



Neighbor's Smoking, Cooking, TV Annoy Resident

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Q: I live in a condominium that was converted in 2005 from an apartment building. I had lived in the apartment for a year before the conversion took place and I decided to buy my unit. Each building has six condominium units, with three units on the top and three units on the bottom. Everything was fine until about eight months ago when a new neighbor moved in, who is a tenant, and began creating disturbances for me. I don't believe he is doing this on purpose, but his daily living style affects my unit. For example, he often cooks meals that create a very strong odor. In addition, he smokes on his balcony nightly and when my balcony door is open, the smoke comes into my unit. Also, he has his television up against the wall that separates our units and often has the television on a loud volume setting late at night. I don't want to be unreasonable because he is not doing anything crazy like having loud parties or purposely disturbing me but I need to address these situations. Do I have any legal rights, and if necessary, can the association help me with these problems? **N.N. (via e-mail)**

A: Your questions and the issues you are facing are very typical of condominium living, which is much more akin to an urban lifestyle where people must interact on a daily basis as opposed to living in a detached home community where people can most often enjoy their property in isolation from other owners.

As a practical matter, and before resorting to any legal rights or association action, you may be in a position to address these issues yourself. As you describe your neighbor's actions, it is likely that the neighbor does not realize his activities are disturbing you. Therefore, you may be well served by having a neighborly discussion about these issues. Perhaps he would be willing to move his television or go smoke elsewhere than the balcony. The cooking odor issue is not as compelling, in my mind, as it is reasonable for people to cook and it is a natural and unavoidable consequence that cooking odors will travel. Therefore, in order to not be perceived as unreasonable, you may want to pick one or two of the more pressing issues that you are having and make a further attempt to live with some of the smaller disturbances that are typical and unavoidable in most condominium buildings.

In the event your neighbor is not able or willing to address these issues to your satisfaction, you may (or may not) have a legal claim for nuisance. Nuisance is generally defined as an act or omission which either annoys, injures or endangers the comfort, health, or safety of persons or which unlawfully interferes or tends to obstruct other persons' lives and the use of their property. Whether or not your neighbor's conduct rises to the level of an actionable nuisance is determined by the standard of a reasonable, objective person. For example, if it is determined that a reasonable, objective person would be disturbed by the

television, the smoking or the cooking odors, then you will have established an important element of a nuisance claim. However, a recurring issue in many nuisance claims is whether the complainant is ultra-sensitive. For example, if you have a very bad allergy condition that makes exposure to even the slightest amount of cigarette smoke disturbing to you, the law will likely not recognize a nuisance claim because such a small amount of smoke may not be bothersome to the average, reasonable person. The same analysis would apply to the noise created by the television and the cooking odors. If you believe the conduct of your neighbor rises to the level of a legal nuisance, then you have personal, legal standing and a legal right to bring such a claim.

You may also know that most well-written condominium declarations include a provision prohibiting owners and their tenants and guests from creating a nuisance on the condominium property. In many situations such as yours, a unit owner will contact the association and demand that the association take action against the neighbor. In those cases, the association board must investigate the situation and make a determination whether a nuisance exists and whether action under the condominium documents is appropriate. Except in very clear cut cases, association boards usually are reluctant to pursue a claim on nuisance grounds due to the uncertainty of the merits of the case.

One way that an association can address specific instances of nuisance is through amendments to the governing documents. For example, a number of associations throughout the country, and some in Florida, have adopted amendments to the declaration of condominium prohibiting smoking upon common elements, and some have even prohibited smoking within units as well. The theory is that prohibiting smoking, including within units, is no different than prohibiting loud, disturbing music or commercial business activity in a unit, and therefore there is a legal basis to adopt such amendments. Initial court cases throughout the country which address total smoking prohibitions in condominiums have generally favored the enforceability of the declaration amendment, although there are no test cases from the Florida appellate courts.

Q: Please explain which types of disputes between a condominium unit owner and an association are subject to the State's arbitration program. **L.J. (via e-mail)**

A: The State's mandatory nonbinding arbitration program is run by the Division of Florida Land Sales, Condominiums and Mobile Homes, which employs full-time attorneys to act as arbitrators to conduct arbitration proceedings. The program was established in 1992.

