DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401	
Plaintiff(s): COLEEN CHRISTIANSEN and ROGER SAUVE **v.** **Defendant(s)**: HERITAGE HILLS 1 CONDOMINIUM OWNERS ASSOCIATION	▲ COURT USE ONLY ▲ Case Number: 06CV1256 Div.: 1 Ctrm.: 5E
ORDER OF JUDGMENT	

THIS MATTER was tried before the court on October 3 and October 4, 2006. The court heard testimony, reviewed admitted exhibits and heard argument from counsel.

Testimony and Exhibits

Plaintiffs Coleen Christensen (now Sauve) and Roger Sauve filed their complaint against Heritage Hills #1 Condominium Owners Association, Inc. ("Association") on March 30, 2006 alleging wrongs stemming from the passage of an amendment to the Association's declaration banning smoking within the boundaries of the Project. The complaint requests both declaratory and injunctive relief, specifically that the court find that the amendment is void as an unreasonable restriction upon the fee simple and tenancy in common property interests of the plaintiffs, and that the defendant be enjoined from enforcement of the amendment and be affirmatively required to take all actions necessary to revoke the amendment.

The evidence produced at trial reveals that the property in question is an older building subdivided into four multilevel condominium units with split entries. Coleen Christensen is the owner of Unit 2, which shares common walls with Units 1 and 3. Ms. Christensen testified that she has lived in Unit 2 for over five years. She currently lives in the unit with her husband, Roger Sauve.

The Association executed Articles of Incorporation on September 13, 2000. The Declaration of Covenants, Conditions and Restrictions ("Declaration") was also recorded with the Clerk and Recorder on September 13, 2000. The Declaration includes a section titled "Article VII Use Restrictions". Article VII (7.1), "Residential", regulates the use of the condominium units and limits use to residential use without Board approval to the contrary. Amendments to the

Declaration can be made only if there is agreement by 75% of the Common Element owners. (17.2)

Article VII (7.4),"Prohibitions", controls activities, uses and practices prohibited in any unit, in the Common elements, on the Project and on the Property. The two lines that are the most relevant to the issue at hand are: "No activities shall be permitted upon any portion of the Project which will violate the provisions of any applicable statute, rule, ordinance, regulation, permit or other validly imposed requirement of any governmental body. No nuisance shall be allowed upon the Property, nor shall any use or practice be allowed which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the Property by its resident."

Testimony of Coleen Christensen

Coleen Christensen (Sauve) testified at the trial. She did receive a copy of the Declarations at closing. She interpreted the Prohibitions section as limited to only those activities which violate any law, statute or ordinance. She noted that the prohibition against nuisances applied only to the common elements. She believed the Declaration could only be amended with regard to the common elements. Ms. Christensen testified that she had a previous complaint from Dave Purcell, who had owned Unit 3 in 2001. She had worked with Mr. Purcell to clear up the problem. After she had insulation blown into the wall between Units 2 and 3, she received no further complaints. Ms. Christensen was not aware of any further complaints of smoke or odor infiltration prior to the complaint from tenant Penelope (Penny) Boyd. Ms. Christensen worked with Ms. Boyd to alleviate the problem. Ms. Christensen participated in a scent test, added filters, and allowed contractors into her unit to perform work. Ms. Christensen stopped attempting to cooperate with Ms. Boyd after she felt Ms. Boyd violated her trust by searching under her sink and then accusing her of lying.

An Association meeting was scheduled and held in November 2005. Ms. Christensen, who was then serving as the secretary of the Association, said that the meeting became very heated. She testified that she and her husband were both accused and accosted. Ms. Christensen testified that she was assaulted and the police were called. She and her husband left the meeting and, relying on advice from the police officers, did not return. Ms. Christensen later received meeting minutes indicating that decisions were made to contact an attorney, to prohibit smoking, and to join an organization called GASP. On December 30, 2005, plaintiffs received by hand-delivery a draft of an amendment with a ballot. The amendment was filed as passed with the Jefferson County Clerk and Recorder on January 3, 2006, before Ms. Christensen had returned her ballot.

