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Marijuana - Growing pains in Massachusetts! A legal update for property owners and managers - by Frank Flynn

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Last September, a Springfield, Mass. man was arrested in a big drug bust -- police reportedly seized 117 pounds of marijuana from his home-grow apartment operation. Two months later, in November 2016, Massachusetts voters approved Ballot Question 4, legalizing the recreational use and home growing of marijuana for personal use. The new law does not allow anything like the Springfield home-grow apartment operation. Legal sales of marijuana will be limited to retail marijuana dispensaries (pot shops) to be licensed by the Commonwealth beginning in July, 2018. Under the new law, persons 21 or over may possess up to 10 ounces of marijuana in their primary residence; a person may cultivate up to 6 marijuana plants for personal use, and up to 12 plants per household are allowed if more than one adult lives on the premises. Outside of a residence, adults 21 or over can possess up to 1 ounce of marijuana. Sales of marijuana are restricted to approved marijuana dispensaries, which are yet to be licensed.

Yet many details of how the law will work are still “hazy”. It seems that the new marijuana law is undergoing growing pains: the Massachusetts legislature is right now at work considering bills regulating implementation of growing and retail sales under the new law, including how heavily retail operations are to be taxed to fund regulation of the new marijuana industry and the ability of municipalities to prohibit pot shops.

For owners and managers of federal assisted multifamily developments, commercial properties, and condominium associations, it is important to know that they may still impose certain restrictions on the recreational use and cultivation of marijuana. At the least, they need to take into consideration various concerns in this new legal environment.

Multifamily residential properties. The new Massachusetts law raises potentially confusing issues of federal versus states regulation of marijuana. Under federal law, the possession and use of marijuana is still a crime. HUD regulations allow owners and managers to enforce prohibitions on marijuana possession, use and distribution on federally assisted properties. This includes medical marijuana. Under the new Massachusetts marijuana law, even in market rate rental properties the new law includes provisions explicitly allowing owners and managers to restrict tenants’ smoking

and cultivation of marijuana under a lease agreement. So the new law does not give residential tenants the right to light up and let a thousand plants bloom. Prohibiting the consumption of marijuana by other than smoking on the property (such as edible marijuana) where the tenant resides may be a trickier issue requiring legal analysis. We have assisted many residential properties with lease revisions and marijuana policies.

Commercial properties. In commercial properties, the use or cultivation of marijuana raises additional, special considerations unique to commercial leasing in office buildings, retail spaces, shopping centers, and industrial spaces. Use restrictions in commercial leases may prohibit smoking in the leased space, and if so may define smoking broadly to include the smoking of marijuana in addition to tobacco. Lease provisions requiring the commercial tenant to be in compliance with all laws can specifically include compliance with federal and state illegal drug laws.

Leasing space to a licensed marijuana dispensary raises multiple special considerations that owners and managers should take into account: municipal zoning laws; impacts on neighboring businesses and local residents (for instance, a nearby school or a subsidized housing development); and even potential landlord liability may arise under federal civil asset forfeiture laws. Federal agents' seizure of personal or real property tied to illegal drugs have included marijuana in states that have legalized marijuana. Also, commercial landlords may face liability due to security issues, particularly in the case of marijuana dispensaries that are cash-only businesses. We have begun to assist commercial landlords with creating stronger commercial lease provisions to protect against these concerns.

Condominium Associations. Condominium associations are increasingly voting on non-smoking amendments to their condominium documents, and such amendments may define non-smoking to include marijuana. Condo associations have great latitude to develop and enforce no-smoking restrictions (including marijuana restrictions), so long as they obtain the proper required vote of unit owners to impose such restrictions on the use of units, and then uniformly enforce the restrictions. We have assisted many condo associations and management companies with these issues, too.

Owners and managers of properties should consider developing a marijuana policy, and the policy should be uniformly enforced to avoid claims of discrimination. Obtaining legal advice, drafting of policies, and review of existing policies should be by knowledgeable, experienced legal counsel, such as the attorneys at Flynn Law Group.

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