Smoke-Free Environments Law Project

The Center for Social Gerontology, Inc.
2307 Shelby Avenue
Ann Arbor, Michigan 48103
Telephone 734 665-1126 Fax 734 665-2071
www.tcsg.org/sfelp/home.htm

Restricting the Use of Medical Marijuana in Multi-Unit Residential Settings: Legal and Practical Considerations

Clifford E. Douglas, J.D.

June 1, 2010

I. INTRODUCTION

Question: Do multi-unit residential property owners have the authority to prohibit the smoking of marijuana in their properties when the individual marijuana user is authorized by the state of Michigan to use it.

Answer: This analysis addresses this question with respect to two broad categories of multi-unit property ownership: 1) non-federally-subsidized, or market-rate, properties; and 2) federally-subsidized properties. Owners in both categories may prohibit the smoking of marijuana even when such use is approved by the state, but the distinction between the two categories is important because somewhat different rules apply.

1) Owners of market-rate, non-federally-subsidized multi-unit properties may institute comprehensive smoke-free policies that include a prohibition on the smoking of medical marijuana. The Michigan Medical Marihuana Act does not preempt property owners (or local governments) from instituting smoke-free policies that apply to the smoking of medically prescribed marijuana. Where such policies are implemented, some residents who use medically prescribed marijuana are likely to seek "reasonable accommodations" that enable them to use marijuana within their residence. Federal law classifies marijuana as a prohibited controlled substance and does not recognize disabilities in the context of medically-approved marijuana use, even if approved by a state. Housing owners must weigh such legal considerations when presented with requests that the use of medically prescribed marijuana be permitted in a residence on their property. When considering whether to grant such requests, it is advisable that owners consult with legal counsel to assist them in determining whether it would be "reasonable" to accommodate medical marijuana use in an individual unit in light of marijuana's status as a prohibited controlled substance under federal law. In addition, it would not be "reasonable" to accommodate such a request if it could potentially expose others to secondhand marijuana smoke.

2) Owners of federally-subsidized multi-unit properties may also institute comprehensive smoke-free policies that include a prohibition on the use of medical marijuana. Even in the absence of a smoke-free policy in a federally-subsidized property, both the applicable federal statutes and the policy of the U.S. Department of Housing and Urban Development prohibit the use of any form of medical marijuana in public housing and other HUD-assisted housing.

II. DISCUSSION

A. Michigan's Medical Marijuana Law

The Michigan Medical Marihuana Act (MMMA) was passed by a state referendum on November 4, 2008.[1] The vote margin was 63 percent to 37 percent. The Michigan Medical Marihuana program is administered by the Michigan Department of Community Health (MDCH). The law enables qualifying patients to obtain a physician's written certification and, upon successful application, to obtain a registry identification card that enables the patient lawfully to use medically prescribed marijuana.[2] As of March 2010, more than 21,000 applications for registry identification cards reportedly had been received by the state.

Section 7(a) of the MMMA states that, "The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." Section 7(b) prohibits the possession or medical use of marijuana in certain locations, including, among others:

- In a school bus
- On the grounds of a preschool or primary or secondary school
- In a correctional facility

Nor are persons permitted to smoke marijuana:

- On any form of public transportation
- In any public place (defined in MDCH's regulations, Rule 1(16), as, "a place open to the public")

Section 7(c)(2) further clarifies that the Act does not require "[a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana."

[1] The word *marijuana* has alternate spellings. Michigan's law employs the less commonly used spelling, in which an *h* appears instead of a *j*.

[2] MCL 333.26421 *et seq.*; *see also* MDCH's related regulations (R 333.101 *et seq.*).

The foregoing makes clear that medical marijuana may not be used in certain venues, but the MMMA is silent regarding smoking in residential settings.

