



Don't Be Dazed and Confused:

*Legalization of Marijuana and
Possible Impact on Virginia
Community Associations*

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Massive legislation legalizing marijuana in Virginia became law July 1, 2021. The legislation ranges from legalization of marijuana to expungement of criminal records involving marijuana offenses to funding a public awareness campaign on the health and safety risks of marijuana to creating the Virginia Cannabis Control Authority. This article focuses on how the legalization of marijuana in Virginia may impact community associations in the context of possession and home cultivation.

LEGALIZATION OF MARIJUANA IN VIRGINIA

Effective July 1, 2021, persons 21 years or older in Virginia may legally possess up to one ounce of marijuana on their person or in any public place. In addition, persons 21 and older may cultivate up to four marijuana plants for personal use at their place of residence, but no household may have more than four marijuana plants. "Household" is defined as those individuals, whether related or not, who live in the same house or other place of residence, and marijuana may only be cultivated at such person's main place of residence. Marijuana plants cannot be visible from the public right of way and must have an attached legible tag that includes the person's name, driver's license or identification number, and a notation that the marijuana plant is being grown for personal use. In addition, individuals who cultivate marijuana in their homes must take precautions to prevent unauthorized access by persons younger than 21 years of age.

Further, persons 21 years and older may engage in "adult sharing" of marijuana so long as it does not exceed one ounce and does not include remuneration. Notably, "adult sharing" does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services.

Unlike personal possession and home cultivation, retail sales of marijuana in Virginia are not slated to start until January 1, 2024. Despite Virginia legalizing marijuana, marijuana is still considered an illegal substance under federal law pursuant to the Controlled Substances Act.

POSSIBLE IMPACT ON COMMUNITY ASSOCIATIONS

The most readily anticipated impact legalization of marijuana will have on community associations, particularly those with attached private dwellings, include: (1) complaints related to odors from marijuana smoke, and (2) possible damages and liability related to home cultivation.



MARIJUANA SMOKE

Even prior to the legalization of marijuana in Virginia, residents complained to associations about marijuana smoke emanating into their homes. With legalization, associations may anticipate an increase in complaints. Virginia community associations and residents, however, are not without recourse in addressing this smoke.

Impacted residents should first try to reach out to their neighbors to make them aware that the marijuana smoke is bothersome and to seek mitigation efforts (e.g., smoking outside, installation of air filters/scrubbers/purifiers, investigate air flow mechanisms, sealing of areas that may contribute to transmission, alternative consumption methods, etc.). This step is often overlooked but could yield a positive result if neighbors engage in respectful communication and consideration.

If a community association receives a complaint of marijuana smoke infiltrating a residence, the association likely should investigate to determine its duty and authority. This process entails a review of the association's governing documents regarding smoke, nuisance, and compliance with applicable laws. The restrictions and rules can run the gambit.

Restrictions that Ban Smoking

For community associations that have express restrictions in their recorded governing documents that prohibit smoking at the property, which may include in condominium units or adjoined homes, these associations may have sufficient authority and a duty to take enforcement action. Associations should look carefully at their documents to discern how "smoking" is defined and whether it covers all types of smoke, including marijuana smoke.



owners' associations, boards may establish rules that restrict smoking in the development, including rules that prohibit smoking in common areas and in *attached* private dwellings, except to the extent the declaration provides otherwise. For condominium associations, boards may create rules that restrict smoking in the condominium, including rules that prohibit smoking in the common elements *and within units*, except to the extent the condominium instruments provide otherwise. Adopting rules that restrict smoking may be another option available to community associations to address issues related to marijuana smoke. Before adopting any such rules, consult with legal counsel about the pros and cons, and potential impact.

If a community association has any of the provisions above, it likely has authority, and hence a duty, to enforce. Enforcement options may include working with the residents to reach an amicable agreement, issuing notices of violation and/or cease and desist letters, proceeding with due process procedures, and/or pursuing injunctive relief.

