

Condo Insights – Smoking & Cannabis in Community, Condominium and Homeowner Associations

Smoking-related issues and problems frequently arise in multi-family condominium buildings and townhomes where people live near each other. Even though smoking is on the decline among the general population, smokers and non-smokers living close together often creates problems and causes conflict between residents. Associations can manage and control smoking and take steps towards providing a smoke-free environment.

Condominium residents and guests are entitled to the quiet enjoyment of their residential units, balconies, and patios. This includes being free from the intrusion and health hazards of second-hand smoke. Condo owners frequently express concerns about the negative impacts, noxious odors, and diminution of quality of life due to second-hand smoke entering and intruding upon their units, balconies and patios created by residents and guests smoking on nearby balconies and patios.

Every association has governing documents. The Master Deed defines common elements and limited common elements. Interior common elements would include inside areas such as lobbies, elevators, hallways, meeting rooms and restrooms. Exterior common elements would include outside areas such as the parking lots, sidewalks, landscaping, as well as the swimming pool and any other recreational amenities. Limited common elements typically include outside private unit balconies and patios or stairwells that only one unit owner can use or has access to.

The By-Laws define the powers of the association board of directors. The board usually has the powers to establish rules and regulations for the use of common elements and limited common elements. A condo board can establish rules prohibiting smoking in and on interior and exterior common areas and limited common areas. While an owner may challenge the legitimacy of an association prohibiting smoking on the individual's private balcony or patio, so long as that private balcony or patio is defined as a common (or limited) common element, the association board may establish rules that control and prohibit certain behaviors and activities, including smoking. Case law throughout the country makes it clear that community association members are bound not only by the rules and regulations that exist at the time they purchase their unit, but as those documents may be properly amended from time to time.

In most associations, while the board can regulate certain activities on common elements, the board cannot regulate behavior inside a residential condominium. The unit owner can smoke in their condo, and in most cases there's not much any other members can do prohibit such behavior. Even though the board may ban smoking in common areas, rules don't prevent second-hand smoke from a smoker's unit from filtering into a non-smoker's unit. A board may appeal to the smoker, mandate a smoke-eater within the unit, and/or charge for additional heavy cleaning to indoor common hallways if the smoke and/or odor is prevalent. But more than likely, a board cannot stop an owner from smoking in their condo.

The biggest challenge to establishing a smoke-free community is enforcing the smoking ban. Voluntary compliance would be nice, but it is unlikely. Suppose a condo owner continues to smoke on common areas. What are the subsequent actions the board can take to enforce compliance? Establishing the rule was easy. Enforcement is more challenging and often leads to confrontation and conflict. The first step is issuing a warning or notice of the violation. But before a warning or violation notice can be issued, there must be a witness. If the offending behavior continues, additional steps may include subsequent violation notices and issuance of a monetary fine.

An association can only issue a violation and a fine if it has an ADR (alternate dispute resolution) procedure. ADR is the formal procedure allowing owners the right to appeal rules violations and fines and is required by the New Jersey Condominium Act. This administrative process is necessary, can sometimes slow down a condo board when dealing with an obstinate owner, but serves to ensure each condo owner is treated fairly and equally.

There is a possible way to ban smoking within a residential condominium – by amending the association governing documents to prohibit smoking throughout the entire association including inside the

residences. Members are empowered to amend their governing documents to prohibit smoking, but amending the governing documents usually requires a super-majority membership vote. A smoking ban implemented as part of a change to the association governing documents through a vote of the membership is more likely to be accepted than a vote of board members to change a rule.

The best way to enforce any rule is to encourage voluntary compliance. Having a clear policy and providing designated smoking areas is one option that shows the association is concerned about all members ability to use and enjoy their residences, as long as one member's actions do not endanger the health, safety or welfare of other residents.

Marijuana is now legal in New Jersey for both medicinal and recreational use and this may pose some additional concerns for board members and residents. Even though marijuana is now legal in New Jersey, smoking or vaping of cannabis is prohibited in public places. An association does not have to allow marijuana smoking in or on common areas regardless of purpose or intent if the association has a no-smoking policy, even for an individual with a medicinal marijuana prescription.

Associations may want to consider establishing a policy that marijuana consumption is permitted in common areas only in edible or other forms that do not produce secondhand smoke or vapors. This may also be an appropriate time for associations to consider a policy stating use of recreational facilities and amenities is not recommended by individuals under the influence of marijuana or any other product that could affect judgment and coordination.

An association's no-smoking policy should be clear - cigarettes, e-cigarettes, cigars, vaping and/or aerosol devices, medicinal marijuana, or recreational marijuana, - anything that gives off smoke as a by-product - should be prohibited in common areas. Such a policy is clear and concise and does not have to differentiate between types of secondhand smoke. As you can see, the restricted behavior and the law continue to evolve in this area.

The objective of a no-smoking policy is to protect residents who are concerned about adverse health effects of secondhand smoke. Focusing on this objective should guide the association's rules and enforcement efforts.

Jim Yost owns Elite Management and Advisory Services, LLC and is Managing Partner for Ocean Property Management Corporation, based in Wildwood. The firms manage numerous community, condominium and homeowner associations in southern New Jersey. He can be reached at yostopmc@comcast.net. Past columns are available online at www.oceanpropertymgmt.com.

Karim Kaspar, Esq. is Senior Counsel with Lowenstein Sandler LLP. He serves as general counsel to numerous community and condominium associations throughout New Jersey. He specializes in complex commercial litigation and real estate matters and has been active and instrumental in the firm's pro-bono activities. He can be reached at kkaspar@lowenstein.com.