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Delving into the weeds of the Mass. recreational marijuana law

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In November of 2016, Massachusetts and Maine voters approved the recreational use of marijuana. They join Alaska, California, Colorado, Nevada, Oregon and Washington in permitting the recreational use of pot. Lawmakers in neighboring New Hampshire, Rhode Island, and Vermont are considering doing the same. In addition, 28 states and the District of Columbia allow some use of marijuana for medical purposes. While the liberalization of marijuana laws seems to be taking hold in many states, the cultivation, sale, and use of marijuana remain illegal under federal law. Moreover, the Trump administration is signaling plans to enforce federal drug laws more strictly, a reversal from the Obama administration, which largely tolerated marijuana industries in states where voters had approved it. This conflict between federal and state laws creates a hazy situation for all, including condominium associations and property managers.

Now that it is legal for adult residents in Massachusetts and Maine to grow their own pot, what are condominium boards and property managers to do? Here are just a few of the issues that have come up in my practice:

- Can condominiums ban the cultivation, use, or possession of pot?
- Do existing smoking bans cover pot?
- If there is no smoking ban in place, can a condominium control marijuana smoking under an existing nuisance

provision contained in the condominium documents?

- What are the casualty risks that result from the cultivation of marijuana plants?
- Will existing insurance policies cover damage related to the cultivation of marijuana?
- Must a condominium allow the use of medical marijuana as a reasonable accommodation?

MARIJUANA BANS IN COMMUNITIES

How are condominium trustees and managers to protect themselves and the associations they represent? First, propose a ban on the cultivation and smoking of marijuana in the units. The Massachusetts recreational marijuana law states that it “shall not be construed to . . . prevent a person from prohibiting or otherwise regulating the consumption, display, production, processing, manufacture or sale of marijuana and marijuana accessories on or in property the person owns, occupies or manages, except that a lease agreement shall not prohibit a tenant from consuming marijuana by means other than smoking on or in property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation.” The quoted language makes it clear that Massachusetts condominiums may lawfully ban the cultivation, smoking, and distribution of marijuana. The sole exception is the consumption of marijuana by means other than smoking cannot be banned in Massachusetts rental dwellings. When proposing a marijuana policy, condominiums should consider limiting the pot ban to the cultivation and consumption of marijuana by smoking, while allowing the consumption of pot by other means, since smoking is the most objectionable use of pot because of drifting smoke and odors.

Since a ban on the cultivation and smoking of marijuana regulates the use of a unit, a pot ban in Massachusetts would require an amendment to the master deed or bylaws consented to by the unit owners. Such amendments typically require a supermajority of the unit owners to pass but, in light of the inevitable litigation that will likely result, a condominium that proposes a marijuana ban which fails to pass may be on stronger legal footing than one that fails to take any action at all.

Some may argue that a condominium with a marijuana ban may permissibly deny a reasonable accommodation request made under the federal Fair Housing or Americans with Disabilities Acts for the use of medical marijuana because the use of pot remains a federal offense. In the employment context, courts have denied medical marijuana as a reasonable accommodation. While it remains to be seen how the courts will treat such requests, the prudent course of action would be to adopt a policy that bans the cultivation, smoking, and distribution of marijuana, but expressly allows the consumption of marijuana by other means.

For those associations with an existing smoking ban, many such bans prohibit the smoking of other substances in addition to tobacco. A smoking ban should be reviewed and updated if the current ban does not extend to marijuana.

Finally, most condominium documents contain boilerplate nuisance provisions that prevent any use of the units which others might find disturbing or offensive. When all else fails, associations may rely on their nuisance provisions to curb the growing and smoking of marijuana in units.

NUISANCE AND INSURANCE CONSIDERATIONS

Aside from the issues that arise from pot smoking, condominiums should act quickly to ban the cultivation of marijuana. The hazards of an indoor growing operation extend beyond the skunk-like smell and can pose real dangers to all residents. Pot plants require large amounts of water, electricity, humidity, and heat. If a ban is not implemented, consider separately metering water and

utility usage so that all unit owners aren't subsidizing the growing operations of a few. The use of heat- and humidity-retaining insulation to enhance plant growth can increase the risk of fire and mold hazards. Insurance policies already exclude mold from coverage and, since the growing of pot is illegal under federal law, you can bet insurance companies will attempt to decline coverage for marijuana-related damages due to "illegal acts" of the occupants. Even if the "illegal acts" exclusion does not apply in states where pot is legal, the failure of growers to strictly comply with the state law's requirements could still be used by insurers to deny claims as "illegal acts." As with mold, you can expect to see litigation pertaining to marijuana-related claims and perhaps even a marijuana exclusion added to future insurance policies.

While we navigate this cloudy period, condominium boards and managers should consider a ban on the cultivation, smoking, and distribution of pot. A proactive board can minimize the nuisance factors associated with these activities, the potential costs of growing operations, and the hazards and insurance risks posed by such operations by acting quickly to propose such a ban.

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