

Associations Regulating Marijuana Use



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What is the problem?

1. The smoke!
 - Strong smell.
 - Second-hand effects.
2. The smell of the plant.
 - Pungent!
3. Cultivation impacts.
 - excessive use of water.
 - excessive use of electricity.
4. Crime.
 - Where there is \$, there is crime.
5. Excessive foot and vehicle traffic?



Is Pot Legal?



Federal law

- All possession, use, manufacture, and distribution is illegal.
- 1970 Controlled Substance Act.
- It is classified as a “Schedule 1” drug.

What ways can Marijuana be Ingested?

Vapes

Capsules

Sprays

Edibles (e.g. brownies and lozenges)

Drinks

Cooking oil



1970 Controlled Substance Act

- Introduced in the House as H.R. 18583 by Harley O. Staggers (D – WV) on September 10, 1970
 - 16 consecutive congressional terms.
- Signed into law by President Richard Nixon on October 27, 1970

1970 Controlled Substance Act

- Factors to determine which “schedule” a drug or substance should be placed in are as follows:
 - (1) Its actual or relative potential for abuse.
 - (2) Scientific evidence of its pharmacological effect, if known.
 - (3) The state of current scientific knowledge regarding the drug or substance.
 - (4) Its history and current pattern of abuse.
 - (5) The scope, duration, and significance of abuse.
 - (6) What, if any, risk there is to the public health.
 - (7) Its psychic or physiological dependence liability.
 - (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(21 U.S.C. § 811 (c))

Schedule I Drugs

- The drug has a high potential for abuse.
- The drug has no currently accepted medical use in treatment in the United States.
- There is a lack of accepted safety for use of the drug under medical supervision.

Schedule I Drugs

Heroin (diacetylmorphine)

LSD (Lysergic acid diethylamide)

Marijuana (cannabis, THC)

Mescaline (Peyote)

MDMA (3,4-methylenedioxymethamphetamine or “ecstasy”)

GHB (gamma-hydroxybutyric acid)

Ecstasy (MDMA or 3,4-Methylenedioxymethamphetamine)

Psilocybin

Synthetic marijuana and analogs (Spice, K2)

Methaqualone (Quaalude)

Khat (Cathinone)

Bath Salts (3,4-methylenedioxypyrovalerone or MDPV)

Schedule II Drugs

Fentanyl

Hydrocodone

Morphine

Amphetamine

Oxycodone

Pseudoephedrine

Methadone

Cocaine topical

Belladonna/opium

Schedule III Drugs

Testosterone

Aspirin/butalbital/caffeine/codeine

Butabarbital

Ketamine

Schedule IV Drugs

Phentermine

Lorazepam

Diazepam

Schedule V Drugs

Codeine

Cannabidiol (CBD; Hemp Oil)

Federal Punishment for Schedule I Drug

- Less than 50 kilograms / 110 pounds or 1 to 49 plants

First Offense

- Not more than 5 years
- Fine not more than \$250,000, \$1 million if other than individual

Second Offense

- Not more than 10 years
- Fine \$500,000 if an individual, \$2 million if other than individual

[The Federal Cole Memo](#)

The 2013 memo from the U.S. Department of Justice (James M. Cole, Deputy Attorney General):

Federal government will, basically,
leave marijuana law enforcement
to the State governments.

The Federal Cole Memo

- Professor Mike Vitello (McGeorge School of Law):

“[A]s long as states followed certain guidelines, like keeping marijuana out of the hands of minors and keeping drug cartels out of the business, the federal government would let states regulate as they saw fit. That memo, known as the Cole Memo, along with a similar memo in 2009 relating to medical marijuana, encouraged investors, who are now pumping billions of dollars into marijuana businesses.”

Jeff Sessions' 2018 rescission of the Cole memo

Professor Mike Vitello (McGeorge School of Law):

“It means that U.S. Attorneys can resume enforcing federal marijuana laws in states with legalized recreational marijuana. The Department of Justice has significant tools to use if it chooses to use them, including criminal prosecutions that could lead to long prison terms, and forfeiture that would allow the government to seize assets of marijuana industry members. That said, the Department of Justice has other more important priorities, including immigration and the opioid epidemic.”

California Proposition 215 (1996)
Compassionate Use Act
(Health & Safety Code Section 11362.5)

Legalization of the possession and cultivation of marijuana
for personal use with a prescription

California Medical Cannabis Regulation and Safety Act (MCRSA) (2015)

The law deals with licensing and regulating commercial medical cannabis cultivation, manufacturing, distribution, transportation, sales, and testing.

California Adult Use of Marijuana Act (AUMA) (2016)

- Proposition 64.
- Legalization of possession and use of recreational marijuana for persons 21 years and older.
- The measure created two new taxes, one levied on cultivation and the other on retail price. Prop. 64 was designed to allocate revenue from the taxes to be spent on drug research, treatment, and enforcement, health and safety grants addressing marijuana, youth programs, and preventing environmental damage resulting from illegal marijuana production

May my association prohibit residents from growing marijuana in their yards?

- Yes. A CC&R amendment or rule adoption may be necessary.
- The law prohibits associations from unreasonably restricting residents from use of their backyards for personal agriculture. (Civil Code Section 4750 (Davis-Stirling Act))
- “Reasonable restrictions” are restrictions that do not significantly increase the cost of engaging in personal agriculture or significantly decrease its efficiency.
- “Personal agriculture” excludes marijuana. (Ca Civil Code 1940.10)
- “[i]t shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: . . . (3) Possess, plant, cultivate, harvest, dry, or process not more than six living marijuana plants and possess the marijuana produced by the plants;” (AUMA, Health & Safety Code Section 11362.1)

May my association prohibit marijuana smoking in the common area, on lots, or within homes?

