

The Debate Rages On

Establishing a Building-wide Smoking Ban

By W.B. King

Concern over health, the environment, and an evolving legal landscape has prompted a number of condo and co-op boards in communities across New Jersey to ban cigarette smoking not only in common outdoor areas but in individual units. This restriction has ignited a heated debate over health/nuisance vs. individual rights, and both sides can be vehement in advocating for their position.

At the Governor's two-day Conference on Housing and Economic Development in September 2011 at the Atlantic City Convention Center, a wide-ranging group of speakers gathered to address the benefits and challenges of enacting a smoke-free policy from the perspectives of a nonprofit resource organization, housing ownership and management.

Karen Blumenfeld, Esq., executive director, Global Advisors on Smokefree Policy (GASP), Lynn Rosner, Health Education, Family Care Coordinator, and Tobacco Dependence Specialist CTTS, Camden County Department of Health and Human Services, and Steve Tancer, director of the property management group at RPM Development Group in Montclair, were guest speakers on the panel 'Smoke-Free Multifamily Buildings,' to discuss what they believe is an emerging trend in housing in the Garden State. Robert Sasso, director of property management at the New Jersey Housing and Mortgage Finance Agency (NJHMFA) acted as moderator.

"By and large everyone likes [building-wide smoking bans]," said Tancer. "It keeps the hallways cleaner and it smells better. There was virtually no resistance." He also pointed out numerous benefits for property managers of going smoke free: lower maintenance costs because no one has to sweep up cigarette butts, lower insurance costs, and faster turnaround times on available units due to the fact smoke residue isn't embedded in wall paint and carpet.

Nearly one third of RPM's 25 properties are completely smoke-free, including buildings in Newark, Orange and Somerset and two dozen public and private housing properties now prohibit smoking in private areas throughout New Jersey, according to the Summit-based GASP.

The New Jersey Smoke-free Air Act prohibits smoking in common areas like lobbies, stairwells and hallways of residential buildings and states that smokers must not stand near doors or windows to prevent smoke from drifting in. Under

New Jersey law, college dorms, nursing homes and foster family houses are also smoke-free.

“Market research keeps showing that people prefer to live in a building that has a building-wide no smoking ban. So if there is a higher demand for it and a preference for it, then why not meet that demand,” says Chris Banthin, a lawyer with Northeastern University’s School of Law’s Public Health Advocacy Institute. “There are also a growing number of complaints from condominium unit owners about smoke seeping into their apartments from neighboring units. That happens in a lot of properties and it’s a difficult issue. We’ve seen a lot of lawsuits. We all want to have privacy to do what we want in our own home, and if smoke wasn’t going from unit to unit we wouldn’t be having this conversation, but when that happens you’re not doing something in your home, you’re doing it in your neighbor’s home. That’s why it’s an issue.”

“Legally, a board can pass many types of rules and regulations under the New Jersey Condo Act and the master deed and bylaws,” says attorney Mark M. Wiechnik, a partner in the Community Association practice group at the law firm of Herrick, Feinstein, LLP, which has offices in Princeton.

“However,” he adds, “the board must always take into account how they are going to enforce such a rule or regulation. For example, how would a condominium association enforce any rule related to smoking if it was not permitted to enter the units, or regulate the vast majority of activities that are occurring in those units? Could it have monitors, or security guards patrol the hallways? At what cost? Could it rely solely upon unit owner complaints? And if it received one of those complaints, what could it do if it couldn’t enter the unit to stop the conduct? And how would the association regulate the activities of people who are not even a member of the association and thus are not bound by the association’s governing documents?”

A Healthy Perspective

For many concerned residents, the call for a smoking ban is directly related to health concerns. According to the CDC (Centers for Disease Control and Prevention) nearly 1 in 5 Americans smoke cigarettes. The University of Minnesota estimated that just 15 percent of cigarette smoke is inhaled by the smoker leaving the balance to linger. Secondhand smoke contains over 4,000 chemicals, including more than 40 cancer causing agents and 200 known poisons. The Environmental Protection Agency classifies it as a Class A carcinogen.

