

Secondhand smoke, also known as “environmental tobacco smoke” (ETS), contains more than 4,000 chemicals, including 200 poisons and 43 carcinogens. ETS is a combination of (1) “mainstream smoke,” which is exhaled by those actually smoking tobacco, and (2) “sidestream smoke,” which enters the environment directly from the burning end of a cigarette. Although mainstream smoke can be filtered twice, once by the cigarette filter and again by the smoker’s lungs, sidestream smoke is largely unfiltered and thus contains higher concentrations of dangerous compounds and particulate matter. Because of the existence of harmful pollutants and noxious compounds in ETS, the U.S. Environmental Protection Agency (EPA) has declared ETS a Group A carcinogen, “a rating reserved ‘only for [those] substances proven to cause cancer in humans.’” Emily Heady, Comment, *Valid Concerns over Environmental Tobacco Smoke or Rights Going Up in Smoke? An Analysis of Foundation for Independent Living, Inc. v. Cabell-Huntington Board of Health*, 19 J. Nat’l Resources & Env’tl. L. 247 (2004–2005).

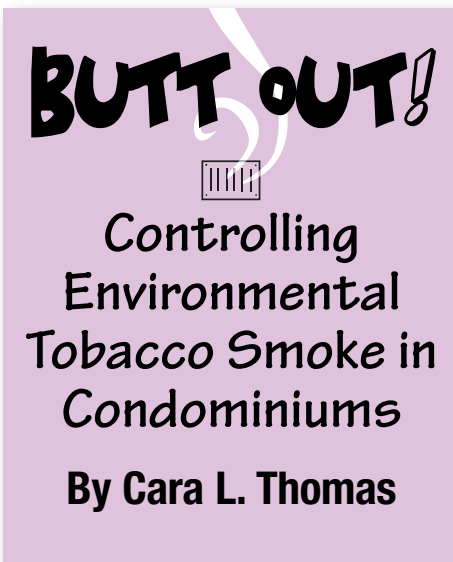
Most people feel that nonsmokers should have a right to avoid forced exposure to ETS because society has realized that ETS is harmful. Traditionally, however, smokers have enjoyed dominance with “the balance of power tipped sharply in favor of a smoker’s right to smoke regardless of the objections of nonsmokers.” David B. Ezra, *Sticks and Stones Can Break My Bones, But Tobacco Smoke Can Kill Me: Can We Protect Children from Parents That Smoke?*, 13 St. Louis U. Pub. L. Rev. 547, 557 (1994). A smoker’s belief in a right to smoke has been ingrained from well-grounded custom because

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tobacco has been an essential part of the American economy from the very beginning. Even before Columbus reached America in 1492, Native Americans grew and smoked tobacco. After Columbus introduced tobacco to Europe, American colonists in Virginia established an economy aimed largely at meeting the new European demand for tobacco.

From the 1600s to the present, however, tobacco’s popularity has experienced many ups and downs. By 1955, 62% of American men between the ages of 25 and 44 smoked tobacco. With so many people smoking, smokers naturally



stopped asking permission to smoke and started smoking whenever and wherever they wanted. Thus, smoking became a widespread privilege, and probably considered a de facto right. The tide has shifted, however, since a 1964 Surgeon General’s report declared that smoking could be harmful to smokers. More recently, the EPA estimated that ETS causes approximately 3,400 lung cancer deaths and 46,000 heart disease deaths in adult nonsmokers in the United States each year. See American Lung Association, *Secondhand Smoke Fact Sheet* (June 2007), available at [www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35422](http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35422) (last visited Jan. 23, 2008). Empowered by these findings, non-

smokers have lobbied their legislators, formed activist groups, and pursued lawsuits to limit their exposure to ETS. In response, governments and private entities have implemented expansive smoking restrictions.

