MEDICAL MARIJUANA'S IMPACT ON MULTIFAMILY HOUSING

Introduction

In November 2014, Florida voters will determine whether medical marijuana will become legal for "qualifying patients" with a "debilitating medical condition", such as cancer, glaucoma, amyotrophic lateral sclerosis (ALS) (often referred to as "Lou Gehrig's Disease"), HIV/AIDS, and Parkinson's disease, among others. Florida Amendment 2 (2014). This vote will be on the ballot as Amendment 2 this year as a result of a public citizen's initiative, which, if passed, would result in an amendment to Florida's Constitution. There certainly appear to be valid arguments representing both sides of the debate on this vote; however, this article is limited to a discussion on the implications that such a constitutional amendment, if passed, may have on the multifamily apartment community industry.

Background

In 1970, Congress implemented the Controlled Substances Act (CSA), which classified all controlled substances into five (5) schedules based on the substances' potential for abuse and medicinal value. Marijuana was specified as a Schedule I drug, which is the most restricted schedule of substances and indicates that the drafters of the CSA determined that marijuana had a high potential for abuse with no accepted medical significance or use at the time of the CSA's passage. Accordingly, the manufacturing, distribution or possession of marijuana is currently a criminal offense under the CSA, 21 U.S.C. §812, and subjects an offender to criminal penalties, including criminal prosecution, arrest, fines and property forfeiture actions for knowingly violating such laws. 21 U.S.C. §§856(a) and 881(a)(7). However, since the CSA's implementation in 1970, twenty-two (22) states and the District of Columbia have passed state-specific laws that legalize the medical distribution and use of marijuana, commencing with California in 1996. This year, Florida is among four (4) states (in addition to New York, Ohio, and Pennsylvania) that have pending ballot voting or pending legislation to determine whether to legalize medical marijuana.

Based on the federal prohibition of marijuana through the CSA, when states subsequently enact laws legalizing the distribution and use of medical marijuana, it creates potential conflict with federal law making it extremely difficult on apartment community landlords to reconcile such conflict when confronting housing related issues and managing multifamily apartment communities. The myriad questions such landlords may have to confront would include, for example: What effect could such legislation have on Fair Housing laws and reasonable accommodation requests from disabled individuals deemed "qualified patients" entitled to use medical marijuana? What if you are a federally subsidized housing community? What if your apartment community has a "No Smoking" policy and/or a "No Smoking Addendum" to the Lease? If an employee (property manager, leasing consultant, maintenance supervisor, etc.) is a "qualified patient" permitted to use medical marijuana, is an employer required to accommodate the use of medical marijuana in the workplace or while the employee is on the job?

Medical Marijuana's Implication on Multifamily Housing

Under both the Federal Fair Housing Act and Florida's Fair Housing Act, a landlord is prohibited from discriminating in the sale or rental of housing based on an individual's disability

or handicap, among other protected classes.[1] Specifically relating to discrimination against a disabled individual, discrimination can include a "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B). Likewise, Florida's Fair Housing Act tracks the identical quoted language of the Federal Fair Housing Act. *See* Fla. Stat. 760.23(9)(b). Thus, when reading Florida's Fair Housing Act together with a potential new state law legalizing the use of medical marijuana for qualified patients, it may arguably provide medical marijuana patients with a claim that they should be granted a reasonable accommodation request to use marijuana on the premises and inside their dwelling units because it is legal under state law, and that denying such a request would constitute unlawful discrimination against a disabled individual under the Fair Housing Act.

In analyzing currently existing case law and relevant opinions from other jurisdictions on this issue, it appears that a federally subsidized housing community landlord would not violate Federal Fair Housing laws in prohibiting the use of medical marijuana on the premises, nor would such a landlord have a duty to accommodate a tenant's medical marijuana use on the premises. For example, in *Assenberg v. Anacortes Housing Authority*, 268 Fed. Appx. 643 (9th Cir. 2008), a tenant in Washington filed a federal lawsuit against a landlord claiming that the landlord violated the Federal Fair Housing Act and the American with Disabilities Act (ADA) by denying a reasonable accommodation request to allow the tenant to use medical marijuana on the premises pursuant to the state of Washington's Medical Use of Marijuana Act. The federal district court granted summary judgment in favor of the landlord, and the Ninth Circuit Court of Appeals affirmed the district court's finding that the landlord did not have a duty to accommodate the tenant's marijuana use notwithstanding that the tenant's use of marijuana on the premises was pursuant to the state's medical marijuana statute. The court further found that the landlord was entitled to evict the tenant based on the tenant's illegal drug use under federal law because requiring a federally subsidized housing community to violate federal laws is not considered a "reasonable accommodation" as contemplated by Fair Housing laws. *Id*. Moreover, the Federal Fair Housing Act currently provides that "handicap" does not include the "current, illegal use of or addiction to a controlled substance" under the CSA. 42 U.S.C. §3602(h).

