Marijuana and HOAs: Can homeowners groups ban people from growing, using pot?

By Michael Roberts
Published Wed., Apr. 3 2013 at 11:50 AM

Amendment 64, which allows adults 21 and over to use and possess small amounts of marijuana, includes provisions that allow growing cannabis at home. But can homeowners associations put rules in place prohibiting such grows even though they're fine under the Colorado law?

That question will be addressed at a panel discussion tomorrow. But an attorney who'll be taking part in the event believes the answer is, under certain circumstances, "yes."

Here's the passage pertaining to home grows in Amendment 64. It allows the following:

POSSESSING, GROWING, PROCESSING, OR TRANSPORTING NO MORE THAN SIX MARIJUANA PLANTS, WITH THREE OR FEWER BEING MATURE, FLOWERING PLANTS, AND POSSESSION OF THE MARIJUANA PRODUCED BY THE PLANTS ON THE PREMISES WHERE THE PLANTS WERE GROWN, PROVIDED THAT THE GROWING TAKES PLACE IN AN ENCLOSED, LOCKED SPACE, IS NOT CONDUCTED OPENLY OR PUBLICLY, AND IS NOT MADE AVAILABLE FOR SALE.

A photo provided by the Colorado Drug Investigators Association when sharing results of a 2012 marijuana mold study.

This language is now enshrined in the state's constitution, but it may not prevent an HOA from establishing rules of its own, says Jerry Orten. An HOA attorney and spokesman for the Rocky Mountain chapter of the Community Associations Institute, whose Spring Showcase and Trade Show gets underway tomorrow at the Colorado Convention Center, Orten will be front and center at "Marijuana & Other Odors -- What Can and Should HOAs Do," which kicks off at 10:15 a.m. Other panelists include attorney Christian Sederberg, who represented the campaign on the Amendment 64 task force, plus Wellness Shop owner Jeremy Kilborne and HOA community manager Matt Egan.

"It's not a given that HOAs are going to jump into this issue head over heels," Orten says. "Many of them may look at this and evaluate it and potentially do nothing, leaving all the regulatory authority to either state or local government. But some HOAs might jump into it."

Orten believes they have every right to do so.

"In my view, and probably in the view of most, HOAs have the authority," he maintains. "The constitutional amendments, Amendment 64 and Amendment 20," a 2000 measure that legalized medical marijuana in Colorado, "apply principally to government. It doesn't apply to private rights, and essentially, HOAs are private communities.

"If they want to create a more restrictive regime, they can -- and that's what some communities may want to do, because either the smell of growing cannabis or the smell of smoked cannabis may be offensive to others in the community."

The Colorado Clean Indoor Air Act of 2006 "puts a number of limitations on where you can smoke tobacco," Orten points out, "and also other types of smoke others might find offensive: pipe smoke, cigar smoke, other unique cooking odors." Presumably, marijuana smoke would fall under this measure as well.

But could HOAs ban marijuana simply because those in charge have a moral objection to its legalization? That's where things could get tricky.

Continue for more of our interview about marijuana and homeowners associations.

Jerry Orten.

"Most associations are concerned with the value of properties and the exterior appearance of properties," Orten says. "They are not generally interested in what happens inside the unit unless it has an adverse effect on other owners, like health effects from secondhand smoke, or value effects, like odors that are offensive."

With that in mind, Orten says, "I don't think associations will be looking to restrict marijuana use just because they're not in favor of it. If associations are interested in restrictions, it will probably be because of adverse effects on others in the community -- and that really begins to define the type of community that might be interested in it.

"Generally, that probably won't include single-family communities where homes aren't attached. It will probably be communities where homes *are* attached" -- like condominiums or duplexes -- "where there's some aspect of odor or effects that might begin to bother other residents."

Math may come into play before HOAs decide to act, he goes on. "Let's say it's a twenty-unit community and the odor of the growth or smoking of cannabis is affecting four or maybe eight people. Then that community may be more inclined to look to restrict it by covenant or rule. But if it's a 100-unit community and you've got the same number of people who are affected, that association might not view it as something that's broad enough to affect all of the community to consider adding a covenant or draft a rule that would restrict the odors associated with marijuana. As in the case of most things, context is everything."

Lining up strong evidence to support such restrictions could be important, since a lawsuit challenging a homeowners association's marijuana ban is certainly possible -- and "HOAs are not interested in being sued," Orten admits. "They wouldn't want to be a test case, because that often means it would go up to an appellate court or even the Colorado Supreme Court. That would mean the possibility of three different courts ruling on it, and the parties involved might be in litigation for potentially four or five years. Associations would prefer to be viewed positively by the community, and the cost and expense of that might not put them in the most desirable position."

At the same time, Orten points to another provision of Amendment 64 that he sees as applying to HOAs -- and which could give cover to those who want to restrict marijuana use and cultivation.

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A graphic from the Community Associations Institute-Rocky Mountain chapter's website.

The passage reads:

NOTHING IN THIS SECTION SHALL PROHIBIT A PERSON, EMPLOYER, SCHOOL, HOSPITAL, DETENTION FACILITY, CORPORATION OR ANY OTHER ENTITY WHO OCCUPIES, OWNS OR CONTROLS A PROPERTY FROM PROHIBITING OR

OTHERWISE REGULATING THE POSSESSION, CONSUMPTION, USE, DISPLAY, TRANSFER, DISTRIBUTION, SALE, TRANSPORTATION, OR GROWING OF MARIJUANA ON OR IN THAT PROPERTY.

Still, Orten concedes that the parameters of this language are largely untested.

"Amendment 64 talks about control of property and the ability to regulate -- but where does awareness of control begin and end?" he asks. "Does it exist only in a lobby, in common-element restrooms, in meeting rooms, locker rooms, etc.? Or does it extend to the units themselves? That question is out there -- but I think that if associations take a balanced approach to this, that envelope won't be tested."

Also important to consider: As Orten points out, "associations have a set of documents that establish them and define restrictions and rules that are binding on owners, and typically, those documents are written by developers, and not so easily changed by owners and the association. That's kind of an impediment to creating new covenants and restrictions regulating use inside of a unit.

"You can present the question this way: How many unit owners in any condominium community would like owners to regulate what happens inside their unit? Most owners would say they're not really interested in that -- but to amend, you'd generally need 67 percent of owners to approve it. So even if it's legally possible, it might not be practically possible. So you're back to the context."

In his view, then, "if you have a smaller community that's really sensitive to odors because of common ventilation issues, they might be keen on this. But if you've got a bigger community, where ventilation allows for less seepage into units, the whole idea of marijuana smoke or any other offensive odor may be a lot less relevant, and they might not be interested in regulation."

And if they are? There may be nothing stopping them.