



Smoking Becoming Hot-Button Conflict

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There's no doubt about it, condominium living presents unique challenges. In America, we are taught from grade school on that our home is our castle, and that America is the land of the free.

We are also taught that there are limits to freedom. The cliché example often used at law schools is that while you have the right of free speech, you do not have the right to run into a crowded movie theatre and yell "Fire."

In association living there are daily conflicts between individual freedom and the interests of the collective group. Otherwise lawful conduct, such as owning a pet, is routinely regulated. A Florida court probably best summed it up over thirty years ago, where a jurist observed:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. 4th DCA 1971)

An association issue which has been getting a great deal of attention lately involves an association's ability to regulate smoking. While viewed by most as a

disagreeable habit, smoking is legal. However, according to many experts (with whom juries in large class action suits seem to have agreed), second-hand smoke can pose a health risk. Setting aside health issues, many find the affects of others' smoke to be unpleasant at best, perhaps a nuisance in the legal sense of that term.

Florida law generally defines a nuisance as a condition which annoys or disturbs another in the free use, possession or enjoyment of their property or which renders the property's ordinary use or occupation physically uncomfortable. Generally, there must be a substantial and continuous or recurrent harm in order for a nuisance to be proved. A mere annoyance is not sufficient.

The test to be applied in determining whether a particular inconvenience is sufficient to constitute a nuisance is the effect of the condition upon any ordinary reasonable person with a reasonable disposition, in ordinary health, and possessing the average and normal sensibilities. In general, the courts will not afford protection to the hypersensitive.

According to a posting I recently received from one of the attorney e-mail groups I subscribe to, the appellate courts around the country have apparently not yet tackled this problem, but the tide may be rolling in. According to one article, the Boston Housing Court ruled last week that a landlord could evict his tenant from a condominium unit,

even though smoking was permitted in the building, and the landlord knew that the tenant smoked before the lease was entered into. Apparently, the tenant's neighbors complained about the constant pollution of their living space, and the jury found the situation bad enough to declare a nuisance.

The State of Utah recently amended its condominium statute to provide that restrictions regarding the use of units "may include other prohibits on, or allowance of, smoking tobacco products." The Utah Legislature has further specifically defined Utah's nuisance laws to include "tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit."

While smoking is generally legal in Florida, it is now forbidden in restaurants and many public places. If

the Florida Legislature can ban a lawful activity, can a condominium association do so as well? Does it make a difference when you cross the threshold into the sanctity of your own home, your castle?

Most attorneys that I have chatted with about the issue feel that an amendment to a declaration of condominium regulating smoking inside a home would be likely upheld. I have heard the opposing point convincingly argued as well. Of course, policing such a rule is a different matter altogether. The effectiveness of a board-made rule on this matter is perhaps subject to greater debate.

Like many things in the law, until addressed by the courts or the Florida Legislature, there are two sides to the story, and both can claim to be right. ■

Disclaimer: This document is intended as an informational reminder and does not constitute legal advice. If you have any questions about the article or would like to discuss a particular situation pertaining to business litigation or intellectual property law (including patents, trademarks, copyrights, trade secrets, and the Internet), please contact Manjit Gill at Becker & Poliakoff, P.A. The purpose of this article is to provide general information about significant legal developments and should not be construed as legal advice on any specific facts and circumstances.

Question: Our homeowners association was created in the 1970's. The articles of incorporation provide that the corporation shall have all of the common law and statutory powers granted to corporations not-for-profit. We know that the Florida Not For Profit Corporation Act, Chapter 617, applies to us. Does our association have only the powers provided for in the Florida Not For Profit Corporation Act, or, as a homeowners' association, are we also governed by the Homeowners' Associations Act, Chapter 720? J.G. (via e-mail)

Answer: In order for your association to qualify as a "homeowner's association" under Chapter 720 (commonly referred to as the Florida Homeowners' Association Act), membership in the association must be mandatory as a condition of property ownership, and the association must have the right to file a lien for unpaid assessments.

