

Medical Marijuana Issues in Oregon Residential Real Estate (Part Two)

By

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Background. This article is the second part of a two-part series for Realtors® on medical marijuana in Oregon. For those who did not read the first article, it can be found at [this link](#). The gist of Part One was my conclusion that both from a criminal and civil fair housing standpoint, it appears that medical marijuana is getting a pass by the enforcement agencies. My conclusion is based upon the following:

- **Federal Criminal Enforcement.** Based upon the August 29, 2013 memo from James M. Cole, Deputy Attorney General, which essentially says that as long as states that legally permit marijuana use¹, cultivation and distribution have established rules in place to avoid abuse, the federal government will defer to those state laws.
- **Federal Fair Housing Enforcement.** The federal government's *laissez-faire* 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" decision – on the issue how HUD would deal with private housing. Nonetheless, it is very complete and helpful for all private landlords. It can be found at [this link](#). I would find it hard to believe that private housing would be treated any differently, since the legal issues are the same. Oregon and federal fair housing laws are "substantially equivalent," so generally speaking, a violation of one, would constitute a violation of the other.
- **Oregon Fair Housing Enforcement.** The 2010 Oregon Supreme Court case of [Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries](#), held that employers do *not* have a legal duty to allow employees to use medical marijuana on the job. The case addressed many unanswered questions on the use of medical marijuana in Oregon, both from an employment and housing perspective. The [Fair Housing Council of Oregon](#) subsequently posted online its interpretation of the current status of Oregon law, titled "[Life after the Emerald Steel Employment Case](#)." The posting is useful for landlords in understanding the view of private fair housing enforcement in Oregon. Additionally, the [Civil Rights Division](#) of the Oregon Bureau of Labor and Industries ("BOLI"), the agency enforcing fair housing claims, has published the following policy: "*Civil Rights Division will not investigate employment or housing claims of discrimination pertaining to the use of medical marijuana.*" [*Underscore mine.*] [See link, here](#).

What Does This Mean For Home Sellers and Landlords? Many people are understandably flummoxed about what all this means. For example, if medical marijuana use, cultivation, and sale is illegal on the federal level, but legal on the state level, can Oregon landlords prohibit its use on site? Is it permissible for a real estate broker to decline to list a property they know to be a grow house by a card-carrying medical marijuana user? Can they be sued for discrimination?

¹ Medical or recreational.

My conclusions – which others are free to disagree with – are pretty straightforward and practical: **As long as federal law continues to treat all forms of marijuana as a controlled substance, it means there is little or no risk of civil enforcement of a violation of the state and federal fair housing laws, for discriminating against persons holding lawfully issued medical marijuana cards. Both the state and the federal regulators have said they are not going to investigate claims for violation of the fair housing laws relating to marijuana use.**²

This means that a landlord or property manager is within their legal rights to institute a “No Marijuana Policy” at their apartments. Same for condominium associations. While the holder of the medical marijuana card may jump up and down, threatening to file a complaint with some federal or state agency, Oregon, following the Steel Fabricators case, and the feds, following HUD and the DOJ memos, have said they are not going to enter the fray. Clearly, case law and/or new state or federal regulations could change all that – I’m limiting my opinion solely to the current state of the law.

Notwithstanding the hands-off policy under state and federal law, there still certain privacy issues under Oregon’s medical marijuana law and the Health Insurance Portability and Accountability Act (“HIPAA”). I addressed them in Part One, and will address their effects below. What follows below is my version of “Frequently Asked Questions” for landlords, property owners, managers, and real estate brokers.

Question: Is there anything “illegal” about a broker listing or selling a property that had a legal (i.e. card holder) grow operation?

Answer: No, there is nothing illegal in listing or selling such a property.

Question: What can I disclose to a prospective buyer asking whether the property was formerly a house used for legal medical marijuana consumption and/or growing?

Answer: Medical marijuana card issuance is confidential under Oregon Administrative Rule [333-008-0050 \(Confidentiality\)](#)³ and protected by HIPAA ([65 FR 82566](#)). So you don’t want to release that information unless you have the cardholder’s express written authorization.

² Note, there are some, including lawyers, that likely disagree with me. I will discuss later what I understand the more conservative legal view is.

³ Herewith is a portion of the administrative rule: (1) The Authority shall create and maintain either paper or computer data files of patients, designated primary caregivers, growers, and grow site addresses. The data files shall include all information collected on the application forms or equivalent information from other written documentation, plus a copy of OMMP registry identification cards, effective date, date of issue, and expiration date. Except as provided in section (2) of this rule, the names and identifying information of registry identification cardholders and the name and identifying information of a pending applicant for a card, a designated primary caregiver, a grower, and a marijuana grow site location, shall be confidential and not subject to public disclosure. (Emphasis added.)

