

SMOKING IN AND AROUND CONDOMINIUMS

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What are the essential legal principles protecting individual condominium unit owner rights, whether that means the right to smoke, or the right to not be affected by their neighbors' smoke? Should condominium associations get involved, and why? Attorney Michael Brandt lays out the discussion on owners' rights, and attorney Michelle Ein addresses the matter of associations' obligations.

Thanks to the spate of research on the health consequences of second-hand smoke on nonsmokers, there is no longer a debate that the consequences are bad. Since the 2006 Surgeon General's report¹ confirming that second-hand smoke causes premature death and disease in adults and kids who do not smoke, and that exposure has immediate, harmful health effects, we have entered an era of change regarding this issue.

Society increasingly expects government to protect us from second-hand smoke. Currently, at least half of all states have enacted some type of anti-smoking legislation, whether in worksites, restaurants and bars, or shopping malls.² Not surprisingly, community association members' expectations mirror society's, and litigation over second-hand smoke exposure in condos has cropped up nationwide.

A. CONDOMINIUM UNIT OWNERS CAN PROTECT THEIR OWN RIGHTS TO SMOKE AND TO NOT BE AFFECTED BY THEIR NEIGHBORS' SMOKING

CONTRACT RIGHTS.

If a condominium unit owner purchases a unit in a condominium where smoking is not prohibited by the terms of the Declaration or Bylaws, a unit owner should be able to smoke in his or her condominium unit and in the common areas. That right is qualified by the rights of other condominium owners to be free from the intrusion of second-hand smoke into their condominium units.

Benefit of the Bargain. When a purchaser of a condominium unit negotiates for the purchase of the purchaser's unit, he or she is basing such negotiations on the conditions of the condominium unit and the common elements at the time of such negotiations. A proactive purchaser will review the governing documents of the

¹ *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (June 2006). Washington state recognizes that tobacco smoke is a pollutant (RCW 70.162.005) and that second-hand smoke is known to cause cancer in humans (RCW 70.160.011).

² *Cigarette Smoking Prevalence and Policies in the 50 States: An Era of Change – The Robert Wood Johnson Foundation ImpacTeen Tobacco Chart Book*. Giovino GA, Chaloupka FJ, Hartman AM et al., Buffalo, NY: University at Buffalo, State University of New York, 2009.

condominium and several years of annual meeting minutes. If these documents reflect that smoking is not prohibited either in the individual units or in other areas of the condominium, then part of what the purchaser is bargaining for is the right to smoke. Conversely, if a purchaser desires a smoke-free environment, the pre-purchase investigation may have revealed that the only place that the purchaser can reasonably expect to be free from second-hand smoke is in their unit. The purchaser will adjust his or her purchase price offer to reflect the benefit the purchaser expects to realize from the purchase of the condominium with the conditions as they exist at that time.

Noxious Odors - Breach of Covenant of Quiet Enjoyment. Most condominium declarations contain a provision that states:

Offensive Activity. No noxious or offensive activity shall be carried on in any Unit, Limited Common Element, or Common Element, nor shall anything be done therein which may be or become an annoyance or nuisance to other owners or to the public; including, but not limited to, noise and odors from any Unit.

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Second-hand smoke entering one's condominium unit or into any area that is designated as a smoke-free zone is such an annoyance or nuisance. A breach of this provision is a breach of the covenant of quiet use and enjoyment of a condominium unit owner's property.

TORT CLAIMS.

A tort is a breach of a duty that the law imposes on persons who stand in a particular relation to one another.³ Smoking in a condominium unit or in another area of a condominium such that the smoke enters another condominium owner's unit provides the basis for several tort claims against the offending smoker.

Trespass.

[W]hen the actions of a defendant have (1) invaded the plaintiff's interest in the exclusive possession of his property, (2) been committed intentionally, (3) been done with the knowledge and reasonable foreseeability that the act would disturb the plaintiffs' possession, and (4) caused actual and substantial damages; [the defendant has committed a trespass.]⁴

An owner of a condominium unit has the right to be free from the invasion of seen and unseen substances. Smoke qualifies as such an unseen substance and since the U.S. Surgeon General concluded in 2006 that second-hand smoke is a serious health risk that rises to the level of harm caused by smoking itself,⁵ it would be reasonably foreseeable

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³ Black's Law Dictionary (8th ed. 2004).

⁴ *Bradley v. American Smelting and Refining Company*, 104 Wn.2d 677, 684, 692-693, 709 P.2d 782 (1985).

⁵ "The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General – Executive Summary Prologue." (2006).

that the invasion of such smoke into an adjacent condominium unit would disturb that condominium unit owner's possession. The unit owner would just need to show that the damages he or she is suffering are "actual and substantial." Expert medical testimony would be brought forth as evidence to bear on this point. A preexisting condition, such as asthma or allergies, adds to the likelihood that the unit owner could prove his or her damages.

Nuisance.

Washington defines "nuisance" by statute, namely [RCW 7.48.010](#), which provides:

[A]n . . . obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.⁶

In other words, a nuisance is an unreasonable interference with another's use and enjoyment of property.⁷ If second-hand smoke interferes with a condominium unit owner's use and enjoyment of his or her unit, then he or she must prove that the person creating the second-hand smoke was smoking in such a way that the smoke was unreasonably entering the condominium owner's unit and interfering with the use the unit owner normally makes of his or her home.

