

Creating a Secondhand Smoke Policy in Your CIC

by Warren Ortlund, Staff Attorney, Public Health Law Center, William Mitchell College of Law

Secondhand Smoke Issue

You are a board member of a condominium association in Minnesota. A recent purchaser of a unit has approached you about an issue with secondhand smoke. The couple next to her travels to Florida during the winter, and they have just returned. They are both heavy smokers. When the purchaser looked at her unit during the early winter, she did not notice any smell of smoke. But now that the couple is back, second-

hand smoke is coming into her unit. The new owner has asthma, which is severely affected by exposure to smoke, and she has to leave her unit frequently because of it. The neighbors have been owners for many years. The non-smoker has approached them to see if they would be willing to stop or limit their smoking inside, but they have refused.

The governing documents of the association do not have any provisions that address smoking anywhere on the property. The non-smoking owner has approached the association board for help with her situation. What should the board do? This article briefly reviews secondhand smoke in condominiums, options that

are available, and some risks the association may face in addressing the issue. grounds smoke-free. Due to the ownership aspect of common interest communities, the process for adopting a smoke-free policy is more complicated than for rental properties, however.



ORTLAND

Preparation

All affected parties, including the owner-occupants, association board, and property management company, should receive information about the dangers of secondhand smoke, the health benefits of a smoke-free environment, the experiences of other properties, and legal considerations. A survey can be used to assess the attitudes of all parties toward different smoking policy options.

Determining support for a policy will help determine whether to adopt the policy by amending the declaration, by changing the rules and regulations, or whether to adopt a policy at all.

Method of Adoption

Under the Minnesota Common Interest Ownership Act (MCIOA), use restrictions, such as smoke-free policies, can be put in the declaration or in the rules and regulations. Minnesota Statute 515B2.105 states that the declaration can include "any material restrictions in use, occupancy, or alienation of units."

Minnesota Statute 515B3.102 on "Powers of Unit Owners' Associations," states that the association has the power to "adopt, amend and revoke rules and regulations. . . regulating the use of the units, and conduct of unit occupants, which may jeopardize the health, safety or welfare of other occupants, which includes noise or other disturbing activity,

Smoke Policy continued on page 17

LEGAL Q & A *continued from page 13*

again at the governing documents, and pay attention as to whether the source of the problem is a part of the improvements needed in your unit, the neighbor's unit or within the common elements of the association. If the problem stems from some deficiency within your unit, you will likely have to pay the cost of the fix. However, if it stems from a problem with the common elements, depending upon the assessment provisions under your declaration, it may be the association's obligation to pay for the fix.

If your neighbor and/or your board of directors will not address this issue, talk to an attorney about the possibility of bringing a lawsuit to require the responsible party to make the repairs. The best way to handle the problem of secondhand smoke in your home is for the homeowner and association to be proactive in finding a solution to keep the smoke from entering the unit without impeding on a neighbor's wish to smoke. But, as we all know, sometimes it takes more than a rational discussion to obtain compliance with what seems to be nothing more than common sense. ■

*Daniel B. Greenstein, Esq.
Bernick, Lifson, Greenstein, Greene & Liszt, P.A.
763-546-1200
dgreenstein@bernicklifson.com*

Due to the ownership aspect of common interest communities, the process for adopting a smoke-free policy is more complicated than for rental properties, however.

Background

With the passage of the Freedom to Breathe Act amendments to the Minnesota Clean Indoor Air Act in October 2007, the majority of indoor public places and places of employment are required to be smoke-free. Included in the statutory definition of "public places" are the indoor common areas of rental apartment buildings. But the common areas of common interest community properties are treated differently.

The Minnesota Department of Health considers the entire condominium building a private residence, and therefore, smoking is permitted in the indoor common areas and in the individual units. State law just establishes a minimum requirement for property owners, so condominium associations can make the common areas, the individual units, and even the entire

SMOKE POLICY *continued from page 15*

or which may damage the common elements or other units.”