A "dispute" within the jurisdiction of the Division's arbitration program includes any disagreement between two or more parties that involves the authority of the board of directors to require any owner to take any action, or not to take any action, involving that owner's unit or the unit's appurtenances thereto, as well as the board's authority to alter or add to a common area or element. A "dispute" also includes any disagreement between two or more parties that involves the failure of a governing body, when required by statute or the association's documents to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or to allow inspection of the books and records.

A "dispute" does not include any disagreement that primarily involves title to any unit or common element, the interpretation or enforcement of any warranty, the levy of a fee or assessment or the collection of an assessment levied against the parties, the eviction or other removal of a tenant from a unit, alleged breaches of fiduciary duty by one or more directors, or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements for condominium property.

The arbitration program requires a party to a dispute to petition the Division for arbitration before instituting litigation in a court of law. Filing a petition requires stating the specific nature of the dispute, demand for relief, notice of an intention to file the petition or other legal action in the absence of resolution of the dispute, and a \$50 filing fee. Upon receipt of the petition, the

Division will determine the existence of a dispute and serve a copy of the petition to all respondents. Either party may request that the dispute be referred to mediation, either before or after the filing of the respondent's answer to the petition. The arbitrator can also require mediation as he or she sees fit.

Arbitration decisions are final in those disputes where parties have agreed to be bound and also where a complaint for a trial de novo is not timely filed in a court of competent jurisdiction in which the condominium is located. The prevailing party in an arbitration proceeding is entitled to an award of costs and reasonable attorney's fees in an amount determined by the arbitrator.

Q: I am on the board of my homeowners' association. We have numerous violations of our rules occurring and would like to levy fines against the violating owners. The board voted to fine the owners for the violations, but the owners have not paid the fine. What can we do now and can we file a lien on the property for the amount of the fine that is due? **J.S. (via e-mail)**

A: Under the current law, the association is not permitted to file a lien for unpaid fines. However, during the recent 2008 legislative session, a bill was passed that would permit homeowners' associations to file a lien for a fine, but only if the amount of the fine exceeds \$1,000, and the right to lien for such fines would presumably need to be set forth in the governing documents for your homeowner's association. The bill has not yet been signed by the Governor, so it is not yet law. However, if the Governor signs the bill into law, the effective date will be July 1, 2008.

In order to understand this proposed change, let me first explain the current law. The Florida Homeowners' Act provides that if the governing documents provide, an association may levy reasonable fines, not to exceed \$100 per violation, against any member or any tenant, guest, or invitee. A fine may be levied on the basis of each day of a continuing violation, with a single notice

and opportunity for hearing, except that no such fine shall exceed \$1,000 in the aggregate unless otherwise provided in the governing documents. The current law further provides that a fine shall not become a lien against a parcel. Therefore, under the current law, the only way to collect a fine is to collect it from the person that owes the fine. This is typically handled as a small claims action against the individual who owes the fine, which is different than the lien and foreclosure process for unpaid assessments.

Under the new law, a fine can become a lien, but only if the fine exceeds \$1,000. In most situations, the fine will not exceed \$1,000 because of the cap in the statute. However, the statute permits fines in excess of \$1,000 for a continuing violation, but only if permitted by the governing documents. Therefore, the new law will have limited application, as it will apply only if the governing documents permit fines to exceed \$1,000, and in my view, would need to also specifically authorize the lien.

Regardless of whether the association tries to collect a fine through a lien process (if the bill is signed into law by the Governor) or through a small claims action, a court will closely scrutinize the association's actions, as fines are penal in nature. If the board has not closely followed the proper notice and hearing procedures in the statute, the court may determine that the association did not properly levy the fine, or that the provision the association is seeking to enforce was not violated. Further, even if the association is successful collecting a fine, it does not guarantee that the violation will be corrected. For example, if the association properly levies a fine against an owner who is violating the parking restrictions, the small claims action could collect the fine, but will not be sufficient to obtain an injunction to require the owner to abide by the parking restrictions. Therefore, if the association is seeking to correct the violation (in addition to collecting the fine), the association will need to file a petition for mediation, or other legal action, in order to obtain compliance.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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