What's That Smell? Dealing with Secondhand Smoke In Community Associations

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Introduction

Secondhand smoke has been categorized by the United States Surgeon General as toxic and carcinogenic. Many community associations face an increased number of complaints from non-smokers about their smoking neighbors and are being asked to take action to abate secondhand smoke. Secondhand smoke can penetrate into dwelling units and residences through walls and floors, via air ducts or heating vents, beneath doorframes and through windows. In addition, owners and residents can also be exposed to smoke outside in the common area, in exclusive use common area locations (such as balconies and patios), and in common area walkways, hallways and recreational facilities.

The emerging trend in California is the prohibition of smoking in multi-unit housing. However, the only current statewide smoking restriction in multi-unit housing is focused on the restriction of smoking in indoor common areas when an employee works on the property (see California *Labor Code* § 6404.5); this restriction is a workplace protection and is not intended to protect the health of an association's owners and residents.

When addressing issues involving secondhand smoke, an association's manager (and board of directors) need to be able to do the following: (1) take action that addresses smoking issues specific to the community; (2) determine the criteria for whether the association can and should adopt smoking regulations and restrictions; (3) establish a policy for dealing with secondhand smoke complaints; (4) know the potential liabilities to the association (and its board and manager) for failing to prevent secondhand smoke; and (5) develop a protocol for dealing with the use of medical marijuana.

Learning Objective #1

Take action that addresses smoking issues specific to the community.

The potential nuisances caused by and the potential exposure by residents to secondhand smoke will vary based on the type of common interest development and the physical set up of a specific development. For example, whether dwelling units are attached or stacked, the age of a building and whether the ventilation system is central or individual per residence will dictate if and how secondhand smoke will travel from one dwelling unit to another. When considering the adoption of smoking restrictions and bans, an association's board and manager should consider these physical factors and whether the restriction or ban is necessary or practical.

The ability of an association to restrict or ban smoking within its development will also depend on the provisions of the association's CC&Rs, bylaws and operating rules. Most association CC&Rs allow the board to adopt rules regulating conduct in the common area. So, it stands to reason that an association can ban smoking in the common area, including exclusive use common area balconies, patios, etc. When it comes to the ban of smoking within individual dwelling units, the CC&Rs for an association would need

to establish that ban; if there is only an operating rule banning smoking in dwelling units (i.e., no smoking ban in the CC&Rs), that rule would likely be construed to be unenforceable as a result of it exceeding the scope of the underlying CC&Rs.

If an association's development is located in a city or county that has adopted specific smoking restrictions or bans, the association should adopt a governing document provision that mirrors (or is no less stringent than) that local restriction or ban. If an association were to have a governing document provision regarding smoking that was less restrictive than a local ordinance, the association's provision would be unenforceable, and the association would be legally obligated to comply with the applicable ordinance.

For example, in 2014, the City of San Rafael in Marin County, California made active a smoking ban which prohibits smoking inside any dwelling that shares a wall with another dwelling. At the time of adoption, this was the strictest smoking restriction in the United States. San Rafael's stated goal underlying the ban is to eliminate secondhand smoke from creeping through doors and windows, ventilation systems, floorboards and other susceptible openings. The owners and residents of all dwelling units in San Rafael (whether condominium units, apartments or other attached housing), are required to comply with this ban, and a common interest development in San Rafael should adopt a smoking policy mirroring the San Rafael ban.

Learning Objective #2

Determine the criteria for whether an association can and should adopt smoking regulations and restrictions.

To a certain degree, what constitutes a nuisance is subjective. The courts in a number of smoking cases around the United States have held that a nuisance can exist where fumes, odors or smoke are reasonably offensive to persons of ordinary sensibilities, even though the fumes, odors or smoke may not have been proven to cause material injury to property or endanger health and safety. Further, some courts have held that the smoking of six cigarettes a day does not constitute a nuisance, whereas other courts have held that the smoking of 60 cigarettes does constitute a nuisance. While an owner or resident does not have to be hypersensitive or allergic to smoke to claim a smoke nuisance, their opinion alone that cigarette smoke is a nuisance is not usually enough to establish that a nuisance actually exists.