B. Prohibiting the Smoking of Medical Marijuana in Market-Rate (Non-Federally-Subsidized) Multi-Unit Residential Properties

Owners of market-rate, or non-federally-subsidized, multi-unit residential properties may institute comprehensive smoke-free policies that include a prohibition on the smoking of medical marijuana. As a threshold matter, multi-unit residential property owners unquestionably have the legal authority to make their properties smoke-free with regard to the use of cigarettes, pipes and other smoking articles such as water pipes (hookahs). Michigan's Attorney General long ago determined that, under Michigan and federal law, a landlord may choose to rent only to non-smokers and may prohibit smoking in both common areas and individual units.[3] Moreover, it is long settled that there is no state or federal constitutional right to smoke.[4] As discussed in greater detail later in this section, it is also clear that the legal authority of multi-unit residential property owners extends to prohibiting the smoking of medically prescribed marijuana in individual units and common areas.

1. Does "Reasonable Accommodation" Apply to Medical Marijuana Use?

Where smoke-free policies are adopted by multi-unit residential property owners, some residents who are registered users of medical marijuana might seek to obtain "reasonable accommodations" under the federal Fair Housing Act[5] enabling them to use medically prescribed marijuana within their units based on a claim that their disability justifies use of medical marijuana in their residence. The Fair Housing Act defines a disabled (or "handicapped," in the language of the statute) person as one who has a physical or mental impairment that substantially limits one or more major life activities, who has a record of such impairment, or who is regarded as having such an impairment.[6] Major life activities include walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself.

At face value, some individuals who have qualified to use medically prescribed marijuana in Michigan would likely qualify as disabled under this definition. The MMMA requires that, as a defense to any prosecution involving marijuana, a medical marijuana user must demonstrate that, based on a full assessment of his or her medical history and current medical condition by a physician, "the patient is likely to receive therapeutic or palliative benefit from the medical use

[3] Mich. Op. Att'y Gen. 6719 (May 4, 1992); *see also* the MISmoke-free Apartment website, http://www.mismokefreeapartment.org.

[4] *See* Samantha Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke* (2005); *see also* National Multi-Housing Council, *No-Smoking Policies in Apartments* (February 1, 2008), http://www.tcsg.org/sfelp/S-F_NMHC.pdf.

[5] 42 U.S.C. §3601 *et seq*.

[6] 42 U.S.C. §3602(h).

of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition."[7] Such "debilitating medical conditions" are defined as including, for example, cancer, amyotrophic lateral sclerosis, agitation of Alzheimer's disease, severe and chronic pain, seizures, multiple sclerosis and other conditions that may qualify an individual as disabled.[8]

However, the Fair Housing Act states that a handicap "does not include current, illegal use of or addiction to a controlled substance" as defined in the federal Controlled Substances Act.[9] While the MMMA makes the use of medical marijuana lawful, the Controlled Substances Act prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions. By classifying marijuana as a "Schedule I" drug under the Controlled Substances Act, Congress rendered the judgment that marijuana has no recognized medical use.[10] It is a foundation of the American legal system, as set forth in the Supremacy Clause of the U.S. Constitution, that federal law supersedes state law where there is a direct conflict of laws.[11]

Thus, while the Fair Housing Act requires housing providers to make reasonable accommodations for persons with disabilities[12] – a reasonable accommodation being a change in rules, policies, practices, or services that enable a person with a disability to have an equal opportunity to use and enjoy a dwelling unit or common space – it is far from clear that a case brought under that federal civil rights law would withstand review by a court, given the dictates of the Controlled Substances Act and the qualified language of the Fair Housing Act itself. When such a case fails, the housing provider need not make the requested changes, and the resident must either accept the status quo or relocate.

[7] MCL 333.26428, Sec. 8(a)(1).

[8] MCL 333.26423, Sec. 3(a).

[9] 21 U.S.C. §802

[10] 21 U.S.C. §801 et seq. *See Gonzalez v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

[11] U.S. Constitution, Article VI, Paragraph 2.

