



Condominium Law Q&A

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Question – My husband and I are owners of a condominium in Lake Worth for nineteen years. We have a neighbor that lives in the next apartment from us who is a heavy smoker. The problem is that her kitchen is directly next to our kitchen. The smoke from her cigarettes comes through the walls right over my stove and my storage closet which is next to the cooking area and infiltrates my apartment and the stored food in the closet and also the food that I am preparing on the stove. Not only is it very offensive to my husband and I, but I suffer with heart disease and my husband is a former cancer patient. I have spoken to this person many times in a friendly manner to no avail. When her husband was alive he would not allow her to smoke in the apartment. She smoked either on the catwalk or on the terrace. This person no longer owns the apartment. She now rents it. If, by chance, you go into her apartment, you feel like you were smoking. It gets into your lungs and your clothes reek from smoke for a long period of time. If you pass her door even with the door closed, you gag from the smell of the smoke. I would appreciate it if you could let me know what can be done about this situation. E.F., Lake Worth

Answer – The subject of second hand smoke being an actionable nuisance is discussed in detail in my new book, [New Neighborhoods: The Consumer's Guide to Condominium, Co-Op and HOA Living](#), co-authored with my son Ryan. We note that until recently non-smokers had very few rights when it

came to avoiding second hand smoke. Once it was perceived as being a normal environmental factor of every day life. Not so today. Recent case decisions have recognized, at least hypothetically, that a large volume of smoke could present an actionable case for nuisance. That is, is the smoke so pervasive and unusual that reasonable people would feel it affects their right to enjoy their own home. If you would like to read an article on the subject [**Butt Out! – Controlling Environmental Tobacco Smoke in Condominiums**, published in *Probate Property*, May/June 2008.] written by one of my students at Nova Law, log on to www.newneighborhoodspublishing.com and go to "resources". I'll post it there for you and other readers.

Question - Article IV of our condo documents, titled "Apartment boundaries, common elements, and limited common elements," states, "There are limited common elements appurtenant to each of the units in this condo, such as covered balconies, directly accessible only through an individual unit." Why would my glass enclosed patio (I live on the bottom level of a 2 level/6 unit condo) inside my condo, be listed as a "limited common element"? Why is the patio any different than the bathroom? The 6 unit patios originally were not enclosed with glass, but were screened in. The governing documents, which date back to the late 1970s, do state that the area is reserved for my exclusive use. The same article in the documents continues, "All

expenses of maintenance, repair or replacement relating to such limited common elements or involving structural maintenance, repair or replacement, shall be treated as and paid for as a part of the common expenses for the Association.” This makes no sense to me. This area is completely enclosed and for the private use of each unit owner (to do what they will with the area). Why should the association pay for anything in this area, (realizing the condo docs treat this area as limited common area, and that is probably the reason)?
D.S., Cocoa Beach

Answer - The determination as to whether an improvement to the condominium property is part of a unit or a limited common element is totally within the discretion of the developer, made at the

time the condominium is created. Improvements which are reserved for the exclusive use of a unit are often defined as limited common elements because it gives the association greater control over the element. Classic examples of limited common elements are the balconies, patios, parking spaces, storage units and boat slips. The cost of maintaining limited common elements can be either the responsibility of the association as part of the common expenses, or the unit with exclusive use rights; as determined by the declaration of condominium. Once the documents define the rights and responsibilities they cannot normally be changed without the prior approval of a super majority of the unit owners and the unit owner effected.

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