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Amendment 64: What property owners, managers should know

Recreational marijuana is coming to Colorado. Amendment 64 already has decriminalized small-scale cultivation, possession and use of marijuana for adults over 21. However, the other major component of Amendment 64 – the regulation and licensing of recreational marijuana businesses – does not go into full effect until Jan. 1, 2014, when recreational marijuana stores and other businesses can open for business in Colorado.

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. Those relative few who currently lease space to medical marijuana businesses may see significant opportunities in the arrival of the recreational marijuana industry. Others are concerned about the impact of recreational marijuana businesses on property values and their neighborhoods in general. Many 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, they should take note. Small-scale, noncommercial marijuana activities already are decriminalized and, barring significant federal action, recreational marijuana businesses soon will be a reality in Colorado. 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.

As noted, some property owners may decide to embrace the recreational marijuana industry. In that context, any discussion of marijuana in Colorado must



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begin with the fact that marijuana remains illegal for all purposes under federal law, regardless of applicable state law. Under certain circumstances, federal authorities can seize properties used for marijuana activities and can prosecute property owners. That said, 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 unlikely targets for such 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 to 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 medical marijuana businesses. The federal prohibition of marijuana remains law, and it 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.

Beyond the potential federal risk, property owners should consider other potential consequences of allowing marijuana-related conduct at their properties. Marijuana activities will constitute a breach of most standard "illegal activity" clauses in loan covenants and could trigger a deed of trust default. Similarly, marijuana activities can create problems with insurance policies. Other tenants and neighboring properties also should be considered. Lease covenants may include restrictions on other tenants' conduct, and nearby property owners and tenants may not appreciate marijuana-related conduct in the neighborhood, whether due to odors, perceptions of the clientele of the businesses or break-in risks.

For these and other reasons, many property owners want to keep marijuana out of their properties. Colorado law is generally helpful in that regard. Property owners should consider whether they want to adopt rules or covenants prohibiting tenants' marijuana-related activities at their properties, which Amendment 64 explicitly allows. Additionally, Colorado law does not allow marijuana activities to be conducted in public. For example, 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 multifamily buildings. With respect to in-unit conduct, developers and owners associations may be able to restrict marijuana activities through use restrictions in a 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 10 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. Accordingly, while personal-scale marijuana activities may 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, Denver is considering imposing initial restrictions that allow only existing medical marijuana businesses to apply for recreational marijuana business licenses and restrict them to their current location. This would result in a landscape very similar to what we see today, albeit with former medical marijuana businesses now serving a broader clientele.

Authorities at both the state and local levels continue to work out the details of the regulatory regime for recreational marijuana businesses. Moreover, federal authorities have yet to issue any official statement as to how they intend to react to the development and regulation of this new industry, and an aggressive federal stance could quickly end this experiment before it begins. As a result, this issue is rapidly evolving. Property owners and managers in Colorado will surely be watching closely over the coming months.▲