The general goals behind adopting a community smoking restriction or ban should be to avoid secondhand smoke nuisance issues, fire risk, and potential litter issues relating to the discarding of cigarette butts. That said, when discussing smoking restrictions and bans, an association's manager and board should be cautious about how they discuss the reasons for the association considering or adopting a smoking restriction or ban, to avoid creating a perception or reliance on the part of owners and residents that the association (and its manager and board) will provide for their general health and safety and/or be responsible for injury an owner or resident may allege with respect to secondhand smoke (or other issues). As a general rule, an association does not have a duty to provide for the safety, security or privacy of owners and residents, unless its governing documents expressly establish that obligation.

As noted above, most associations can ban smoking in the common area, including exclusive use common area balconies, patios, etc. In the alternative, an association can also establish a designated smoking area within the common area, assuming there is a suitable location for that area and appropriate protocols are implemented regarding the use and maintenance of that area. The decision whether to adopt either of these bans should be based on the underlying goals of the association – such as whether to avoid fire hazards, or whether to avoid a smoke nuisance – and the adoption of the ban should effectuate the implementation of this goal.

An association can also seek to allow owners within individual buildings in a multi-building development to declare and designate their building as smoke-free. In 2011, United Laguna Woods Mutual (an association formed to manage an age restricted stock cooperative in Laguna Woods, California) created a process by which residents of an individual building can collectively petition for the designation of their building as "smoke-free." This procedure was developed and implemented by the then-current board of directors of the association, in consultation with the association's legal counsel, in response to association member concerns that had been raised about the health effects of, and nuisance factors involving, secondhand smoke.

At United, the process to designate a building as "smoke-free" requires the unanimous consent of all members having an interest in dwelling units in the building, the completion and submission of various forms, and a hearing before the board of directors. At the conclusion of the process, the subject building is permanently and irrevocably designated as "smoke-free." Building 410 was the first building at United to be designated as a "smoke-free" building in the development, and that designation went into effect in 2015.

As noted above, the banning of smoking in individual dwelling units and residences within a common interest development likely can only be accomplished by an amendment to an association's CC&Rs, and the enforceability of that ban is not at this point in California guaranteed to be upheld by a court. It would be prudent for a board considering a development-wide smoking ban to send non-binding surveys, hold town hall meetings, and take other actions to determine whether a majority of the community supports a complete smoking ban, and what sort of objections owners may raise. Doing homework ahead of time on this issue could help an association avoid spending time and money on a proposed amendment that does not have and will not garner the necessary community support, or which could result in legal action against the association by a smoking owner if adopted.

As with all rules, a manager and board of directors of an association should keep in mind that just because the board can adopt a rule does not mean that the board should adopt that rule. Once a smoking restriction or ban is adopted, the board will have a duty to enforce that rule. Failure to enforce the restriction or ban could result in breach of fiduciary duty claims against the association and the board by non-smoking owners, and could lead to potential directors and officers liability coverage issues for the board members if the failure to enforce is a deliberate/willful act.

In the absence of a smoking restriction or ban, secondhand smoke could easily be classified as "noxious and offensive" and considered a nuisance under the general nuisance provisions of an association's CC&Rs. Reported nuisance violations relating to secondhand smoke should be handled by an association's board of directors in the same manner as other types of nuisance violations. If an association does not act timely and decisively in enforcing nuisance restrictions, the association and its board of directors may be liable for breach of fiduciary duty (assuming a nuisance exists and/or can reasonably be proven to have existed).

Finally, when addressing secondhand smoke, an association needs to consider not just cigarettes and cigars, but also other devices that use tobacco substances and result in the emission of secondhand smoke, such as electronic cigarettes, vaporizers, pipes, hookah pipes and other devices. Any operating rule or CC&R provision related to smoking should focus on all items and devices that could lead to the creation of secondhand smoke and related odors.

Learning Objective #3

Establish a policy for dealing with secondhand smoke complaints.

Most dwelling units and residences are not airtight, and smoke can filter through ventilation systems, pipes, walls, windows, floorboards, electrical sockets, and even cracks in plaster; there are also technical issues involving pressurization and wind flow that could cause smoke to move from one dwelling unit or residence to another. When a complaint is received by an association about secondhand smoke, doing nothing is not an option. Complaints made about secondhand smoke should be dealt with in the same manner as other alleged governing document violations (meaning there is a general duty on the part of the association to investigate and evaluate a complaint regarding smoke).

