



Marijuana and Real Estate – New Rules Coming from DORA

The legal landscape concerning the cultivation, sale, distribution and use of marijuana has become very complex over the past dozen or so years. Beginning with an amendment to the Colorado constitution in 2000 concerning the medical use of marijuana and more recently another amendment in 2012 relating to the cultivation, sale, possession and use of recreational marijuana, the voters have “carved out” some exceptions to the general rule that marijuana use, possession, sale, etc. is illegal under Colorado Law. (Sec. 18-18-406 C.R.S.) Essentially, the constitutional amendments offer the people of the State an affirmative defense to what would otherwise be considered illegal conduct.

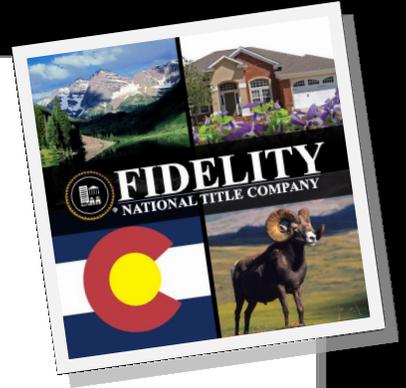
While at first blush this “carve out” would seem to be relatively straightforward, what makes the situation much more complex is the interplay between Federal law regulating marijuana use, possession, etc. and the Colorado provisions. Even in the wake of the Colorado Constitutional Amendments, local news media have been carrying recent stories of Federal raids, arrests, confiscation of property and ill-gotten gains. In short, the Federal government continues to regulate, on a criminal enforcement basis, the use of marijuana under The Controlled Substances Act. It also has jurisdiction over money laundering transactions, tax evasion and other criminal activities that can be associated with or arise out of marijuana related activities. Unfortunately, there are no clear or distinctly drawn lines at present as to when the Federal government will act, even as the State of Colorado may decline to act due to the recent amendments to its Constitution. Stated differently, it is possible to conceive activity that would be considered non-criminal in Colorado which could still result in Federal prosecution.

The situation created by the conflicting regulatory schemes could produce some complicated outcomes for those engaged in the real estate industry, whether they be real estate brokers, appraisers or mortgage loan originators. For example, each of these professionals enjoy licensing that is subject to disciplinary action when the licensee engages in certain conduct, including but not limited to actions that are considered criminal in nature. What will be the outcome, for example, if a licensee has partaken in ‘recreational use’ considered legal in Colorado, but illegal by the Federal government? Is that individual’s license subject to discipline or even revocation? Other questions, as well, tend to present themselves, such as:

- Does a real estate broker who becomes aware of a “grow operation” in the basement of a property offered for sale have an obligation to disclose that to prospective purchasers? Are there circumstances where that disclosure might be mandated, whereas in others, restricted?
- Similarly, when an appraiser makes an inspection of the premises on behalf of the lender, does that appraiser have to make special note of, or call attention to, the fact of the “grow operation” or evidences of a recently concluded “grow operation?”
- What, if any, obligations or mandates does the use of property, considered legal in Colorado, but criminal by Federal Standards, impose upon the mortgage loan originator who is engaged in what is typically defined as a “federally regulated mortgage transaction”?

Will the originator be obliged to disclose any knowledge of “marijuana type uses” on the property, or may the Originator let the other participants deal with and be responsible for that knowledge, disclosure and ramifications?

These and other questions will become the subject matter of discussions which will be presented before the Colorado Real Estate Commission, the Board of Appraisers and the Board of Mortgage Loan Originators. Licensees will soon be hearing about policy statements, Position Statements or even new rule-making directed at helping them navigate the challenging landscape created by the conflicting State and Federal provisions regulating marijuana cultivation, use, possession and sale. Obviously, once this guidance is issued by the various bodies of the Division of Real Estate, licensees should be prepared to adjust their conduct and business practices accordingly when dealing with affected properties.



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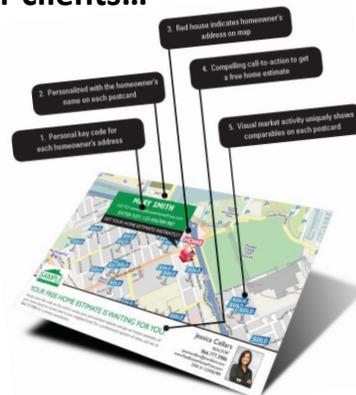


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