



Clearing the Air in Cannabis Consumption Lounges

BY SEAN T. MCCOY, ESQ.

As industry leaders look ahead, 2024 may be the year of the cannabis consumption lounge. The fact that we reached this point in just seven short years is nothing short of a miracle. But as Nevada seeks to expand cannabis tourism, lingering questions remain about the application of the Nevada Clean Indoor Air Act (NCIAA).¹

Approved by a majority of voters in 2006, with the intent of protecting employees from the negative effects of second-hand smoke, the NCIAA prohibits smoking in any form within most indoor places of employment. In 2019, the Nevada Legislature expanded the smoking ban to include smoking products that do not contain tobacco,

like e-cigarettes and vapes. They did so by deleting the word “tobacco” from the prohibition against “smoking tobacco” and added a definition for “smoking” to the NCIAA. As defined, “smoking” means “inhaling, exhaling, burning or carrying any liquid or heated cigar, cigarette or pipe or any other lighted or heated tobacco *or plant*² product intended for inhalation, in any manner or in any form.”

The NCIAA also prohibits smoking inside most restaurants.³ The NCIAA defines “restaurant” as “a business which gives or offers for sale food, with or without alcoholic beverages, to the public, guests or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere.” By offering food, cannabis consumption lounges are “restaurants” under the NCIAA.

To smoke indoors legally, the establishment must fall under one of the

NCIAA’s limited exceptions that allow for smoking. Those exceptions include gaming areas of casinos, age-restricted standalone bars, taverns, saloons, strip clubs or brothels, retail tobacco stores, and private tobacco-related trade shows and conventions.⁴ Notably missing from the list are cannabis consumption lounges. That is because, unlike the state of Ohio, the Nevada Legislature did not expand the indoor smoking exceptions in the NCIAA when they authorized cannabis consumption lounges in 2021.

Instead, Assembly Bill 341 simply added a provision to Nevada Revised Statute (NRS) 678D.310 stating that “[a] person may smoke or otherwise consume cannabis or a cannabis product in a cannabis consumption lounge.” When the NCIAA was briefly raised during discussion on AB 341, the testimony was that the Cannabis Compliance Board (CCB) would need

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Nevada Revised Statute 202.2483(13)

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to put in regulations for the NCIAA.⁵ There was no explanation as to why. If the NCIAA applies, it controls. Nor was there any discussion, direct or implied, regarding the need to amend the NCIAA. As such, there was no public conversation about the policy behind the NCIAA or the appropriateness of rolling back protections for cannabis consumption lounge patrons and employees from the harmful effects of second-hand cannabis smoke. Eventually, the CCB promulgated regulations for smoking marijuana inside cannabis consumption lounges, to the exclusion of alcohol, tobacco, and nicotine, but without squaring the NCIAA's prohibition against smoking any plant or liquid inside restaurants and places of employment.⁶

When two statutes are in conflict, the rules of statutory construction are used to resolve the conflict. *State v. Eighth Judicial Dist. Court*, 129 Nev. 492, 508 (2013). The two rules are the general/specific canon and the implied repeal canon. *Williams v. State, Dep't of Corr.*, 133 Nev. ___, ___, (2017). Under the general/specific, the more specific will take precedence. *Id.* Under the implied repeal rule, "when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment." *Laird v. State of Nev. Pub. Emps. Ret. Bd.*, 98 Nev. 42, 45 (1982). Such rule is heavily disfavored, and the Nevada Supreme Court will not consider a statute repealed by implication unless there is no other reasonable construction of the two statutes. *Lader v. Warden*, 121 Nev. 682, 687 (2005). "The presumption is always against the intention to repeal where express terms [of repeal] are not used." *Presson v. Presson*, 38 Nev. 203, 208-09 (1915) (internal quotation marks omitted).

Unlike the cases referenced above, the NCIAA contains a provision stating "[a]ny statute or regulation inconsistent with this section is **null and void**."⁷ Can there be two statutes in conflict for the purposes of statutory construction analysis if the NCIAA renders the second invalid? If null and void, NRS 678D.310(10) does not exist.

Being more specific would not matter. Likewise, being more recent in time is immaterial. Allowing the NCIAA to be disregarded as more general or repealed by implication, outside of the act itself, renders its "null and void" provision meaningless—a provision that, unlike the creation of cannabis consumption lounges, was approved by the voters.

Ultimately, the statutory authorization for cannabis consumption lounges is not mandatory. Local governments have discretion in approving cannabis consumption lounges. Local governments do not, however, have the discretion to violate the NCIAA. NRS 202.2483(8) allows local governments to meet or exceed the minimum protections outlined in the NCIAA, but they cannot set standards below them. In fact, NRS 202.2483(10) states that "[h]ealth authorities, police officers of cities or towns, sheriffs and their deputies" shall enforce the NCIAA and issue citations for violations. And yet, local governments are being asked to authorize cannabis consumption lounges with indoor smoking in what may be a direct violation of the NCIAA.

If the NCIAA renders the inconsistent cannabis statutes and regulations null and void, then "smoking" of any plant or liquid is prohibited in cannabis consumption lounges. The only way for the relevant cannabis provisions to be consistent with the NCIAA is if the NCIAA is amended to allow for smoking cannabis in cannabis consumption lounges. To date, the Nevada Legislature has not expressly done so.

ENDNOTES:

1. NRS 202.2483.
2. NRS 678A.085 defines "cannabis" in part as "[a]ll parts of any plant of the genus *Cannabis*, whether growing or not."
3. NRS 202.2483(1)(g).
4. NRS 202.2483(3).
5. See Hearing on A.B. 341 Before the Assembly Committee on Revenue, 81st Leg. (Nev., March 25, 4. 2021) (Statement by A'Esha Goins, representing Cannabis Equity and Inclusion Community).
6. See Nevada Cannabis Compliance Regulations 15.050, 15.055, 15.060, and 15.065.
7. NRS 202.2483(13).



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