

The Impact of Cannabis on the Purchase, Sale or Lease of Residential Real Property



A Very Brief History – Federal Marijuana Law

- ▶▶ Schedule 1 [c (10) Marijuana] controlled substance, Controlled Substances Act (1971)
 - 21 USC (chapter 13) Section 801 et seq
 - A high potential for abuse and no currently accepted medical use
 - Illegal to possess, manufacture, distribute, sell, grow
- ▶▶ 2013 – Cole Memo, Limited federal enforcement guidelines
- ▶▶ 2014 - Rohrabacher Amendment (originally, needs renewal annually) – Congress prohibits DOJ from using resources against individuals in compliance with medical marijuana laws
- ▶▶ 2016 - U.S. V MacIntosh (9th Circuit) – cannot prosecute if in compliance with local MM laws
- ▶▶ 2018 – Cole memo withdrawn by new attorney general. Law enforcement priorities take into account Department finite resources



A Very Brief History – California Marijuana Law

- ▶▶ 1996 - Prop. 215, Compassionate Use Act
 - Allows patients with serious medical condition to possess and cultivate marijuana
- ▶▶ 2004 – SB 420, Medical Marijuana Program Act (H&S, 11362.7 – 11362.83)
 - Valid ID card provides immunity from arrest for possession, cultivation, transportation of medical cannabis. 8 oz, 6 mature plants, 12 immature plants **presumed** reasonable
 - Allows non-profit collectives or cooperatives to grow, distribute and sell to members
- ▶▶ 2008 – Atty General guidelines.
 - Allows storefront dispensaries. Comply with SB 420. Verified patients only.
 - Comply with State sales permit, local business license, State sales tax.
- ▶▶ 2015 - Medical Cannabis Regulation and Safety Act (MCRSA)
 - Framework for State regulation and licensing of cannabis businesses



A Very Brief History (cont.) – California Marijuana Law

► 2016 - Prop. 64, Adult Use of Marijuana Act

- Legalized adult (21yrs old) use and possession of 1 oz cannabis, less than 8 grams concentrate
- Reduced penalties for state offenses and quasi-legalized use and possession of small amounts
- Legalized personal cultivation of up to 6 plants per household if age 21 and over
- Permits commercial, non-medical, use. Taxes cannabis cultivation and sales
- Allows patients with serious medical condition to possess and cultivate marijuana
- Required the state to begin issuing licenses for adult-use cannabis business by January 1, 2018. 14 different licenses. See Q. 10, Legal Q&A, Marijuana Issues for REALTORS®

► 2017 – SB 94, AB 133 Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA)

- One regulatory structure for both adult-use and medical (now “medicinal”)
- Combined licenses under MCRSA and AUMA
- Maintained local control



A Very Brief History (cont.) – California Marijuana Law

- ▶▶ No smoking in public, where tobacco prohibited or while driving (H&S §§ 11362.1 and 11362.3)
- ▶▶ No smoking if prohibited by a lease (H&S § 11362.45(h))
 - Personal agriculture" under Civil Code 1940.10 specifically excludes cannabis
 - Landlord could already prohibit tobacco use (Civil Code 1947.5)
- ▶▶ 6 plants at home if inside or outside but not visible to public
 - Local can ban outside but not if in an accessory unit
- ▶▶ No smoking within 1,000 feet of a school, day care center, or youth center while children are present (H&S §11362.3(a)(3))
 - Except in or upon the grounds of a private residence if such smoking is not detectable by others on the grounds of the school, day care center, or youth center while children are present.
- ▶▶ Cities can ban or limit cannabis businesses
- ▶▶ Medicinal use cannabis can exceed limits for personal use if not prohibited locally





Buying or Selling Residential Property

May a real estate licensee be involved in the sale of residential real property where marijuana was cultivated, used or sold?

- ▶▶ State – Yes.
- ▶▶ Federal – No. But no enforcement if follows proper State laws for medical use only.
- ▶▶ Still, not hearing about any enforcement actions against real estate licensees.
- ▶▶ EXCEPT, local enforcement against knowing violations of licensing laws or facilitating such violations



Buying or Selling Residential Property

What should a **real estate licensee** do ...?

Who knows, suspects or is aware that property being offered for sale is or was previously used for cannabis purposes?

- ▶▶ D.A.D. – Disclose. Attribute. Disclaim.
- ▶▶ **Who.** What. Where. When. Why. How.
- ▶▶ **Who?** A real estate broker or salesperson (seller side and buyer side)

What should a real estate licensee do ...?