- Yes. A CC&R amendment or rule change will likely be necessary.
- Some California Cities and Counties are prohibiting smoking in residential areas.
- Berkeley, San Mateo, and Pasadena require all residential multi-unit housing to be 100% smoke free.
- In 2014, the City of San Rafael in Marin County adopted an ordinance prohibiting smoking inside any dwelling that shares a wall with another dwelling.

CC&R amendment vs. a Rule change

- CC&R amendment: Courts will enforce the amendment unless an owner proves that the amendment is unreasonable.
 - A CC&R amendment is unreasonable if:
 - It is arbitrary. I.e., there is no reasonable justification.
 - It imposes burdens on the property that substantially outweigh the restriction's benefits to the development's residents, or
 - It violates a fundamental public policy. E.g., it is unlawful discrimination.
- (Nahrstedt v. Lakeside Village)
- Rule change: Courts will enforce the rule only if the Association proves that the rule is reasonable.

May my association prevent an owner
from growing marijuana plants indoors?

- State law provides that persons 21 years and older may grow up to six plants.
- The Association would need to show that growing the plants is a nuisance or otherwise adversely affects the Association.

May my association impose discipline on an owner for smoking marijuana, without a CC&R amendment or rule change?

- Yes, as long as the CC&Rs and/or rules have an anti-nuisance and/or anti-illegal act provision.

- E.g.:

“The following activities are prohibited: Activities which are nuisances, or which cause unreasonable embarrassment, disturbance or annoyance to any residents of the development . . .”

What is the Nuisance?

1. The smoke!

Strong smell.

Second-hand effects.

2. The smell of the plant

Pungent!

3. Cultivation impacts

excessive use of water

excessive use of electricity

Does a Board have a duty to deal with marijuana complaints?

- Yes.
- Boards have a duty to investigate pursuant to their fiduciary duty.
 - Act reasonably
 - Act in best interests of the association as a whole
 - Act after a reasonable inquiry.

(Corp. Code Section 7231)

Enforcement Steps

- Warning letter
- Hearing letter, hearing, and post-hearing letter
- Request to mediate (request for resolution)
- Mediation
- Lawsuit

Enforcement Actions

- Impose fines
- Suspend members' access to common area facilities
- Suspend member's right to vote or to be a Board member
- Impose, record, and foreclose on, Special Individual Assessment for costs incurred by association if the CC&Rs so authorize
- Additional actions (for failure to cure violation or repeated violation):
- Request for resolution – mediate dispute
- Lawsuit to enforce governing documents

Enforcement Compromises

- Require owner to use alternative forms of marijuana other than smoking.
- Require owner to use an air purifier, seal vents and/or make other home modifications.
- Restrict smoking in certain areas of the lot/unit.

May a Board consider a marijuana complaint a Neighbor-to-Neighbor Dispute, and take no action?

- 1. If you have a dispute between you and a neighbor you must first contact the neighbor and make a good faith attempt to resolve the problem.
- 2. You must show written proof that you contacted the neighbor and made good faith attempt to resolve the disputes.
- 3. Some suggestions:
 - Reach an agreement with your neighbor.
 - Etc.
- 4. The association is not obligated to actions regarding disputes that are primarily between neighbors.

May an association be liable for failing to enforce against an owner smoking marijuana?

The jury in the Orange County Superior Court case of Chauncey v. Bella Palermo Homeowners Association (2013) made a verdict decision that the association was negligent and in breach of its CC&Rs for failing to resolve a secondhand smoke dispute between neighbors.

The owners alleged that their neighbors smoked incessantly on their patio next to the owners' unit and on the adjoining sidewalks in front of their unit, citing a constant infiltration of secondhand smoke entering their unit through windows and a sliding-glass door. The owners alleged that the smoke aggravated their young son's asthma.

May an association be liable for a Fair Housing violation by failing to enforce against marijuana smoking?

There is a possibility that the DFEH or a court would rule that an association is liable for failing to provide a smoke-free environment and/or for failing to protect children, the elderly and persons with compromised immune systems from exposure to secondhand smoke. (Birke v. Oakwood Worldwide et al. (2009) 169 Cal.App.4th 1540)

May an association be liable for a Fair Housing violation by prohibiting a disabled resident from marijuana smoking?

Probably not, as long as the association does not prohibit the owner from using marijuana other than by smoking it.

May an association require a resident to show documentation that the resident is disabled and that the disability requires the resident to use marijuana?

Yes, as long as the resident's disability is not known or obvious.

“[A] housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation.” (Joint Statement of HUD and DOJ (2004))

May an association be liable for failing to adequately perform maintenance to prevent smoke from traveling between units?

- Yes.

- An association's board must carry out the association's duty to maintain the common area, including to repair a building defect or condition that would allow secondhand smoke to permeate from a unit into other units. (Ritter & Ritter, Inc. v. The Churchill Condominium Association (2008) 166 Cal.App.4th 103)

What is the bottom line?

1. Associations must:

- a. Investigate complaints of marijuana smoke.
- b. Perform necessary maintenance, repairs, and replacement.

2. Associations may:

- a. Take reasonable enforcement steps.
- b. Reasonably compromise.
- b. Request information reasonable information about disabilities that are not known or obvious.
- c. Adopt CC&R amendments and rules prohibiting and restricting marijuana use.

[Thank you!](#)