[12] To prevail on a claim under 42 U.S.C. §3604(f)(3), a plaintiff must prove all of the following elements: (1) that the plaintiff or his associate is handicapped within the meaning of42 U.S.C. §3602(h); (2) that the defendant knew or should reasonably be expected to know of the handicap; (3) that accommodation of the handicap may be necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that defendant refused to make the requested accommodation.

2. Case Law from the Employment Context Offers Guidance

A very recent court decision may offer some guidance. In April 2010, the Oregon Supreme Court ruled that employers do not have to accommodate workers' medical marijuana use, even if such use takes place off the job.[13] The court determined that the employer acted lawfully when it fired a drill press operator after he disclosed that he was using marijuana off the job for a medical problem. The employee had, for many years, experienced anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which substantially limited his ability to eat. The employee had obtained a registry identification card under the Oregon Medical Marijuana Act after receiving the signed statement of a physician that he suffered from a "debilitating medical condition" that would be ameliorated by the medical use of marijuana. Two key issues reviewed by the court included: 1) whether Oregon law was trumped by federal law; and 2) whether the employer had a legal obligation to try to determine a reasonable accommodation for the employee's disability before firing him. On the first issue, the court found that the federal law's prohibition on all use of marijuana was sufficient to support the employer's decision to fire its employee. (The court's decision was narrow, in that it did not outlaw Oregon's medical marijuana law, but dealt specifically with the employment-related question.) On the second issue, the court held that the employer had no legal obligation to offer a reasonable accommodation at the request of the employee, since under federal law the employee was engaged in illegal drug use.

No comparable case involving housing, as opposed to employment, has been decided in the courts. Nonetheless, some direction can be taken from the Oregon case, although it is possible that other courts might rule differently. (The Oregon case was decided 5-2, with the dissenting judges filing an opinion that would have reached different conclusions.)

Consistent with the above, the U.S. Supreme Court's decision in the case of *Gonzalez v. Raich*, issued in June 2005, ruled that the Bush administration could block the backyard cultivation of marijuana for personal medicinal use, even in a state where the use of medical marijuana was allowed.[14] At issue was the power of the federal government to override state laws that permitted such use. The Court's decision underscored the position that federal anti-drug laws trump state laws that allow the use of medical marijuana.

3. Owners are Advised to Weigh the Legal Considerations When Presented with Requests for "Reasonable Accommodation"

A resident who is registered to use medical marijuana in Michigan (or any other state that makes such use lawful) and seeks a reasonable accommodation based on a disability, will doubtless cite state law as permitting such use. The property owner must balance the benefits of complying with federal law by not permitting the use of marijuana on the premises against the possibility

[13] *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, April 14, 2010, http://www.publications.ojd.state.or.us/S056265.htm.

[14] *Gonzalez v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

that taking that approach might trigger a legal claim that the owner has discriminated against the resident under state law. Thus, even before the Oregon employment case was decided, some lawyers had advised property owners to make "risk management decisions" about how to proceed.[15] Some have argued forcefully that "a total prohibition policy is legally defensible because marijuana, including MM [medical marijuana], remains illegal under federal law. If an activity is illegal, [the property owner] should be allowed to prohibit it entirely with no exceptions, and should not be required to condone a resident's illegal behavior. The illegality of MM under federal law is also the primary argument why [the property owner] shouldn't have to allow MM use as a reasonable accommodation under fair housing laws. In order for a resident to be granted a reasonable accommodation under fair housing laws, the resident must be disabled within the meaning of fair housing laws, must need the accommodation, and the accommodation must be reasonable. A resident's request for [the property owner] to be complicit in the resident breaking federal law is not reasonable."[16]

This viewpoint appears to animate an announcement by the Washington State Human Rights Commission that, based on legal cases involving medical marijuana, employment and housing, it will "decline to investigate any claims of discrimination involving the use of medical marijuana." (The commission notes that individuals are still at liberty to file complaints in state or federal court, if they wish.)[17]

