



Smoke-Free Policies and Condominiums In Illinois

Introduction

Over the last several years considerable progress has been made in promoting smoke-free policies for multi-unit rental properties, but adoption of policies for condominiums has been slower. The ownership aspect of condominiums raises more complex legal issues than those in the landlord and tenant context, but the issues are temporary challenges and not permanent barriers.

Condominium homeowners' associations will experience similar benefits as apartment building owners from adopting smoke-free policies—healthier environment, reduction in maintenance costs and fire risks, and more desirable property for prospective buyers. This fact sheet briefly discusses some of the primary legal issues involving smoke-free policies in condominiums, in the context of Illinois law.

Legality of Smoke-Free Condominium Policies in Illinois

Smoke-free policies are legal for condominiums in Illinois. Regulation of condominium associations in Illinois is controlled by the Illinois Condominium Property Act (ICPA)¹. This law states that the declaration establishing the condominium may contain, “such other lawful provisions not inconsistent with the provisions of the Act as the owner or owners may deem desirable in order to promote and preserve the cooperative aspect of ownership of the property and to facilitate the administration thereof.”² According to the statute, the bylaws of the association may contain, “such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners.”³ The statute also allows the association board of managers “to adopt and amend rules and regulations covering the details of the operation and use of the property.”⁴ Restrictions on smoking are considered the same as restrictions on leasing out the condominium unit or ownership of pets.

¹ 765 ILL. COMP. STAT. ANN. 605/1-32 (2011).

² 765 ILL. COMP. STAT. ANN. 605/4(i).

³ 765 ILL. COMP. STAT. ANN. 605/18(k).

⁴ 765 ILL. COMP. STAT. ANN. 605/18.4(h).

Legal Issues / Factors

Many of the legal concerns that arise when discussing the adoption of smoke-free policies for rental apartment buildings also come up in the context of condominiums, and the answers are generally the same.

- *Discrimination*
The adoption of smoke-free policies for condominiums is not discriminatory because the activity of smoking is not protected;⁵ an individual's status as a smoker is not protected;⁶ and addiction to nicotine is not a disability that merits accommodation.⁷
- *Liability*
Homeowner's associations that have adopted smoke-free policies generally have not found increased liability due to the new policy, if the policy is adopted in compliance with the state's condominium law and the association's governing documents.

“Grandfathering”

When residential multi-unit properties adopt new smoke-free policies, a key concern is how the policies will apply to current residents who smoke. With condominiums, the issue is more complex because residents own their units as opposed to temporarily renting them.

When buyers purchase a condominium unit, they receive a copy of the governing documents, usually the declaration, bylaws and rules and regulations. These documents typically put new owners on notice that use restrictions on units and conduct rules may be changed in the future as long as they follow proper procedures. Because the adoption of smoke-free policies in condominium is a relatively new development, little litigation has addressed this issue. One case from Colorado, however, does support the authority of a homeowners' association to adopt a smoke-free policy and enforce it against an existing smoking owner.⁸

Approach to Adoption / Guidelines

In deciding whether to adopt a smoke-free policy, condominium associations need to consider several issues. Surveys could be conducted to solicit responses to questions such as those listed below.

What areas of the complex should the smoke-free policy cover? Illinois law and the Chicago Clean Indoor Air ordinance may cover some common areas, but the

⁵ Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Threats and Challenges* (2009), available at

http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009_0.pdf.

⁶ Samantha K. Graff, Tobacco Control Legal Consortium, *There Is No Constitutional Right to Smoke* (2008), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf.

⁷ Clifford E. Douglas, Tobacco Control Legal Consortium, *The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure* (2004), available at

<http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-disabilities-2004.pdf>.

⁸ *Christiansen v. Heritage Hills Condominium Association*, No. 06CV1256 (Colo. Dist. Ct. Jefferson county 2006).

association will need to determine the extent of the policy. The more expansive the policy, the more likely the association will face some opposition, especially if individual units are included.