Testimony of Roger Sauve

Roger Sauve testified that the first complaint he heard was from Ms. Boyd shortly after she moved into Unit 3. He described a series of ameliorating actions taken by Ms. Christensen, including installing HEPA filters, sealing gaps and pipes with foam, and insulating between walls. Ms. Boyd continued to complain about smoke.

Testimony of Robert Rock

Robert Rock testified as an expert in heating and air conditioning. He is an acquaintance of Roger Sauve, who had asked him to examine the apartment units and investigate the possibility of smoke infiltrating from Unit 2 to 3. Mr. Rock explained that each unit had a separate heating system with individual furnace and air intakes. Since each unit was isolated, it was his opinion that there was "no way" that smoke could penetrate the ductwork.

Testimony of Christine Shedron

Christine Shedron was the first witness called by the Condominium Owners Association. Ms. Shedron purchased Unit 3 from Dave and Debbie Purcell as an investment, and serves as an officer of the Association. She currently rents the unit to her mother, Penny Boyd. She testified concerning her mother's verbal and written complaints and the attempts made by her mother to alleviate the smoke smell. Ms. Shedron testified about her conversations with unit owner Heather Thompson. Ms. Thompson told her that she was worried about the impact of the smell on her ability to rent the unit. Ms. Shedron also spoke with the Johnsons who were also worried about the economic impact of the smoke smell.

Ms. Shedron testified that she had a heated exchange with Ms. Christensen at the November 2005 homeowner's meeting after Ms. Christensen maligned Ms. Boyd.
However, Ms. Shedron contends that she did not assault Ms. Christensen. Her testimony was that the smoke infiltration issue was discussed, and Ms. Christensen rejected the suggested compromise that she would smoke only outside of her unit. Ms. Shedron testified that during the verbal exchange with Ms. Christensen, Ms. Christensen fell backwards in her chair. Ms. Christensen asked that the police be called and plaintiffs left the meeting. The remaining members felt that they had no other recourse but to seek the advice of an attorney to determine if they could amend the covenants and pass a no smoking provision.

Later, the HOA did consult an attorney, and distribute a draft provision to the unit owners. Three of the four owners gave approval and the measure was passed. The Association received another complaint from Ms. Boyd regarding smoking in Unit 3. The Association sent a letter to plaintiffs warning that fines could be imposed if they continued to violate the amendment. No further action was taken in the direction of imposing fines because the Association was served with this lawsuit. Ms. Shedron testified that the amendment was not passed out of malice or spite. She indicated that it made no difference to her that the current tenant was her mother. She stated that she voted to ban smoking to preserve her investment and protect her tenant.

Ms. Shedron's brother, Jake, had once rented the unit now occupied by Ms. Christensen. Jake smoked but was required to smoke outside the unit. Jake had smelled infiltrating smoke but never complained. Ms Shedron acknowledged that she has never had any chemical or particulate testing done to prove that second hand cigarette smoke was actually infiltrating into Unit 3. Ms. Shedron was aware that Ms. Boyd had complained about smoke when she lived in a trailer park. Also, while living in Unit 3, Ms. Boyd complained about the presence of snakes and the smell of mothballs.

Testimony of Penelope Boyd

Penelope Boyd testified that she moved into Unit 3 on July 2, 2004. Initially, she had a friendly relationship with the plaintiffs. She told Ms. Christensen about the smoke. After discussing the problem with Ms. Shedron, Ms. Boyd purchased two ionic breeze air filters to purify the air. The filters worked to some extent but produced an ozone smell. Ms. Boyd testified at length about her calls to Monster Vac and the service calls they made to her home. Bills were admitted into evidence to substantiate the work. Eventually, Darrell Sanders, a drywall contractor, came to the condominium and proposed opening the ceiling in each unit to allow for foaming in the hope that any infiltrating smoke would be blocked. Ms. Boyd paid to have this same work done in all four units of the building, including Unit 3. Ms. Christensen permitted entry into her unit for the work to be done and supervised by Ms. Boyd. While Ms. Boyd was in Unit 3, she looked under the sink and observed no foam. Ms. Boyd had additional work done in her unit by other contractors. Bills and invoices were admitted to confirm that Ms. Boyd spent thousands of dollars to attempt to dispel the smoke smell. She sent a formal complaint the Association in November 2005.

