The Smoker Next Door: Secondhand Smoke + Condominiums = Trouble

May 25, 2012 by David C. Swedelson, *Esq., Condo and HOA Attorney*

Recent reports indicate that only 12% of California adults smoke cigarettes. The problem is that they all live in condominiums, or so you would think from all the reports of problems we are receiving relating to complaints from the non-smokers who do not want to smell cigarettes.

And the issue is not limited to cigarettes; we are hearing a lot of complaints regarding pipes, cigars and marijuana. And marijuana is becoming one of the more difficult issues to deal with, as the smokers are not that considerate, and those with medical marijuana cards think that they are impervious to criticism or the complaints of others. But the fact is that smoke can be a nuisance, and nuisance is prohibited by just about every California community associations' CC&Rs.

Someone saying that their legal right to smoke trumps the rights of the other owners is like saying that an owner can maintain their seeing/emotional support animal in violation of the CC&Rs even though the dog barks all night. I trust you get the point that no one can create a nuisance.

Because secondhand smoke is injurious to health according to most experts, many states and local governments, even low levels of exposure can be considered a nuisance. Many condominium associations are adopting or considering the adoption of restrictions or prohibitions on smoking in the common areas, exclusive use common areas such as balconies and patios, and even units.

A typical nuisance provision in a condominium association's CC&Rs will typically provide as follows:

> "No noisy, hazardous, noxious, illegal or offensive activity shall be allowed on or emanating from any unit or from any portion of the properties, nor shall anything be done or kept in any unit or on the common area which may be or may become an annoyance, disturbance, nuisance, or safety hazard to the other residents of the association or the neighborhood, or which shall unreasonably interfere with the quiet enjoyment of other residents."

To constitute a nuisance, the invasion of the owner's interest in the use and enjoyment of his or her property must be substantial, based on significant harm judged by an objective standard (*San Diego Gas & Electric v. Superior Court*). The legal test for determining whether an owner has suffered unreasonable interference with the use and enjoyment of his or her property is whether the gravity of the harm outweighs the social utility of the offending conduct.

At a typical condominium association, the affected owner(s) and the Association have "standing" to enforce the nuisance provision. The question is whether the plaintiff is going to be the association or the affected homeowner.
A number of smoking cases around the country have held that a nuisance can exist where fumes, odors or smoke are reasonably offensive to persons of ordinary sensibilities, even though they do not cause material injury to property or endanger health and safety. So, while an owner does not have to be hypersensitive or allergic to claim a private nuisance, their opinion alone is usually not enough.

I recently prepared an article for a program that I spoke at regarding smoking issues at condo associations for the **Los Angeles chapter of Community Associations Institute**. **And here is the PowerPoint** that I prepared for that presentation.

Frequently Asked Questions Regarding Smoking at California Community Associations

1) Can Boards of Directors adopt a no smoking rule?
Absolutely. But depending on the association's CC&Rs, that rule may only apply to smoking in the common area, such as the pool or clubhouse. Depending on the language in the CC&Rs relating the association's rule making authority, that rule may also apply to the patios or balconies.

Because rules can be more easily challenged then CC&Rs, a CC&R amendment prohibiting smoking of any kind is recommended. But if the board believes that the association would not be able to pass a CC&R amendment, then a no smoking rule is the next best thing. But keep in mind that to the extent the smoke is creating a nuisance, then it is prohibited, and this can be "expressed" in the association's rules.

2) Should the board amend the CC&Rs with an anti-smoking provision?
As discussed above, a CC&R amendment would be the best option for eliminating smoking. Under California law, an amendment to the CC&Rs is presumed reasonable, and there is no requirement that existing smokers be grandfathered. The bigger issue is whether the association would be able to obtain the requisite approval of the owners.

3) Can and should the board adopt an anti-smoking rule now, pending a CC&R Amendment?
Yes, especially if the board determines that immediate action is required and the board does not want to rely only on the nuisance provision in the CC&Rs. Keep in mind that the board must follow the procedures set forth at Civil Code §1357.130 which requires a 30-day comment period and a 15-day notice period following adoption by the board.

4) Should the Board meet with the complaining owner?
Yes, and this is a must. The board (or management for the board) should determine if there is an actual problem and not merely a hypersensitive resident that is complaining. To be a nuisance, the smoke must be substantial and unreasonably offensive to persons of ordinary sensibilities. Some courts have held that 6 cigarettes a day does not constitute a nuisance; others courts have held that 60 cigarettes is a nuisance.

The board should have an evaluation made as to whether there are things the complaining owner can or should do to eliminate or lessen the extent of the smoke or odor. In addition, the association should evaluate options that the association could utilize to eliminate gaps in the unit that allow the smoke to intrude.

If the Board does not feel qualified to make this determination, then it should consider hiring an expert or consultant to advise the Board on what level of odor is considered unreasonably offensive, what steps the owner can take to mitigate the problem and what steps, if any, the association can take to limit the smoke infiltration.

5) What about IDR—should the Board try to meet with the smoking owners?
Yes, if possible. The Board should first verify the fact that there is an actual smoking problem and identify what the problem is (cigarettes, cigars, marijuana). The smoker needs to be educated to the fact that they cannot create a nuisance.

Problems with smoking or other nuisances in your association? Contact David C. Swedelson, Esq. at 800-372-2207 or dcs@sghoalaw.com.

Posted In: CC&R and Rule Enforcement