REMEDIES

A unit owner who has suffered the effects of second-hand smoke can pursue a course of action against the offending party. An initial attempt should be made to discuss the problem with the offending person and the impact the second-hand smoke is having on the affected unit owner. If such a discussion does not prove to be productive, then a letter from an attorney, which attempts to educate the offending person, along with establishing that the continuation of the behavior that led to the communication will not be tolerated. A specific date for a response should be stated in the letter. If the response is unsatisfactory, or is not timely received, then a lawsuit naming the offending party will need to be filed with the Superior Court and served upon the offending party. As part of the complaint, the first document in a lawsuit, the affected party can request an order enjoining the defendant from allowing smoke to escape his or her condominium unit, along with pursuing any monetary damages that have been suffered by the affected party.

B. CONDOMINIUM ASSOCIATIONS SHOULD REGULATE SECOND-HAND SMOKE

⁶ *Wallace v. Lewis County*, 134 Wn. App. 1, 18, 137 P.3d 101 (2006).

⁷ *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

With the usual lawyer's caveat that each situation deserves its own analysis, second-hand smoke's health consequences are too dangerous for associations to ignore. Moreover, associations, not individual owners, must act on behalf of the entire membership; regulate the common areas; adopt rules; and conduct internal rules enforcement proceedings.

1. Only the Association must act on behalf of the entire membership.

Condominium directors elected by their members have the duty of acting at all times on association's behalf, using ordinary and reasonable care.⁸

Unlike noise or cooking odors, exposure to second-hand smoke has immediate, harmful health effects. Second-hand smoke exposure is unsafe at any level (it is an EPA-designated carcinogen). While cigarette smoking is not illegal, it is also not constitutionally protected. The board's exercise of its duty of care should reflect these relative risks and rights.

2. Only the association may regulate the use of common and limited common areas.

Condominium associations, through their boards, may regulate the use, maintenance, repair, replacement, and modification of common elements.⁹ Individual owners do not have that authority.

Although no Washington state appellate court has yet addressed whether a condominium association may prohibit cigarette smoke in common and limited areas, a reviewing court would likely uphold such a rule as reasonable.¹⁰ Washington case law holds a key principle of condominium ownership is that owners, who benefit from community living, "must give up a certain degree of freedom of choice which [s]he might otherwise enjoy in separate, privately owned property."¹¹ An owner shares her stake in the common and limited common elements with her fellow owners; she also has nonexclusive use rights in the common areas; (s)he may use them for their intended purpose, without hindering other owners' lawful rights.¹² In other words, when in the common areas, an owner's right to smoke her cigarette, ends at the tip of her neighbor's nose.

3. The way associations regulate the use of common and limited common areas is by enforcing the declaration and the rules.

A well-crafted declaration amendment banning smoking will maximize enforcement authority but is difficult to achieve. To ban smoking in units requires the affected owners' (read: smokers) approval, and at least 90 percent of the members' approval. An

⁸ RCW 64.34.308(1)(b).

⁹ RCW 64.34.304(1)(f).

¹⁰ See *Shorewood West Condominium Assoc. v. Sadri*, 92 Wn. App. 752, 966 P.2d 372 (1998), reversed, 992 P.2d 1008 (2000). The Court of Appeals held, for the first time in Washington, that a reasonableness standard should be applied to review condominium rules. The Supreme Court, however, has yet to adopt that standard of review.

¹¹ *Shorewood West Condominium Assoc. v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000).

¹² See RCW 64.32.050(4).

amendment banning smoking in the common and limited common areas requires the same supermajority vote required for most amendments.

Without a no-smoking amendment, associations may attempt enforcement through the “noxious and offensive use” provision in most declarations: “no noxious or offensive activity shall be carried on in any unit or common or limited common element, nor shall anything be done therein which may be or become an annoyance or nuisance to other owners.” At least in a litigation posture, the successful plaintiff needs a judge willing to connect the dots to hold second-hand smoke to be a legal nuisance. While Washington courts have already found sewage dumped into a river, and garbage dump smoke infiltrating a residential neighborhood, to be nuisances, second-hand smoke has yet to be so designated. Associations should spell out in a rule what their community deems “noxious and offensive.”

All condo associations may adopt and amend rules and regulations, subject to their declaration.¹³ A rule clarifying a noxious/offensive declaration provision can reasonably regulate smoking: (a) in a unit in a manner that causes smoke to be a nuisance to another owner, (b) in the common area, or (c) in the limited common area. That rule may be enforced by suit or preferably, by the use of an internal enforcement hearing.

4. Only the Association has the tools to conduct an internal enforcement hearing for governing documents’ violations.

One of associations’ most powerful enforcement mechanisms is also one of the most under-utilized. Any association that has established a written fine schedule and “notice and opportunity to be heard,” or due process procedures, and published them to the membership, may levy reasonable fines against a violator.¹⁴

The Legislature created this internal procedure precisely to give condo associations an alternative to suit. Smoking-related claims are an excellent matter to address in an internal enforcement setting. Unlike litigation, which is expensive, time consuming, and requires expert testimony to prove the presence of uninvited nicotine and its pathway, a due process hearing is much more user-friendly. It is structured but informal. There will be witness testimony, including evidence from others who experienced any second-hand smoke. There should be evidence of the parties’ attempts to resolve the matter themselves. There may be direct examination of the witnesses, by the parties and/or by the hearing board. In the end, a written determination will be provided to both parties. If a violation is found, the responding party may be ordered to cease any violative behavior and/or pay a fine. Given a properly drafted declaration or amendment thereto, fines may be collectable as assessments.

When second-hand smoke is at issue, associations ought to consider whether the facts and circumstances warrant their involvement, and if so, whether that means adopting rules,

¹³ RCW 64.34.304(1)(a).

¹⁴ RCW 64.34.304(1)(k).

proposing declaration amendments, or holding an internal hearing to meet its duty of care.

While individual condominium owners have rights that they can enforce as they relate to second-hand smoke, if they cannot work out their differences, a request that the Association regulate the second-hand smoke should be made before an individual launches into expensive and uncertain litigation.

