

Condo Board Options in Dealing with Second-Hand Smoke Complaints

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One of the most prevalent issues faced by a condominium board of managers and their managing agents are complaints about marijuana and cigarette smoke/odors. In the face of such complaints, the Board has two options: it can attempt to implement a ban on smoking throughout the building or address the problem in a more narrow manner by enacting new rules aimed at limiting unit owner complaints.



While condominium by-laws give the board expansive discretion to make, amend, and revoke rules and regulations governing quality of life issues that are binding on the unit owners, any rule that is considered an amendment to the by-laws (which typically requires the approval of the unit owners owning at least two-thirds of the common interest) is not enforceable. A ban on smoking anywhere in the condominium building, including the units, can only be accomplished by an amendment to the by-laws. Notwithstanding that bans on smoking is now a societal norm throughout the New York City metropolitan area, Boards have been reluctant to propose anti-smoking by-law amendments – even in the face of complaints about smoke odors – because of uncertainty as to how a smoking ban will affect unit values and because of sensitivity to concerns that smoking unit owners may have purchased their units before the ban was implemented.

Boards commonly respond to smoking complaints by shoring up their existing rules and regulations in that regard. The by-laws give the Board the right to regulate the use of the “common elements,” so Boards have the right to adopt a rule that prohibits smoking within any of the common elements, such as the lobby, hallways, laundry room and common area roof-top gardens. Boards have also responded to concerns about smoke by adopting rules that prohibit unit owners from permitting smoke and smoke odors from permeating into the common areas or other units.

While adopting a rule that precludes smoke and odors from emanating from a unit into the common elements or other units is straightforward, enforcing that obligation can be more elusive. The most typical enforcement mechanism is the imposition of fines for violations of the smoking rules. Such fines are permissible.

A number of boards have recently addressed smoking complaints by enacting rules that empower the Board to require unit owners who violate smoking rules and regulations to install air filtration systems at the unit owners’ expense. While it does not appear that the courts have addressed a

challenge to this type of regulation, under the business judgment rule, Board decisions will not be second-guessed by the judiciary unless the unit owner can come forward with evidence that the Board members acted in bad faith.

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