

NEVADA'S BAN ON PUBLIC USE OF MARIJUANA CREATES PROBLEMS FOR VISITORS

BY KATHERINE L. HOFFMAN, ESQ.

When Nevadans voted in favor of the Initiative to Regulate and Tax Marijuana (also known as Ballot Question 2), in November 2016, the initiative's supporters heralded its passage as an opportunity for the state to generate significant new tax revenue. Leading up to the 2016 election, the initiative's sponsor, the Coalition to Regulate Marijuana Like Alcohol, commissioned an economic report estimating that legalized marijuana in Nevada would generate \$464 million in tax and fee revenues between 2018 and 2024.¹

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Nearly 64 percent of this revenue was expected to come from the more than 55 million tourists who visit the state annually.² However, now that Nevada's first adult-use marijuana retail shops have opened and the tax dollars have started to roll into state coffers, one thorny question continues to cloud this rosy economic picture. Where are Nevada's visitors permitted to use marijuana?

The Prohibition on Public Use

The initiative, now enacted as NRS Chapter 453D, explicitly provides that it is unlawful to smoke or consume marijuana "in a public place, in a retail marijuana store, or in a moving vehicle."³ A public place is defined as "an area to which the public is invited or in which the public is permitted regardless of age" and does not include a retail marijuana store.⁴

For Nevada residents, the easiest way to comply with this requirement is to use marijuana only within a private residence. Tourists, particularly the millions of visitors who stay at a casino property, have a more difficult time utilizing marijuana in compliance with Nevada's statutes. Because marijuana remains a Schedule 1 drug under the federal Controlled Substances Act, Nevada's gaming regulators have taken the position that gaming licensees should not have any involvement with the marijuana industry. The Nevada Gaming Commission is currently in the process of

formulating the particular contours of this policy through a series of public meetings on this issue. Governor Brian Sandoval has also called on the Gaming Policy Committee, comprised of gaming regulators, state legislators and gaming industry representatives, to gather information and provide recommendations on policies related to potential interactions between gaming and marijuana businesses. The Gaming Policy Committee initiated its consideration of these issues at a meeting in late November 2017.

In the meantime, however, many hotels and casinos have already explicitly banned their guests from using or possessing marijuana on their properties. MGM Resorts, Caesars Entertainment and Wynn Resorts are among the companies that have adopted such a policy. Clark County Commissioner Chris Giunchigliani has recognized the problem visitors face as a result of the public consumption prohibition noting, "we're setting people up for failure and getting in trouble, especially for our tourists."

Lessons from Colorado

Nevada is not the only state to confront the inherent tension between developing marijuana tourism while prohibiting public use of the drug. When Colorado's adult-use marijuana retail businesses opened their doors on January 1, 2014, visitors flocked from out-of-state to patronize the first state-licensed adult-use marijuana shops in the country, but

the prohibition on openly or publicly using marijuana meant that those customers faced significant hurdles in finding locations where they could lawfully smoke or consume their purchases. Arrests for unlawful public use of marijuana in the City of Denver rose from eight in 2012 to 1,186 in the first nine months of 2014.⁵

Denver voters sought to address this issue by passing Initiative 300 during the 2016 election, which called for the city to develop a pilot program allowing certain businesses to designate areas for social consumption of marijuana. Final rules for the program were issued in June 2017, and interested businesses are in the process of completing the licensing requirements.

The LCB Opinion

Looking to stimulate local discussion on the public consumption issue, Nevada State Senator Tick Segerblom requested that the Legislative Counsel Bureau (LCB) provide clarification on some of the legal issues surrounding the prohibition on public use or consumption of marijuana. On September 10, 2017, the LCB released an opinion addressing two main questions:

- Whether state law allows businesses to establish and operate lounges, or other facilities or special events at which patrons of the businesses may use marijuana, and if so, whether local jurisdictions may license and regulate such businesses; and
- Whether the failure of Senate Bill 236 during the 2017 legislative session, which specifically authorized local governments to adopt ordinances allowing such businesses, affected the analysis of the first issue.