While an association generally is not required to enforce its governing documents to cater to the hypersensitivities of owners and residents, or to a general dislike of a certain activity, the known and potential health effects of secondhand smoke complicate the ability of an association to simply declare an issue as a "neighbor-to-neighbor" dispute. A manager should keep in mind that to be a nuisance, the secondhand smoke must be substantial and unreasonably offensive to persons of ordinary sensibilities. That said, the problem with secondhand smoke complaints is determining whether an average person would find the smoke to be a nuisance.

Also, obtaining evidence of a secondhand smoke issue can be difficult for an association in many cases, since smokers may smoke only periodically or in different areas around their dwelling unit or residence. If an association is able to confirm (or is reasonably able to determine) that there is a secondhand smoke issue that is creating a nuisance or that is otherwise in violation of the governing documents or applicable law, the board has a duty to seek the reasonable correction/abatement of the issue.

Adoption of a policy for dealing with secondhand smoke complaints can help establish a formalized mechanism for complaints about smoke and help set expectations of both the complaining party and the smoking party. Following this syllabus is a sample secondhand smoke complaint policy that can be customized and modified for different associations. To ensure that any version of this sample policy that is proposed to be adopted by an association's board of directors is valid and enforceable, an association's board of directors should involve the association's legal counsel in the drafting of the policy.

Assuming smoking is permitted within dwelling units and residences in an association's development, the association can require a smoking owner or resident to take measures to reduce and eliminate smoke emanating from inside his or her unit. Such measures may include requiring the owner to install circulating air filters in the unit's vents, apply various sealing treatments around door and window perimeters, install door sweeps and weather stripping around windows, seal cracks or gaps in the interior walls and around fixtures in the unit, restrict smoking to certain parts of the unit, smoke less frequently within the unit, and/or smoke only within certain areas of the unit. An environmental assessment company can be engaged – ideally at the owner's cost – to evaluate the owner's dwelling unit and help the association and the owner determine what measures may be best and/or appropriate based on the physical setup and layout of the building.

In addition, an owner complaining of secondhand smoke issues may have a duty to "self-help" to minimize the entry of secondhand smoke into their unit. Such action may include the complaining owner taking steps to make their dwelling unit airtight, by using silicone caulk or insulating foam to close gaps in electrical outlets, under doors, light fixtures, pipes, etc. to keep smoke out. Vents are another source of smoke seepage, and in older buildings they may no longer be in use; a sheet of plastic can be placed inside the vent (behind the grate) to prevent smoke infiltration. Also, door draft excluders will keep smoke from coming in through doors, and air purifiers and filters can be used to remove smoke from within a unit.

An association's manager and board should keep in mind that under most CC&Rs, an owner has the right to enforce CC&R provisions against another owner. So, an owner would presumably be able to pursue legal action against his or her neighbor for the creation and existence of a nuisance condition resulting

from secondhand smoke. However, most owners do not want to have to go to the trouble, and, more importantly, pay for, pursuing legal action against their neighbor, and will want the association to step in and do the "dirty work." In the event of a lawsuit against an association by an owner who refuses or fails to engage in reasonable self-help, the association could use that factor to reduce the association's potential liability.

Any agreement that an association and an owner arrive at regarding the implementation of measures to eliminate the infiltration of secondhand smoke from a unit, or to prevent the intrusion of secondhand smoke from another unit, should be documented in a written agreement. This will help ensure that there is a clear record of what was agreed upon in the event of later disputes. That agreement should contain a procedure for what the next steps will be if the measures agreed upon do not work, or if secondhand smoke complaints continue to be made by neighboring residents, and the timeline for accomplishing those actions/goals. For obvious reasons, it would be prudent for the association's legal counsel to be involved in the negotiation and drafting of that agreement.

Learning Objective #4

Know the potential liabilities to an association (and its board and manager) for failing to prevent secondhand smoke.

An association and its board of directors can be liable for failure to address a complaint about smoke that is a nuisance or which violates the association's governing documents. A recent Orange County, California case also held the management company partially liable. Following is a discussion of three California cases which involved claims against an association for (alleged) failure to properly abate a secondhand smoke nuisance.

1. *Chauncey v. Bella Palermo Homeowners Association et al,* (2013) Orange County Superior Court Case No. 30-2011-00461681.

