



Medical Marijuana: Do We Have To Allow It?

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Eighteen states have now legalized the use of medical marijuana, and two states, Colorado and Washington, have legalized the recreational use of marijuana. This has raised myriad issues for community associations, including how to limit or prohibit the use of medical and/or recreational marijuana, primarily in attached home communities, such as townhome and condominiums.

Some associations have responded by trying to limit the use via nuisance provisions in the declaration or by the adoption of rules by the associations. But, even if an Association has an outright prohibition on smoking in units generally, or on the use of marijuana in particular, in its declaration, that may not be the end of the story.

Both state and federal fair housing laws prohibit discrimination against persons with disabilities. These laws also require housing providers, which includes community associations, to make reasonable accommodations (i.e., changes, exceptions or adjustments to rules or policies) that are necessary to afford the disabled person an equal opportunity to use and enjoy his or her home.

Who is Disabled?

The fair housing laws define a person with a disability to include:

- Individuals with a physical or mental impairment that substantially limits one or more major life activities;
- Individuals who are regarded as having such an impairment; or
- Individuals with a record of such impairment.

The definition of disability has been broadly interpreted and includes, but is not limited to, such conditions as:

- Orthopedic, visual, speech and hearing impairments
- Cerebral palsy
- Autism
- Epilepsy
- Muscular dystrophy
- Multiple sclerosis
- Cancer
- Heart disease
- Diabetes
- HIV infection
- Emotional illness

Is a Reasonable Accommodation Required?

As discussed above, associations must grant disabled residents reasonable accommodations to afford the resident an equal use and enjoyment of his or her home. Sounds simple enough, but in application it is not always straightforward.

Is there a Disability?

Upon the request of a resident for a reasonable accommodation, the first determination that the association needs to make is whether the resident is disabled. In some cases, the disability may be obvious, such as in the case of a resident who is bound to a wheelchair. However, in many medical marijuana cases, the disability may not be obvious. For example, a person may have cancer, is undergoing chemotherapy and uses medical marijuana to combat the nausea caused by the chemotherapy. Or, an owner may be using medical marijuana to treat her glaucoma.

In such cases, if the disability is not obvious, the association can ask for support from the disabled person's doctor or care provider. While the association cannot directly ask what condition the person has, it is appropriate to ask for information that:

- Is needed to verify that the person is disabled as defined by the fair housing laws (in other words, that the person has a physical or mental impairment that substantially limits one or more major life activities);
- Describes the accommodation that is necessary; and
- Shows the relationship between the disability and the need for the accommodation

Is the Accommodation Reasonable?

Once it has been determined that the person is indeed disabled, either because the disability is obvious, or through information provided by the resident, the next step is for the association to determine whether the accommodation requested (i.e., the bending of the no-smoking covenant or the nuisance rule) is a reasonable one.

Establishing the relationship between the disability and the need for the accommodation is important. For example, if a resident has a heart condition, but there is no relationship between the use of medical marijuana and any alleviation and treatment of the heart condition, then the requested accommodation is not reasonable since it has no relevancy to the disability. On the other hand, if the resident has cancer and uses the medical marijuana to alleviate nausea caused by chemotherapy treatments, then there is a relationship between the disability and the accommodation requested.

But, that is not the end of the analysis. In considering a request from a resident to allow the smoking of medical marijuana in his or her unit, the association should also consider the interplay of federal law and the impact of the use on other residents, who are also entitled to the quiet enjoyment of their own homes.

In relation to federal law, the use of marijuana, for either medical or recreational use, is still illegal under federal law. The question then raised is whether an accommodation that involves breaking federal law is a reasonable request. The issue is far from being clearly settled. However, it is conceivable, given the number of states that have legalized medical marijuana and the federal government's stance to not strongly enforce the federal law; it's conceivable that courts will follow suit and will be determined that it is a reasonable accommodation despite the federal law supremacy issues.

Going on that assumption, the association should still consider the impact on other residents and take steps to ensure that the accommodation (i.e., the use of medical marijuana) by the disabled resident has the least impact as possible on other residents. In doing so, it is appropriate for the association to have an interactive dialogue with the disabled resident to make that determination. For example, instead of smoking the marijuana, could the resident use an edible form that would not have any external impact? If not, can negative air or HEPA filters be installed to lessen the smoke odors that may travel into other units? Can the resident agree to smoke only during certain times of the day when it is less likely that neighbors will be home or bothered by the smoke?

As with so many issues facing boards of directors on a day-to-day basis, automatically taking a negative or defensive position one way or the other is usually not the best approach. The primary practice pointer is for boards to be open to discussions, to be fair, reasonable and to plan ahead to address these issues.