

INSIDE THE LAW

Summer 2017

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DELVING INTO THE WEEDS OF THE MASSACHUSETTS RECREATIONAL MARIJUANA LAW

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In November of 2016, Massachusetts and Maine voters approved the recreational use of marijuana. They join Alaska, California, Colorado, Nevada, Oregon and Washington in permitting the recreational use of marijuana. Lawmakers in neighboring New Hampshire, Rhode Island, and Vermont are considering doing the same. In addition, 28 states and the District of Columbia allow some use of marijuana for medical purposes. While the liberalization of marijuana laws seems to be taking hold in many states, the cultivation, sale, and use of marijuana remain illegal under federal law. Moreover, the Trump administration is signaling plans to enforce federal drug laws more strictly, a reversal from the Obama administration, which largely tolerated marijuana industries in states where voters had approved it. This conflict between federal and state laws creates a hazy situation for all, including condominium associations and property managers.

Now that it is legal for adult residents in Massachusetts and Maine to grow their own pot, what are condominium boards and property managers to do? Here are just a few of the issues that have come up in my practice:

- Can condominiums ban the cultivation, use, or possession of pot?
- Do existing smoking bans cover pot?
- If there is no smoking ban in place, can a condominium control marijuana smoking under an existing nuisance provision contained in the condominium documents?
- What are the casualty risks that result from the cultivation of marijuana plants?
- Will existing insurance policies cover damage related to the cultivation of marijuana?
- Must a condominium allow the use of medical marijuana as a reasonable accommodation under ADA or FHA?

MARIJUANA BANS IN COMMUNITIES

How are condominium trustees and managers to protect themselves and the associations they represent? First, propose a ban on the cultivation and smoking of marijuana in the units. The Massachusetts recreational marijuana law states that it “shall not be construed to . . . prevent a person from prohibiting

or otherwise regulating the consumption, display, production, processing, manufacture or sale of marijuana and marijuana accessories on or in property the person owns, occupies or manages, except that a lease agreement shall not prohibit a tenant from consuming marijuana by means other than smoking on or in property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation.”¹ The quoted language makes it clear that Massachusetts condominiums may lawfully ban the cultivation, smoking, and distribution of marijuana. The sole exception is that consumption of marijuana by means other than smoking cannot be banned in Massachusetts rental dwellings. When proposing a marijuana policy, condominiums should consider limiting the pot ban to the cultivation and consumption of marijuana by smoking, while allowing the consumption of pot by other means, since smoking is the most objectionable use of pot because of drifting smoke and odors.

Since a ban on the cultivation and smoking of marijuana regulates the use of a unit, a pot ban by a condo association in Massachusetts would require an amendment to the master deed or bylaws, consented to by the unit owners. Such amendments typically require a supermajority of the unit owners to pass but, in light of the inevitable litigation that will likely result, a condominium that proposes a marijuana ban which fails to pass may be on stronger legal footing than one that fails to take any action at all.



Condominiums should consider limiting the pot ban to the cultivation and consumption of marijuana by smoking, while allowing the consumption of pot by other means.

Some may argue that a condominium with a marijuana ban may permissibly deny a reasonable accommodation request made under the federal Fair Housing or Americans with Disabilities Acts for the use of medical marijuana because the use of pot remains a federal offense. In the employment context, courts have denied medical marijuana as a reasonable accommodation. While it remains to be seen how the courts will treat such requests, the prudent course of action would be to adopt a policy that bans the cultivation, smoking, and distribution of marijuana, but expressly allows the consumption of marijuana by other means.

¹ *The Regulation and Taxation of Marijuana Act.*

For those associations with an existing smoking ban, many such bans prohibit the smoking of other substances in addition to tobacco. A smoking ban should be reviewed and updated if the current ban does not extend to marijuana.

Finally, most condominium documents contain boilerplate nuisance provisions that prevent any use of the units which others might find disturbing or offensive. When all else fails, associations may rely on their nuisance provisions to curb the growing and smoking of marijuana in units.

When all else fails, associations may rely on their nuisance provisions to curb the growing and smoking of marijuana in units.



