

WHERE THERE'S SMOKE, THERE'S IRE

by

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The regulation of smoking in Condominium and other forms of Homeowner's Associations has received greater interest in recent years, particularly due to the growing anti-smoking sentiment prevalent in both society and legislative bodies. Generally, it is accepted as "conventional wisdom" that smoking is not only bad for the smoker but also has adverse health effects on bystanders who inhale the "second-hand" smoke. While it is unquestioned that an Association can prohibit smoking in the common areas and common elements of the Association, there remains the question as to whether such jurisdiction can extend to the smoker's conduct in his/her individual unit. In other words, can a Condominium Association prohibit a unit owner from smoking in his or her own individual unit? For the reasons stated below, it is my opinion that such a prohibition would be legally enforceable.

To begin with, it should be noted that an individual does not have a "right" to smoke. Unlike certain fundamental rights, the act of smoking (which is potentially harmful but not illegal) is not protected by constitutional principles or public policy which extend to other forms of societally sacred behavior (for example, free speech, free exercise of religion, due process of law). Clearly, the places and times and circumstances under which a person is allowed to smoke may be and has been regulated by both public and private entities without any intervention of the Courts.

In Condominium Associations, there is a necessary balancing of private rights and common interests. Most notably, in the often quoted Florida Appellate decision of Hidden Harbour Estates vs. Norman, the condominium is described as a democratic subset in our society in which “to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such a close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice he might otherwise enjoy in separate, privately owned property.” In accordance with the foregoing principle, it is indisputable that the rights of an individual in a condominium or common interest community may have to be limited. For example, the right to listen to music must be limited if the volume causes an unreasonable disturbance to neighbors’ peace and quiet. In general, the common denominator of such regulation is that the conduct of the individual in the unit has adverse or harmful consequences extending beyond the unit itself, into the common elements and other units and affecting other occupants.

Smoke is composed of gases and particles which are airborne and readily travel. It can be and often is treated as a form of pollution. Thus, the smoke generated by a smoker will leave his/her presence and migrate as the airflow takes it. In most multi-family attached housing, the ventilation system is shared and the units are not airtight but instead allow for air movement into and between them. Inevitably, the smoke from one unit will travel into the common elements (walls, ventilation systems) and then migrate into other units’ air space. In this way, the activity of the smoker in his/her individual unit does in fact impact the air quality of the common elements and other units. Indeed, it is unlikely that the ventilation system in an attached multi-family

residential building could effectively and properly operate if each unit/apartment were a self-contained airtight compartment. It is fairly typical in many high-rises that air from the common hallway corridors will circulate into the units and then be taken out of the building through exhaust vents. However, that ventilation arrangement is not perfect in that the air may still migrate into other units or other areas of the common elements even though being generally exhausted to the outside.

The basis for prohibiting or regulating a unit owner's smoking in his/her own unit can be founded upon two possible situations:

First, the covenants and restrictions of most Associations contain provisions which prohibit nuisances or unreasonable disturbances to other occupants. The flow of smoke from one unit to another, with both its unpleasant odor and adverse health consequences, would clearly be a basis for prohibition. Essentially, the smoker has no "right" to pollute the environment of the common elements or adjacent units. Note that, if the smoker were able to capture the smoke and retain it totally within his/her unit by means of sophisticated ventilation devices and without adversely interfering with the building's ventilation system, it is arguable that his/her smoking should be permitted.

Second, if an occupant of an adjacent unit is sensitive to smoke due to various conditions or ailments to the extent that such sensitivity can be deemed a disability, it is arguable that the disabled occupant must be protected by reasonable accommodation (such as the prohibition of smoking by rule or regulation). Otherwise, failure to make such a reasonable accommodation may give the adversely affected disabled occupant a claim against the Association (as well as against the smoker) for disability discrimination under the Fair Housing Act Amendments to the Civil Rights Laws.

If a unit owner cannot smoke on the Condominium property, he or she can still theoretically smoke somewhere else (although “somewhere else” is becoming less and less certain). Thus, the effect of prohibition would not be to prohibit conduct in its entirety (that is, forcing a smoker to quit smoking) but only in the location under the jurisdiction of the Association.

While there is yet to be a reported decision of a Condominium Association successfully prohibiting smoking within individual units, it is our view that such regulation will inevitably be imposed and will just as inevitably be upheld.

Finally, in the recent (2010) session of the Illinois General Assembly, there was a proposed amendment to the Illinois Condominium Property Act whereby the condominium bylaws could restrict the use of a unit by including prohibitions on smoking tobacco products. Both bills remained stuck in committee. See House Bill 5522 and Senate Bill 3175 introduced in the 96th Session. Of course, to add a smoking ban in the bylaws would generally require a supermajority vote of the unit owners, which would be much more challenging than a simple rule adoption by the board of directors.

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