Although smokers may be prohibited from lighting up in many public places, they still cherish their unfettered freedom to smoke in the privacy of their own homes. “As the Tobacco Institute argues, ‘reasonable people agree that no one should be able to dictate what legal activities we can or can’t do in our own homes.’” David B. Ezra, *“Get Your Ashes Out of My Living Room!”: Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 Rutgers L. Rev. 135, 137 (2001). Yet heated disputes, similar to those that led to the prohibition of smoking in the workplace, restaurants, airplanes, and other public places, are beginning to arise between smokers and nonsmokers living in multi-unit housing such as condominiums, apartments, and townhomes. Because of the close proximity between units, ETS is traveling from one unit to another by wind or ventilation systems and resulting in a clash of “rights.” Smokers believe that they have a right to smoke in their own homes, while nonsmokers believe that they have a right not to be exposed to harmful ETS in their own homes.

This article addresses the current debate over smoker versus nonsmoker “rights” in the sanctity of one’s own home and, more specifically, whether nonsmoking condominiums may be the next evolution in smoking restrictions.

### **Smoking Disputes in Multi-unit Housing**

Whether smoking a pack a day or two packs a day, most smokers follow a fairly consistent smoking routine. Therefore, because of the ambient nature of tobacco smoke, “nonsmokers may perceive the invasiveness of a neighbor’s tobacco smoke as a constant, if not relentless, irri-

tant." Ezra, *"Get Your Ashes Out,"* supra, at 156. Smoke, which to most is perceived as having a foul odor, can travel from one unit to the next through shared ventilation ducts, openings for electrical outlets, improperly sealed construction components, or even open windows or doors.

Although nonsmokers' continuous exposure to ETS has resulted in a wide array of acute reactions, such as sore throats and hoarseness; persistent coughs, sinus problems; burning, itching, and tearing eyes; headaches; and nasal irritation, the major concern is the possibility of extremely serious, and possibly deadly, long-term health risks such as lung cancer or heart disease. Both the health concerns and the fact that tobacco smoke can linger in carpets, draperies, and clothing for extensive periods of time have initiated some very emotional and combative disputes between smokers and nonsmokers residing in neighboring units of multi-unit residential housing, with some disputes eventually leading to litigation.

The first reported neighbor versus neighbor smoking case, *Lipsman v. McPherson*, was filed in Middlesex County, Massachusetts, in 1991. Mark Hansen, *Smoke Gets in Your High-Rise*, 84 A.B.A. J. 24 (Nov. 1998) (citing *Lipsman*, No. 90-1918, 19 M.L.W. 1605 (Middlesex, Mass., Super. Ct. 1991)). In *Lipsman*, an apartment dweller sued his neighbor, alleging that smoke from the neighbor's apartment was seeping into his, causing him annoyance and discomfort and subjecting him to an increased risk of physical harm. Although the plaintiff "technically" lost the case, the plaintiff indirectly won the battle because the defendant vacated his apartment less than a month after the decision was rendered. So the first case concerning smoking in multi-unit residential housing set an unfavorable precedent for nonsmokers, but it opened the door for other similar smoking cases.

For instance, in *Fox Point Apt. v.*

*Kippes*, a landlord permitted a known smoker to move into the apartment directly below a non-smoking tenant. Hansen, supra (citing *Fox Point Apt.*, No. 92-6924 (Clackamas County, Or., Dist. Ct. 1992)). When the nonsmoking tenant began to experience nausea, swollen membranes, and respiratory problems from the cigarette smoke entering her apartment, she sued her landlord, alleging breach of his statutory duty to keep the premises habitable. A six-person jury unanimously found a breach of habitability, reduced the tenant's rent by 50%,



and awarded her money to cover her medical bills. Then, in 1994, an Ohio appellate court held that secondhand smoke could be considered a breach of a lease's implied guarantee of "quiet enjoyment" of a rental unit. *Dworkin v. Paley*, 638 N.E.2d 636, 639 (Ohio. Ct. App. 1994); see also *Poyck v. Bryant*, 820 N.Y.S.2d 774 (Civ. Ct. 2006) (finding genuine issues of fact that precluded summary judgment on tenant's claim that secondhand smoke from neighboring apartment violated the implied warranty of habitability and caused a constructive eviction). Perhaps the nonsmokers' greatest victory occurred in June 1998, in the case of *50-58 Gainsborough St. Realty Trust v. Haile*, when a Boston housing court judge awarded \$4,350 to a couple because their landlord failed to prevent smoke from a bar directly beneath