Note, however, these laws only apply to the legal use medical marijuana – not the *illegal* use of marijuana. If the property was being used illegally for a grow operation, there is no prohibition about its disclosure – just make sure you know the answer in advance.

Question: But how can I find out? I always thought that we could not inquire as to the nature of a person’s handicap.

Answer: You are correct to a point. But I’ve already said that the state and feds have said quite clearly that they are not going to enforce perceived violations of the fair housing laws when related to the use of medical marijuana. So the real issue is whether you are asking them to violate their own right of *medical confidentiality* under state and federal law. I’m not sure I’ve got a very good answer to the problem. However, I suspect this issue may tend to resolve itself. If the house reeks of marijuana, the seller will certainly know it may become an issue, in which case, he or she will likely raise it. Once voluntarily raised, the confidentiality issue is waived and the problem goes away.

If the seller ignores what is obvious, then you have to decide how you want to proceed. Technically, it would probably be a violation to ask whether they are a cardholder. But remember, it is not the fact that they are a legal cardholder that is germane to the transaction, but whether, by growing marijuana, have they done damage to portions of the property due to excess moisture, mold and mildew lurking in the attic or elsewhere? In short, you should focus on the *physical condition* of the property, not the *medical condition* of the seller.

Question: What about the odor? Does it go away?

Answer: It is my understanding that the marijuana odor is not like cat urine – it can be removed. This is what I’ve been told by other brokers involved in property management. However, it certainly is an issue that each broker should become familiar with by checking with professional cleaning services. Moreover, brokers should encourage their buyers to do so as well.

Question: So what would a listing broker tell someone who suspected marijuana use and/or a grow operation at the property? If I know, I can’t lie to them.

Answer: How about the truth? “State and federal privacy laws prohibit me from personally identifying cardholders or their personal information.”⁴ You can sympathize, commiserate, and apologize, but you can’t disclose. Besides, if they are asking, there may be a reason, such as the odor. *If there’s smoke, there’s a toke.*⁵

Question: So if I know that the seller has used the home for the past few years as a legal medical marijuana grow operation, I can’t say anything? I’ve heard of complaints in neighborhoods where these operations exist, that cars come by at all hours of the day and night. Most buyers would be concerned about late night traffic and visitors after the sale of a known grow house.

⁴ Here is what Oregon Administrative Rule [333-008-0050 \(Confidentiality\)](#) says: “... the names and identifying information of registry identification cardholders and the name and identifying information of a pending applicant for a card, a designated primary caregiver, a grower, and a marijuana grow site location, shall be confidential and not subject to public disclosure.

⁵ No self-respecting article on marijuana would be complete without a pun....

Answer: I agree. If the prospective buyer wants to speak to neighbors about the issue of traffic and noise, he or she may do so. However, a bigger issue relates to a common problem of grow operations, legal or illegal: improperly venting vapors into the attic. Growers often don't want to advertise their operations, and accordingly use [hydroponics](#) to grow the marijuana plants. There have been anecdotal reports from brokers of dry rot and mold in these venting areas. If you are taking a listing where you suspect such activity, it would be prudent to see if the seller will agree to have the area professionally inspected before placing it on the market. It's far better to know of a potential problem in advance, than have it interrupt or kill a transaction ready to close.

Remember that your duty of confidentiality to your client, i.e. the seller, does not extend to matters *the nondisclosure of which would be fraudulent as to the buyer*.⁶ In addition, your statutory affirmative obligation of full disclosure extends to *all parties and their brokers*. It specifically includes the duty to "disclose material facts known by the seller's agent and not apparent or readily ascertainable to a party."⁷

So while you owe a privacy duty to your seller under state and federal laws privacy law, you have to balance that with your statutory duties of full disclosure as a real estate licensee. So while *the cause* of the moisture need not be disclosed – i.e. the owner being a medical marijuana cardholder - *the result*, i.e. potential moisture damage, may be something you will want to discuss with the buyer's agent. Of course, the best solution is to vet the issue before the property is listed, and hopefully, the seller will remedy it ahead of time. If he or she declines, you can decide your approach and discuss it with the seller. Lastly, speak to your managing principal broker about the issue, just to make sure he or she approves of your approach.

Question: I am in property management. Can my owner institute a "No Marijuana Policy"?

Answer. You should recommend that your owner talk to his or her own legal counsel. This article is not intended as legal advice. It is merely a discussion of the issues, and my opinions given as the author. With that disclaimer, I personally believe that instituting such a policy is a low-risk proposition. While a prospective renter may hold a medical marijuana card and claim a disability, both the feds and state have said they are not going to get involved.

However, a word of caution; no such policies should be made retroactive. They should only be prospective. It should not be applied to an existing tenant with a medical marijuana card who had no such notice of the policy at the commencement of their tenancy. This is not because of fair housing issues, but because under the landlord-tenant law, I believe a landlord would be hard-pressed to enforce such a policy when it was not a part of the original rental agreement.⁸

Question: What if there is no such policy and the renter discloses after taking possession that he or she wants to grow and sell pot with the proper cards. Can the manager say No?