NUISANCE AND INSURANCE CONSIDERATIONS

Aside from the issues that arise from pot smoking, condominiums should act quickly to ban the cultivation of marijuana. The hazards of an indoor growing operation extend beyond the skunk-like smell and can pose real dangers to all residents. Pot plants require large amounts of water, electricity, humidity, and heat. If a ban is not implemented, consider separately metering water and utility usage so that all unit owners aren't subsidizing the growing operations of a few. The use of heat- and humidity-retaining insulation to enhance plant growth can increase the risk of fire and mold hazards. Insurance policies already exclude mold from coverage and, since the growing of pot is illegal under federal law, you can bet insurance companies will attempt to decline coverage for marijuana-related damages due to "illegal acts" of the occupants. Even if the "illegal acts" exclusion does not apply in states where pot is legal, the failure of growers to strictly comply with the state law's requirements could still be used by insurers to deny claims as "illegal acts." As with mold, you can expect to see litigation pertaining to marijuana-related claims and perhaps even a marijuana exclusion added to future insurance policies.

While we navigate this cloudy period, condominium boards and managers should consider a ban on the cultivation, smoking, and distribution of pot. A proactive board can minimize the nuisance factors associated with these activities, the potential costs of growing operations, and the hazards and insurance risks posed by such operations by acting quickly to propose such a ban. **FT**

IN MASSACHUSETTS AND MAINE, IT IS LAWFUL* FOR ADULTS OVER THE AGE OF 21 TO:

- Possess up to one ounce of pot outside the home in Massachusetts and up to 2.5 ounces in Maine
- Possess up to 10 ounces of pot inside the home in Massachusetts and 2.5 ounces in Maine
- Cultivate up to six mature marijuana plants for personal use (Massachusetts and Maine)
- Cultivate up to 12 plants per household of two or more adults in Massachusetts
- Gift (but not sell) up to one ounce of pot in Massachusetts and up to 2.5 ounces in Maine

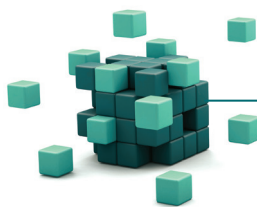
IN MASSACHUSETTS AND MAINE, IT IS UNLAWFUL TO:

- Sell any form of pot without a retail license
- Smoke or consume pot products in public places or where tobacco smoking is prohibited
- Possess, purchase, or grow pot if under the age of 21 (unless pursuant to a valid medical marijuana permit)
- Drive under the influence of marijuana
- Possess pot on school grounds or federal property (Massachusetts)
- Transport pot across state lines or send by U.S. mail (Massachusetts)
- Grow pot at home unless done discreetly and securely

Tenants of Massachusetts rental housing cannot grow or smoke pot if their landlord has a rule against it, but rental agreements cannot prohibit tenants from consuming marijuana in other forms such as edibles, oils, tinctures, vapors, or salves.



** under state law only*



FLETCHER TILTON BUILDING BLOCKS

Fifth in a series of articles about how to avoid construction litigation

TIPS TO AVOID CLAIMS UNDER THE MASSACHUSETTS HOME IMPROVEMENT CONTRACTOR LAW

It is fairly common for contractors to perform residential construction work without ever executing a contract with the homeowner. Sometimes, the parties “shake on it;” other times, the contractor simply provides the homeowner with a basic invoice identifying the scope of work and a total cost. Whether you are a residential contractor or a homeowner interested in making improvements to your property, you should be familiar with the laws governing home improvement contractors in Massachusetts, including Massachusetts General (“Mass. Gen.”) Laws Chapter 142A.

VERBAL AGREEMENTS OR SIMPLE INVOICE CONTRACTS LIKELY VIOLATE CHAPTER 142A.

In 1992, the Massachusetts legislature adopted the Home Improvement Contractor (“HIC”) Law, known as Chapter 142A of the Massachusetts General Laws. Even though the law was passed approximately 25 years ago, it is still common for contractors and homeowners to enter into agreements for home improvement work that blatantly violate Chapter 142A. By following a few basic rules with regard to written contracts, contractors may better protect themselves from claims and, importantly, create a road map for homeowners to better understand project scopes and time frames.

Here are some simple rules to live by:

The HIC Law provides a list of particular provisions that must be included in any home improvement contract for work valued in excess of \$1,000. Those requirements are paraphrased below:

1. The contract must be in writing.
2. The contract must include a clear description of all other documents, plans, drawings and/or specifications that are incorporated into the contract.
3. The contractor must include its HIC registration number, along with complete address information.
4. The date on which the parties signed the contract must be included. The signatures of all parties must be affixed to the contract.
5. The contract must state the date on which the work is scheduled to begin *and* the date on which the work is scheduled to be substantially completed.

