

COOPERATIVES AND CONDOMINIUMS

BY RICHARD SIEGLER AND EVA TALEL

Dealing With Secondhand Tobacco Smoke

Given recent conclusive scientific evidence of the serious health hazards associated with second-hand smoke from cigarettes, cigars and pipes, especially for children,¹ co-op and condominium boards are increasingly looking into how to keep their buildings smoke-free.

While New York City and State have banned smoking in all public areas, we are only aware of one co-op board that imposed a ban on smoking within apartments in 2002, and then only on new owners.² While the ban was quickly rescinded, we believe that in 2006, in light of irrefutable evidence of second-hand smoke health hazards, there are no legal obstacles to prohibiting smoking in co-op or condominium buildings. Lodging giant Marriott recently banned smoking, effective September 2006, in its over 2,300 hotels in the United States and Canada, some 400,000 rooms. Starwood Hotels has banned smoking in its 77 upscale Westin brand hotels in the United States, Canada and the Caribbean.³

This column discusses the vulnerability of apartment occupants to second-hand smoke, recent case law recognizing a landlord's duty to prevent smoke from penetrating into an apartment, and recommends policies that boards can implement to restrict smoking in their buildings.

Second-Hand Smoke Hazards

In a long-awaited June 2006 report, the U.S. Surgeon General concluded that second-hand smoke is not only a serious health risk, but is almost as bad as smoking itself, citing to "massive and conclusive scientific evidence" of the "alarming public health hazard(s)" of involuntary smoking, including increased risk of death from lung cancer and heart disease.⁴ While the degree of risk associated with second-hand smoke had been the subject of debate, all levels of government in the United States took steps to decrease citizen exposure to second-hand smoke (also referred to as Environmental Tobacco



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Smoke (ETS) or "passive smoking"). In 2002, the New York City Council amended the New York City Smoke-Free Air Act (SFAA) to prohibit smoking in almost all indoor places where people work or socialize, and in 2003, the state amended the Clean Indoor Air Act (CIAA) to prohibit smoking in the same locations statewide.⁵ As of April 2006, 11 states had adopted comprehensive bans on indoor smoking, and the federal government has prohibited smoking on all domestic commercial flights and interstate buses, and in most motor common carriers.⁶

Now that the Surgeon General has declared the debate over and the science clear—second-hand smoke is not a mere annoyance but a serious health hazard—boards should address exposure of apartment occupants to passive smoking.

Tobacco Smoke Escapes

Smoke is not easily contained within an apartment; it travels through central air systems, vents and doors into other apartments and common areas such as lobbies, hallways and elevator cubicles. Moreover, the Surgeon General's report establishes that there are no "safe" levels of second-hand smoke and only smoke-free buildings protect occupants from the hazards of passive smoking; cleaning the air and installing ventilation systems does not eliminate exposure to second-hand smoke. While courts recognize a right to privacy in one's home, that right does not protect actions that infringe on the rights of others.⁷ Here, smoking in one's home directly affects people outside one's home. Therefore, boards should be permitted to regulate smoking, a conclusion supported by the rationale used by courts to sustain New York City and state smoking regulations.

In *New York City C.L.A.S.H., Inc. v. City of New*

York, the court permitted extension of the CIAA and SFAA from offices, theaters, libraries and retail stores, to bars and restaurants, holding: "there is nothing about a bar or a restaurant that makes ETS any less harmful to persons affected by it... There is no inherent quality in bars and restaurants that offer some protective shield from ETS that other public places do not have."⁸ Applying this rationale to co-op and condominium apartments, there is nothing about second-hand smoke that comes through vents, ceilings or doors of an apartment that makes it less harmful than the second-hand smoke people are legally protected from inhaling in public spaces. ETS is equally harmful in all locations, and boards should have the right to enact the same protections from second-hand smoke for apartment occupants as those afforded restaurant patrons.

Submission to Co-op Regime

In *Levandusky v. One Fifth Ave. Apartment Corp.*, the court recognized that joining a co-op is a voluntary submission "to the decision-making authority of a cooperative board.... There is always the freedom not to purchase the apartment. The stability offered by community control, through a board, has its own economic and social benefits..."⁹ The U.S. and state constitutions restrict the government's ability to regulate conduct because its citizens are bound to submit to their authority. Shareholders, on the other hand, freely join co-ops and agree to their rules and regulations in exchange for concrete benefits; they also retain a right to move if building policies change to their disliking. This freedom of choice to make a private contract is the foundation for board regulation of the conduct of occupants, including the implementation of a smoking ban in a building.