A homeowners' association under Chapter 720 of the Florida Statutes, must be either a for profit or not for profit corporation. Almost all homeowners' associations are organized as not for profit corporations. Chapter 720.302 (5) of the statute provides that, "Unless expressly stated to the contrary, corporations not for profit that operate residential homeowners' associations in this state shall be governed by and subject to chapters 617 and this chapter." Therefore, both Chapter 617 and Chapter 720 apply to your association. Chapter 617 provides the general framework for the formation and operation of the association, and Chapter 720 adds additional requirements designed to meet the special needs of homeowners' associations.

For example, the Not For Profit Corporation Act allows regular board meetings to take place without notice, unless the articles or bylaws specifically require notice. The Homeowners' Associations Act requires that all board meetings be preceded by notice. In the event of a conflict between these two statutes, the

Homeowners' Associations Act controls, otherwise the specific provisions of that Act would be rendered meaningless.

You should also be aware that the initial version of the Homeowners' Association Act was created in 1992, and therefore your association well pre-dates the law. There are some questions as to the extent of retroactive application. When the law was created, the Legislature's stated intent was to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions. The Legislature also recognized that certain contract rights were created prior to the new law, and that the Homeowners' Association Act could not be applied to impair vested contract rights.

Question: Our condominium was built over twenty years ago. The condominium includes a fishing pier and a set number of boat slips, which have been assigned to unit owners on a waiting list approach. However, the boat slips are not addressed in the declaration of condominium or in the bylaws. They are referred to in the rules and regulations, and there are very specific rules regarding the waiting list and slip usage. The recent hurricanes significantly damaged the slips. Now, the replacement of the boat dock and slips has become a major issue. Though never defined, the dock and slips have been treated as common elements and no fees have ever been collected from slip users. Due to the number of units, not everyone can have a boat slip. A question has arisen as to whether the association must rebuild the dock and slips, and if so, who must pay for it. In addition, does the association have to replace the seawall, or can we patch it/repair? J.R. (via e-mail)

Answer: Even though not specifically referenced in the declaration of condominium, the slips may be shown on the survey or drawings that are attached

to the declaration. You should check to see if those drawings show the slips as common elements. Even if not specifically shown on the drawings or survey, if originally built by the developer, they would likely be considered part of the common elements. In such a case, the association would likely have to pay to make the repairs.

If the slips are not mentioned at all in the documents, and were not built by the developer, the association should have its legal counsel review whether they were properly added to the common elements in the first instance. If the slips were illegally constructed, there may be no duty (or even authority) to replace them, especially with funds of all unit owners.

If the association wanted to make those owners who use the slips responsible for the maintenance, repair, and replacement, then the association would probably need to amend the declaration of condominium and enter into lease agreements with those owners who are assigned a slip.

As to whether the association must repair or replace the seawall, this is a business judgment decision for the board. The board can rely on experts regarding whether the seawall can be effectively repaired or whether replacement would be the more prudent option.

Question: Our board took over from the developer in March. The developer continued as the property management firm until late May when they informed

us that they would discontinue services July 1. Is there any requirement for the association to have a licensed property management company or an individual licensed manager. B.C. (via e-mail)

Answer: Absent a requirement in your governing documents (which would be rather unusual), there is no requirement that either a condominium association or a homeowner's association hire a paid manager, whether management company or individual manager.

The hiring of a manager is typically a decision granted to the board of directors, in the exercise of its business judgment, through the governing documents for the association. Although I am not aware of any statistics on the issue, I would say that the majority of associations do have a paid management arrangement, although I am familiar with a substantial number of successfully self-managed associations.

If your association does hire a manager or management company, the community association manager assigned to your association must have a state-certified management license (there are some limited exceptions to the law).

You can check on a manager's licensure statute, and whether complaints have been filed against the license, by going to the web page of Florida's Department of Business and Professional Regulation, www.state.fl.us/dbpr.

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