Who should be covered by the policy? As discussed above, if existing smokers are included, the association may face opposition and perhaps a legal challenge. If, however, individual owners are grandfathered, the health benefits of going smoke-free may be indefinitely delayed and enforcement issues may arise with smokers scattered among the non-smokers.

How much is the association willing to spend on implementation? Costs for implementing a new smoke-free policy vary depending on how the policy is adopted. If the policy is adopted by way of an amendment to the declaration, the cost will be higher because the association attorney will need to be involved to draft the amendment, voting procedures will need to be established and the resulting amendment will need to be filed with the declaration. A less expensive option is for the smoke-free regulation to be adopted by a change to the rules and regulations, which can be made by a vote of the association board of managers.

Does the association anticipate a legal challenge to a new smoke-free policy? If the association has substantial support for a strong policy—for example, one covering smoking in individual units—but has vocal opponents, then the association should adopt the policy by way of an amendment to the declaration or bylaws. Policies included in the declaration or bylaws are stronger than rules and regulations because of the super-majority support of association members required to amend the governing documents, making them more likely to withstand a legal challenge.

Sample scenarios

- 1. Our association is relatively new. At this point we do not have any smokers in our complex and would like to ensure that we do not have smoking in our buildings in the future. We have strong support for the smoke-free policy.**

Recommendation: Implement the new smoke-free policy through an amendment to the declaration or the bylaws. Because this is a relatively new association, the membership may be in the process of establishing the use restrictions and rules and regulations, so including the smoke-free policy would not be a unique expense. Also, by adding it to the declaration or bylaws, the policy is stronger and less likely to be changed in the future.

- 2. We have a large condominium building with about 20 smokers out of 200 units. When the topic of smoke-free policies comes up at association meetings, the smokers are adamant that we are taking away their rights. Even some of the non-smokers are hesitant to tell long-time owners what they can do in their own units. What are our options?**

Recommendation: Make sure that information is made available to all residents about the health dangers posed by exposure to secondhand smoke. Also, make it clear that smoke-free policies are not designed to get rid of residents; it is about the smoking and not the smoker. No-smoking policies could be gradually implemented, starting with common areas and then expanding coverage, through rules and regulations, and the response from

residents could then be assessed. This approach would be relatively inexpensive, because it would be a board decision, and the policies could be easily changed according to resident reaction.

3. We've been unable to get a smoke-free policy adopted as an amendment to the declaration, or as a new rule or regulation. I'm a non-smoker with asthma and a smoker recently bought the unit below me. What can I do?

Recommendation: Most association governing documents have a general nuisance provision that prohibits one owner from engaging in an activity that negatively affects another owner's use or enjoyment of his or her property. This provision has been used with some success to force smokers to take some action to prevent smoke from entering another unit. Depending on the severity of their health condition, non-smokers may be able to request a reasonable accommodation under disability statutes or state laws. These remedies would only help one resident at a time, however. Each resident bothered by secondhand smoke would need to start the process over again.

4. Some residents of my condo complex are smoking in the hallway. Doesn't the Smoke Free Illinois Act or the Chicago Clean Indoor Air Ordinance prohibit smoking in the common areas of condominium buildings?

Answer/Recommendation: The state law and city ordinance may prohibit smoking in some common areas but this has not been tested. Contact the Chicago Department of Public Health and the Chicago Department of Business Affairs and Consumer Protection; these agencies are responsible for enforcing the city ordinance.

Resources

- The Illinois Condominium Property Act: <http://tinyurl.com/4xme5>
- Chicago Department of Public Health: <http://www.cityofchicago.org/city/en/depts/cdph.html>
- Results of Survey of Condominium Residents: <http://tinyurl.com/3el6sbo> (from a Minnesota survey)
- How to Make a Condo Complex Smokefree: <http://tinyurl.com/3tqysqq> (this fact sheet is based on California law, but the general concepts are applicable in Illinois)
- Massachusetts Guide to Smoke-Free Condos: <http://tinyurl.com/3oh4lt9>

The information contained in this document is not intended to constitute or replace legal advice.