We believe that co-op boards can ask prospective purchasers whether they smoke—and reject applicants who do smoke—because co-op boards control the application process for the purchase of an apartment and, absent unlawful discrimination, boards are generally free to set standards for admission.¹⁰ Co-op and condominium boards can adopt and amend House Rules and bylaws that regulate the conduct of occupants. For example, if children loitering in front of the building becomes a problem, such activities can be prohibited; if music playing past 10 o'clock in the evening bothers shareholders, time limits for such activities can be set. The interests of shareholders can

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change over time, and apartment owners consent to this evolutionary aspect of co-op or condominium life when they purchase an apartment.

Courts generally defer to the judgment of boards regarding such regulations. In *Levandusky*, the court adopted the “business judgment rule” as the standard for review of such board actions, so as not to frustrate the purpose of a residential community designed to regulate conduct of occupants for the common benefit. If the board regulation or action is in furtherance of a legitimate purpose of the co-op, it will generally be upheld. In *40 West 67th Street v. Pullman*,¹¹ the Court of Appeals applied the business judgment rule to validate a co-op’s right to terminate a proprietary lease because of objectionable conduct by the shareholder. Under this rationale, the legitimate purpose of a board-imposed smoking ban to preserve the health of occupants should be sustained by the courts.

Notwithstanding the private contractual nature of co-op membership, boards may not discriminate against protected classes in their application process, breach the warranty of habitability to their tenants, or act in such an economically detrimental manner as to constitute a restraint on alienation (sale) of apartments. However, none of these limitations should prevent a board from banning smoking in a building. Indeed, recent case law teaches that the failure to ban smoking may breach the warranty of habitability.

Not Protected Class

Smokers are not among the recognized protected classes of apartment purchasers, thus rejecting applicants because they are smokers, or prohibiting smoking in apartments, is not a violation of the 14th Amendment’s Equal Protection Clause. In *New York City C.L.A.S.H.*, the court explained that “smokers as a class lack the typical characteristics” of a suspect classification such as “an immutable trait, the lack of political power, and a ‘history of purposeful unequal treatment.’”¹² Further, the U.S. “Supreme Court has rejected the notion that a classification is suspect ‘when ‘entry into the class... is the product of voluntary action.’”¹³ Moreover, the Equal Protection Clause does not prohibit treating one class of individuals differently from others, unless the difference in treatment is “palpably arbitrary” or amounts to an “invidious discrimination.”¹⁴ In light of the Surgeon General’s findings, keeping smokers and smoking out of a building is not arbitrary or invidious because the reason for doing so is soundly based on a legitimate health goal.

Smoking Is Not a Disability

Some concerns have been voiced that smoking restrictions could violate laws prohibiting discrimination in housing based on disability, and that smoking is an addictive condition that amounts to a disability. We believe it highly unlikely that smoking would be considered a handicap under the federal Fair Housing Act.¹⁵ This act prohibits discrimination based on mental or physical handicap that substantially limits a person’s major life activities, which smoking does not do. As the court found in *New York City C.L.A.S.H.*, even if some individuals smoke under the influence of nicotine addiction, it

is treatable, and “there is a whole industry dedicated to assisting smokers to become nonsmokers.”¹⁶

Not a Restraint on Alienation

Certain co-op policies can unreasonably restrain alienation and are therefore not permitted. For example, in *Chemical Bank et al. v. 635 Park Avenue Corp.*, the court held that a shareholder could not be required to settle lawsuits against the co-op as a condition for being permitted to sell an apartment.¹⁷ Given that boards are obligated to act in the co-op’s best economic interest, shareholders could argue that preventing smokers from purchasing apartments limits marketability, thus lowering values. However, there may well be an increasing market for smoke-free buildings (especially for families with children). Further, tobacco smoke prevention should fall within the same category as restrictions on bicycles, noise or pets, in that they restrict certain conduct to improve the welfare of the community at large. Although these restrictions too limit the people who might buy a co-op apartment, they open a door to other buyers with different interests.

A No-Smoking Ban

Concerns have been raised that enforcing a smoking ban is difficult. While such costs, in legal fees and tenant relationships, could be high, boards may find the cost of failing to address second-hand smoke to be greater. For example, proprietary leases generally prohibit apartment owners from permitting odors to escape into common areas or into other apartments. If boards fail to remedy second-hand smoke, they could be liable for health problems caused by escaping smoke. Such costs could far outweigh the costs of enforcing a no-smoking policy. Further, under the warranty of habitability, every residential lease contains an implied, nonwaivable warranty that the premises are fit for human habitation and occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to life, health or safety.¹⁸ The proprietary lease in co-ops creates the requisite landlord-tenant relationship, and shareholders may therefore obtain an abatement of maintenance if the co-op fails to remedy hazardous or detrimental conditions. Further, if a shareholder prevails on such a claim, the co-op may be responsible for the shareholder’s legal fees. While the warranty of habitability is not applicable to condominiums, their by-laws generally obligate the board to protect occupants from noxious odors, and a unit owner’s claim for breach of such by-laws for permitting second-hand smoke to emanate from a unit may be asserted.