the couple's apartment from escaping through the fireplace and the electrical outlets. Hansen, supra (citing *Haile*, No. 98-02279 (Mass. Hous., Boston Div., filed June 8, 1998)). The judge, in the first-ever written decision on the subject, held that the smoke had made the couple's apartment "unfit for smokers and non-smokers alike" and had interfered with the tenants' right to "quiet enjoyment" of their property.

The earliest cases concerning neighbor versus neighbor smoking disputes involved rental apartments. Then condominiums also became litigation battlefields of aggrieved nonsmokers bothered by a neighbor's secondhand smoke. The first lawsuit involving a smoking dispute in a condominium was *Platt v. Landi* in 1996. Ezra, *"Get Your Ashes Out,"* supra, at 171 (citing No. BC 152452 (L.A. Super. Ct., filed June 21, 1996)). In that case, the plaintiff, Roy Platt, sued his neighbors, his condominium association, and various officers and directors of the association, alleging that he had "been exposed to and had to endure substantial and excessive quantities of secondhand smoke from cigarettes and cigars being smoked by one or both of the Landis." *Id.* In addition, Platt asserted that "the association had failed to control his neighbors' smoking to prevent what amounted to a nuisance and a breach of the applicable conditions, covenants, and restrictions." *Id.* Finally, Platt alleged that the "situation had become emotionally charged, with his neighbors' 'intentionally thrust[ing] lit cigars and/or cigarettes in the plaintiff's face' and allegedly threatening Platt and his guests with 'physical harm.'" *Id.* Although Platt was unable to convince a jury to award damages, he believed that he was ultimately successful because the filing of the suit "caused the Landis to drastically reduce the number of cigarettes and cigars smoked in their condominium unit." *Id.*

Although similar litigation has continued to erupt all over the country, a Florida trial court wrote a com-



prehensive decision in June 2005 analyzing the applicable laws regarding a neighbor versus neighbor smoking dispute in a condominium. In *Merrill v. Bosser*, the Merrill family purchased a condominium unit at the Palm Aire Condominium in Pompano Beach. *Merrill v. Bosser*, No. 05-4239 (Fla. Cir. Ct., filed June 29, 2005); see also Rob Samouce, *Second Hand Smoke Can Be Considered a Legally Actionable Nuisance*, Naplesnews.com, Nov. 8, 2005, www.naplesnews.com/news/2005/nov/08/ndn\_rob\_samouce\_\_second\_hand\_smoke\_can\_be\_consider (last visited Jan. 15, 2008). The Merrills' neighbor, Bosser, lived in a unit one floor up and one unit over from the Merrills. Although Bosser was a pack-a-day smoker, there were no noticeable smoke problems until Bosser allowed a tenant, who was also a smoker, to move into the unit. Shortly thereafter, the Merrills, as well as residents living directly next door to Bosser, noticed smoke from Bosser's unit seeping into their units on a regular basis, with the most bothersome problem in the bathrooms.

Merrill acknowledged that her family was hypersensitive to smoke because of a history of respiratory allergies but insisted that the smoke caused their health to deteriorate. When Merrill attempted to ameliorate the problem by installing air purifiers in her home, the smoke still persisted. Merrill complained directly to Bosser and to the condominium association. Eventually, the condominium association installed a mechanical fan to draw air from the common shafts up through the roof, but the problem still was not resolved. The smoke was so bad on several occasions that the Merrills had to sleep elsewhere, and, on one occasion, the smoke detector went off.

