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Secondhand smoke and your condominium: How to navigate the changing legal landscape

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It's a hot-button topic producing scientific studies, legal changes, and a whole lot of frustration on the part of condominium owners. It's secondhand smoke. And since January 1, 2013, in Mass., the issue isn't limited to cigarettes, but includes medical marijuana as well.

The furor over secondhand smoke has led to lawsuits, both against smoking unit owners and condominium associations. This Client Update canvases the legal landscape relating to secondhand smoke in condominiums and suggests ways that associations can address unit owner concerns, respect the rights of smokers and patients using marijuana, and, ultimately, avoid legal liability.

Cigarette Smoke

What's the danger?

In 2006, the Surgeon General reported that the scientific evidence was sufficient to conclude that there is no risk-free level of exposure to secondhand smoke. This report also highlights some of the many dangers of secondhand smoke:

* Secondhand smoke contains more than 4,000 chemicals and more than 50 carcinogens.
* Secondhand smoke is especially hazardous for those who suffer from cardiovascular diseases, asthma or other lung conditions.
* Secondhand smoke can increase the risk of heart disease in nonsmokers by as much as 60% and children exposed to secondhand smoke in the home are twice as likely to develop and suffer persistently from asthma.
* Secondhand smoke also can cause acute lower- and upper-level respiratory tract conditions, acute middle ear conditions, and elevated levels of SIDS.

Residents of condominium units neighboring a smoker may be susceptible to the effects of secondhand smoke. Studies have shown that tobacco smoke travels from its point of generation in a building to all other areas of the building moving through light fixtures, ceiling crawl spaces, and into and out of doorways. Preventative steps can be taken, however, such as the installation of commercial air filtration systems, often referred to as "smoke eaters," to limit the passage of secondhand smoke to neighboring units.

When can a condominium association be liable?

A condominium association's duty to unit owners is defined by the condominium declaration of trust, master deed, and by-laws. Once a restriction is in place prohibiting smoking within units or within the common areas, the condominium association has a duty to enforce the policy. While a condominium association will not be liable if it had no reason to know that a unit owner violated the restriction, if the condominium association knew or had reason to know that a violation was taking place and failed to take reasonable steps to enforce the anti-smoking restriction, it may be liable to a nonsmoking unit owner bringing suit.

Unit owners have brought, and likely will continue to bring, suits against condominium associations for failing to prevent the effects of secondhand smoke from neighboring units, even when there is no restriction on smoking units in place. Unit owners often base these suits on a failure to enforce a general nuisance policy in the by-laws or other condominium rules and restrictions. To date, however, no condominium association has been held liable when there is no restriction in place prohibiting smoking in units.

How can a condominium association make changes?

A restriction on smoking in units would need to come in the form of an amendment to the declaration of trust - a rule passed by the trustees without unit owner approval would not be enough.1 In order to pass a by-law amendment, typically 67% or 75% of unit owner interest is required, as well as approval by a majority of Trustees. Once a condominium association clears this high hurdle, it has broad powers to develop its by-laws.

These broad powers emerge from the basic premise of condominium ownership 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."2 Massachusetts General Laws Ch. 183A Â§ 11, provides that the by-laws of a condominium shall include:

"(e) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common areas and facilities, not set forth in the master deed, as are designed to prevent unreasonable interference with the use of their respective units and of the common areas and facilities by the several unit owners."

Under these powers, condominium rules prohibiting smoking in common areas have been universally upheld against challenges, regardless of whether they apply to owners who purchased their units before the rule went into place.

With respect to rules prohibiting smoking in units, if the restriction will only affect owners who purchase the unit after the restriction goes into place, courts will use the standard of "equitable reasonableness" in determining whether the restriction is valid.3 In other words:

"If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. This approach recognizes the discretion of the majority of unit owners while at the same time limiting their rule-making authority to those matters 'that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.'"4

If a rule reasonably restricts an activity, such as smoking, because of serious concerns - such as the effects of heavy smoking in units on neighboring unit owners - courts will not invalidate the rule because it also incidentally restricts less harmful behavior - such as the unit owner who smokes just one cigarette a month.5

If a restriction affects an owner who purchased the unit before the restriction went into place, courts have articulated a slightly more stringent standard; one remaining closely akin to reasonableness. In Franklin v. Spadafora, for instance, a case considering a limitation to two of the number of units a person may own, the court held that "[i]f a [by-law amendment] serves a legitimate purpose, and if the means the [condominium association] adopted are rationally related to the achievement of that purpose, the [amendment] will withstand constitutional challenge."6

While no Massachusetts case to date has considered a condominium association adopting a restriction that prohibits current unit owners from smoking in their own units, a court would likely find

that such a restriction meets the requisite standard of reasonableness. Courts throughout the country have noted the significant dangers imposed by secondhand smoke. A condominium need not undertake its own research to find that smoking presents a real danger. In Noble, the court did not require that unit owners "conduct investigations or cite authority in order reasonably to conclude that the presence of pets within the condominium may interfere with their health, happiness, and peace of mind."7 The fact that the trustees "had received several complaints" was enough.8 Although it is possible a court may require more documentation of problems arising from smoke use when applying a restriction to current owners, the threshold for evidentiary findings would likely remain low given the strong deference afforded to condominium associations.