6. The contractor must include a detailed description of the project work and the materials to be used.
7. The total contract price must be stated, along with a time schedule of payments. For example, the contractor might require a one-third deposit upon the parties' execution of the contract, plus additional payments for completion of future project tasks (e.g. rough framing and electrical, building inspection, finishes).
8. If any deposit is required under the contract before the work starts, the contractor cannot request a deposit greater than one-third of the total contract price.
9. The contractor cannot seek any final payment under the contract until the project work is "completed to the satisfaction of the parties."
10. The contractor must "inform the homeowner" of any permits required, that the contractor shall obtain necessary permits, and homeowners who secure their own permits will be excluded from the HIC guaranty fund, which may provide monetary protection (up to \$10,000) to homeowners who obtain unpaid judgments against registered contractors.
11. The contract must contain a clear and conspicuous notice stating:
 - a. that "all contractors and subcontractors must be registered by the [HIC] director and that any inquiries about a contractor or subcontractor relating to a registration should be directed to the [HIC] director";
 - b. that the homeowner has "three-day cancellation rights" (meaning that the homeowner has the right to cancel the contract within three days following its execution);
 - c. any warranties under the contract for the home improvement work;
 - d. that the homeowner has certain rights pursuant to Chapter 142A;
 - e. whether the contractor intends to record any liens against the project property; and
 - f. "Do not sign this contract if there are any blank statements" in ten-point or larger font size directly above the space provided for the parties' signatures.

See M.G.L. c. 142A, § 2.



Whether you are a residential contractor or a homeowner, you should be familiar with the laws governing home improvement contractors.

The foregoing contract requirements are straightforward and promote clear expectations between the contractor and homeowner before the commencement of a project. Moreover, if a contractor fails to satisfy these basic requirements, it may be liable not only for violations of the HIC Law, but also of the Massachusetts Consumer Protection Act, Mass. Gen. Laws Chapter 93A.

Violation of Chapter 142A could lead to multiple damages against the contractor.

Chapter 142A explicitly provides that a violation of the HIC Law constitutes an unfair or deceptive act under Chapter 93A, the violation of which may support a homeowner's claims for attorney's fees and multiple damages against a breaching contractor. In addition to the written contract requirements, the HIC Law also provides a list of "prohibited acts" that may serve the basis for a homeowner's Chapter 93A claim. Those prohibited acts include, without limitation, the following:

1. Operating without a certificate of registration issued by the Office of Consumer Affairs and Business Regulation.
2. Abandoning the project without justification or deviating from plans or specifications without the homeowner's consent.
3. Failing to credit the owner for payments made.
4. Making misrepresentations that caused or persuaded the homeowner to execute the contract for home improvements.
5. Violating the Massachusetts building code or applicable building laws.
6. Demanding or receiving payment in violation of the contract's time schedule.
7. Conducting a residential contracting business in any name other than the one in which the contractor is registered.

See M.G.L. c. 142A, § 17.

CONCLUSION

Home improvement contractors can avoid unnecessary risk by preparing model contracts that comply with Chapter 142A. Furthermore, the legislature has not only identified provisions that must be included in written contracts with homeowners, but also certain prohibited acts the violations of which could lead to multiple damages and attorneys' fee awards against contractors. By abiding by these rules that have been laid out for approximately 25 years, contractors will limit the types of claims brought against them and set better expectations for their home construction projects. **FT**

FirmNews



LAHTI, LAHTI & O'NEILL JOIN FLETCHER TILTON

We are delighted that Michael T. Lahti, Mia H. Lahti, and Stephen T. O'Neill have joined the Fletcher Tilton team, adding capacity to our robust Trust & Estate department. Their offices in Providence,

RI and New Bedford, MA have become two more Fletcher Tilton offices. This addition to the firm's resources follows closely on Elder Law attorneys Jack McNicholas and Mary Proulx joining the firm in the spring. These moves are part of the firm's overall strategy to serve clients throughout their lives, and to make sure the best resources are available for our clients when needed.

Attorney Michael T. Lahti, one of five Certified Elder Law Attorneys in Rhode Island and one of twenty-four Certified Elder Law Attorneys in Massachusetts, is licensed to practice in Massachusetts, Rhode Island and Florida. Michael, Mia and Steve focus on estate planning and elder law needs, such as:

- Minimizing estate taxes
- Passing on family legacies
- Creating wills, trusts, and advance health care directives
- Determining life sustaining wishes
- Avoiding probate
- Handling estate administration
- Special Needs Planning

Check our website this fall for Michael and Mia's estate planning seminars.