Notwithstanding the court decisions noted above, the picture has in certain respects become more complex based on a guidance memorandum issued by the U.S. Department of Justice in October 2009.[18] The memorandum articulates a revised executive branch policy that strongly discourages federal prosecutors from taking legal action against "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." The Justice Department's guidance does not legalize medical marijuana, and the memorandum acknowledges that, "Of course, no State can authorize violations of federal law." Instead, the memorandum focuses on the question of potential medical marijuana prosecutions as a "resource allocation" issue, and directs that prosecutors' resources be spent on fighting illegal drug traffickers and disrupting illegal drug manufacturing and trafficking networks, rather than on prosecutions of individual users of legalized medical marijuana.

---

[15] Kathleen Belville, "Medical Marijuana Poses a Unique Dilemma for Landlords," *Real Town*, April 16, 2007, http://www.realtown.com/articles/view/medical-marijuana-poses-a-unique-dilemma-for-landlords-.

[16] Hopkins, Tschetter, Sulzer, "Has Your Medical Marijuana Policy Gone to Pot?" *Landlord News*, February 2010.

[17] Laura Lindstrand, Washington Human Rights Commission, *Washington Non-discrimination Laws and the Use of Medical Marijuana*, March 18, 2009, www.hum.wa.gov/Documents/Guidance/medical%20marijuana.doc.

[18] David W. Ogden, Deputy Attorney General, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009, http://blogs.usdoj.gov/blog/archives/192.

Still, given that, as the Justice Department memorandum says, "no State can authorize violations of federal law," it may remain "unlikely that a landlord would be expected to allow the violation of federal law on a rental property as a 'reasonable accommodation' for a disabled tenant," as noted by one legal observer.[19] Whether or not this observation turns out, in general, to be accurate, it is conceivable that some users of medical marijuana will seek reasonable accommodations with uncertain outcomes in the event new cases are brought before other courts.

4. <u>If an Accommodation is Granted, it Must Not Result in Potential Exposure of Others to Secondhand Marijuana Smoke</u>

Even if requested accommodations are granted as being reasonable in certain cases, such accommodations need not, and should not, result in exposure of other residents to secondhand marijuana smoke, for such an outcome should render such an accommodation *unreasonable*, perhaps especially (but not only) in those states that have adopted statewide smoke-free laws, reflecting the explicit policy of government to protect non-smokers against unwanted exposure to the harmful constituents of secondhand smoke.[20] Logically, the clear public health concern reflected in such state laws would support a recognition that public or private policies eliminating secondhand exposure to marijuana smoke are also in order.

A practical middle ground might be considered: If an accommodation is deemed warranted, it should be argued that such accommodation will only be reasonable if it completely avoids potential secondhand smoke exposure. Since ventilation systems and other stopgap measures have proved incapable of providing protection and are not legitimate options,[21] marijuana users might be advised to identify alternative, non-smoked forms of the drug that will provide the required therapeutic benefit. In such a case, it would be up to the individual and his or her prescribing physician to determine the most effective, non-smoked form of marijuana to be used in the treatment of the individual's illness in the event an accommodation is granted for the use of medical marijuana in a smoke-free multi-unit residential property. A variety of methods for ingesting, in lieu of smoking, marijuana or its medicinal compounds appear to exist. Without

[19] Kathleen Belville, "Medical Marijuana Poses a Unique Dilemma for Landlords," *Real Town*, April 16, 2007, http://www.realtown.com/articles/view/medical-marijuana-poses-a-unique-dilemma-for-landlords-.

[20] At this writing, 24 states, including Michigan, have adopted comprehensive smoke-free statutes, while another 14 have enacted laws eliminating smoking in selected public venues.