In 2011, the Michigan Attorney General's Office issued an opinion with similar findings on this issue relevant to state law, therein basing such opinion on the specific language contained within "Michigan's Medical Marihuana Act" ("MMMA"). Mich. Comp. Laws Ann. §333.26421 – 333.26430. The MMMA was originated by a citizen initiative vote, like Florida's vote this year, which ultimately passed in Michigan to permit the use of medical marijuana by qualified patients within the state. The MMMA did not amend, supersede or repeal any existing state law otherwise making it unlawful for an individual to possess, use, sell, deliver or manufacture marijuana, but rather, simply permitted seriously ill individuals to use marijuana for its medical effects and avoid criminal prosecution under state law so long as such individuals comply with the procedures set forth in the MMMA. However, in analyzing the MMMA's impact on apartment communities in response to certain questions raised by a State Senator, the Attorney General opined that a landlord still maintains the right to prohibit the smoking of marijuana in

[1] In addition to disability or handicap, the Fair Housing Act further prohibits discrimination in the sale or rental of housing based on an individual's race, color, national origin, religion, gender or familial status. 42 U.S.C. §3604.

public areas within the apartment community in addition to prohibiting individuals from smoking marijuana in their specific dwelling units or other areas not open to the public. In support of his opinion, the Attorney General stated:

> Property owners may want to prohibit smoking marihuana or growing marihuana plants within their privately-owned facilities for a number of reasons. For example, as noted above all marihuana-related activity remains illegal under the Controlled Substances Act. *See* 21 USC 812(c), 823(f), and 844(a). The federal government remains free to enforce the criminal provisions of the Controlled Substances Act against Michigan citizens, regardless of whether they are registered patients or caregivers under the MMMA. Property owners who allow their properties to be used by patients or caregivers for the purposes of using or growing marihuana could be subject to prosecution, civil forfeiture, or other penalty under the Controlled Substances Act. *See* 21 USC 856(a) and 881(a)(7).
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> In addition, the smoking of marihuana or the possession of marihuana plants within a property may make other tenants or guests within a facility concerned for their own or their family's personal safety. Further, property owners may simply wish to respect the preferences or expectations of other guests or tenants within a facility. Marihuana smoke, like tobacco smoke, has a strong and distinctive odor, which may offend other persons using the facility or discourage future occupancy of the facility. *Honorable Rick Jones*, 2011 Mich. OAG No. 7261 (2011).

With respect to Fair Housing laws and Michigan's "Persons with Disabilities Civil Rights Act," the Attorney General further indicated that such laws do not prohibit a landlord from denying an accommodation to a disabled individual to smoke medical marijuana on the property because such a denial "would not be based on a patient's disability, but rather on the patient's decision to treat that condition with marihuana," and the MMA does not specifically require property owners to allow the use of medical marijuana on their properties. *Id.*

However, not all jurisdictions are in harmony with the above opinions. For example, Rhode Island has enacted a medical marijuana statute that explicitly provides that "*no* school, employer or *landlord may refuse to* enroll, employ or *lease to or otherwise penalize a person solely for his or her status as a [medical marijuana] cardholder.*" RI Gen Laws §21-28.6-4(b) (emphasis added). Thus, Rhode Island's laws on this subject expressly prohibit a landlord from taking adverse action (e.g., terminating a lease, filing eviction, refusing a rental application to lease, etc.) against tenants who are medical marijuana cardholders solely based on their status as a medical marijuana user. This type of language in a state statute can place a landlord (who is typically an innocent third party in these situations) in a precarious situation. As discussed by Michigan's Attorney General above, a state statute does not supersede or nullify the federal government's power to enforce criminal penalties or its ability to seize property through a forfeiture action from owners who knowingly violate federal law. *See also, Gonzales v. Raich*, 545 U.S. 1 (2007) (finding that under the U.S. Constitution's Supremacy Clause, U.S. Const. Art. VI, §2, the Federal CSA trumps California's state medical marijuana laws even though the patients' possession and use of marijuana in this case were in full compliance with California's medical marijuana laws).

In 2009, President Obama's Deputy Attorney General issued a memorandum to selected United States Attorneys to establish guidelines for federal prosecutors in states with medical marijuana laws. The memorandum provided that federal resources should not be focused on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," but also reinforced the Department's duty to continue prosecuting those who use such state laws as a mere pretext for the illegal use of marijuana. *See "Memorandum for Selected United States Attorneys" from David W. Ogden, Deputy Attorney General* (October 19, 2009).