When the smoke problem continued for almost a year, the Merrills used the Palm Aire Declaration of Condominium as a basis to bring suit against Bosser for damages under theories of trespass, common law

nuisance, and breach of covenant. The Palm Aire Declaration of Condominium provided, in part, that a "unit owner shall not permit or suffer anything to be done . . . in his unit . . . which will . . . interfere with the rights of other unit owners or annoy them by unreasonable noises, or otherwise, or shall the unit owners commit or permit any nuisance . . . in or about the Condominium property." *Merrill*, No. 05-4239.

On the trespass theory, the trial court acknowledged that "in Florida, common secondhand smoke which is customarily part of everyday life

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would not be actionable in trespass." Id. The court stated, however, that "[a] trespass need not be inflicted directly on another's realty, but may be committed by discharging a foreign polluting matter at a point beyond the boundary of such realty." Id. The court concluded that the evidence in this case demonstrated something more than customary secondhand smoke, thereby giving rise to a disturbance of possession or trespass.

Concerning the nuisance theory, the trial court referred to a Nebraska case, *Thomsen v. Greve*, in which smoke from a wood-burning stove had entered the Thomsen's home approximately 140 times over four years. Id. (citing 550 N.W.2d 49, 55 (Neb. Ct. App. 1996)). The *Thomsen* court held that "to have the use and enjoyment of one's home interfered

with by smoke, odor, and similar attacks upon one's senses is a serious harm." *Thomsen*, 550 N.W.2d at 55. Therefore, the Florida trial court said that the facts of the instant case, although not as egregious as the *Thomsen* case, "demonstrate an interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct." *Merrill*, No. 05-4239. Merrill and her family "had recurring illnesses as a result of the smoke, and on several occasions had to vacate the premises." Id.

Lastly, as to the breach of covenant theory, the Merrill court said that the Declaration of Condominium contained a covenant of quiet enjoyment, which is breached when a party "obstructs, interferes with, or takes away from another party in a substantial degree the beneficial use of the property." Id. Relying on the *Haile* case discussed above, the trial court said that the "instant case is similar to *Haile* in that smoke actually seeped into the Plaintiff's apartment from the Defendant's apartment on numerous occasions, once causing the smoke detector to sound and several times causing the Plaintiff's family to have to sleep elsewhere." Id.

The Merrill family was ultimately awarded medical expenses, loss of use of the premises, and remedial expenses. As a result, the *Merrill* case, although only a state trial court decision, is a persuasive case that can be used to argue that "excessive" secondhand smoke gives rise to a legal action for trespass, nuisance, and breach of covenant. Samouce, *supra*.

### **The Effect of Smoking on Condominiums**

Although secondhand smoke may have a negative effect on nonsmokers' enjoyment of their condominium units, smokers are also residents of condominium communities and, absent valid prohibitions against smoking, have the same rights under the governing documents as the nonsmokers. Nonetheless, although "William Pitt, Earl of Chatham, may

have declared, in a famous speech to Parliament, that a man's home is his castle, this is not necessarily true of condominiums." See *Kilgore v. 2970 Lakeshore Drive Condo. Ass'n*, No. 95-C-4746, 1996 WL 31159, at \*1 (N.D. Ill. Jan. 26, 1996). "Condominium associations and other home owners' associations impose a variety of restrictions on owners—restrictions on pets, children, leasing, the color of draperies, times one may move in and out, the color of trash bags—ostensibly for the purpose of enhancing the quality of life in the condominium community by controlling aesthetics and behavior." David E. Grassmick, *Minding the Neighbor's*



*Business: Just How Far Can Condominium Owners' Associations Go in Deciding Who Can Move into the Building?*, 2002 U. Ill. L. Rev. 185, 185.

In the past, community associations routinely viewed disputes between neighbors as matters not involving the association and directed combatants to work out their problems between themselves. Today, community associations cannot ignore neighbor versus neighbor disputes because the governing documents—which often include articles of incorporation, a declaration of conditions, covenants, and restrictions, bylaws, and association rules—impose a duty to act in some situations. If the association fails to act, unit owners can sue the association

for damages and an injunction to compel the association to enforce the provisions in the governing documents.