Answer: In my opinion –Yes. The reason is that federal law says that marijuana is a controlled substance. Here is how I believe the issue would play out: The manager refuses and the tenant demands

⁶ [ORS 696.800\(3\)](#).

⁷ [ORS 696.805\(2\)\(c\)](#).

⁸ ORS 90.262(2) provides that "If a rule or regulation adopted *after* the tenant enters into the rental agreement works a substantial modification of the bargain, it is not valid unless the tenant consents to it in writing."

the right to do so, saying the manager must make a “reasonable accommodation.” But the lease requires that the tenant obey all laws. Federal law trumps state law on this issue – and the feds have said they are not going to press it. This is why I believe a tenant would be hard-pressed to argue in favor of the legal right to smoke medical marijuana on the premises, since it is the equivalent of saying he or she has a right to violate federal law.

Although we haven’t discussed it, there is a real issue concerning the odor of burning marijuana. Some may like it, others may not. But one thing is sure: it has a very distinct smell. Many folks find the odor offensive. So by refusing the tenant the right to smoke marijuana on premises, the manager is also likely honoring the sensibilities of many other non-smoking tenants.

Question: Can I refuse to take a listing if I know the seller grew and/or used marijuana on the premises?

Answer: Yes, you can. But remember, you’re not selling the smoker, you’re selling the house. Assuming there are no collateral problems, such as traffic or moisture damage, it should not be much different than any other sale. Certainly, for those who have not listed or sold a home where marijuana was either used or cultivated, I would suggested getting help and advice from a broker who has. So rather than refusing to list a home where medical marijuana was used or grown, my suggestion is to take the listing and regard the experience as a “joint venture”!

Question: As a property manager, can I ask if a prospective tenant has a medical marijuana card? Can I refuse to rent to them if I learn they have a medical marijuana card?

Answer: Just because someone is a medical marijuana card holder is not a basis to refuse them the right to rent or purchase a property. You should not make possession of a medical marijuana card part of your tenant screening criteria. As discussed above, they have a right of confidentiality. This is why, in my opinion, it would be better to institute a “No Marijuana Policy” going forward, since then a prospective tenant would have advance notice that you prohibit the smoking and/or growing or sale of medical marijuana – even though it may be legal under Oregon law.

Question: What happens if Oregon law changes this November, and recreational marijuana use becomes legal? Will that change your opinions?

Answer: Actually, I believe that so long as someone is using marijuana recreationally, they are not a member of a protected class, and therefore cannot be “discriminated” against. It is just the same as cigarette smokers. But if the federal law changes to legalize marijuana, then the issue will likely be how the state and feds decide to treat card-holders under the fair housing laws.

Question: Is there a less “aggressive” way to deal with this issue for property managers, than risking – however remote – legal claims?

Answer: “No Smoking Policies,” are permitted under Oregon’s landlord-tenant laws. [ORS 90.220\(4\)](#) permits landlords to institute these policies so long as they comply with ORS 479.305(1) which provides that:

“...the rental agreement for a dwelling unit regulated under ORS chapter 90 must include a disclosure of the smoking policy for the premises on which the dwelling unit is located. The disclosure must state whether smoking is prohibited on the premises,

allowed on the entire premises or allowed in limited areas on the premises. If the smoking policy allows smoking in limited areas on the premises, the disclosure must identify the areas on the premises where smoking is allowed.”

Some lawyers are telling their HOA and property management clients that they could use this approach to ban the use of medical marijuana on site. I believe this is a tepid and incomplete response. First, it's one thing to dictate where folks may and may not smoke cigarettes, but it's another to try to regulate medical marijuana use by treating them all the same way. Secondly, although I've not researched the issue, I am reasonably certain that the legislative history of Oregon's no-smoking law was intended only to regulate cigarette smokers. Whether it could be legally enforced against marijuana smokers is problematic. Thirdly, the reason cigarette smokers can be “discriminated” against in the first place, is because they are not members of a protected class under the fair housing laws. Marijuana smokers *are* protected – it's just that the state and federal regulators are not going to do anything about it for the present time. Fourth, banning marijuana smoking through the use of a generic “No-Smoking” policy ignores the growing trend of putting marijuana into cookies and other edibles. The ban against cigarette smoking is due to the odor. It's not a ban against other tobacco products.

My belief is that the policies against marijuana are broader than just the odor. There are potential collateral issues: Marijuana can become a lifestyle; it can become a gateway drug; and it brings with it legal and perhaps illegal sales, which can be disruptive to other tenants or residents.

Accordingly, I believe the marijuana issue needs to be dealt head-on. If a landlord or manager wants to ban the “substance” regardless of whether it is consumed or inhaled, a more direct approach is better.

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