Who knows, suspects or is aware that property being offered for sale is or was previously used for cannabis purposes?

- ▶▶ D.A.D. – Disclose. Attribute. Disclaim.
- ▶▶ Who. **What.** Where. When. Why. How.
- ▶▶ **What?**
- ▶▶ Identify red flags:
- ▶▶ **Example:** Gutted house. Unexplained extra electrical panels. Unexplained extra water pipes and outlets. Unexplained industrial ventilation system. Reputation. Neighbor gossip. City abandonment notice on door. Flow of unwanted visitors showing up at house. Recognize growing plants. Smell permeates house.

What should a real estate licensee do ...?

Who knows, suspects or is aware that property being offered for sale is or was previously used for cannabis purposes?

- ▶▶ D.A.D. – Disclose. Attribute. Disclaim.
- ▶▶ Who. What. **Where. When.** Why. How.
- ▶▶ **Where? and When?** Real Estate Transfer Disclosure Statement (C.A.R. form TDS) or Agent Visual Inspection Disclosure (C.A.R. form AVID). At time of delivery.

What should a real estate licensee do ...?

Who knows, suspects or is aware that property being offered for sale is or was previously used for cannabis purposes?

- ▶▶ D.A.D. – Disclose. Attribute. Disclaim.
- ▶▶ Who. What. Where. When. **Why.** How.
- ▶▶ **Why?** It is the duty of a real estate broker or salesperson (seller side and buyer side), ... to a prospective buyer of residential real property improved with one to four dwelling units, ... to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective buyer all facts materially affecting the value or desirability of the property that an investigation would reveal (Civil Code § 2079)

What should a real estate licensee do ...?

Who knows, suspects or is aware that property being offered for sale is or was previously used for cannabis purposes?

- ▶▶ D.A.D. – **Disclose. Attribute. Disclaim.**
- ▶▶ Who. What. Where. When. Why. **How.**
- ▶▶ **How?**
- Neighbor says ... Article in paper about ... Electrician states ... Home Inspector report reveals ... I noticed in my inspection ... **[insert fact]** **AND**
- May be indicative that property was used for cannabis or illicit use ... **AND**
- I have not verified prior use/ factual claim ... **AND**
- Recommend that buyer contact seller or others for additional information and satisfy themselves regarding the property (also, see SBSA, #B 10)



Buying or Selling Residential Property

SELLER

►► **Who? Seller**

►► **What?** Disclose known material facts affecting the property's value or desirability that are not known to within diligent attention or observation of buyer

►► **Where? and When?** Transfer Disclosure Statement (TDS); Seller Property Questionnaire (C.A.R. form SPQ).

4. Room additions, structural modifications, or other alterations or repairs made without necessary permits.
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes ..

10. Material facts or defects affecting the Property not otherwise disclosed to Buyer

2. Any occupant of the Property smoking on or in the Property.
3. Any past or present known material facts or other significant items affecting the value or desirability of the Property not otherwise disclosed to Buyer

►► **Why?** Civil Code §§ 1102.3, 1102.6. *Lingsch v. Savage*, (1963) 213 Cal. App. 2d 729



Buying or Selling Residential Property

►► **Seller and Broker**: Advise buyer to conduct own inspection. SBSA, B 10

10. MARIJUANA, CANNABIS, AND METHAMPHETAMINE LABS: Buyer and Seller are advised permits individual patients to cultivate, possess and use marijuana for medical purposes. Furthermore permits primary caregivers, lawfully organized cooperatives, and collectives to cultivate, distribute and for medicinal purposes. California law also allows recreational use of marijuana for adults, as well as

►► **Buyer's Broker or Dual Agent**

- With knowledge that buyer intends to grow for personal or other use
- Disclose that broker makes no representation regarding buyer intended use
- Provide copy of Legal Q&A, “*Marijuana Issues for REALTORS®*”
- Buyer to get advice of counsel. Consider C.A.R. Sample Letter, “*Acting Against Broker Advice – Buyer*” and check “Other” and write in buyer’s intended use
- Broker is fiduciary – Civil Code §§ 2079.13,2079.16

Buying or Selling Residential Property

If property is sold and there are marijuana plants growing on or in it, what happens to the plants?