[21] U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General.* Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2006.

taking a position on the relative therapeutic effects or other medical (or other) considerations of such forms of delivery, it will simply be noted that this analysis has identified the following:[22]

- Capsules
- Vaporization
- Eating (e.g., brownies, flour, "cannabutter")
- Drinking (e.g., tea)
- Suppositories

5. The Silence of the Michigan Medical Marihuana Act Regarding Marijuana Use in Multi-Unit Residential Settings Leaves Local Governments and Property Owners Free to Restrict or Prohibit Marijuana Smoking in Such Settings

An additional issue that deserves recognition is the fact that the Michigan Medical Marihuana Act expressly forbids the use of medical marijuana in certain locations, but says nothing about its use in multi-unit residential settings. Property owners and residents, alike, may be reassured that this silence leaves both local governments and private citizens free to adopt and enforce policies that eliminate all smoking, including marijuana smoking, in such settings. With regard to local government authority to prohibit the smoking of marijuana in multi-unit residential settings, a comparison may be made with the application of the Michigan Public Health Code's "Clean Indoor Air Act" (CIAA) [23] to private workplaces. Before it was superseded by enactment of the Dr. Ron Davis Law on May 1, 2010,[24] the CIAA imposed certain limited restrictions on smoking in "public places." Like the Michigan Marihuana Act, the CIAA specifically did not cover certain venues. For example, the CIAA did not restrict smoking in restaurants, bars, private educational facilities after regularly scheduled school hours, and private, enclosed rooms or offices (except in health facilities) occupied exclusively by a smoker. It also made explicit that the restrictions on smoking did not apply to "a room, hall, or building used for a private function if the seating arrangements are under the control of the sponsor of the function and not under the control of the state or local government, or the owner or operator of the room, hall, or building." The CIAA was otherwise silent with regard to private workplaces, just as the Michigan Medical Marihuana Act, which specifically disallows the medical use of marijuana in certain venues, is silent regarding the medical use of marijuana in multi-unit residential settings.

---

[22] Michigan Medical Marijuana Association, *Methods of Ingestion*, http://www.michiganmedicalmarijuana.org/index.php?/page/articles/health/ingestion-methods; *MAPS, MAPS/CaNORML Vaporizer and Waterpipe Studies*, http://www.maps.org/mmj/vaporizer.html.

[23] MCL 333.2401 *et seq*.

[24] The "Dr. Ron Davis Law" requires restaurants, bars, and virtually all public and private workplaces to be smoke-free. While the new law supersedes the old Clean Indoor Air Act, the legal precedent discussed here still stands.

When a local smoke-free measure was enacted in northern Michigan and then challenged in the case of *McNeil v Charlevoix Co.*,[25] the plaintiffs argued that a county and a multi-county health department were preempted by the CIAA from, among other things, mandating the elimination of smoking in all enclosed areas of private workplaces. The Michigan Supreme Court upheld lower court rulings, which found that state law did not preempt the adoption and enforcement of such restrictions. The fact that state law was silent on the subject of smoking in private workplaces did not mean that the state legislature had determined that smoking could not be prohibited in such locations.[26]

The *McNeil* case did not consider whether private workplace smoke-free policies could be adopted, because there was no question that owners and employers had such authority and the plaintiffs did not even raise the question. Similarly, policies prohibiting the smoking of medical marijuana as part of a broader smoke-free policy can be adopted in multi-unit housing. The distinction is that a smoker of tobacco clearly cannot claim a disability related to such use – no law, state or federal, permits such a disability claim[27] – and therefore cannot seek an accommodation related to such use. Under the Michigan Marihuana Act, a user of medical marijuana might attempt to make such a claim, as discussed earlier in this memorandum.

C. Prohibiting the Smoking of Medical Marijuana in Federally-Subsidized Housing

Public housing authorities (PHAs) and other owners of federally-subsidized, low-income housing (sometimes referred to as "Section 8 housing" in reference to a provision of the Fair Housing Act) have the same authority to ban or otherwise restrict smoking as do owners of market-rate properties, according to the U.S. Department of Housing and Urban Development (HUD).[28] While HUD has not issued a national policy with regard to smoking, on July 17, 2009, HUD's Office of Public and Indian Housing and its Office of Healthy Homes and Lead Hazard

[25] *McNeil v Charlevoix Co.*, 275 Mich. App. 686; 741 N.W.2d 27 (2007).