If, perhaps in order to gain the requisite number of votes to pass a restriction on smoking in units, current owners are grandfathered in, a condominium association could still require that the current smoking unit owners take certain remediation measures such as installing air filters or blocking cracks under doors.

Medical Marijuana

What exactly does this new law say?

The new Massachusetts statute governing medical marijuana went into effect January 1, 2013. The statute allows individuals with "debilitating medical conditions" to use marijuana and possess a 60-day supply without being subject to civil or criminal penalties. The statute defines "debilitating medical conditions" as including, but not limited to, "cancer, glaucoma, Crohn's disease, AIDs (or HIV-positive status), Hepatitis C, Parkinson's disease, ALS or multiple sclerosis." The statute also allows users to cultivate marijuana if their access to authorized dispensaries is limited.

What about the dangers?

Putting aside the concerns most frequently voiced with respect to drugs in general, the possession and cultivation of the marijuana poses considerable dangers for condominium associations. One danger is property damage. Because marijuana requires water, heat and intense light, its cultivation creates increased risks of mold and fire hazards. As with cigarette smoke, marijuana smoke can travel to neighboring units. Secondhand marijuana smoke contains many harmful toxins and neighboring unit owners may also take offense to the noxious odors that growing marijuana can omit. Finally, security is a legitimate concern for many condominium associations as a 60-day supply of marijuana could make for a potential target for burglars.

What are the options?

Condominium associations can adopt a by-law to govern marijuana the same way it would for any other restriction. This by-law could theoretically ban the possession of marijuana altogether, or it could just ban the cultivation of marijuana. The legal ground on which such a by-law would stand, however, is still shifting considerably. Marijuana is still a prohibited drug under federal law, which contains no medical exemption. As such, a condominium association could argue the law only protects individuals from state prosecution for possession and use of the drug - that it doesn't regulate the actions of private entities nor overrule their drug policies. Several courts in other states with medical marijuana laws have adopted precisely such reasoning in the employment context, allowing employers to fire, or otherwise not accommodate, employees using medical marijuana.

Whether Massachusetts courts will adopt this rationale in the housing context remains an open question. Short of adopting a bright-line rule that could make your condominium association the test case, several lower risk options exist. One possibility is for your association to treat medical marijuana accommodation requests the same way it treats accommodation requests made under

the Fair Housing Act, which requires a good faith effort to identify an accommodation that meets the needs of the resident seeking it without unduly burdening the community or harming other residents. Such an approach would include a thoughtful and balanced evaluation process, considering the legitimate needs of the patient as well as the legitimate concerns of other unit owners. This evaluation process might include verifying the patient's need for medical marijuana through documentation from the prescribing physician, as well as inquiring whether there are any other drugs that could provide comparable relief. If the evidence indicates that marijuana is the only appropriate drug, your association could request that the patient mitigate the effect of his or her smoking through installing a smoke eater or consuming the marijuana through means other than smoking it. While a unit owner denied accommodation through this process might still bring suit, if the association closely follows its duly adopted procedures, its exposure to liability would be significantly diminished.

Summary

As studies continue to amass evidence on the dangers of smoking, and unit owners continue to call for reform, condominium associations need to understand the options available to them. Through the adoption of by-laws, condominium associations have wide latitude to restrict the smoking of cigarettes in units. When it comes to medical marijuana, however, the case law is much less certain about whether a bright-line restriction would stand if challenged. Both cigarette smoke and the use of marijuana in units pose potential dangers to condominiums. With respect to the latter, however, condominium associations may be wise to adopt more fluid procedures for determining accommodation requests on a case-by-case basis.

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(Endnotes)

1 Granby Heights Ass'n, Inc. v. Dean, 38 Mass.App.Ct. 266 (1995).

2 Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla.Dist.Ct.App.1975).

3 See Noble v. Murphy, 34 Mass.App.Ct. 452 (1993) (citing Goldberg, Community Association Use Restrictions: Applying the Business Judgment Doctrine, 64 Chi.-Kent L.Rev. 653, 655 (1988)).

4 Id. (quoting Hidden Harbour Estates, Inc. v. Norman, 309 So.2d at 182).

5 Id. See Barclay v. DeVeau, 384 Mass. 676, 682, 429 N.E.2d 323 (1981).

6 388 Mass. 764, 775 (1983) (quoting Shell Oil Co. v. Revere, 383 Mass. 682, ---, Mass.Adv.Sh. (1981) 1285, 1289). See also Johnson v. Keith, 368 Mass. 316, 322 (1975) ("[B]ecause restrictions in the master deed and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions. . . . We find no merit in the plaintiff's claim that the statute of frauds bars enforcement of an otherwise lawful restriction against a unit owner who has not assented in writing to that restriction.").

7 34 Mass.App.Ct. at 458.

8 Id.