

Medical Marijuana Issues in Oregon Residential Real Estate (Part One)¹

By

Phillip C. Querin, QUERIN LAW, LLC

Website: www.q-law.com

Introduction. Realtors® involved in the sale or purchase of homes for their clients are understandably flummoxed by the new prescription drug *du jour*, medical marijuana. Why? Because, while Oregon permits the medical use of marijuana, the [Federal Controlled Substances Act, 21 U.S.C. § 801](#), et seq., says that it is illegal to manufacture, distribute, and possess marijuana, even when state law authorizes its use. Furthermore, here in Oregon, federal law technically *supersedes* state law, and since there is a direct conflict between them, the federal law, being more restrictive, prevails.²

So, assuming that a property owner is *legally* using and growing marijuana, what risks, precautions, tips, etc. are appropriate when listing the property? Same questions for buyers and buyer agents. The purpose of this article is to address these questions, with the *caveat* that this is still an emerging area of law and brokerage practice.

Background. One of the main fears of Realtors® is that since a person holding a medical marijuana card is presumptively undergoing some form of medical treatment, they are therefore entitled to protection under the [Fair Housing Act](#), the violation of which could result in charges of “discrimination” in certain circumstances.

The Fair Housing Act (“the Act”) was amended in 1988 to include two new protected classes: (a) Those persons with disabilities; and, (b) Those with children under the age of 18. It is the disability issue that gives concern about medical marijuana, since the Act requires that under certain circumstances, one with a disability³ can require that they be allowed a “reasonable accommodation.” A “reasonable accommodation” is an allowance, adjustment, or exception to an otherwise binding rule or regulation imposed by an employer or housing provider. Not all requests for an accommodation “must” be granted, but generally, if they are not illegal, dangerous, costly to the owner or landlord, and do not interfere with the peaceful enjoyment of others, they should be given due consideration.

In the context of medical marijuana, the argument is that since one with a physical or mental impairment has been prescribed the use of the drug, they should be permitted to use it for treatment purposes, notwithstanding private rules or regulations to the contrary. The failure to do so – under certain circumstances – i.e. where it is not costly or otherwise illegal or dangerous – can conceivably

¹ The opinions expressed in this article are mine alone, and are not intended as legal advice on the issue of medical marijuana.

² This is not to say that the Department of Justice regards marijuana use or cultivation, as a hanging offense. See discussion later in this article.

³ The [Americans with Disabilities Act or “ADA”](#) states: “An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.” The Fair Housing Act follows this definition as well.

result in legal liability. However, as discussed below, in my opinion, much of this concern is a tempest in a tea pot – *or a bong, if you will.*

Discussion. As noted above, marijuana is a controlled substance under Federal Law, but under Oregon law, its use, cultivation and sale, in limited quantities, are lawful with a medical marijuana card. The Oregon laws cover such things as grow-site registration; medical uses for marijuana; issuance of the identification card; and limitations on a cardholder’s immunity from criminal laws involving marijuana. For those interested, the specific Oregon statutes should be consulted [here](#) and the administrative rules [here](#). The Oregon Medical Marijuana Program (“OMMP”) is regulated by the Oregon Health Authority, whose website is found [here](#).

Federal Enforcement. On August 29, 2013, James M. Cole, Deputy Attorney General, issued a legal memo “for all United States Attorneys” titled “Guidance for Marijuana Enforcement,” which essentially says that as long as those states legally permitting marijuana use, cultivation and distribution have established rules in place to avoid abuse, the federal government will defer to those laws.

Attorney General Holder has also weighed in, as reported in various [news reports](#). Thus, it appears that, subject to certain exceptions,⁴ there will be no effort by the U.S. Department of Justice to seek out and charge violators of the federal Controlled Substances Act in those states where the medical or recreational use of marijuana are legal. Oregon is one of those states. Thus, since legal marijuana use and cultivation is permissible in Oregon, it appears that the federal government will be taking a *laissez-faire*, or hands off, approach toward enforcement. How long that will continue remains to be seen. However, for the present time, it appears to be the semi-official position of the U.S. Department of Justice.

Moreover, the federal government’s position goes beyond enforcement of the criminal statutes. It is also reflected in its interpretation of the federal fair housing laws. On January 20, 2011, the U.S. Department of Housing and Urban Development (“HUD”) issued a Memorandum, the subject of which was “Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing.” While the Memo was limited to federal public and assisted housing, it can be regarded as a helpful – though perhaps not a “final” resource – on the issue.⁵ It is very complete and helpful for all landlords. It can be found at [this link](#). Here is what the Memo directs:

Public housing agencies “...in states that have enacted laws legalizing the use of medical marijuana must therefore establish a standard and adopt written policy regarding whether or not to allow continued occupancy or assistance for residents who are medical marijuana users. The decision of whether or not to allow continued occupancy or assistance to medical marijuana users is the responsibility of PHAs, not of the Department.” [Emphasis added.]