[26] In the context of multi-unit residential housing and medical marijuana use, precisely this approach was taken in the comprehensive smoke-free housing policy adopted on April 19, 2010, by the Sault Ste. Marie Tribe of Chippewa Indians Housing Authority. Finding that "HUD Notice PIH-2009-21 (HA), issued on July 17, 2009, strongly encourages Public and Tribal Housing Authorities to implement Smoke Free Policies in some or all their housing units," the policy prohibits the smoking of "cigarettes, cigars or other tobacco product, *marijuana*, or any illegal substance that produces smoke" (emphasis added).

[27] *See, e.g.*, Americans with Disabilities Act, §12201(b): "Nothing in this chapter [i.e., the ADA] shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter."

[28] Letter from Sheila Walker, Chief Counsel, U.S. Department of Housing and Urban Development, Detroit Field Office (July 18, 2003), http://www.mismokefreeapartment.org/hudletter.pdf).

Control issued a formal notice to PHAs strongly encouraging them to implement non-smoking policies in some or all their public housing units, as long as those policies are consistent with applicable state and local laws.[29] Where PHAs or owners seek to make their federally-subsidized residential properties smoke-free, however, they must grandfather in (exempt) units occupied by smoking residents until lease renewal or until such time as adequate notice of the change is given.[30]

On the question of whether medical marijuana – in any form – may be used, however, both federal law and policy are unequivocal: Even in the absence of a smoke-free policy in federally-subsidized housing, both the applicable federal statute and the written policy of the U.S. Department of Housing and Urban Development prohibit the use of medical marijuana anywhere on the premises.

HUD's general counsel issued a legal memorandum titled, "Medical use of marijuana in public housing" in 1999.[31] The memorandum, which reflects HUD's current policy on this issue, "conclude[s] that State laws purporting to legalize medical marijuana directly conflict with the admission and occupancy requirements of the Quality Housing and Work Responsibility Act of 1998 ('Public Housing Reform Act') and are thus subject to preemption." It states further: "To the degree that a PHA may look to these State [medical marijuana] laws for authorization to admit families with a member who is using medical marijuana on the grounds that under State law the use of medical marijuana is not the illegal use of a controlled substance, we believe that the PHA would not be in compliance with section 576 [of the Public Housing Reform Act, governing the screening of applicants for federally-assisted housing]."[32] In short, medical marijuana may not be used in federally-subsidized housing.

---

[29] HUD Notice PIH-2009-21 (HA), July 17, 2009, http://www.hud.gov/offices/pih/publications/notices/09/pih2009-21.pdf ("This notice strongly encourages Public Housing Authorities (PHAs) to implement non-smoking policies in some or all of their public housing units. … PHAs are permitted and strongly encouraged to implement a non-smoking policy at their discretion, subject to state and local law."). *See also* National Multi-Housing Council, *No-Smoking Policies in Apartments* (February 1, 2008), http://www.tcsg.org/sfelp/S-F_NMHC.pdf.

[30] *A Smoke-Free Apartment Policy is Legal and Protects Health While Saving Money*," http://www.tcsg.org/sfelp/SFAptPolicy.pdf.

[31] Memorandum from Gail W. Laster, General Counsel, U.S. Department of Housing and Urban Development, September 24, 1999.

