

Momentum Gathers for Smoking Bans. Two Attorneys Tell How To Implement.

By Stephen Marcus and V. Douglas Errico

*In a major policy move, the **Real Estate Board of New York (REBNY)** yesterday proposed guidelines for implementing no-smoking policies for inside co-op and condo apartments, and not just in common areas as city law already specifies. As well, a draft proposal for legislation mandating this very thing was recently submitted to the New York City Council.*

Here, two nationally recognized condominium-law attorneys survey the fast-changing landscape regarding anti-smoking rules — with a practical guide on how co-op boards and condo associations can fairly and effectively implement bans.

April 13, 2012 — The battle between smokers and non-smokers may be reaching a tipping point in co-ops and condos. Boards are introducing proprietary lease or bylaw amendments prohibiting smoking completely — in individual units as well as in common areas. And those proposals are attracting considerably more support and considerably less opposition than they have in the past.

This is largely a reflection of changing attitudes toward smoking. Only 20 percent of the population nationally define themselves as smokers, and growing numbers of non-smokers are concerned about the health hazards of exposure to secondhand smoke. A 2006 Surgeon's General report concluded that "**there is no risk-free level of exposure to second-hand smoke,**" and that message appears to have taken hold.

Condominium owners and co-op shareholders who a few years ago would have defended the right of their neighbors to smoke, even if they themselves did not, are now more inclined to support non-smoking neighbors concerned about the smoke that is seeping into their units.

We regularly field calls from boards that have adopted smoking bans or are looking for advice on that process. Some advertise their smoke-free status on their websites, suggesting that they view their smoking ban not as the sales impediment that many co-op shareholders and condominium unit-owners have traditionally feared, but as a marketing advantage.

Some co-op and condo boards remain concerned that a smoking ban will reduce the pool of prospective apartment buyers, but **Chris Banthin** — an attorney working with the [Public Health Advocacy Institute at Northeastern University School of Law](#) to develop free-market strategies to reduce smoking and exposure to secondhand smoke — points out that with non-smokers now significantly

outnumbering smokers, smoking restrictions are likely to attract more buyers than they repel.

Projecting current trends, he suggests the non-smoker to smoker ratio will become even more lopsided, smoking bans will be more widespread, and with fewer options available to them, smokers will concentrate in the remaining buildings that allow smoking. So co-ops and condos that choose not to adopt smoking bans will be choosing, in effect, to become smokers' buildings in the future, Banthin contends.

Condominium owners who are willing to tolerate a few smoking neighbors today may feel differently if they find themselves a few years from now in a small minority, vastly outnumbered by residents who smoke. And as the ranks of smokers continue to decline, the pool of potential buyers and tenants interested in smokers' buildings will shrink as well, giving communities another strong economic argument for going smoke-free.

Going Beyond "Nuisance"

It is possible to prohibit smoking by claiming it to be a "nuisance," in violation of the proprietary lease or other governing documents. But this is not an approach we recommend, for several reasons. First, while the board's authority to regulate activities in common areas is clear, its authority to restrict activities in individual units is both less clear and more restricted.

Second is the difficulty of defining precisely what a nuisance is. Think of noise as an example. Some people are more sensitive to noise or less tolerant of it than others. The same is true of smoke. Some people are more concerned about second-hand smoke than others. Some find even a trace of smoke intolerable, while others barely notice the odor in a smoke-filled room.

Courts in some jurisdictions have found that second-hand smoke rises to the level of a nuisance or a "trespass" if it exacerbates an underlying health condition (asthma, for example) of those exposed to it. But other courts have noted a distinction between an annoyance and a nuisance, finding that because a neighbor is annoyed or offended by smoke is not in itself sufficient grounds for prohibiting residents from engaging in a legal activity (smoking) inside their homes.

The Supermajority Speaks

So nuisance is simply not a strong enough peg on which to hang a cooperative or condominium association's no-smoking policy. Boards that want to prohibit smoking in individual units should amend the co-op proprietary lease or condo governing documents, securing the supermajority vote of owners required to do so.

While the courts remain reluctant to restrict what individuals can do within their

own homes, they are less likely to challenge a policy approved by a supermajority of owners than one imposed by the community's elected board. Moreover, courts have recognized that a condo or co-op board has the right to change its governing documents and to make those changes retroactive.

In what may be the first court decision addressing the questions raised by a community association's smoking ban, a Colorado court upheld the policy, rejecting the 'my-home-is-my-castle' argument of smokers, who said the ban interfered unfairly and unreasonably with their right to the full use and enjoyment of the unit they owned. In *Heritage Hill Condo Owners v. Sauve* (2006), the court was influenced strongly by evidence that the board had gone to great lengths to find other solutions, short of a ban, that would address the concerns of non-smoking neighbors. A well-drafted ban, properly enacted (with the required owners' vote), should stand on its own.

Some communities include a "grandfather" provision exempting current owners from the smoking ban; others go "cold turkey," prohibiting smoking immediately and with no exceptions, while some wind up in between, grandfathering current residents for a limited period to give them time either to adjust to the policy or move.