On cross-examination, Ms. Boyd acknowledged that her ex-husband has now purchased Unit 4 of the building. She also confirmed that she is sensitive to smoke and is bothered by the smell in public places.

Testimony of Katherine Johnson

Katherine Johnson testified that she and her husband purchased Unit 4 as a residence for her daughter while she was a student at the School of Mines. Ms. Johnson knew Ms. Christensen as they had both served on the Association board. In her recollection, the first complaint about smoking was raised by Dave Purcell at the first Association meeting. All unit owners voted to foam under their sinks to block the migration of any smoke. Ms. Johnson believed that any other complaints would be documented in minutes retained by Ms. Christensen as secretary of the Association. Ms. Johnson was worried about the smoke because she feared it would have an economic impact on the value of her unit. She had spoken to Ms. Christensen in the past about the problem and Ms. Christensen indicated that she was one of the first owners and she was going to continue to smoke.

After the Association received the written complaint from Ms. Boyd, Ms. Johnson saw the smoke problem as a health risk and became concerned that the Association might be subject to a lawsuit for failing to address the issue in Ms. Boyd's unit. Ms. Johnson attended the November meeting. She confirmed the heated exchange between Ms. Shedron and Ms. Christensen. She did not observe Ms. Shedron strike Ms. Christensen, but did observe Ms. Christensen fall back in her chair onto the floor. She confirmed the Board's decision to seek advice from counsel. She sent out an e-mail to the Board members asking for input if the decision was made to move forward on the amendment. Her husband hand-delivered a draft of a proposed amendment to the unit owners. The Amendment passed. After receiving another complaint from Ms. Boyd, a warning letter was sent to the plaintiffs. No action was taken to enforce the warning letter because the lawsuit was filed. It was Ms. Johnson's testimony that the Association never tested Unit 3 for smoke or particulates.

Testimony of Heather Thompson

Heather Thompson purchased Unit 1 in March 2001 and lived there until March of 2004. She has served as both Vice President and President of the Association. While living in Unit 1, she frequently smelled smoke. The smell worsened after Mr. Sauve moved into the unit. Ms. Thompson herself smoked while she lived in Unit 1; however, she indicated that she never smoked inside her unit. She testified that she also mentioned the smoke odor at the first Association meeting after Dave Purcell complained. She complained to Ms. Christensen at least three times about the smoke smell after that meeting. Ms. Christensen stated that she had smoked for years, could not quit and was not planning to quit.

Ms. Thompson indicated that she did not receive any complaints from her first tenants but noticed that filters had been installed in each room. Her second tenants noted the smoke smell after they moved. The current tenants have complained about the smell. She has replaced furnace filters, placed air fresheners in return ducts and had remediation work completed by Daryl Sanders. She foamed under her sink after the first board meeting. Ms. Thompson is concerned about the possible negative economic impact the smoke problem will have on her unit. She does not permit tenants smoking in her unit.

Ms. Thompson was present at the November 2005 meeting. She indicated that everyone knew that discussion of Ms. Boyd's complaint would be uncomfortable. Ms. Thompson confirmed that Ms. Christensen was not amenable to restricting smoking to outside the units. Ms. Thompson characterized the meeting as turning nasty. She observed the verbal confrontation between Ms. Shedron and Ms. Christensen. She also indicated that Ms. Shedron did not strike Ms. Christensen, rather, Ms. Christensen leaned back into her chair and the chair fell backwards. After the plaintiffs left the meeting, the Association decided to research and also to consult with legal counsel. An amendment was drafted by counsel and approved by three owners. After receiving additional complaints from her tenants and Ms. Boyd, the Board sent a warning letter to defendants to enforce the amendment. Ms. Thompson testified that she would consider passing an amendment to prohibit any offensive odor if it was a recurrent problem.