Analyzing the public-use restrictions in both NRS Chapter 453A (medical marijuana) and NRS Chapter 453D (adult-use marijuana), the opinion determines that state law presently prohibits “the possession or consumption of marijuana at a place where the public is invited or in which the public is permitted regardless of age or a place exposed to public view.” The opinion further explains that this restriction leaves the door open to “use of marijuana at a place to which the public is not invited or permitted, including ... a private lounge or other facility, which is closed to the public, and only allows entry to persons who are 21 years of age or older,” so long as marijuana use is not “exposed to public view.” Given the power of local governments to license and regulate “all manner of lawful businesses which are conducted” within their jurisdictions, the opinion concludes that counties, cities and towns have authority to adopt licensing and operational requirements for such businesses.

With respect to whether the failure of Senate Bill 236 impacts the analysis, the opinion notes that this bill would have placed certain limitations on the authority of local

governments to license and regulate businesses and special events, allowing the consumption of marijuana by establishing certain minimum requirements for these businesses and events. Quoting from *Pension Benefit Guarantee Corp. v. LTV Corp.*, the opinion explains that legislative inaction “lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” 496 U.S. 633, 650 (1990) (internal citations omitted).

In essence, because the rules of statutory construction “give[] limited weight to subsequent legislative proposals when determining the meaning of existing language, especially, when the subsequent legislative proposals are defeated,” the opinion concludes that the failure of the Legislature to pass Senate Bill 236 should not be viewed as repealing the existing authority of local governments to

license and regulate businesses or events allowing use of marijuana at a place where the general public is not invited or permitted.

Mixed Reactions to the LCB Opinion

Following the opinion’s release, Sandoval issued a statement explaining his concerns with its conclusions: “I do not agree with the LCB Opinion and believe that statutory authority is necessary to establish local marijuana smoking shops. I am concerned with these establishments

popping up piecemeal throughout the state with differing rules and regulatory structure. I also question why legislation was proposed during the 2017 legislative session if legal authority already existed.” The governor also suggested further analysis by the Nevada Attorney General’s Office was warranted, noting that LCB opinions do not carry the same weight as Attorney General opinions.

Hoping to get further clarification on the issues raised in the LCB opinion, the Nevada Department of Taxation, which is charged with licensing and regulating both medical and adult-use marijuana establishments, sent a request to Nevada Attorney General Adam Laxalt seeking an opinion on the public consumption issues addressed by the LCB. The Attorney General’s Office, however, declined to provide the requested guidance on the basis that the Department of Taxation “does not regulate the time, place or manner of consumption of marijuana.” Rather, it only regulates marijuana cultivation, production, testing and retail businesses, which are prohibited from allowing marijuana consumption on their premises.

A Challenging Path Forward

The LCB opinion has not yet spurred local governments to develop licensing and regulatory schemes for marijuana lounges or similar businesses. Following the opinion’s release,

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the Clark County Board of County Commissioners addressed the issue at a September 2017 meeting, but ultimately decided not to pursue authorizing such businesses. The board did not foreclose future action, however, and Commission Chairman Steve Sisolak stated that the board could revisit the issue down the road if it decided to do so.

One factor that appears to be motivating this cautious approach is uncertainty regarding potential federal crackdowns on state-licensed marijuana businesses. U.S. Attorney General Jeff Sessions has repeatedly expressed strong opposition to state legalization and licensing schemes. Both Sandoval and local governments appear keen to avoid the additional federal scrutiny that would likely accompany the development of a marijuana lounge industry. However, until the state is willing to address this issue head-on, Nevada's marijuana tourists will remain trapped in a legal limbo. **NL**

1. RCG Economics, Nevada Adult-Use Marijuana Economic & Fiscal Benefits Analysis, June 2016, <http://www.rcg1.com/wp-content/uploads/2012/01/2016-7-12-Final-NV-MJ-Initiative-Rpt-v.2.pdf>.
2. Id.
3. NRS 453D.400(2).
4. NRS 453D.030(17).
5. Drug Policy Alliance, Marijuana Arrests in Colorado After the Passage of Amendment 64, https://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Arrests_After_Amendment_64.pdf.



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