⁴ Based upon a [USA Today report](#), the exceptions are: The distribution of marijuana to minors; Directing revenue from marijuana sales to gangs and cartels; Diverting marijuana from states where it is legal to other states where there are no laws allowing for marijuana use; Using legal sales as cover for trafficking operations; Using violence and or firearms in marijuana cultivation and distribution; Driving under the influence of marijuana; Growing marijuana on public lands; Possessing marijuana or using it on federal property.

⁵ However, note that Oregon has its own set of fair housing laws. I will not render a firm legal opinion on whether federal trumps state, but that is my inclination, *i.e. where the state law is more lenient, federal law prevails.*

Thus, it appears that HUD will not directly investigate such claims, leaving it up to public housing agencies on the local level. While HUD’s pronouncement is directed toward “public housing” it would be hard to believe that housing would be treated any differently. Oregon fair housing law is “substantially equivalent” to federal fair housing law. So, generally speaking, on the issue of medical marijuana, *as goes the federal law, so goes state law.*

This interpretation is supported by the 2010 case of [Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries](#), in which the Oregon Supreme Court held that employers do *not* have a legal duty to allow employees to use medical marijuana on the job. This case addressed many unanswered questions on the use of medical marijuana in Oregon, both from an employment and housing perspective. Additionally, a subsequent article [[found here](#)] by the [Fair Housing Council of Oregon](#) is helpful for landlords from the view of private fair housing enforcement. Additionally, the Oregon Bureau of Labor and Industries (“BOLI”), the agency enforcing fair housing claims, has expressly adopted the following [policy](#):

“Civil Rights Division will not investigate employment or housing claims of discrimination pertaining to the use of medical marijuana.” [Underscore mine.]

Thus, it appears that in Oregon, on both the federal and state levels, private owners and landlords have it within their control, and with little fear of fair housing/reasonable accommodation claims, to enact rules and regulations prohibiting the on-premises use of medical marijuana. However, here are some caveats:

- Any proscription should not be retroactive to persons or tenants holding legal medical marijuana cards who have already signed their rental agreements or lease;
- Just because someone is a medical marijuana card holder is not a basis to refuse them the right to rent or purchase a property;
- Each situation is different, and for that reason, legal advice should be sought before implementing anti-marijuana rules, or enforcing them against a particular individual.

Privacy Issues. Oregon administrative rule [333-008-0050 \(Confidentiality\)](#) provides that information relating to patients, their designated primary caregivers, growers, and grow site addresses are confidential and not subject to public disclosure. Exceptions are limited to: (a) Authorized employees of the Oregon Health Authority; (b) Authorized employees of state or local law enforcement agencies; and (c) Other persons [*such as, but not limited to, employers, lawyers, family members*] upon receipt of a properly executed release of information signed by the patient, the patient's parent or legal guardian, designated primary caregiver or grower.

The Oregon Medical Marijuana Program states that it follows all Department of Human Services (“HHS”) privacy policies under the Health Insurance Portability and Accountability Act (HIPAA), which applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA (the “covered entities”). See site [here](#).

Although HIPAA does not provide for a private cause of action by those persons aggrieved by a violation ([65 FR 82566](#)), Oregon state law very well may provide a remedy under various theories of tort liability, such as a real estate licensee’s breach of the fiduciary duties of loyalty, confidentiality, etc. Thus, while private owners and landlords may have a certain amount of leeway regarding the use, growing and

distribution of marijuana on their property, it does not mean that real estate brokers are free to disclose information to others concerning their clients' marijuana use.

Zoning and Local Issues. Medical marijuana facilities must be located on property zoned for commercial, industrial, mixed use or agriculture uses only. See, [OAR 333-0080-1110](#). The issue of whether a county or municipality believes a certain type of business should operate within one of these zones is a local government decision. On March 19, 2014, [Senate Bill 1531](#) was signed into law, giving local governments the ability to impose certain regulations and restrictions on the operation of medical marijuana dispensaries, including the ability to impose a moratorium for a period of time up until May 1, 2015. Here is a [current list](#) of those communities/counties that have imposed moratoria.

The Issues for Realtors®. For Realtors® representing sellers or buyers in transactions, the question is whether the use, or intended use, of property for the legal consumption, growing or distribution of marijuana poses a higher degree of risk than any other transaction. That is an issue we will ~~take~~ talk about in Part Two.

© 2014 QUERIN LAW, LLC