Conditions Related to Marijuana Cultivation
With individuals 21 and older permitted to cultivate up to four marijuana plants in their homes, the conditions needed for plant growth could result in unintended consequences. There are different ways to cultivate marijuana, many of which include some combination of a warm environment, humidity, and a light source for significant portion of each day. It is foreseeable that these conditions could lead to mold and/or a fire hazard. Unit owners and residents who cultivate marijuana in their units or adjoined homes will need to exercise caution and take steps to prevent harm or damage. Community associations should be familiar with the relevant provisions in their governing documents related to the cultivation of marijuana

Restrictions that Require Compliance with Law

It is relatively common for community associations to have provisions in their recorded governing documents that prohibit illegal activity and/or that require residents to comply with all valid laws. Even though Virginia is legalizing marijuana, marijuana remains illegal under federal law. Accordingly, associations that have such restrictions in their recorded governing documents can look to them for enforcement.

Restrictions that Bar Nuisances, Annoyances, and/or Interference with Peaceful Enjoyment

Another common provision prohibits nuisances, annoyance, and/or interference with quiet enjoyment of one's home. Determining what constitutes a nuisance, annoyance, or interference is a fact-specific inquiry. Currently, there are no cases in Virginia that have specifically addressed whether marijuana smoke is considered a nuisance. Nonetheless, Virginia case law has held that a nuisance may include "everything that endangers life or health, or obstructs the reasonable and comfortable use of property." *National Energy Corp. v O'Quinn*, 223 Va. 83, 85 (1982) (citations omitted). An analogous case from a Roanoke Circuit Court found that a party sufficiently pled facts that cigarette smoke from a neighboring resident interfered with the party's enjoyment of her property and caused annoyance to her occupation of her property; specifically, that smoke infiltrated her home, caused her breathing problems, and other medical issues. See *Reid v. Meisenzahl*, 95 Va. Cir. 188, 189 (Roanoke Cir. Ct. 2017). To determine whether complaints about marijuana smoke violate this type of provision an association should investigate the claim, speak with the parties involved, and gather and consider any additional information to help guide a decision. Involving legal counsel early in the process is encouraged.

Interestingly, at the same time Virginia is legalizing marijuana, two other new statutes take effect on July 1, 2021, which permit community associations to establish rules that restrict smoking. For property





in a unit or attached home. Further, associations should consult with their insurance representative to determine whether the current insurance policies cover claims related to marijuana cultivation and what, if any, additional insurance may be recommended. Finally, determine whether the insurance policies need to be revised or increased to cover the risk.

SPECIAL CONSIDERATION RELATED TO MARIJUANA

Regardless of whether smoking marijuana in a unit or attached private dwelling is prohibited under a community association's governing documents or rules, an association may receive a reasonable accommodation request from a resident who seeks to smoke marijuana in a unit or attached private dwelling because of a disability or, conversely, seeks adoption of a rule prohibiting smoking as a reasonable accommodation.

Virginia community associations are subject to the federal Fair Housing Amendments Act of 1988 ("FHA") and the Virginia Fair Housing Law ("VFHL"). Together, the FHA and VFHL prohibit discriminatory housing practices against individuals based on their protected class. When it comes to community associations and marijuana, the protected class at issue will likely be individuals with disabilities. Both the FHA and VFHL prohibit discrimination and require community associations to make reasonable accommodation in rules, policies, practices or services when necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.

Reasonable accommodation requests related to marijuana may result in different treatment under the FHA versus VFHL since federal law classifies marijuana as an illegal drug. In January 2011, the Department of Housing and Urban Development issued a memorandum stating public housing agencies and owners of other federally assisted housing are

not required to grant reasonable accommodations for medical marijuana use. Unlike federal law, however, marijuana will be legal in Virginia starting July 1, 2021, and Virginia has its own fair housing laws. As such, there could be different outcomes under the FHA and VFHL for reasonable accommodation requests related to marijuana. A Virginia community association that receives such a request should consult with its legal counsel.

The legalization of marijuana in Virginia will have many implications for individuals, businesses, government, and society in general. Virginia community associations should consider the potential impact, consult with counsel and determine whether to amend governing documents, adopt rules, and consider its policies and procedures.

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¹ For more information on this sweeping legislation, check out <https://lis.virginia.gov/000/chapter550.pdf>.

² Va. Code § 55.1-1819.1.

³ Va. Code § 55.1-1960.1.