Testimony of Darrell Sanders

Darrell Sanders, a dry wall refinisher, testified about the work he performed in each unit to dispel the smoke smell. He described a seven foot soffit housing pipes, a structural beam and wiring that ran through each unit. This soffit allows smoke to infiltrate between units. He described work that he undertook in each unit. He noted prominent heavy smoke in Unit 2. He explained that older building codes did not require the blocking between units that is required by today's standards. He stated that the only other suggestion he had that might ameliorate the problem would be to install fresh air ducts in the furnace room. This would be costly.

Testimony of Brian McIntyre

Brian McIntyre is the proprietor of Monster Vac. He is a distant relative of Penny Boyd. He described the four visits his company made to Ms. Boyd's unit and the work that was done. He could not smell smoke in the ductwork. He testified that air returns in this soffit were under negative pressure and as a result would draw in whatever odors or gasses were present in the

soffit. His company performed work for Ms. Boyd beyond that usually performed by Monster Vac. He felt the job had blossomed into more then he bargained for. He received a thank you note from Ms. Boyd.

Legal Discussion

In Colorado, the overwhelming weight of cases interpreting actions by Homeowners Associations to enforce covenants uphold the actions if the exercise of power was reasonable, made in good faith; and not arbitrary and capricious. *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361, 363 (Colo. 1969). It is also true that any use restriction must be strictly construed and clearly established. *Greenbrier-Cloverdale Homeowners Ass'n v. Baca*, 763 P.2d 1, 3 (Colo. App. 1988). Finally, a restrictive covenant that is clear on its face should be enforced as it is written. *Flaks v. Wichtman*, 260 P.2d 737 (Colo. 1953).

The Condominium Ownership Act, C.R.S. § 38-33-101 *et seq.*, requires that bylaws and amendments be supplied at or before the closing of any condominium sale. C.R.S. § 38-33-106(2). In this case, each unit owner who testified confirmed that she was given a copy of the declaration at or before closing. However, the use restriction at issue on the individual condominium units and common elements was not in place when the Declaration was originally written. The restriction was not contained in the copy of the Declaration given to unit buyers. Instead, this restriction is an amendment to the original Declaration supported by three out of the four unit owners. Some courts do not give the same deference to amendments or rule making after the original declaration is in place. (For a review of this distinction see the California Supreme Court's discussion in *Lamden v. La Jolla Shores Condominium Homeowners Ass'n*, 980 P.2d 940, 949 (Cal. 1999)). However, courts have also recognized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts the risk that the power may be used in a way that benefits the commonality but harms the individual." *Id.* at 953.

This condominium association was specifically organized under the Colorado Condominium Ownership Act, § 38-33-101 *et seq*. The court heard no argument about this particular common interest community and its election to be treated as such under the Common Interest Ownership Act for property taxation or other purposes. However, § 38-33.3-217(4.5) leaves no doubt that the legislature anticipated the possibility that condominium declarations could be amended, changing unit usage restrictions if a sufficient majority of the unit owners agree.

The Property under discussion here is defined by Exhibit A to the Declaration. At trial, the parties agreed that Exhibit A is the printed copy of the plat mylar found at Plat book 39 Page 32. As a consequence, the Property includes the building housing the four units and land and buildings outside the condominium building. Common elements also include the buildings exterior shell, floors, ceilings, roof and the walls separating units together with any shared use wiring, plumbing, and ducting. Plat Map Plat Book 39 Page 32 Note 6.

Article XVII of the Declaration provides the mechanism for amendment to the Declaration. The article permits amendment with a 75% approval vote and recordation. If the amendment impacts

an owner's proportionate share of the common elements appurtenant to each unit or owner's assessment obligation, a unanimous vote is needed for its passage. (At trial, plaintiffs raised the issue for the first time of the propriety of the technical procedure used to pass the amendment. Defendants objected. Since no such claim was ever incorporated in the plaintiffs' pleadings, the court did not hear further argument on that point.)