Declarations typically provide that each unit owner is entitled to the "quiet enjoyment of the unit," which means "exclusive use and possession of his or her unit, free of unnecessary nuisances, but subject to the association's right of access for maintenance and repair of the condominium property." Peter M. Dunbar, *Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums* 255 (Pineapple Press, Inc. 2005). Moreover, declarations usually provide that "unless the declaration says otherwise," the association is responsible "for repairing, replacing, or maintaining the common areas, other than the exclusive use common areas." *Id.* In the context of neighbor versus neighbor smoking disputes, nonsmokers are likely to view involuntary exposure to a neighbor's tobacco smoke as a nuisance, which would be a breach of the covenant of quiet enjoyment. Because the association has a fiduciary duty to act when a violation of the governing documents occurs, the nonsmoker is likely to insist that the association remedy the situation. In addition, when transfer of smoke from one unit to another is blamed on poor construction or maintenance, the nonsmoker also may believe that the association has a duty to correct that problem as well.

Although one trial court held that a neighbor's excessive secondhand smoke was a nuisance, *Merrill v. Bosser*, No. 05-4239 (Fla. Cir. Ct., filed June 29, 2005), it is still unclear whether tobacco smoke entering an owner's condominium unit would violate most declaration provisions regarding nuisances. Nonetheless, tobacco smoke, much like noise, has the potential to generate hostile and emotional disputes between neighbors that may implicate construction and/or maintenance issues. If condominium associations fail to comply with their fiduciary duty and take

steps to address residential smoking issues, they may find themselves as involuntary referees in disputes between neighbors, or worse, defendants in a lawsuit.

Even if secondhand smoke is not considered to be a nuisance, a condominium association may eventually find itself in court fighting a discrimination suit under the federal Fair Housing Amendments Act of 1988, which extended the cloak of protection of the fair housing law to "handicapped individuals." The Act "requires a housing provider to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." Gary A. Poliakoff, *Prescription Pets: The New Miracle Drug*, 2 J. Cmty. Ass'n L. 74 (Community Ass'ns Inst. 1999); see also 42 U.S.C. § 3604(f)(2), (3)(B). Because courts have suggested in other contexts that "hypersensitivity" to tobacco smoke qualifies as a handicap," condominium associations may be forced to reasonably accommodate nonsmokers when ETS from a neighbor's unit causes health problems, such as asthma or allergies. Ezra, "Get Your Ashes Out," *supra*, at 168 (citing *Kamen v. AT&T*, 791 F.2d 1006 (2d Cir. 1986) (holding in an action against employer under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), that a woman who had a lifelong history of severe tobacco smoke hypersensitivity "is very likely a 'handicapped individual.'" *Id.* at 1013.)).

The question then becomes what is a reasonable accommodation for nonsmokers in a condominium. In a complaint filed against the Seattle Housing Authority (SHA) on July 23, 2001, the Justice Department alleged that the SHA failed to provide a reasonable accommodation to a tenant resident with allergies and asthma who was suffering from secondhand smoke exposure. Ronald B. Glazer, *Representation of Common Interest Ownership Associations*, 25614 NBI-

CLE 84, 95 (2005). When the SHA failed to move the resident, the department claimed that “allergies and asthma constitute a disability and that the resident was entitled to a different apartment as a ‘reasonable accommodation.’” By comparison, unit owners in a condominium community could not be required to swap units. *Id.* Therefore, will a reasonable accommodation require “physical modifications to the common elements to prevent smoke from traveling between units (if that is even possible)” or will it require a drastic step such as entirely prohibiting smoking in the smoker’s unit? *Id.*