In March of 2013, an Orange County jury found Bella Palermo Homeowners Association negligent and in breach of its CC&Rs for failing to resolve a secondhand smoke dispute between neighbors. The association's CC&Rs included the following nuisance provisions (similar to most every other association's CC&Rs): "*No noxious or offensive trade or activity shall be permitted upon any part of the covered property, nor shall anything be done thereon which shall in any way interfere with the quiet enjoyment of each of the owners of his respective residence.*"

The Chaunceys alleged that their neighbors and the neighbors' visitors smoked incessantly on their patio next to the Chaunceys' unit and on the adjoining sidewalks in front of their unit, citing a constant infiltration and presence of secondhand smoke entering their unit through windows and a sliding-glass door. Further, the Chaunceys said the smoke aggravated their young son's asthma. As a result of the secondhand smoke nuisance, the Chaunceys decided to move out of their condominium unit and rent a different residence.

The Chauncey family filed a lawsuit in March 2011 against the association, the association's management company, and the smoking tenants of the unit next door. The lawsuit alleged that the Chaunceys had made repeated complaints to the association, the management company, the tenants and the owner of the unit next door, but that none of them did anything to stop the problem. Specifically, the Chaunceys focused on the fact that the association was negligent in its failure to enforce the nuisance provisions of the CC&Rs for the benefit of all homeowners. A five-week jury trial ensued.

The jury found that the association had breached its contract (the association's CC&Rs) with the Chaunceys, was negligent by failing to ensure the Chaunceys' right to the quiet enjoyment of their unit,

negligently inflicted emotional distress on the Chaunceys, and caused economic damage to the Chaunceys. A total judgment of $15,500 was awarded to the Chaunceys: $6,000 for economic damages (for costs incurred to address the smoke issues and relocate to another residence); and $9,500 for non-economic damages (for emotional distress). The association was held liable for 60% of the verdict, and, more surprisingly, the association's management company was held liable for 10% of the verdict; the remaining 30% of the verdict was apportioned to the smoking neighbor-tenants and the owner of their unit. The Court also awarded the association to pay $54,000 in attorneys' fees and costs.

At the time, it was believed this this was the first jury verdict of its kind in California and, perhaps, the nation. The findings and verdict in this case demonstrate that associations can be held responsible for secondhand smoke exposure to owners and residents.

2. *Birke v. Oakwood Worldwide et al.* (2009) 169 Cal.App.4th 1540

This case involved the Oakwood Worldwide residential apartment complex which banned smoking in all indoor common areas and indoor dwelling units, but permitted smoking in all outdoor common areas. A resident father sued Oakwood on behalf of his five-year-old daughter who suffered from asthma and allergies, alleging that Oakwood's failure to abate secondhand tobacco smoke in the outdoor common areas was a public nuisance. Specifically, the resident argued that Oakwood allowed, encouraged and approved a toxic, noxious, hazardous, offensive and carcinogenic condition to be present in the common areas of the complex. Oakwood argued that it did not have a legal duty to prohibit smoking in the outdoor common areas, and reasoned that, therefore, it could not be liable for failing to stop the alleged smoke nuisance.

The Appellate Court held that Oakwood, as a landlord, had a duty to maintain its apartment complex in a reasonably safe condition, and that by failing to abate secondhand smoke in the exterior common areas, Oakwood may have created a condition harmful to residents and interfered with their comfortable enjoyment of life and property. The Appellate Court's ruling returned the case to the lower, trial court to decide if a nuisance actually existed in this case. The lower court decided that based on the facts in this particular situation, there was no nuisance.

This case demonstrates that the failure to limit secondhand smoke in outdoor common areas of a common interest development may be deemed to create a public nuisance and expose an association to liability for failure to abate and prohibit that nuisance. In addition, the case raises the issue that fair housing complaints can be made by owners and residents for failure to provide a smoke-free environment and/or for failing to protect children, the elderly and persons with compromised immune systems from exposure to secondhand smoke. Further, *Birke* provides support for associations that attempt to ban smoking in common areas; this case does not, however, require an association to ban smoking in common areas.

3. *Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Association* (2008) 166 Cal.App.4th 103

A homeowner sued The Churchill Condominium Association (a mid-rise condominium project located on the Wilshire Corridor in Los Angeles) based on the board's failure to repair concrete slab penetrations in the slabs between units, which had existed in the building for approximately 40 years, since the time of construction. The slab penetrations were required to be fire-proofed at the time of construction to comply with then-current building codes, but they were not. In spite of this, a certificate of occupancy was issued by the City of Los Angeles.