The cost of amending a declaration to add a use restriction will be higher than implementing the policy through a rule or regulation. These costs could include expenses associated with providing notice to all association members, establishing a method for voting and follow-up, attorney fees for drafting the amendment, and costs to file with the county recorder's office. A change to the rules and regulations, however, generally only needs to be approved by a majority of the board and does not need to be recorded.

Another consideration in deciding the approach for adopting the policy is the anticipation of a legal challenge. Courts will consider a policy adopted by declaration amendment stronger than a new rule or regulation because of the more rigorous procedures required to amend the declaration. Courts usually give deference to the association's decision and will generally only find a declaration amendment invalid if it is determined to be arbitrary and capricious, illegal, against public policy or unconstitutional. If the policy is adopted as a change to the rules and regulations, the courts will generally also review the policy for reasonableness. This could become an issue if enforcement is necessary against owners who purchased prior to adoption of the new policy. For example, some courts may consider the lack of a “grandfathering” exception to a smoke-free policy as “unreasonable” in the case of long-time owners.

Policy approach

The policy approach toward existing owners who smoke is another important consideration. Several condominiums in

Minnesota have chosen to implement the policy for all new purchasers, and “grandfather” current owners who smoke until they sell the unit. The grandfathering policy could be drafted so that only the owner of that unit, and not a guest or another owner, is allowed to smoke in their unit, and the owner is not allowed to smoke elsewhere on the property. When the unit is sold, the non-smoking policy will apply to that unit.

Although the grandfathering option seems a fair approach, it has drawbacks. The main problem with grandfathering is that a smoking owner could continue to own a unit for an extensive period, so the health benefits of a smoke-free environment could be delayed for years. Ongoing complaints and enforcement challenges can also arise with grandfathered smokers scattered among non-smoking units.

Enforcing a policy

From the experience of multi-unit rental apartments and the few condominiums nationwide that have adopted smoke-free policies, the policies tend to be self-enforcing. Residents abide by the policies and smoke only where permitted. Enforcing smoke-free policies should not be viewed as different from enforcing other declaration use restrictions or rules or regulations, such as restrictions regarding pets or noise. Associations should enforce the policy consistently, equitably and uniformly, however, or the courts may decide the association has waived the right to enforce the policy.

Declaration nuisance clause

Most declarations contain a nuisance clause which states that no owner is permitted to engage in activity that will affect the use and enjoyment of another owner's property.

This clause has been used in several states to require the association to take action against smoking owners to restrict or eliminate the transfer of smoke between units. The challenge for the non-smoking owner is to demonstrate that the amount of

smoke moving between units rises to a level necessary to constitute a nuisance. Defining secondhand smoke transfer of a certain frequency as a nuisance in the governing documents could be a way for homeowners associations to clarify what constitutes a nuisance.

Disability Statues

Certain conditions affected by exposure to secondhand smoke, such as asthma, emphysema, or multiple chemical sensitivity disorder, can be considered disabilities under federal and state law. If a court considers the condition a disability, it could require a homeowners association to provide a reasonable accommodation to the affected owner-occupant. Courts decide on a case-by-case basis whether a condition meets the statutory definition of a disability, as well as what qualifies as a reasonable accommodation. The accommodation could require the complex to adopt a smoke-free policy, or it could consist of allowing an exception to the association's regulations on unit modifications so an owner can make structural changes to eliminate the intrusion of smoke.

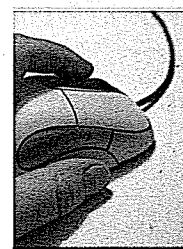
Conclusion

Many organizations around the country have been working on secondhand smoke in multi-unit rental apartment buildings for years, but limited attention has been paid to common interest communities. This will likely change as more people become aware of the risks of exposure to secondhand smoke. Oakland, California

Smoke Policy continued on page 19

Find Vendors that Serve the Multi Housing Industry Online Now!

