outdoors. This appears to include limited common elements for condominiums. The law advises that any rules be developed by an attorney.
- Associations may not prohibit the use of marijuana within a privately owned unit even if smells spread. It is unclear whether if smoking in general is prohibited, smoking marijuana also is forbidden. In the past, smoking prohibitions generally have been thought of as related to tobacco. However, if a condominium declares itself smoke-free, it is possible the prohibition could apply to marijuana as well.
- Associations may request that law enforcement address marijuana consumption in parked cars in the lot. As mentioned above, law enforcement may not be very responsive.
- Remember: Marijuana is only legal for possession or use among the over-21 population. The use of marijuana by anyone under 21 years remains a civil violation. We are encouraging residents to report underage use even if the police appear reluctant to respond.
- Even if the police fail to act, violation of approved rules may constitute "noxious behavior." After consulting with an attorney, communities may be able to enforce noxious behavior covenants in well-documented cases.

Maryland managers are taking a symbolic deep breath as we assess our options. No one is eager to take the lead in generating a precedent in case law.

Aimee Winegar is a manager with Community Association Services in Frederick, Md. abwinegar@gmail.com

The decriminalization of cannabis and cannabis products in Minnesota is already causing headaches for community associations.



MINNESOTA THE LAND OF 10,000 LAKES AND UNINTENDED CANNABIS CONSEQUENCES

THE DECRIMINALIZATION of cannabis and cannabis products in Minnesota is already causing headaches for community associations. In addition to issues such as smoking and growing cannabis plants in the community, associations will now face potential liability if one resident is legally smoking cannabis and another is bothered by the smoke.

As of July, Minnesota defines any use of cannabis flower that is injurious to health, indecent, offensive, or interferes with someone's free use or enjoyment of property as a nuisance. If an association fails to enforce the terms of a lease, governing document, or policy related to the use of cannabis on the premises, the person affected may seek injunctive relief or monetary damages.

LOOMING QUESTIONS

It is unclear whether an association must have a specific policy in place that mentions cannabis and prohibits the smoking of cannabis in some or all parts of the property or whether typical language prohibiting nuisance behavior in most association governing documents will be enough to subject the association to liability.

Associations governed under the Minnesota Common Interest Ownership Act cannot prohibit smoking within individually owned units or impose any other restriction on the use of a unit without an amendment to the declaration, which requires approval of a minimum of 67% of the membership.

If an association has not amended its declaration to prohibit

smoking inside units and a resident is legally smoking cannabis inside their unit, the association could potentially still be liable if other residents are bothered by the smell.

A LOOPHOLE

The new law does provide some theoretical relief to associations by prohibiting vaporizing or smoking of cannabis or hemp-derived products, except for medical use cannabis, in multifamily housing buildings, including balconies and patios. However, this provision does not go into effect until March 2025.

The legislature did not define multifamily housing building provision so it is unclear if the prohibition applies to townhome or rowhome-style buildings where there are shared walls but no shared indoor space.

Local authorities are typically not interested in getting involved or enforcing these statutes, meaning associations will have to police residents. Associations will have some authority to do so starting next year if their governing documents do not contain any restrictions on smoking within units. Until then, many associations may find themselves between a rock and a hard place when it comes to cannabis smoke.

Hopefully, the Minnesota legislature will clean up some of these issues in the future. In the meantime, associations statewide will continue to try to navigate these issues under the threat of potential lawsuits. **CG**

Phaedra Howard is with Hellmuth & Johnson in Edina, Minn., and a CCAL fellow. phoward@hjlawfirm.com