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Take a Deep Breath

With planning, landlords can assure that their property investments don't disappear in a cloud of smoke.

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In November 2010, California voters will head to the polls to decide whether to implement Assembly Bill 2254, formally known as the Regulate, Control and Tax Cannabis Act of 2010. The act would allow adults 21 years and older to possess, cultivate and/or transport marijuana for personal private use within California. It would be the first such law in the country.

While the act would allow private possession, cultivation and consumption, use would still be barred in all public places and in all spaces where a minor is present. There could be no smoking in restaurants and bars or at Little League games.

The act does not authorize commercial processing, distribution, sale or use. So even if the proposed law passes, commercial landlords need not worry about tenants seeking to start recreational marijuana clubs on their properties (any more than they already do). The act does permit local governments to legalize and regulate commercial marijuana activity. However, it is unclear which communities would be receptive to this possibility and to what extent.

The act only requires approval of a simple majority of votes to pass: 50 percent plus one. If approved, it would be implemented as soon as the California secretary of state certifies the election results. Considering the significant campaigning in favor of the act, there is a very real possibility that come November, residential landlords will be faced with tenants who wish to grow and consume marijuana on their property.

Should this scenario unfold, attorneys will likely be inundated with questions from landlord clients about their rights to regulate marijuana use on their properties and the risks they run of renting to tenants who decide to exercise their state-given right to grow or consume marijuana in their apartments or backyards, even as the federal government continues to prohibit it.

The answer, like the air in your client's apartment building, is hazy. On the state and local levels, your clients are safe. The proposed act specifically states that all adults 21 years and older may legally possess and/or cultivate marijuana for personal use on private property. Cultivation may occur within a 25-square-foot parcel, more than large enough to keep your average smoker and his or her guests well satiated for days. As California courts have already struck down local authorities' power to prosecute individuals for legal marijuana use in the medical context, it appears that as long as the tenant isn't running an illegal commercial operation out of your client's building, neither the state nor local authorities will have any reason to come knocking.

But what about the federal authorities? Even if the act is passed, the federal Controlled Substances Act makes marijuana cultivation and possession a federal crime and civil infraction. The U.S. Supreme Court has on multiple occasions upheld the federal government's right to enforce the Controlled Substances Act notwithstanding state laws legalizing marijuana cultivation or possession. In the past, the federal Drug Enforcement Administration has sent hundreds of threatening letters to California landlords whose tenants operate medical marijuana dispensaries on the landlord's property, threatening criminal and civil prosecution, including forfeiture of the property itself. Most of these letters were ignored by the Justice Department and the landlords never prosecuted; however, charges have been filed and cases litigated.

In early 2009, U.S. Attorney General Eric Holder spoke out against this practice, vowing that under the Obama Administration, the Justice Department would not raid or prosecute legally established dispensaries or any other persons possessing marijuana legally under state laws. However, this is an informal policy and subject to change at any time. Additionally, there is no telling what the next administration's stance on this issue will be, especially with respect to such uncharted territory as legalized recreational marijuana use.

The good news for residential landlords is there are virtually no recent California cases in which federal authorities have targeted individuals growing or cultivating marijuana solely for personal consumption. While state and local authorities have done so, the act would eliminate that threat. Therefore, we can expect that even if the federal government were to enforce federal marijuana laws in California after implementation of the proposed state act, such efforts would focus on large-scale commercial operations, as they have in the past.

That being said, "you probably won't be prosecuted" likely isn't strong enough language to allay landlords' fears of reprimand—or worse—should state-sanctioned marijuana use occur on their property. Luckily, most California communities, including Oakland and San Francisco, allow landlords to regulate smoking at will. Nothing in the act would affect that right. Therefore even if the act passes, landlords can probably sidestep any worries by including a prohibition in all leases against marijuana and tobacco use. Alternatively, they can consider including an indemnification provision regarding at least civil federal prosecution due to tenant marijuana use or cultivation.

Ultimately, the threat to landlords under the proposed scheme is probably very low. However with a little planning and proper legal advice, even that small threat can be extinguished. So take a deep breath and try to relax. ■

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