Going Smoke-Free: More Condominiums and Apartment Complexes are Banning Smoking in Homes

One unit owner complains about the smell of smoke infiltrating her unit and claims that it is aggravating her asthma. She wants the smoker stopped and is threatening suit against the condominium board if it fails to take action. The smoker claims he has a legal right to smoke inside his unit, and his rights aren't limited to cigarettes anymore. Since January 1, 2013, qualified individuals are permitted to smoke medical marijuana as well. What is a condominium board to do? Secondhand smoke is a hot topic, and it isn't going up in a puff of smoke anytime soon.

The uproar over secondhand smoke has led to lawsuits, both against unit owners who smoke and condominium associations. How can property managers address the concerns of unit owners; respect the rights of smokers, including those using medical marijuana; and avoid legal liability?

A condominium association's duty to unit owners is defined by its condominium documents. If there is a ban on smoking in place, the condominium has an obligation to enforce it uniformly. Where there is no express restriction on smoking, unit owners have based their lawsuits on a failure to enforce boilerplate nuisance policies typically found in most condominium bylaws, which prohibit offensive noises, odors, fumes or hazards to health. To date, no Massachusetts condominium association has been held liable when there is no restriction in place prohibiting smoking in units. However an increasing number of cases have been settled because litigation is expensive and risky; and under the condominium lending guidelines implemented by FHA, Fannie Mae and Freddie Mac, any pending litigation can stall sales, loans and the refinancing of units.

An existing condominium association interested in restricting smoking must have the support of the unit owners. Since such a ban regulates the interior of a unit, it would need to come in the form of an amendment to the master deed and/or declaration of trust, and typically 67% or more of the interest of unit owners and a majority of the trustees must vote to pass such an amendment. In addition, the restriction must be reasonable and rationally related to the achievement of a legitimate purpose. In order to garner the requisite number of votes to pass a ban on smoking in units, many condominiums are grandfathering in existing smokers while requiring that they take steps to mitigate the effects of smoking by installing air filtration systems and the like. Moreover, proposing such a ban might reduce a condominium's risk of liability, as all a board of trustees can do is propose a ban and not guarantee its passage – which requires a supermajority vote of the unit owners.

It is becoming more common for developers of new condominiums to impose a smoking ban at the time of the creation of the condominium. Such a bylaw would be difficult to challenge since all purchasers would buy with notice of the smoking prohibition and could choose to live elsewhere if they did not approve of the ban. In the single reported case in the country thus far, a Colorado district court held that smoking is not a constitutionally protected right. The court noted that a condominium's authority to restrict legal activities within residential units is strengthened where private activities are so negatively impacting the remainder of the condominium community. While the Colorado case is not binding, it follows the trend of upholding laws designed to protect persons from suffering the adverse effects of secondhand smoke in indoor areas.

Smokers will surely object to limitations placed on smoking in their homes, but condominiums are a special type of property ownership, and the Massachusetts Condominium Act provides a strong basis for the imposition of reasonable rules, regulations and bylaws designed to protect the peaceful enjoyment of units. See G.L. c. 183A, § 11(e). As Massachusetts courts have stated, "[c]entral to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'" Noble v. Murphy, 34 Mass. App. Ct. 452, 456 (1993), quoting Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

As with cigarette smoke, medical marijuana smoke can also seep into neighboring units. The new Massachusetts statute allows individuals with "debilitating medical conditions" to use marijuana and possess a 60-day supply without being subject to criminal and civil penalties. The law also allows users to cultivate marijuana if their access to authorized dispensaries is limited. How then is a property manager to balance the competing interests of someone with a legal prescription to smoke marijuana against the asthmatic neighbor next door?

Condominium associations may adopt a bylaw to govern marijuana the same way it would for any other use restriction. Marijuana is still a prohibited drug under federal law, which contains no medical exception. As such, condominiums might argue that the Massachusetts law only protects individuals from state prosecution but it does not regulate the actions of private entities or overrule their own drug policies. This argument has carried the day in the employment context when employers have been allowed to terminate employees who use medical marijuana.

Whether Massachusetts courts will adopt this rationale in the housing context remains an open question, however.

Short of adopting a definitive rule addressing the use of medical marijuana, a condominium could elect to treat medical marijuana requests the same as other accommodation requests under the Fair Housing Act. Such requests require a good-faith effort to identify an accommodation that meets the needs of the patient without unduly burdening the condominium or harming other residents. The evaluation process could include verifying the patient's need for medical marijuana through documentation from the prescribing doctor as well as determining whether other drugs could provide comparable relief. If the information gathered shows that medical marijuana is the only appropriate treatment, the condominium association could request that the patient lessen the effects of smoking by installing a smoke filter or consuming the marijuana through other means. Even if a unit owner who is denied accommodation through this process files suit, the condominium's exposure to liability would be lessened if it carefully followed its duly adopted procedures.

As for smoking in apartments, bills have been filed in Massachusetts that would limit smoking to detached single-family homes, but each time they have died quietly or sent to committee for more study. In the meantime, some local apartment complexes and public housing developments, along with the Worcester Housing Authority, have banned smoking in certain buildings. It's clear that smoking reform will continue to evolve within the housing context.

Property owners need to understand the options available to them to address the dangers of smoking. With the requisite level of unit owner support, or at the inception of a project, condominiums have the ability to restrict the smoking of cigarettes within units and in the common areas and facilities of the condominium. The rights surrounding the use of medical marijuana are still cloudy, but given the patient's right to reasonable accommodation, condominiums would be well-advised to adopt procedures for addressing such accommodation requests on a case-by-case basis.

For further information about adopting smoke-free policies for interested condominium associations, the Massachusetts Department of Public Health, in conjunction with the Boston Public Health Commission, published a condominium association guide, which can be found on the Boston Public Health Commission website *www.bphc.org*. In addition, the attorneys at Fletcher Tilton would be happy to advise those property owners who are considering implementing a smoking ban.

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