►► RPA, #8B, Items included:

B. ITEMS INCLUDED IN SALE: Except as otherwise specified or disclosed,

(1) ALL EXISTING fixtures and fittings that are attached to the Property;
(2) EXISTING electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fans, fireplace inserts, gas logs and grates, solar power systems, built-in appliances, window and door screens, awnings, shutters, window coverings, attached floor coverings, television antennas, satellite dishes, air coolers/conditioners, pool/spa equipment, garage door openers/remote controls, mailbox, in-ground landscaping, trees/shrubs, water features and fountains, water softeners, water purifiers, security systems/alarms and the following if checked: all stove(s), except _____ ; all refrigerator(s) except _____ ; all washer(s) and dryer(s), except _____ ;

►► Are in-ground plants considered landscaping?

►► Are potted plants considered shrubs?

►► For clarity, Buyer can exclude. Seller can counter to take or cultivate before COE

►► Broker should disclaim knowledge of legal implications.

►► Different rules for crops but not likely to apply to legally permissible plants



Renting Residential Property

- ▶▶ **Can a residential landlord prohibit smoking of marijuana on the property?**
- ▶▶ Yes, if lease prohibits marijuana or tobacco. (H&S §11362.45(h), Civ. §1947.5)
- ▶▶ Probably, as illegal use (Controlled Substance Act)
- ▶▶ See C.A.R. Residential Lease, paragraph 14 C.

C. NO SMOKING of any substance is allowed on the Premises or common areas. If smoking does occur on the Premises or common areas, (i) Tenant is in material breach of this Agreement; (ii) Tenant, guests, and all others may be required to leave the Premises. Smoking of the following substances only is allowed: _____.

- ▶▶ **Does a residential tenant have right to grow marijuana on the property for medicinal or adult-use?**
- ▶▶ No, if prohibited by lease or rental, and probably as illegal use under Federal law. Puts landlord at risk of forfeiture.



Renting Residential Property

- ▶▶ **Can a residential landlord **evict** a tenant for smoking or growing marijuana on the property?**
- ▶▶ Yes, if lease prohibits marijuana or tobacco. (H&S §11362.45(h), Civ. §1947.5)
- ▶▶ Probably, as illegal use (Controlled Substance Act)
- ▶▶ Even if subject to Tenant Protection Act of 2019 (AB1482)
 - **Illegal Use**
 - **Material Breach of lease or rental**
 - **Civil Code § 1946.2 (b)(1)(F) and (L)**



Renting Residential Property

- ▶▶ Is a residential tenant with a **medical need for marijuana** entitled to smoke marijuana in a property, as a **reasonable accommodation** for a **disability** even though there is a prohibition in the lease or rental?
- ▶▶ Probably not. Still a federal violation. See, also, *Ross v Ragingwire*, (2008) 42 C.4th 920 (California Supreme Court interpretation of Fair Employment and Housing Act in employment context).
- ▶▶ User of illegal drugs not considered an individual with a disability (42 USC 12210)
- ▶▶ Alternative reasonable accommodation? Maybe edibles.





Renting Residential Property

► Is a residential tenant with a medical need for marijuana entitled to smoke marijuana in a property, as a reasonable accommodation for a disability even though there is a prohibition in the lease or rental?

■ Other Considerations

- If eviction pursued or contested, case will be tried in California, before California judge, or jury, that may see things differently, or distinguish other case as inapplicable.
- In other contexts, tenant obligated to pay for reasonable **modification** of physical improvements as a necessary accommodation. Could landlord demand ventilation requirements? Additional security deposit (probably not to exceed maximum allowed by law)?



Renting Residential Property

- ▶▶ **May a residential landlord deny a lease or rental to a tenant who has a valid medical marijuana card?**
 - ▶▶ Probably not, especially if tenant agrees to be bound by any restrictions on smoking.

- ▶▶ **May a residential landlord deny a lease or rental to a tenant who works for a dispensary?**
 - ▶▶ Probably not. In California it is illegal to discriminate based on source of income. Presumes legal income. Difference between California and Federal law.

- ▶▶ **If lease/rental does not prohibit smoking, can other tenants object?**
 - ▶▶ Probably not BUT if other has a disability aggravated by smoke, and smoking tenant has medicinal reason, must engage in dialogue



Final Advice

►► Become a trusted resource

- Example, C.A.R. Legal Q&As, Quick Guide;
- Compile a list of State regulatory agencies;
- Know which local governments have requirements or prohibitions;
- Be aware of local politics (advantages of community involvement, swing councilmembers and county supervisors, resident sentiment).
- Remember your A, B, Cs – Always Be Careful
- Remember your D.A.D. – Disclose. Attribute. Disclaim.





Neil Kalin

Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, CA 90020
(213) 739-8341 phone / fax
neilk@car.org