

The Cannabis Industry and the Real Estate Lawyer – Not Quite Groovy Yet

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The medical and recreational cannabis industry is experiencing explosive growth. Now legal (for medicinal and/or recreational use) in 36 states, the U.S. legal cannabis market generated roughly \$16 billion in revenues in 2020, but by 2030 revenues are projected to exceed \$64 billion. That would put it on pace to surpass sales of retail categories such as video games, coffee, organic foods, chocolates and doughnuts (doughnuts, really, how appropriate!). This sector is producing important public benefits as well; it is a driver of job growth and sales (and other) tax revenues, and by most accounts it is recession-proof. In other words, it is here to stay!

Even for practitioners who might not represent companies involved in the research, cultivation, distribution or retail sale of cannabis products, there nevertheless will be occasions where our traditional real estate clients are likely to be involved. Prime examples include developers, landlords and lenders. For many of us, it is only a matter of time before a client calls, seeking assistance on a cannabis-related engagement.

The growth in this sector, and the engagement by many law firms in representation of clients in this space, however, are not without speedbumps. First, a number of U.S. law firms are still understandably reluctant or unwilling to represent clients which are involved, even peripherally, with the cannabis sector, given that marijuana remains a Schedule 1 controlled substance and its manufacture, dispensing or possession is therefore deemed to be in violation of federal law, notwithstanding its legalization in a number of states. Be sure to check with your firm's ethics counsel before accepting an engagement.

In addition, the real estate industry is moving somewhat sluggishly in the cannabis transactional context. Because federally-chartered financial institutions for the most part are unwilling to transact in this space, construction or permanent financing for cannabis-related facilities is sourced, if at all, from state-chartered and non-bank lenders. Likewise, institutional landlords have been slow to embrace this sector and cannabis company tenants (most of which are eager to invest their profits in expansion and marketing, and not in hard assets like real estate) are reduced to working with a finite number of public company landlords or with entrepreneurial real estate owners who are finding the opportunity to be rewarding.

Even once a developer, landlord or lender has been selected, counsel encounters yet another impediment, namely, identifying critical service providers to facilitate the transaction. As one example, many title companies are not willing to write title insurance in connection with property intended to be used for cannabis cultivation or sales. They simply remain uncomfortable with the federal proscription of cannabis, and given that they are subject to governmental regulation, they pass on the opportunity as a matter of policy. Even the more aggressive carriers, when issuing title coverage, typically include an exception such as the following:

Without limiting, modifying, abridging or negating any provision of the Exclusions
From Coverage stated in this Policy or any other exception included in this

Schedule B, and as a supplement and addition thereto, this Policy does not insure or provide title insurance coverage directly or indirectly for or against any and all consequences and effects, legal, equitable, practical or otherwise, civil or criminal, of any violation or alleged violation of any United States federal, state, county, municipal or local laws, statutes, ordinances or regulations or any actual or threatened action, court order or mandate for the enforcement thereof, relating to or governing the use, processing, manufacture, growth, possession, distribution, sale or any other activity on, about, or relating to or concerning the land, title thereto or any interest therein, of any Schedule I drug as defined by the United States Controlled Substances Act, including, without limitation, marijuana and/or cannabis, and any component, derivative or product thereof. This Policy insures title only; nothing contained in this Policy shall be construed to insure the subject premises for any particular use.

One final challenge: even those title companies willing to issue title insurance policies in the first place draw the line there; they refuse to perform standard escrow and settlement services, especially where it involves the exchange of proceeds. Here is what Ann Regan, Senior Counsel-Real Estate at Cresco Labs, a prominent operator of cannabis cultivation and dispensary facilities, had to say on this topic: “One of the biggest challenges in purchasing commercial real estate on behalf of a cannabis company is getting the sellers to understand that the universe of title companies willing to insure on behalf of cannabis purchasers is limited and there is a separate escrow agent required as well.”

This last consideration only adds to the complexity, and I might add risk, in closing purchase and sale transactions and financing transactions involving cannabis companies. A cottage industry of non-title company vendors prepared to assist in rendering settlement services including processing of wire transfers and other has emerged, but that of course invites certain speculation regarding the legitimacy of these service providers.

All told, the cannabis sector, while experiencing robust growth, is to an extent still the Wild Wild West in the context of the legal and closing services associated with it. If and when federal legalization of cannabis arrives, the door will open for established financial institutions, institutional owners and investors, title companies and, importantly, their legal advisors, to participate in a more meaningful way.