nerej
CELEBRATING 55 YEARS

# Where there's smoke, there's ire: Approaching the hot- button issue of medical marijuana in the housing context

June 18, 2015 - Spotlights

It's well known that Massachusetts legalized the medical use of marijuana several years ago, but what exactly the move means for landlords and condominium associations remains largely an open question. This Client Update provides a brief summary of what the Mass. statute does say, explores the legal ambiguity over what it doesn't address, considers the intersection between state and federal laws relating to marijuana, surveys the concerns facing condominium associations and landlords, and ultimately suggests best practices for addressing medical marijuana in the housing context.

Medical Marijuana in Mass.: What does the law say?

The new Mass. statute governing medical marijuana went into effect January 1, 2013. Mass. is now one of 23 states (and D.C.) to remove criminal sanctions for the medical use of marijuana. Under the statute, patients with "debilitating medical conditions" can use marijuana, and patients as well as their caregivers can possess a 60-day supply without being subject to civil or criminal penalties. The statute defines "debilitating medical conditions" as including, but not limited to, "cancer, glaucoma, Crohn's disease, AIDs (or HIV-positive status), Hepatitis C, Parkinson's disease, ALS or multiple sclerosis" or related debilitating conditions as determined by a qualifying physician. Also, patients with limited access to dispensaries can obtain a hardship registration from the Department of Public Health, allowing them to cultivate the 60-day supply in their home.

What is the status of these dispensaries?

The state licensing system has seen its fair share of controversy since initially awarding 20 provisional licenses back in January of 2014. Several licenses were revoked amid questions about the fairness of the process, and dispensary openings, initially expected to begin in the summer of 2014, have been delayed due to bureaucratic uncertainties and mounting costs.

On April 8, however, the Department of Public Health announced that is launching a new, "fairer, more efficient, market-driven licensure process similar to other medical facilities," which will implement "high safety and suitability standards for dispensaries to meet, particularly with regards to security and background checks." As part of this revamped process, the Department of Public Health began posting updated information on its website (www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana) about the status of each of the 15 applicants currently granted licenses for dispensaries. Currently, the Alternatives Therapies Group, located in Salem, Mass., plans to be the first to open its doors sometime this spring.

How does the law intersect with federal law?

Marijuana remains illegal under federal law. In a 2009 memo, however, the Department of Justice, while reiterating the drug's illegality on the federal level and the federal government's right to enforce

all of its laws, guided U.S. Attorneys away from the prosecution of marijuana-related activities that are legal under state law.

But not all federal departments have taken such a permissive stance. The Department of Housing and Urban Development (HUD), most notably, issued its own memo in 2011 strictly prohibiting marijuana use - even state-approved medical use - for residents of HUD-financed housing developments:

"[Public Housing Agencies] and owners may not grant reasonable accommodations that would allow tenants to grow, use, otherwise possess, or distribute medical marijuana, even if in doing so such tenants are complying with state laws authorizing medical marijuana-related conduct."

This type of conflict between not only state and federal law but state and federal policy has led to litigation in other states that have legalized medical marijuana, and how this type of conflict might play out in Mass. remains an open question.

What about the dangers?

Putting aside the concerns most frequently voiced with respect to drugs in general, the possession and cultivation of the marijuana poses considerable dangers for condominium associations and landlords. One danger is property damage. Because marijuana requires water, heat and intense light, its cultivation creates increased risks of mold and fire hazards. Marijuana smoke can also travel to neighboring units. Secondhand marijuana smoke contains many harmful toxins and neighboring unit owners may also take offense to the noxious odors that growing marijuana can omit. Finally, security is a legitimate concern for many condominium associations and landlords as a 60-day supply of marijuana could make for a potential target for burglars.

What are the options?

Condominium associations and landlords could take a hardline position banning the use and/or cultivation of marijuana altogether. The legal ground, on which such a restriction would stand, however, is still shifting considerably. As explained above, marijuana is still a prohibited drug under federal law, which contains no medical exemption. As such, condominium associations and landlords could argue the law only protects individuals from state prosecution for possession and use of the drug - that it doesn't regulate the actions of private entities nor overrule their drug policies. Several courts in other states with medical marijuana laws have adopted precisely such reasoning in the employment context, allowing employers to fire, or otherwise not accommodate, employees using medical marijuana.

Whether Mass. courts will adopt this rationale in the housing context remains an open question. Short of adopting a bright-line rule that could make a condominium association or landlord the test case, several lower risk options exist. One possibility is to treat medical marijuana accommodation requests the same way condominium associations and landlords treat accommodation requests made under the Fair Housing Act, which requires a good faith effort to identify an accommodation that meets the needs of the resident seeking it without unduly burdening the community or harming other residents.

Such an approach would include a thoughtful and balanced evaluation process, considering the legitimate needs of the patient as well as the legitimate concerns of other unit owners. This evaluation process might include verifying the patient's need for medical marijuana through documentation from the prescribing physician, as well as inquiring whether there are any other drugs that could provide comparable relief. If the evidence indicates that marijuana is the only appropriate drug, a condominium association or landlord could request that the patient mitigate the

effect of his or her smoking through installing a smoke filtration system or consuming the marijuana through means other than smoking it.

While a unit owner or tenant denied accommodation through this process might still bring suit, if the association or landlord closely follows its duly adopted procedures, its exposure to liability would be significantly diminished.

With dispensaries soon to open and licensing processes revamping, there is little doubt that medical marijuana will be a fixture in Mass. Unit owners and tenants, however, will continue to call for reform to address their concerns, so condominium associations and landlords need to understand the options available to them. The current case law in Massachusetts is ambiguous as to whether a bright-line restriction against medical marijuana use and/or cultivation would stand if challenged. In light of this uncertainty, condominium associations and landlords should stay apprised of the changing legal landscape and adopt reasonable rules to accommodate medical marijuana use. Such new medical marijuana rules should accommodate legitimate medical use by balancing it against the concerns of other unit owner's concerns about second hand smoke and presence of drugs close by.

Howard Goldman is the founding partner of the law firm of Goldman & Pease LLC, Needham, Mass.