

Unlike medical marijuana, Issue 2 would allow smoking. That's raising property rights questions

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COLUMBUS, Ohio – If Ohio voters pass a recreational marijuana ballot initiative – and if the legislature doesn't touch it – adults would be allowed to do something that the state's medical marijuana program has barred since its inception: smoking.

[Under Ohio's medical marijuana program](#), smoking is prohibited, although vaping, and using edibles, oils, tinctures and patches is allowed. But if State Issue 2 passes Nov. 7, recreational users would be allowed to smoke.

The proposed change to Ohio law would give private property owners power to prohibit smoking on their premises. However, the campaigns on each side of the issue dispute how strong the proposal is on granting private property owners the power to prohibit vaping, edibles and other forms of the drug on their premises.

[Issue 2](#) would allow Ohioans aged 21 and older to possess and consume marijuana. They could purchase it from licensed dispensaries, paying a 10% tax on top of sales taxes. Individuals also could grow as many as six marijuana plants, or up to 12 per household, according to the proposal.

But because Issue 2 is introduced as an initiated statute and not a constitutional amendment, the legislature is allowed to repeal or amend it if it passes.

Ohio Senate President Matt Huffman, a Lima Republican who opposes recreational marijuana, [has said he wants to change](#) some parts of it, specifically redirecting where some of the tax revenue is sent. In the Ohio House, state Rep. Jamie Callender, a Lake County Republican who will vote for Issue 2, [said he believes the legislature](#) will inevitably make changes if it passes.

Smoking

As lawmakers worked on the bill in 2016 that legalized medical marijuana, they debated over whether Ohioans should be allowed to smoke the medicine, since

people do not smoke other medicines. An early version of the bill created a commission that was to decide the smoking issue. But ultimately, the bill that passed the General Assembly [explicitly banned combustion](#), or smoking.

Ohio medical marijuana dispensaries sell flower and other parts of the plant because some people vape it. Vaping heats the plant to the point that it releases chemicals but not smoke.

The CDC and the American Lung Association say smoking marijuana [can be harmful](#) to the lungs and cardiovascular system. But it's unclear how many medical patients ignore the prohibition on combustion and smoke it at home, out of sight of police and state regulators.

Smoking is legal in each of the 23 states that have adult-use programs, said Tom Haren, a Cleveland attorney who is part of the campaign backing Issue 2, the Coalition to Regulate Marijuana Like Alcohol, made up of licensed Ohio medical marijuana businesses.

If Ohio were to be the 24th, Haren said they should be allowed to smoke as well.

"That is a preferred method of consumption for a number of Ohioans, and we are focused on ending marijuana prohibition, and ensuring that the use of marijuana doesn't lead to interactions with law enforcement," he said.

Private property rights

Issue 2 is proposed as [a 41-page law](#) that contains two provisions for property owners: That public places cannot be required to accommodate an individual's use of adult cannabis; nor can they be prohibited from accommodating it.

That leaves decisions about whether establishments will allow marijuana usage with the property owners, Haren said.

"It's private property rights here," he said. "If I'm a restaurant, or a comedy club, it's my business. I can say if you can or cannot allow marijuana. Just like you can or cannot allow alcohol."

But the campaign in opposition Issue 2 – called Protect Ohio Workers & Families, which is made up of children's health care, law enforcement and business groups – says there's ambiguity on the extent to which private property owners can prohibit

people from using, possessing, displaying or transferring marijuana on their property, apart from existing bans on smoking.

“First question: What constitutes a ‘public’?” asked Rick Carfagna, the Ohio Chamber of Commerce’s senior vice president of government affairs. “It’s not defined anywhere in the statute... What is ‘accommodate?’ Does it mean that property owners don’t have to provide a designated marijuana-use area where people can get high? Or the property owners, do they have the full right, the full latitude, to ban all cannabis products from all places on the premises? Is it merely applying the existing smoking ban to marijuana?”

Columbus attorney Eric Wittenberg, who practices commercial and residential property law, reads the proposal as prohibiting property owners from actively stopping marijuana use, except for smoking.

The proposal doesn’t allow places like shopping malls, movie theaters, bars, restaurants and others to prohibit consumption, possession or transfer of cannabis products on their properties, Wittenberg said.

“And that is another what I view as a weakness in the legislation,” he said. “But the legislation was drafted by the cannabis companies, so of course it’s written in their favor.”

And even if a court determined the proposed law allowed private property owners to prohibit marijuana, “How are you going to police that?” he asked. “Smoking is easy because of smoke, but how are you going to police somebody from taking edibles? That’s the big issue with it. There’s no way to tell.”

Haren said that’s a red herring tossed by people who oppose consumption of marijuana. He pointed to the section of state medical marijuana law from which the recreational marijuana campaign obtained the language.

[The medical marijuana statute states](#) that the law does not: “Require any public place to accommodate a registered patient’s use of medical marijuana... Prohibit any public place from accommodating a registered patient’s use of medical marijuana.”

There are no definitions for “public” or “accommodate” in the medical law either, Haren said.

“The clause at issue is verbatim from this section of Ohio’s medical marijuana law,” he said. “I never heard that from the chamber six or seven years ago about ambiguity

in this language. It seems to me that everybody's known what these clauses mean for six or seven years."