Go to www.cicmidwest.com to find information at your fingertips, whenever you need it! You will find lists of CIC



Management Companies, CIC Attorneys and Product/Service Suppliers to the Multi Housing Industry.

Resources

Public Health Law Center: <http://www.publichealthlawcenter.org/>

Susan Schoenmarklin, Tobacco Control Legal Consortium *Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009* (2009). <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-condos-2009.pdf>

Technical Assistance Legal Center publications: http://www.phlpnet.org/product_search/tobacco%20control/talc?pt=13&pa=104&criteria=



Enforcing Your Association's Governing Documents

by Phaedra J. Howard, Esq., Hellmuth & Johnson, PLLC

Governing documents that are clear, concise and drafted in accordance with applicable statutes are much easier to enforce than those that are vague, poorly drafted and/or conflict with statutes or other governing documents. Here are some tips for enforcing your association's governing documents:

Enforcement Policy and Procedures

Every community association should establish its own procedures and policy for enforcing its governing documents. This includes setting a fine schedule and other procedures that will help ensure that the board of directors is consistent in its application of the governing documents and its enforcement of rules and regulations.

Communicate

An association cannot provide too much information to its homeowners when adopting and enforcing rules and

regulations. Homeowners that are made aware of the association's policies and rules and regulations will be more apt to follow them, and it will be easier for the association to enforce them.

Establish Reporting and Response Procedures

The association's rules and regulations policy must have an effective reporting and response procedure, one that en-

Associations can be deemed to have waived their right to enforce rules where they consistently fail to enforce one or more rules over a period of time.

courages homeowners to report violations in writing. This will not only provide documentation for the association, it will hopefully eliminate constant phone calls from homeowners reporting violations.

This is part two of our Governing Documents series. Part one, "Understanding and Interpreting Your Association's Governing Documents," was in the Winter 2010 issue of CIC Midwest News.

Enforce Violations

Timely and consistent enforcement of the rules and regulations policy will lead to speedy resolution, and should lead to fewer violations in the future.

On the other hand, if the association fails to respond to violations in a timely and consistent manner, the homeowners will become apathetic and unwilling to report them. It could also lead to an increase in violations because the consequences aren't perceived as real.

Additionally, associations can be deemed to have waived their right to enforce rules where they consistently fail to enforce one or more rules over a period of time.

Use Informal Notices

Associations may avoid enforcement conflicts by personally contacting homeowners

Governing Documents continued on page 21



HOWARD

SMOKE POLICY *continued from page 17*

requires sellers of condominiums to disclose the smoking policy for the unit being sold and for the condominium complex. Belmont and Richmond, California, require that all multi-unit condominiums sharing

a floor or ceiling be designated as smoke-free. The U.S. Surgeon General and the Department of Housing and Urban Development recently released documents highlighting the health risks

posed by secondhand smoke in homes and urging the adoption of smoke-free policies. Common interest communities should take note of the increasing evidence of the dangers of exposure to secondhand smoke and be proactive in considering smoke-free policies.

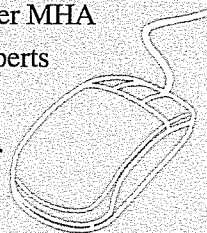
Funding for the research on secondhand smoke in condominiums and for the preparation of this article was made possible by Grant Number RC-2008-0044 from ClearWay MinnesotaSM. The contents of this article are solely the responsibility of the author and do not necessarily represent the official views of ClearWay Minnesota. ■

Have a Question? Get Your Answer on the CIC Midwest LinkedIn Group

Send your name and email address to information@cicmidwest.com to be included in the CIC Midwest LinkedIn Group under MHA (LinkedIn.com). Ask questions & get answers from experts in the industry and from your peers. Learn valuable information by reading about the experiences of others.

For CIC Midwest members only.

(This takes the place of the CIC Midwest Email Hotline.)



Warren Ortland
Staff Attorney
Public Health Law Center
William Mitchell College of Law
651-290-7539
warren.ortland@wmitchell.edu