### The Possibility of Nonsmoking Condominiums

Although landlords can refuse to rent to smokers or can segregate apartment complexes into smoking or nonsmoking, condominium associations do not share the same luxuries because of the ownership rights vested in condominium residents. One state, however, has taken steps to encourage condominiums to adopt smoking restrictions. Utah’s Condominium Ownership Act expressly authorizes condominium association bylaws to provide restrictions regarding the use of the units, which “may include other prohibitions on, or allowance of, smoking tobacco products.” Ezra, “*Get Your Ashes Out*,” *supra*, at 138–39 (citing Utah Code Ann. § 57-8-16(7)(b)). Utah also implemented a law that says residential smoking conduct can amount to a nuisance. Ezra, “*Get Your Ashes Out*,” *supra*, at 139 (citing Utah Code Ann. § 78-38-1(3)–(4)).

Although most states have not passed specific laws concerning smoking in residential settings, many states have adopted “Clean Indoor Air Acts” that restrict people from smoking in all enclosed indoor workplaces. See Deborah S. Crumbley & Gregory A. Hearing, *Where They Smoke, They May Get Fired: An Overview of Significant Workplace Smoking Issues*, 68 Fla. B.J. 108 (Oct. 1994); see also H.B. 359—*Clean Indoor Air Act of 2007: The Economic Matters*

*Committee—Maryland House of Delegates*, [www.marypirg.org/advocacy/testimony/archive/testimony-archive/hb-359](http://www.marypirg.org/advocacy/testimony/archive/testimony-archive/hb-359)—clean-indoor-air-act-of-2007 (last visited Jan. 8, 2008) (approximately 1,000 cities and 17 states such as California, Delaware, Connecticut, Maine, Massachusetts, Florida, New York, New Jersey, Rhode Island, Montana, Vermont, Washington, and Oregon, among others, have taken action to protect their citizens by enacting Clean Indoor Air Acts, which ban smoking inside of all workplaces, including bars and restaurants).

Because they apply to indoor workplaces, Clean Indoor Air Acts are likely to prohibit smoking during all indoor meetings of the condominium board of administration, committees of the board, and meetings of the membership because “work” is being performed. The simple cleaning or maintenance of an enclosed common area of a condominium is sufficient to impose a ban on smoking within these areas as well. Smoking in one’s own condominium unit is not included under the Clean Indoor Air Acts because one’s home is not an enclosed indoor workplace. Nonetheless, condominium associations may be able to restrict smoking in condominium units through their governing documents.

A condominium association may pass many kinds of rules to promote the “health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity.” Grassmick, *supra*, at 203, quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975). In turn, “each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.” *Norman*, 309 So. 2d at 182. It follows that if condominium residents wish to live only with other residents of a similar age or desire not to have pets in their community, the same restrictions may be adopted to permit nonsmok-

ers to live only among other non-smokers.

Many courts across the country have adopted two different standards of review for evaluating the validity of condominium use restrictions in the governing documents. If the use restriction is contained in the original declaration prepared by the developer, then it is considered an initial developer restriction. For example, according to a Florida court in *Hidden Harbour Estates, Inc. v. Basso*, initial developer restrictions are “clothed with a very strong presumption of validity which arises

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from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.” 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981). The court compared these restrictions with covenants running with the land and declared that they “will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.” *Id.*; see also *Restatement (Third) of Property—Servitudes* § 3.1 cmt. d (2000). Moreover, the court stated that “a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.” 393 So. 2d at 640.

By contrast, subsequent restrictions are rules later imposed by an association board through an amendment to the bylaws. Courts will apply the reasonableness test to these subsequent restrictions "to limit the discretion of boards of directors to ensure that they only 'enact rules and make decisions that are reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners.'" See Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. Rev. 837, 861 (1995) (quoting *Basso*, 393 So. 2d at 640); see also *Restatement* § 6.7 (2000). According to the *Basso* court, when a board has discretion to permit or bar a particular use or behavior, "the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual owners." *Basso*, 393 So. 2d at 640; see also *Restatement* § 6.7 cmt. e (2000).

