

## Cigarette Use in Condominiums a Smoking Issue

*Courts May not have Addressed Question Yet*

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During my recent trips to Tallahassee regarding condominium and homeowners' association legislation, I had the opportunity to observe some of the pitched battles going on in the Legislature over implementation of the recent constitutional amendment banning smoking in restaurants, and a more ambitious proposal to extend the ban to bars as well.

Coincidentally, at least according to the industry e-mail groups I subscribe to, the same debate is occurring all over the country regarding multi-family housing, including condominiums.

Smoking tobacco is, in and of itself, a lawful activity. If your "home is your castle," shouldn't you have the right to engage in lawful activity there? When your cigar or cigarette smoke wafts into the neighboring lanai or home, do you lose those rights?

The Florida Clean Indoor Air Act provides guidance for common areas, but is conspicuously silent when use of the homes (units) is involved. The law specifically defines "common areas" in a condominium to include the interior hallways, corridors, lobbies, stairwells, and conference rooms. These areas must always be "smoke free." All other indoor common areas must also be no-smoking, unless the board designates a smoking area. Smoking may occur outdoors, unless the board adopts a no smoking policy with regard to outdoor areas.

Although many have asked about the extent of an association's right to regulate smoking in private quarters, the courts have not, to my knowledge, addressed the question. According to a 1998 Georgia Law Journal article, cigarette smoking is believed to cause half of residential fires, and accounts for twenty-eight percent of household fire deaths. Since condominium restrictions involving "health, safety, and welfare" are

routinely upheld, the argument in favor of authority to regulate can certainly be made.

Utah's condominium statute was recently amended to specifically permit restrictions involving tobacco use. Further, the Utah Legislature made a specific finding that tobacco smoke that drifts into any "residential unit a person rents, leases, or owns" constitutes a "nuisance."

In many types of housing, particularly condominiums, the act of smoking can frequently force second-hand smoke on non-consenting neighbors. The classic example is the unit dweller whose wife makes him smoke his stinky cigars out on the lanai, so as not to smell up the apartment. Unfortunately, the configuration of the building causes the smoke to billow up to the lanai of the neighbor above, making the upstairs neighbor a prisoner in their own home. Adding a bit more spice to the sauce, what if the upstairs neighbor suffers a respiratory condition (such as asthma) and demands that the association's board "accommodate" his "disability" by telling the downstairs neighbor to cut out the stogies?

Until these issues are addressed by the legislature and/or the courts, it is anyone's guess as to how the law will develop. In my humble opinion, a board-made rule prohibiting smoking within the private home would be suspect, or at least subject to strict scrutiny on review by a court. Conversely, an amendment to a declaration or other deed restriction would probably stand a reasonably high chance of being upheld. Of course, there is always the question of how to detect and verify violations, and the need for enforcement.

Maybe the next Surgeon General will need to start adding warnings on the side of cigarette packs that you can't do this at home.

*Now on to reader mail.*

**QUESTION:** Is it possible for our condominium association to post the names of those who are delinquent in the payment of maintenance fees? I realize that we cannot cut off their right to use amenities. Do you have any other suggestions how to deal with delinquent members? B.W. (via e-mail)

**ANSWER:** While it is certainly “possible” to publish a “dunning list,” I very strongly recommend against it. Your association could be subject to potentially significant liability under fair debt/fair credit reporting laws, on the basis of defamation, or perhaps invasion of privacy. In my opinion, it is clearly not worth the risk.

Any unit owner who wishes to review the association’s official records may do so, and that would include a ledger card for each unit that would show assessment payment status. If an owner requests access to this information, you must provide it to them, but do not go out of your way to embarrass those who are delinquent.

You are correct that a condominium association cannot suspend the right to use common facilities due to delinquency. As unfair as that may seem, that is the law. Conversely, a homeowner’s association can suspend certain rights (including voting rights) for non-payment, provided that certain procedures are followed.

The best thing that an association can do to protect itself is to ensure that it has a good set of governing documents. The documents should provide a short “grace” period for delinquencies (I recommend no more than 10 or 15 days) and then provide for the assessment of interest at the maximum legal rate (eighteen percent) and also permit the charging of late fees. If so provided in the documents, a late fee for condominium assessments may be charged up to \$25.00 per installment, or five percent of the installment due, whichever is greater.

If the association has good “teeth” in its documents, and takes timely action to enforce payment obligations, owners will learn that their obligations to the association must be taken seriously. Good luck. ⚖️

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