For smokers, it becomes a personal rights issue as many believe they should be free to smoke in the privacy and confines of their apartment or unit. There has been push-back by pro-smoking organizations such as Citizens Lobbying against Smoker Harassment (CLASH). A recent press release from founder Audrey Silk underscored CLASH’s general stance on banning. “It’s time to take this country

back...and let the deprogramming begin. Smoking is okay... as an informed adult's choice. Once chosen there's nothing to be ashamed of, nothing to apologize for, and we certainly don't need anyone's approval or permission nor to be banished like criminals from view."

Stephen Helfer, a smokers' rights advocate from Cambridge, Massachusetts, agrees with CLASH. "I think there are a lot of Americans, I wouldn't say they are the majority, but they recognize the anti-smoking movement for what it is. It's a movement that uses very, very exaggerated scientific evidence to expand power and to control the lives of other people," he says. "It's controlling the behavior of people in their own homes, if you're going to ban that, what's next—wood-burning fireplaces?"

While health is a leading concern, board members and anti-smoking groups also frequently bring up the issue of property values in their justifications for building-wide bans.

"A smoke ban is going to increase the economic value of the property," says Banthin. "Condo owners are worried about the value of their units, and they should be. It's green and healthy housing, and who doesn't want that? People will pay for that. There's also safety reasons too because cigarettes cause fires. And then there's the cost. The expense of dealing with rehabbing a unit that was filled with smoke over and over again is expensive."

Co-op & Condo Procedures

As more boards field complaints from disgruntled unit owners, the question on how best to proceed becomes a necessary starting point.

"If condo owners are interested in going smoke-free, they should call their attorneys and say 'we want to pass a bylaw amendment,'" says Banthin. "They know how to do that—condominiums do that all the time. They know how to hold a mini-political campaign in their condominium, and then they'll hold a vote. They will decide yes or no. It's up to the owners to decide. There is model bylaw language out there. This is not heavy lifting."

In order to amend existing bylaws a unit-owner vote of approximately two-thirds or 75 percent is required.

"No smoking in a condominium doesn't mean smokers aren't allowed to live there," says Banthin. "It's like bars and restaurants, smokers are welcome to eat and drink there but not to smoke there. It's the same thing."

For most irritated neighbors claiming that second hand smoke is interfering with their health or the health of their children, they look to a "nuisance" clause which is noted in all bylaws and proprietary leases.

“A potential recourse for an affected unit owner would be to file suit against the offending owner, asking the court to find that the smoking is a nuisance, and having the court order that the person couldn’t smoke inside their home, but that would be a long shot at best,” says Wiechnik, “Associations may be able to ban smoking in common areas if they so choose, as it is responsible for those areas and can limit conduct in those areas. For example, arguably the smoke in those areas would require more frequent painting, or carpet replacement.”

In 2004, a homeowner association in Mendham Township voted 9–2 (one owner was absent) to ban smoking in the 12-unit Mendham Knolls condo complex’s common areas, outside areas and within each unit. The bylaws were amended after a unit owner claimed the stench from his downstairs neighbor’s cigarette smoke wafted upstairs into his apartment and was so overpowering that it woke him up in the middle of the night and would cause his throat to become hoarse. The secondhand smoke was also the source of anxiety for the upstairs resident. Six years later on December 1, 2010, the Bellmawr Senior Housing Association followed suit and prohibited smoking in its two building, 130-unit complex in the South Jersey town. When residents leases were up for renewal a new clause included a no-smoking policy.

A Smoke-Free Future?

With more buildings going smoke free, including new rental buildings with non-smoking lease stipulations, it seems logical that in ten year’s time, a non-smoking building will be as common as a non-smoking bar.

As is the case with all building-wide initiatives, it comes down to informing the tenants and letting them decide what is in their best interest. Ultimately, the decision to go smoke free is up to the owners, says Banthin.

“Right now we are in a period of time where smoking restrictions are getting tighter and tighter,” says Helfer. “The public is hyper-sensitized to tobacco smoke. It’s because of the last twenty to thirty years of anti-smoking propaganda to which they’ve been subjected. Will this trend continue? I hope not, but right now we are in the throes of it.”

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