



## Condominium Law Q&A

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By Gary A. Poliakoff

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**Question** – I am a frequent reader of your columns. I have an 81 year old senior friend that has lived 33 years in the same unit, who is suffering an allergy from cigarette smoke coming into her unit. I have also experienced the same situation in my unit in the past. I have been a nonsmoker for over 7 years, now, and I don't ever want this situation to happen again for me. How do we go about finding out where it is coming from, and what recourse do we have to avoid exculpating medical bills, as well as severe health issues as a result of cigarette smoke coming from another unit owner? Any advice you can offer will be most helpful. We will also be contacting the State of Florida in reference to the Clean Air Act that was passed as relates to condominiums. G.F., Pompano Beach

**Answer** – At the time Florida's Clean Air was passed it contained a provision which prohibited smoking in/on the common elements of a condominium. Shortly thereafter, the Act was amended, and the prohibition against smoking removed. I am not sure why the anti-smoking restriction was removed. That said, there is a growing trend in the case law where, under certain circumstances, second hand smoke which comes into a unit from a neighboring unit has been held to constitute a nuisance. In those cases, the courts have enjoined the neighbors from smoking within their own units.

**Question** – Our homeowner's association's declaration of covenants and restrictions is badly out of date and was written to favor the developer, who

is no longer involved in the association. Do we, as an association, through a delegated board committee, have the right to rewrite a clear, revised amended declaration, or must we go through a lawyer (and their jargonized language)? We propose to write a clear, up-to-date version, have it passed by the board and a minimum two-thirds (2/3) of the association members, have that final copy legally reviewed, then send it on to be attached to our declaration on file. Are we, by doing so in this fashion, practicing law in the eyes of the State? What are our alternatives, or do we have any? R.B., Rockledge

**Answer** – Even lawyers and judges now recognize that legal documents need to be written in language understandable by laymen. The venerable Constitution of the United States has been amended 27 times. One should not expect aging covenants, conditions and restrictions, drafted before one fully appreciated all of the nuances of common interest ownership, to weather time without being updated. While the framework of the desired amendments can certainly be drafted by a committee of unit owners, it is best to have an attorney experienced in community association law put the amendments in a format which will satisfy statutory requirements and withstand judicial challenge.

**Question** - My simple question is, can board members debate association issues via e-mails among BOD members without voting? J. L., Boynton Beach

**Answer** – In my opinion, the answer is no.

**Question** - Do members of the Board who are currently serving a two-year staggered term (elected March 2008), as allowed in the bylaws, have to stand for election again in March 2009 with the other Board members (elected March 2007) who are up for election, or do they serve out their terms until March 2010 and then begin one year terms absent a

majority vote to continue staggered terms? Thanks.  
R.J.M., Miami

**Answer** - The Division has issued an opinion on this which is consistent with my own; namely, those elected to staggered terms before the effective date of the change to the Act, serve out their FULL Term.

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