Applying these standards to a smoking restriction in condominium units, it appears that a smoking ban may have a greater chance of being upheld as an initial developer restriction than as a subsequent restriction because even unreasonable initial restrictions have a strong presumption of validity. When unit owners buy the condominium, they are fully aware of the rules and regulations. Smoking is not a fundamental constitutional right (even though most smokers will try to argue that it is), and a smoking restriction would not be a violation of public policy because, with all the smoking restrictions in the United States today, public policy is weighted more heavily on the side of less forced exposure to harmful ETS. Finally, with the many neighbor versus neighbor disputes that have erupted over the past decade, it is clear that the problem needs to be addressed. Therefore, as long as the smoking restriction was not selectively enforced, it would not be wholly arbitrary in its application.

As a subsequent restriction, a smoking ban may be slightly more difficult to enforce because smokers are already residents of the condominium community and have previously enjoyed the freedom to smoke in their units. With the known addictiveness of nicotine, requiring smokers to immediately quit smoking in their units might be considered an unreasonable restriction. The restriction could be considered reasonable if the association implemented a "grandparent" provision, in which current smokers could continue to smoke, so long as their smoking did not interfere with other residents, but all new residents would be subject to the rule prohibiting smoking. In *Winston Towers 200 Ass'n v. Saverio*, a pet restriction that had a retroactive effect was considered invalid based on the discriminatory effect. 360 So. 2d 470 (Fla. Dist. Ct. App. 1978). In *Wilshire Condominium Ass'n v. Kohlbrand*, however, a restriction against the replacement of dogs was "reasonably consistent with principles that promote the health, happiness and peace of mind of unit owners living in close proximity." 368 So. 2d 629, 630 (Fla. Dist. Ct. App. 1979); see also *Restatement* § 6.7, illus. 13. Just as a grandparent provision could make a pet restriction valid, a straightforward rule prohibiting all future residents from smoking in their units may be upheld as reasonable.

According to a Florida court in *Hidden Harbour Estates, Inc. v. Norman*, "the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness, and enjoyment of life of the various unit owners," and "[i]t is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof." 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975). Therefore, even if secondhand smoke were not held to be a nuisance under state law, the proven dangers associated with exposure to ETS would dictate that a smoking ban has a strong relationship to the "health, happiness, and

enjoyment of life of the various unit owners." Although smokers may feel their happiness and enjoyment has decreased based on the rule, the health of nonsmokers outweighs the desires of smokers. As the Surgeon General concluded in its 1986 report: "The right of smokers to smoke ends where their behavior affects the health and well-being of others; furthermore, it is the smokers' responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke." Ezra, "Get Your Ashes Out," supra, at 147.

A smoking ban may ultimately be considered a reasonable restriction. Still, to remain valid, the rule must be consistently enforced. Not only may it be difficult to prove that odors or fumes are emanating from a specific condominium, but selective enforcement may expose the condominium association to serious claims and/or lawsuits based on breach of fiduciary duty. Residents could further claim that the failure to enforce a smoking provision creates serious health risks because of the harmful consequences from secondhand smoke. Therefore, before adopting such an easily violated restriction, condominium boards must be committed to undertaking the responsibility of enforcement.

Although the above analysis of the review standards only provides speculation on how courts may rule regarding a no-smoking restriction in condominium units, one court has upheld an amendment to a condominium association's declaration that banned smoking within the boundaries of its four multilevel condominium units. *Christiansen v. Heritage Hills 1 Condo. Owners Ass'n*, No. 06-CV-1256 (Colo. Dist. Ct., filed Nov. 7, 2006); see also *Restatement* § 6.10. The lawsuit began when unit owners, Coleen Christiansen (now Sauve) and Roger Sauve, filed a complaint against the association requesting that the court find the no-smoking amendment void as an unreasonable restriction on their property interests.