We have found that a grandfather provision can make it easier to win owner approval. We also think grandfathering makes it less likely a smoking ban will be challenged, and easier to defend if it is. Banthin says he's seen both approaches — with and without a grandfather provision — work in different communities, depending in part on the number of current smokers and the number of owners who feel strongly about eliminating second-hand smoke.

Boards obviously should get a clear sense of how owners feel about a ban before deciding how or if to proceed with one. And they should gauge not only how owners feel about the ban but the intensity of the feelings on both sides.

A couple of additional points about the grandfather provision. It should apply to the owners or residents occupying the units, not to the units themselves. When current residents move, future residents must abide by the ban. The provision should also address tenants who are renting units as well as owners who are occupying them. The co-op- / condo boards can require investor owners to begin imposing the no-smoking rule on tenants when an existing lease or rental agreement ends, or when a new tenant replaces existing ones.

Enforcement and Discretion

Condo / co-op boards that enact smoking bans have to consider how to enforce them. We strongly encourage associations to include a provision specifying that:

1. While the board may enforce the policy, it is not required to do so; and Owners have the authority to pursue complaints on their own, by filing suit,

if necessary, against owners who are violating the covenant.

This language makes enforcement of the smoking ban an **option, not an obligation**. Boards are not required to address every violation, large or small; they have the discretion to determine whether and how to enforce association rules. Those decisions can't be arbitrary or capricious; they must be fair and reasonable, reflecting efforts to act in what board members believe to be the community's best interests, as required by the Business Judgment Rule.

Within that framework, boards don't have to respond equally to every smoking complaint. They can and should distinguish between the complaint of a pregnant owner concerned about the health impact of second-hand smoke, and the complaint of the owner who says, "I think I smelled smoke last night and I'm pretty sure it was coming from the owner down the hall, and this has nothing to do with the fact that I've been fighting with this owner about just about everything for the past 10 years."

Boards can decide to pursue some complaints while deciding that they don't have sufficient evidence or sufficient resources to pursue others. The language above clarifies both the board's discretion and the right of owners individually to enforce the smoking ban. It also specifically prohibits anyone from recovering legal fees or other costs from the board because of its failure to enforce the ban.

Future Trends

Many city and state governments have barred smoking in offices, restaurants and other public places, and it is possible they may eventually bar smoking in multi-family residences, as well, relieving landlords and community associations of the need to do so. A few city and county governments (most of them in California) have already taken that step. (See sidebar.)

It is also possible that insurance companies might be persuaded to offer premium reductions on co-ops / condos that adopt no-smoking policies, because of the reduced fire risks.

While changes in insurance policies and government regulation may come eventually, Banthin anticipates a more immediate trend: Fair Housing Act complaints filed by non-smokers, seeking accommodations (in the form of smoking bans) based on the adverse health impacts of second-hand smoke. "That's going to be a powerful concern for condominium associations," he predicts, and another strong argument to adopt smoking bans.

Those proposals "won't sell themselves," Banthin emphasizes. Boards will have to sell the idea to owners, first by educating themselves about the advantages of a ban, and then by educating owners.

It won't be enough just to explain the arguments in favor of a ban, Banthin

advises boards. "You will have to make owners care enough about the issue to vote," he says, and persuade them that the ban is in the long term interests of the community and its residents. Under existing law, co-op and condo boards are free to adopt a non-smoking policy covering any free-market apartment. While no laws in New York prohibit smoking within a residential apartment, a smoking ban could lower maintenance costs and insurance rates.

[The Real Estate Board of New York \(REBNY\)](#) — the city's leading real estate trade association, with more than 12,000 members — has created a guide to help co-op / condo boards who are considering implementing a no-smoking policy.

In most instances, implementation of a smoking ban will require an amendment to the proprietary lease or bylaws, approved by a supermajority of apartment owners. REBNY recommends consulting with your co-op board or condo association's lawyer prior to implementing any policy.

Co-ops

2. An outright ban on smoking would most likely require an amendment to the proprietary lease, which would require the affirmative vote of the owners of a supermajority (typically two-thirds or 75 percent) of the shares
- The Board of Directors may consider whether the smoker's conduct rises to the level of objectionable conduct sufficient to terminate the shareholder's proprietary lease. The Board of Directors could also use the prohibition against "objectionable odors" emanating from an apartment found in most proprietary leases to attempt to terminate the smoker's proprietary lease.

Condos

- Condominium bylaws can generally be amended by the affirmative vote of the owners. The Board of Managers has the ability to reject any purchaser who permits smoking in the unit. The Board of Managers can also indicate a specific date in the future at which point no resident may smoke in the building including within the unit.
- If the Board of Managers has the authority under the By-Laws to fine a unit owner who smokes in a unit and the smoke enters another unit, it may impose such a fine. Absent such a provision, the Board or offended unit owner could sue the owner who smokes for monetary damages and an order enjoining the owner from smoking.

<http://www.habitatmag.com/Publication-Content/2012-April/Featured-Articles/Practical-Legal-Implement-Co-op-Condo-Smoking-Bans#.T5hZnO1gP8t>