FLETCHER TILTON ATTORNEY PREVAILS IN NADEAU V. OFFICE OF MEDICAID

May 2017 – Fletcher Tilton collaborated with another firm to achieve an important victory for the elderly in Massachusetts, especially for those of modest means. Litigation attorney Patrick C. Tinsley is pleased to report a favorable decision from the Supreme Judicial Court, allowing applicants to remain eligible for long-term Medicaid benefits if they reside in a home that they deeded to an irrevocable trust. For details, visit: <http://www.mass.gov/courts/docs/sjc/reporter-of-decisions/new-opinions/12200.pdf>

**THE YMCA OF CENTRAL MASSACHUSETTS PRESENTS
STRENGTHENING FOUNDATIONS OF COMMUNITY AWARD
TO FLETCHER TILTON PC**



Attorney Sumner B. “Tony” Tilton; Paula Green, Chair of the Board of Directors for the YMCA of Central MA; Kathryn Hunter, President and CEO of the YMCA of Central MA; Attorney Mark L. Donahue (holding award plaque). Photography by John Lenis Photography of Worcester, MA.

At its 153rd Annual Meeting on April 26, 2017, Paula Green, Chair of the Board of Directors for the YMCA of Central Massachusetts, presented the Strengthening Foundations of Community Award to Fletcher Tilton PC.

Fletcher Tilton has served as counsel to the YMCA of Central MA since 1979.

**THE METROWEST YMCA PRESENTS COMMUNITY CHAMPION
AWARD TO FLETCHER TILTON PC**



Flanking honoree Faith Easter (holding the plaque) are (from left): Rick MacPherson, President and CEO of the MetroWest YMCA, attorneys Adamantia Giannakis, Nelson Santos and Sarah

Tricot, and Celia MacPherson. To Faith’s right are: attorney and co-honoree Peter Barbieri, attorneys Mary Attia and Kirk Carter.

The MetroWest YMCA held its Annual Dinner on Wednesday, May 17 where Fletcher Tilton received the Community Champion Award. This award is presented to businesses or organizations who have actively partnered with the Y to improve the lives of children and families in the MetroWest community through philanthropic and volunteer support.

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UPCOMING SEMINARS

THE VENTURE FORUM: LEGAL 101 FOR ENTREPRENEURS

Mon., Sept. 11 - 5:30-8 p.m.

Speakers: Attorneys Joseph Bartulis, Jr. Dennis Gorman, Bobby Hazelton & Jess Oyer

Location: Worcester Polytechnic Institute, Worcester, MA

ESTATE PLANNING FOR MA-FL SNOWBIRDS

Tue., Sept. 19 - 8:30-11:30 a.m.

Speaker: Attorney Frederick Misilo, Jr.

Location: Resort & Conference Center Hyannis, MA

SPECIAL NEEDS BRIEFING FOR CPAs AND CFPs

Tue., Oct 3 - 8-11:30 a.m.

Speakers: Attorney Frederick Misilo, Jr. and Theresa Varnet

Location: Sheraton Hotel & Conference Center, Framingham, MA

EMPLOYMENT LAW UPDATE

Thur., Oct. 5 - 8:30-10:30 a.m.

Speaker: Attorney Joseph Bartulis

Location: Verve Crowne Plaza, Natick, MA

MASSACHUSETTS ESTATE TAXES

Thur., Oct. 12 - 5:30-8 p.m.

Speaker: Attorney Richard Barry, Jr.

Location: Resort & Conference Center Hyannis, MA

EMPLOYMENT LAW UPDATE

Tue., Oct. 17 - 8:30-10:30 a.m.

Speaker: Attorney Joseph Bartulis, Jr.

Location: Cyprian Keyes, Boylston, MA

MASSACHUSETTS ESTATE TAXES

Wed., Oct. 18 - 5:30-8 p.m.

Speaker: Attorney Richard Barry, Jr.

Location: Ken's Steak House, Rte. 9, Framingham, MA

HOW TO ADMINISTER A SPECIAL NEEDS TRUST

Sat., Oct. 28 - 8 a.m.-1:30 p.m.

Speakers: Attorneys Frederick Misilo, Jr., Theresa Varnet & David Guarino

Location: Courtyard Marriott, Marlborough, MA

ESTATE PLANNING SEMINARS

With Attorney Michael Lahti

Tue. Sept. 26 - 10 a.m. & 1 p.m.

Location: Crowne Plaza Hotel, Warwick, RI

Tue. Oct. 17 - 10 a.m. & 1 p.m.

Location: Kirkbrae Country Club Lincoln, RI

Tue. Nov. 7 - 10 a.m. & 1 p.m.

Location: Lobster Pot Restaurant Bristol, RI

Tue. Nov. 14 - 10 a.m. & 1 p.m.

Location: Blackinton Inn Restaurant Attleboro, MA

**For details and
to register, visit
our website**

***FletcherTilton.com/
seminars-events***