An August 2006 decision held, as a matter of law, that second-hand smoke is a condition that invokes the warranty of habitability.¹⁹ The court found that tenants of a condominium unit owner who vacated the unit before their lease expired because of smoke penetrating from an adjoining apartment could assert both the warranty of habitability and constructive eviction as a defense to their landlord’s non-payment of rent proceeding, even though the landlord had no control over the adjoining apartment. While this is the first New York decision addressing landlord liability for second-hand smoke penetrating from one apartment to another, we expect other courts will follow suit.

Recommendations

While it would be ideal to create a building that is smoke-free from its inception, an alternate route to a smoke-free co-op building would be requiring disclosure in purchase applications of whether the prospective purchaser smokes and rejecting applicants who smoke. Boards should also consider prohibiting smoking in all building common areas. If boards wish to ban all smoking in the building, we recommend this be done through an amendment to the proprietary lease in a co-op, and amending the bylaws in a condominium. While board action may be legally sufficient, a court may be more inclined to endorse a smoking ban if it is adopted by a supermajority—a two-thirds vote of shareholders or unit owners—and amendment of the proprietary lease or condominium bylaws. As the city, state and the lodging industry moves to reduce second-hand smoke exposure, co-ops and condominiums should follow suit. We believe that creating a smoke-free building is not only a legally enforceable option for co-op and condominium boards, but also is a legally desirable one.

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1. “The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General—Executive Summary at Prologue” (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf>. See also Eric Nagourney, “At Risk: A Surgery Hazard for Children Exposed to Smoke,” N.Y. Times, July 25, 2006, p. F6, col. 1 (children exposed to second-hand smoke experience more breathing problems under general anesthesia).

2. Dennis Hevesi, “Co-op Board Bans Smoking in Apartments for New Owners,” N.Y. Times, April 30, 2002, p. B6, col. 1.

3. Peter Sanders, “Marriott to Ban Smoking From All Rooms,” Wall Street Journal, July 19, 2006, p. D1, col. 3. (Guests who sneak a smoke are subject to a “clean up” fee of \$200-\$300, plus lost revenue charges if the room is taken out of service.)

4. *Supra* note 1.

5. See 2002 New York City Local Law 47, Council Int. No. 256-A, codified at New York City Admin. Code §§17-501 et seq; 2003 N.Y. Senate Bill No. S.3292; 2003 N.Y. Assembly Bill No. A.7136, codified at N.Y. Pub. Health Law §§1399-n et seq.

6. Richard G. Jones and John Hall, “New Jersey Joins 10 States in Banning Indoor Smoking,” N.Y. Times, April 14, 2005, p. B6, col. 1. See 49 C.F.R. section 374.201 (2005).

7. See *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. *New York City C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461, 489 (S.D.N.Y. 2004). Plaintiff is an organization dedicated to advancing the interests of smokers, including challenging the constitutionality of bans on smoking in bars and food service establishments.

9. *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 536 (1990).

10. *Weisner v. 91 Park Avenue Corp.*, 6 N.Y.2d 426 (1959).

11. *40 West 67th Street v. Pullman*, 100 N.Y.2d 147 (2003).

12. *New York City C.L.A.S.H.* at 482, citing, in part, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 437 U.S. 432.

13. *United States v. Coleman*, 166 F.3d 428, 431 (2d Cir. 1999) (quoting *Plyler v. Doe*, 457 U.S. 202, 219 (1982)).

14. *Trump v. Chu*, 65 N.Y.2d 20, 25 (1985). See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973); *Shapiro v. City of New York*, 32 N.Y.2d 96, 103 (1973).

15. *Supra* note 2, quoting Michael Schill, director of the Furman Center for Real Estate and Urban Policy at the New York University School of Law (“It would be highly unlikely for smoking to be considered a handicap under the federal Fair Housing Act.”).

16. *New York City C.L.A.S.H.*, 315 F. Supp. at 482, FN 14.

17. *Chemical Bank v. 635 Park Avenue Corp.*, 155 Misc.2d 433 (Sup. Ct. N.Y. Co. 1992).

18. N.Y. Real Property Law §235-b (McKinney Supp. 2006). See Richard Siegler and Eva Talel, “The Warranty of Habitability,” 2006, NYLJ, May 3, 2006, p. 3, col. 1.

19. *Poyck v. Bryant*, NYLJ, Sept. 1, 2006 (Civ. Ct. N.Y. Co., Hagler, J.).