[32] *See also* HUD regulations at 24 C.F.R. § 5.854(b)(1) (advising that federally-assisted housing "must establish standards that prohibit admission of a household to federally assisted housing if: (1) You determine that any household member is currently engaging in illegal use of a drug"); 24 C.F.R. § 960.204(2)(i) ("The PHA must establish standards that prohibit admission of a household to the PHA's public housing program if: (i) The PHA determines that any household member is currently engaging in illegal use of a drug"); other applicable federal statutes, *e.g.*, 42

In addition, as discussed in the previous section of this memorandum, the federal Controlled Substances Act's legal superiority over state law, combined with the qualified language of the federal Fair Housing Act, makes it unlikely that property owners will be found legally obligated to try to determine reasonable accommodations for residents who use medical marijuana, even if such use is lawful under state law. Underscoring the importance of the legal superiority of federal law, some universities that are in states permitting such use and that receive federal funding have prohibited the use of medical marijuana. For example, the University of Montana announced recently that marijuana is not allowed on campus even if a student is registered by the state as a medical marijuana user. The university adopted the policy because of concern that a failure to adhere to federal regulations prohibiting the use of marijuana would jeopardize its receipt of federal funding. Federal law requires institutions receiving federal funds to maintain drug-free campuses and workplaces. The university's chief counsel was quoted as saying, "We're not unsympathetic to the medical conditions of [medical marijuana users], but we don't have the authority to do anything about it."[33]

D. Conclusion

In light of the clear restrictions set forth in the federal Controlled Substances Act and federal Fair Housing Act, as well as the related rules and policies adopted in support or in interpretation of those statutes, multi-unit residential property owners are not legally obligated to permit the use of medical marijuana in individual units, even in jurisdictions such as Michigan in which use of medical marijuana is permitted by state law. This is particularly clear in federally-subsidized housing. On a practical level, given the position articulated recently by the U.S. Department of Justice and other considerations discussed in this memorandum, it appears that property owners may, if they choose, exercise discretion as to whether to permit the use of non-smoked forms of the drug in individual units for purposes of accommodating a resident's disability while protecting other residents from secondhand smoke exposure.

U.S.C. § 1437d(1)(6) (requiring public housing leases to state that any drug-related criminal activity during the lease term shall be grounds for lease termination); 42 U.S.C. § 13661(b)(1)(A) (prohibiting public housing owners from admitting users of illegal drugs); and 42 U.S.C. § 1437a(b)(9) (defining "drug-related criminal activity" to include illegal manufacture, use or possession of a controlled substance as defined by the Controlled Substances Act); *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (unpublished decision), *aff'd* 268 Fed.Appx. 643 (9th Cir.2008) (unpublished decision), *cert. denied* 129 S.Ct. 104 (2008) (housing authority not required to make reasonable accommodation to allow Section 8 tenant to use medical marijuana pursuant to Washington State law; housing authority had no duty to accommodate illegal drug user because "reasonable accommodations do not include requiring [the housing authority] to tolerate illegal drug use or risk losing HUD funding for doing so").

[33] Chelsi Moy, "UM Prohibits Medical Marijuana on Campus for Fear of Losing Federal Funds," *The Missoulian*, March 26, 2010, http://missoulian.com/news/local/article_fec6b1ca-3886-11df-af5a-001cc4c002e0.html.

Property owners must make their own risk-management judgments, advisedly with the assistance of legal counsel, in which they weigh the dictates of the law against the health and well-being of its residents and the possibility that a resident who is a medical marijuana user might bring a legal complaint claiming that a failure to grant their "reasonable accommodation" request constitutes discrimination under the law.

Finally, multi-unit residential property owners who have not already done so are strongly encouraged to adopt comprehensive smoke-free policies covering individual units and all common areas of their properties, and to make explicit that the policy applies to the smoking of marijuana. As noted previously, the Sault Ste. Marie Tribe of Chippewa Indians Housing Authority expressly prohibited the smoking of marijuana as part of the written smoke-free policy it adopted in April 2010. While, as a legal matter, it may not necessarily be essential to include language that makes clear the policy's application to marijuana smoking, doing so eliminates ambiguity and the chance of misinterpretation of the rules by residents. Thus, property owners who already have smoke-free policies in place are encouraged to add language to their existing policies that makes explicit that smoking of marijuana is prohibited. Owners adopting smoke-free policies for the first time are similarly encouraged to include such language.