While such memorandum may appear to offer some reprieve to an innocent medical marijuana user or apartment community landlord, it does not constitute legal authority upon which reliance can be grounded; and, consequently, the state legislature should pass legislation that provides guidance and protections to affected parties who are clearly striving to comply with state law. Specifically relevant to multifamily housing, the legislature should address concerns of property owners, medical marijuana users who rent property and other tenants of multifamily housing communities to address Fair Housing implications and provide safeguards against criminal and civil liability, including forfeiture actions, as Amendment 2 currently offers such guidance and protections to other affected parties. For example, the current draft of Florida's Amendment 2 includes a limitation stating that "nothing in this section shall require any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking medical marijuana in any public place." Thus, it appears that any proposed medical marijuana law would not require employers to allow the use of medical marijuana in the workplace and that medical marijuana use would be prohibited in a public place (which term is not currently defined in Amendment 2). Amendment 2 further provides protections to qualified patients, physicians, caregivers, and treatment centers to be free from criminal and civil liability so long as they comply with the law. Florida Amendment 2 (2014).

However, Amendment 2 is currently devoid of language providing safeguards for such property owners against potential forfeiture actions, addressing private property owners' rights, and/or offering guidance on Fair Housing implications to landlords renting to qualified patients who may submit an accommodation request to use marijuana on the premises. Today, the majority of apartment communities maintain an established "No Smoking" policy inside the apartment buildings and/or require all residents to sign a "No Smoking Addendum" so as to prevent disturbances, disruptions and complaints from neighboring residents about the smell of secondhand smoke and to prevent potential property damages (such as smell in carpet, carpet burns, smoke residue on walls, fire hazards, etc.). Many multifamily communities further maintain a strict "Drug Free / Crime Free" housing policy. Therefore, an innocent apartment community landlord should not be forced to speculate or haphazardly guess the legislative intent on this issue or subject itself to potentially defending or prosecuting expensive lawsuits for the judiciary to decide a landlord's and tenant's rights with respect to these issues.

If Amendment 2 passes, Florida should consider following the examples of Colorado, Michigan, New Mexico, Oregon, and Washington, among other states, which provide safe harbors in their statutes against state property forfeiture actions if property is possessed, owned

or used in connection with the lawful medical use of marijuana.[2] If Amendment 2 passes, Florida should also adopt language addressing Fair Housing concerns to landlords and tenants of multifamily communities, which could be supplemented by Florida's Department of Health adopting meaningful rules or policy statements that would assist in providing guidance to landlords and tenants. For example, Michigan's Department of Community Health has enacted administrative rules for the Michigan Medical Marijuana Program and further maintains a Multi-Housing Smoke-Free Apartments webinar on its website discussing the position that smoking medical marijuana in a smoke-free apartment community is not a "reasonable accommodation" if it results in exposure to other residents of secondhand marijuana smoke and other non-smoking methods of using marijuana are available to the tenant.[3]

Unfortunately, similar departments in some states publish statements that appear to be completely inconclusive and offer very little guidance or support, as exemplified by Nevada's Department of Health and Human Services' statement: "It is up to you to decide whether or not to tell your landlord that you are a patient in the [Nevada Medical Marijuana Program] NMMP. Nothing in NRS 453A specifically addresses whether or not you can be evicted because you are a patient in the NMMP, even if you have only the amount of medical marijuana allowed by law. Nothing in NMMP laws specifically addresses whether or not a person can be an NMMP patient and live in subsidized housing. If you have questions about these important issues, the NMMP recommends you talk to an attorney to learn about your rights and protections." http://health.nv.gov/MedicalMarijuana_FAQ.htm. Florida should refrain from similar tactics and, instead, should take affirmative steps, through legislation or otherwise, to provide meaningful guidance and support to persons who may be affected by Amendment 2.

Conclusion

Accordingly, if Amendment 2 passes, due to the potential conflict with Federal laws and Fair Housing laws as discussed herein, it would appear that this issue presents fertile ground for litigation. Consequently, Florida's lawmakers and representatives of its Department of Health should consider the impact such medical marijuana laws may have on multifamily apartment communities and should adopt clear statutory language and meaningful guidance to Florida landlords and tenants alike as to the property rights and Fair Housing concerns raised herein, which may assist in avoiding unnecessary litigation and unintended consequences of medical marijuana laws. In addition, any persons who may be impacted by Amendment 2 should strive to stay updated and educate themselves as much as possible on this matter.

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[2] Colo. Const. Art. XVIII, §14(2)(e); Mich. Comp. Laws Ann. §333.26424(4)(h); N.M. Stat. Ann. §26-2B-4(G); Or. Rev. Stat. §475.323(2); Wash. Rev. Code Ann. §69.51A.050(1).

[3] The webinar contains a caveat that reasonable accommodation requests from medical marijuana users has risk management and legal implications for multi-unit property owners and that advice of legal counsel is well advised. http://www.michigan.gov/documents/mdch/Making_Multi-Unit_Housing_Smoke_Free2.24.11_346623_7.pdf