Plaintiffs contend that, with the exception of prohibiting violations of law in an individual unit, the Prohibitions section (Article VII, Section 7.4) applies only to prohibitions within the common areas. Thus the Declaration could be amended only to restrict usages or activities in those same common areas. However, when read as a whole, the section does not support plaintiffs' interpretation. Each line containing a prohibition in the section is tied to a specific term defined in Article 1 of the Declaration. The prohibitions are specifically applied to any unit, the common elements, the project or the property. The prohibition central to this controversy read as follows: "No nuisance shall be allowed upon the Property, nor shall any practice be allowed which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the Property by its residents." As already specified, the term "Property" includes the building housing the four individual condominium units.

The court then must consider whether seepage of second hand smoke or its smell constitutes a nuisance which is a source of annoyance or interferes with the peaceful possession of the property. If so, the court must additionally consider whether the remedy of banning all smoking on the Property was done reasonably and in good faith, and was not otherwise violative of any legal rights.

The term "nuisance" is not defined in the Declaration. Black's Law Dictionary (6th ed. 1990) defines "nuisance" as "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 law will presume resulting damage." *See State ex rel. Herman v. Cardon*, 530 P.2d 1115, 1118 n.1 (Ariz. App.1975). Also, "[t]hat 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." *Patton v. Westwood Country Club Co.*, 247 NE2d 761,763 (Ohio App. 1969). In this case, complaints were made about smoke or the smell of smoke migrating from Unit 2 into adjoining units at the very first homeowner's meeting. Despite plaintiffs' contentions that this action was taken simply to appease one tenant, testimony by several witnesses supports the fact that smoke smell seepage was a longstanding problem. The issue of whether there was actual smoke or simply a smoke smell is irrelevant. Testimony substantiated an almost constant smell of cigarette smoke which was the source of complaint by multiple tenants. Clearly, the smoke smell constitutes a nuisance under these circumstances.

Plaintiffs contend that the ban itself is an unreasonable reaction to the issue presented. Plaintiffs further argue that the ban was passed in an arbitrary and capricious manner after tempers were raised at a very volatile meeting. Clearly, the November 2005 homeowner's association meeting was extremely fractious. The testimony, however, does not in any way substantiate that the

decision to make the units smoke free was undertaken in an arbitrary and capricious manner. The testimony was replete with various occupants' attempts to minimize or prevent the smoke smell. Ms. Boyd testified at length about her efforts to rid her home of the smoke smell. She undertook work herself and hired a number of contractors to complete work and even make structural changes. She spent thousands of dollars to stop the smoke and/or smoke smell infiltration. Testimony showed that an effort to reach a consensus with plaintiffs about only smoking outside the units was rebuffed. It is apparent that the shared airspace in the soffit area permits smoke or smoke smell to migrate. Thousands of dollars of contract work has not solved the problem. 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. There can be no finding that the passage was arbitrary or capricious or done in bad faith.

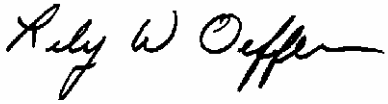
Finally, the court considers whether the smoking ban violates any public policy or fundamental rights of any of the owners. Defendant asks the court to take judicial notice of laws recently passed in Colorado regarding cigarette smoking. Section 25-14-202, C.R.S., speaks to the concern of the legislature for protecting nonsmokers from environmental tobacco smoke in indoor areas. Section 25-14-202 also specifically states that the legislature wishes to limit any unwarranted intrusion into private spheres of conduct and choice. Plaintiffs argue that this ban impacts their ability to enjoy their private home. However, the migration of smoke and/or smoke smell in this setting is like extremely loud noise. Despite numerous efforts, it cannot be contained within a single unit. Finally, courts have not specifically extended the protections of the Fourteenth Amendment to a fundamental right to smoke. (See the court's lengthy discussion in *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10th Cir. 1987)). This is especially true here where plaintiffs' private activities are impacting so negatively on the remainder of the community that they choose to join.

Ruling

The court finds for the Defendant. The passage of the Amendment to the Declaration of Covenants, Conditions and Restrictions was proper, reasonable, made in good faith and not arbitrary and capricious. Plaintiffs have not established that the Amendment violates public policy or otherwise abrogates a constitutional right. Plaintiffs' requested relief is denied. Each party shall bear their own fees and costs.

SO ORDERED November 7, 2006.

BY THE COURT:



Lily Oeffler
District Court Judge