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Otten Johnson Alert:

Amendment 64: Retail Marijuana Businesses on the Horizon

It appears that the first state-regulated recreational marijuana businesses will open for business in Colorado as early as January 1, 2014. Additionally, Amendment 64 has already decriminalized small-scale cultivation, possession and use of marijuana for adults over 21. Many Colorado property owners and managers are anxious about what the coming changes will mean for their properties, their businesses, and the built environment in which they operate. Some are concerned about the impact of recreational marijuana businesses on property values and their neighborhoods in general. Others simply do not know what to make of this first-of-its-kind experiment. Regardless of whether property owners and managers are or will be directly involved with the budding recreational marijuana industry, prudent property owners and managers should try to understand the implications for their properties, and, where possible, they should plan ahead to mitigate any potential business risks.

Any discussion of marijuana in Colorado must begin with the fact that marijuana remains illegal for all purposes under federal law, regardless of applicable state law. Accordingly, all Colorado marijuana businesses are engaged in the systematic violation of federal drug laws, and their owners and employees are at risk of significant federal criminal penalties. Moreover, federal enforcement risk extends beyond marijuana businesses themselves. Under certain circumstances, federal authorities can seize properties used for marijuana activities, and can prosecute the property owners. Federal law clearly places financiers, landlords and others involved with marijuana businesses at risk.

That said, federal authorities have largely taken a hands-off approach toward state-sanctioned medical marijuana businesses in Colorado, and it is possible that this treatment may extend to recreational marijuana businesses. In particular, as a practical matter, residential landlords with tenants engaged in marijuana activities, or commercial landlords with arm's length commercial relationships with offending tenants may be

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unlikely targets for aggressive federal action. Indeed, in the context of medical marijuana businesses, the furthest federal authorities have gone in Colorado with respect to landlords of properties housing state-compliant businesses is threaten to take action against those located within 1,000 feet of a school. Given the alternative, such threats (which imposed no consequences in cases of compliance) can properly be characterized as extremely lenient.

However, this leniency is solely the result of a thus-far restrained exercise of prosecutorial discretion relating to state-sanctioned medical marijuana businesses. The federal prohibition of marijuana remains law, and that is not likely to change soon. In contrast, federal authorities' exercise of prosecutorial discretion could change at any time, whether in connection with a new presidential administration, or otherwise. Moreover, while federal treatment of medical marijuana businesses may provide some guidance, it is not yet known how federal authorities intend to react to recreational marijuana businesses.

Federal law risk, alone, is sufficient to motivate many property owners to keep marijuana out of their properties. Property owners may also be concerned that marijuana activities could trigger violations of loan covenants relating to "illegal activities," create problems with insurance coverage or renewals, and frustrate other tenants. Fortunately, Amendment 64 and other Colorado law generally provides property owners with significant rights to control how their properties are used. For example, Amendment 64 explicitly allows property owners to adopt rules or covenants prohibiting tenants' marijuana-related activities at their properties. Additionally, Colorado law does not allow marijuana activities to be conducted in public, and public use of marijuana remains a crime. Similarly, the Colorado Clean Indoor Air Act now expressly bans smoking marijuana in all indoor places, including common areas in public and private buildings, condominiums and other multi-family buildings. Developers and owners associations may also have the ability to restrict marijuana activities that occur within the units of common interest communities, by imposing use restrictions in the applicable declaration of covenants.

For property owners concerned about the possibility of a marijuana business locating near their property, the impact may not be as widespread as some expect. Many local jurisdictions have already enacted bans or moratoria on recreational marijuana businesses. Indeed, according to the Denver Post, of the ten largest cities in Colorado (by population), only Denver is expected to accept license applications for recreational marijuana stores this year. Many other smaller cities and many counties have also already enacted bans or moratoria. Those enacting moratoria are taking a wait-and-see approach, as they closely watch how implementation of Amendment 64 plays out in other jurisdictions. Accordingly, while personal-scale marijuana activities may already lawfully occur throughout Colorado (possession of small amounts, in-home cultivation of up to six plants, etc.), recreational marijuana businesses will be absent from large portions of the state. Moreover, in those jurisdictions where such businesses will be allowed, the landscape may not look much different than it does today. For example, it appears likely that Denver will impose initial restrictions that allow only existing medical marijuana businesses to apply for recreational marijuana business licenses. Conversion or co-location (in which a medical and recreational marijuana business are allowed to operate at the same premises) will require a public hearing, allowing members of the community to weigh in. Additionally, public hearings will be required for any change of location of a marijuana business. Given these requirements, it is likely that many of the initial recreational marijuana

businesses in Denver will be located in existing medical marijuana dispensaries. This would result in a landscape very similar to what we see today, albeit with former medical marijuana businesses now serving a broader clientele.

Finally, it is entirely possible that federal authorities will not allow the development of a regulated recreational marijuana industry. Federal authorities have suggested that they intend to announce a policy toward recreational marijuana businesses, but it is not clear when they will do so or what stance they will take. Federal authorities may take a firm stance against allowing recreational marijuana businesses. A few high profile raids, or even clear threats, targeting some of the first regulated recreational marijuana businesses could quickly end the development of the industry before it really begins.

Despite the significant ongoing efforts at the state and local level to enact regulations, authorities at both the state and local level continue to work out the details of the regulatory regime for recreational marijuana businesses. Moreover, federal policy is not clear, and a range of federal reactions is possible. As a result, this issue is rapidly evolving. However, barring significant federal pushback, recreational marijuana businesses are coming to Colorado soon, and property owners and managers in Colorado would be wise to consider how to appropriately react to this change in Colorado's legal and business landscape.

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