

Medical Marihuana*¹ Trends for the Michigan Real Estate Professional

Hello Michigan Realtors® and welcome to 2018's first installment of the "Letter of the Law." I'm Brian Westrin and today we're going to look at a question that has been recurring in real estate markets around the country – can a real estate licensee safely work on a transaction that involves property used for the cultivation or sale of medical marihuana? Many Realtors® are facing this issue more and more, whether as an agent or a landlord. As you might imagine, the answer to this question doesn't boil down to a simple "yes" or "no." In fact, the analysis involves layers of conflicting governmental regulation, and frankly requires the possession of a crystal ball to make any definitive determination. Our purpose will be to look at the current landscape and identify the risks that real estate professionals face when working on these transactions.

The Landscape

The national climate for legalized marihuana for medical purposes has changed drastically over the last 10 years. Currently, there are 30 states and the District of Columbia that feature some kind of regulatory framework for allowing use and cultivation of medical marihuana. Michigan is one of those states. Michigan is also a state with a tentative ballot initiative underway to decriminalize recreational use of marihuana for individuals 21 years or older. Proponents of the measure are waiting to hear whether the issue will appear on the 2018 ballot.

Of course, this installment is not intended to weigh in favor or against the legalization of marihuana for recreational or medicinal purposes. Regardless of how you feel on a personal level, Realtors® should take great care when offering advice or working on a transaction where the real property's past, current, or intended use involves marihuana sale or cultivation. Based on the current trends, these types of real estate transactions may get more complicated for the buyer, seller, and others involved in the transaction.

State and Federal Divide

Irrespective of how the landscape for medical marihuana and/or recreational marihuana continues to develop in Michigan, the undeniable elephant in the room remains the Federal Government's strict treatment of marihuana as a schedule 1 controlled substance under the federal Controlled Substances Act. This schedule 1 designation is important as it does not acknowledge any medical use for marihuana and classifies it as a drug with a high probability of abuse – placing it in the same category as heroin and LSD. As such, the federal law on all marihuana is diametrically opposed to Michigan's allowance for regulated medical marihuana. This conflict between state and federal law has caused a fair amount of confusion and understandable apprehension within the real estate industry.

¹ Note that this is the statutory spelling in the Michigan Medical Marihuana Act, MCL [333.26421](#). For consistency and statutory reference, it will be used throughout. The authors understand that the common mainstream spelling is Marijuana.

In the last few months, we have seen many (if not all) title and financial institutions, along with their respective underwriters, issue notices indicating an unwillingness to perform closing, title insurance or lending services for property used or intended to be used to cultivate or sell marijuana. This decision appears to have been triggered in large part by a U.S. Treasury Department advisory bulletin that came out in August of 2017. In that bulletin, the government made clear that financial institutions are required to file a suspicious activity report if they suspect that one of their transactions involved funds derived from illegal activity. While title companies and real estate brokers are not similarly required to file such reports, the government indicated that they are “encouraged” to do so.

There is also a concern on the part of many title companies and financial institutions that any involvement in the closing of a transaction of real property used for the cultivation or sale of marijuana may be viewed as aiding and abetting a criminal drug enterprise and/or money laundering. This concern related to aiding and abetting is compounded by the fact that in January of 2018, there was a significant pronouncement from the United States Justice Department that the previous federal policy of relative non-interference with state marijuana law enforcement has been reversed. As such, there will likely be a period of increased uncertainty as to how federal prosecutors will direct enforcement efforts in those states with some form of legalized marijuana use and cultivation. Understandably, this potential sea change in federal enforcement has triggered conservative and risk-averse positions by title companies and financial institutions.

What Does it Mean For You?

The positions being adopted by title companies and financial institutions create important considerations for Realtors®. In many ways it shifts us back to the question posed at the outset of this video – can a real estate licensee safely work on a transaction that involves property intended to be used for the cultivation or sale of medical marijuana? The answer remains a murky one. While the federal government does not require real estate licensees to file suspicious activity reports, they are specifically “encouraged” to do so. Taking the legitimate concerns raised above to their logical conclusion, a real estate licensee representing a buyer or seller of real property used for the cultivation or sale of regulated marijuana could arguably be subject to the same type of federal scrutiny. As it stands, the scope of enforcement efforts remains a large unknown. Of course, even if pursuit of a Realtor® involved in such a transaction may seem somewhat unlikely, should it occur, the cost of defending a federal criminal prosecution is always very costly both in terms of money and reputation.

Even with a crystal ball informing a Realtor® that he or she could confidently represent a client in these types of transactions without risk, there are still significant issues to consider. A Realtor® representing a buyer or seller of real property used for the cultivation or sale of regulated marijuana must fully appreciate the burdens of a real estate transaction that may not include the ordinary checks and balances of the title and mortgage process. While there might be a title search conducted, there most certainly will not be title insurance or escrowing of funds. The deal will likely be a cash deal or some form of land contract. Buyers of former marijuana facilities also risk becoming involved in the federal forfeiture process, even

if the buyers use the property for a different (and wholly legal) purpose. In short, in transactions involving marijuana facilities, you will likely be relied upon for areas of expertise outside of the scope of your license. For these reasons, not only should a Realtor® encourage his clients to seek legal counsel, a Realtor® should consider declining to represent any client who will not agree to use counsel for this type of transaction.

Closing Thoughts

It is always important for a real estate brokerage to go into any representative capacity with clear eyes. Understanding the basic concerns that others in the real estate industry have identified is an important first step. Until there is true clarity relative to federal enforcement and its scope, real estate licensees would do well to seek legal counsel before entering an agency relationship involving the sale or potential purchase of marijuana-related real property.

As always, thank you for tuning in and watching this installment. If you have questions or would like to suggest topics for future videos, please send suggestions to the email below. Again, thanks for watching and see you next time.