Christiansen, the owner of Unit 2, which shared common walls with Units 1 and 3, was a smoker and lived



in her condominium with her husband, who was also a smoker. Since 2001, Christiansen had received complaints from multiple neighbors concerning the smell of cigarette smoke from her unit. Although Christiansen had worked with her neighbors to alleviate the problem, such as having insulation blown into the wall between Units 2 and 3, participating in a scent test, adding filters, and allowing contractors into her unit to seal gaps and pipes with foam, the complaints regarding the smoke continued.

In November 2005, when Christiansen and her husband abruptly left a condominium owners meeting after a heated exchange erupted over the smoke infiltration issue, the remaining members sought the advice of an attorney to amend the covenants and pass a no-smoking provision. On December 30, 2005, Christiansen received by hand-delivery a draft of the no-smoking amendment with a ballot, but, on January 3, 2006, the amendment was passed with a 75% approval vote and recorded before Christiansen had returned her ballot. Finally, Christiansen and Sauve filed a lawsuit against the association after they received a letter from the association stating that they were in violation of the no-smoking amendment.

The court determined that an amendment to a condominium association's declaration that is passed with the requisite approval vote and recordation should be upheld if it is reasonable, made in good faith, and not arbitrary and capricious. First, the court considered whether the seepage of secondhand smoke or its smell constituted a nuisance, which was specifically prohibited in the Declaration. See also *Restatement* § 6.10 cmt. d (2000). Although the Declaration did not define the term nuisance, the court identified it as (1) "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material

annoyance, inconvenience and discomfort that will presume resulting damage" or (2) "that which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him; e.g. smoke, odors, noise, or vibration." *Christiansen*, No. 06-CV-1256. Because testimony substantiated an almost constant smell of cigarette smoke from Unit 2, which was the source of complaint from multiple neighbors, the court concluded that the smoke smell constituted a nuisance under these circumstances. Therefore, the court held that the remedy of banning all smoking in the condominium units was done reasonably and in good faith.

Second, the court addressed whether the decision to make the units smoke free was undertaken in an arbitrary and capricious manner. After testimony showed that individual unit owners spent thousands of dollars in unsuccessful attempts to stop the smoke infiltration and Christiansen and Sauve rebuffed the proposal of smoking outside their unit, the court determined that the "smoking ban was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means." *Id.* Therefore, the court held that "there can be no finding that the passage was arbitrary or capricious or done in bad faith." *Id.*

Finally, the court considered whether the smoking ban violated any public policy or fundamental rights of any of the owners. In light of Colorado laws designed to protect nonsmokers from environmental tobacco smoke in indoor areas and the legislature's "wishes to limit any unwarranted intrusion into private spheres of conduct and choice," the court determined that the smoking ban did not violate any public policy. *Id.* The court noted that the protections of the Fourteenth Amendment do not include a fundamental right to smoke.

Ultimately, the court found for the association and upheld the passage of the no-smoking amendment to the

Declaration because the use restriction was "proper, reasonable, made in good faith and not arbitrary and capricious." *Id.* It is uncertain whether condominium associations across the country will take notice of this ruling and begin enacting no-smoking restrictions in their own condominium units. But one thing is certain: condominium associations now have one case as precedent to argue on their behalf.

## Conclusion

It is clear that the battle between smokers and nonsmokers has reached the home front. Conflicts are inevitable given the close quarters that typify condominium living and the fact that smokers believe that they have a right to smoke in their own homes while nonsmokers believe that they have a right not to be exposed to harmful ETS. For many years, smokers have enjoyed the freedom of "lighting up" wherever and whenever they wanted; however, the times are changing quickly. Regulations on smoking are everywhere—in restaurants, in hotels, at sporting and cultural events, in the workplace, and even in the sky. Is now the time for no-smoking laws to continue in the home domain?

Condominiums are a distinct type of community with the ability to enact restrictions based on the personality and identity of a majority of the unit owners and thus represent an ideal arena for no-smoking bans in the home. A Florida Court of Appeal said it best: "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others." *Sterling Village Condo., Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971). Still, only time will tell whether nonsmokers eventually reign over the kingdom. ■