An owner complained about cigarette smells coming from other units. Experts hired by the association determined that the odors were coming from the slab penetrations and that the existence of those holes

posed a "significant" fire/safety risk. The owner of two adjoining units (a pension and profit plan/trust) which was remodeling those units demanded that the association fix the problem; however, the association's board of directors refused and demanded that the owner do so.

The owner filed a lawsuit against the association and sought an injunction forcing the association to repair the slab problem in their unit as well as all other units in the building, damages for diminution in value of their units and, at the end of trial, attorneys' fees and costs. The association filed a cross-complaint for an injunction against the owner, seeking a requirement that the owner seal the slab penetrations under its units, fines for the owner previously failing to do so, and attorneys' fees and costs. The board defended its position by stating that its decision not to repair the slab penetrations was protected by the *Lamden* rule of judicial deference; see *Lamden v. La Jolla Shores Clubdominium Association* (1999) 21 Cal.4th 249.

At trial, the jury determined that the association was negligent and had breached the CC&Rs by failing to fix the slab penetrations, as the slabs were a part of the common area, and the duty of the association to maintain and repair under the CC&Rs. In an interesting twist, the jury found that the association was partially responsible for the problem, but that the association's directors had not breached their fiduciary duties. The jury awarded the owner a small sum for loss of value of its two units.

The judge ruled that the association should immediately fix the slab under the owner's two units and that a membership vote should be taken as to whether all other units in the building should be repaired. The trial court also ordered the association to pay the owners' attorneys' fees and costs, in the amount of $531,159.

The board contracted to have the slab penetrations under the owner-trust's two units fixed, and conducted a vote of the membership, as ordered by the court. Out of the 110 units in the building, the owners of 81 units cast votes; 78 owners voted against repairing the slab penetrations under all units, and owners representing only three units voted in favor (two of those three votes were cast by the plaintiff-owner in the case). The board subsequently adopted a policy requiring that all owners who remodel their units add fire proofing in the penetrations beneath their units.

The take away from *Ritter & Ritter* is that an association's board of directors must carry out the association's duty to maintain the common area. In the context of secondhand smoke infiltration issues, if there is a building defect or deteriorated condition that would allow secondhand smoke to permeate from a unit into other units or the common area, the board should weigh and, as reasonably necessary, implement repair alternatives; simply doing nothing or refusing to act can expose the association and its board members to liability for breach of fiduciary duty and nuisance claims.

One last thing to consider is pollution liability coverage under an association's directors and officers liability insurance policy. There will be insurance coverage issues for an association in a smoke-related lawsuit if the association's insurance policies exclude pollution liability coverage; most policies contain an exclusion, so coverage is generally not afforded. It would be prudent for an association with attached dwelling units to address this pollution coverage issue with its insurance agent or broker.

Learning Objective #5

Develop a protocol for dealing with the use of medical marijuana.

Today, an estimated 573,000 California residents use medical marijuana. However, there is a conflict between California and federal law as to the legal right of a person in California to purchase, possess, grow and use marijuana for medical purposes. The federal government has not legalized any activities relating to marijuana, medical or otherwise.

An association is generally required under California law to allow an owner or resident with a prescription for medical marijuana to use and ingest marijuana in accordance with the provisions of the California Compassionate Use Act and other applicable provisions of the California Health & Safety Code. That said, community association industry professionals in California generally don't believe that medical marijuana patients are protected under the federal Fair Housing Act and its requirement that a "reasonable accommodation" be made for people with disabilities. Nevertheless, an association needs to be careful when addressing complaints and other issues relating to smoke from medical marijuana in order to avoid a violation of California fair housing laws.

One question that is often asked is how an association can determine if an owner or resident has a lawful prescription for medical marijuana. Would it be reasonable for an association to ask to review a resident's medical marijuana card? So long as an association does not violate an owner's or resident's privacy rights (i.e., the board or manager does not ask for an explanation of or information about the medical condition leading to the issuance of a medical marijuana card), it arguably would be reasonable for an association to verify that a person smoking or otherwise using marijuana in the development is legally authorized to do so. However, before making this request/demand, it would be prudent for the association to consult with its legal counsel first to determine what legal considerations need to be addressed and evaluated.

An owner or resident who has a right to use and ingest medical marijuana does not have a right to create a nuisance by way of marijuana smoke. Many people find marijuana smoke to be as offensive and noxious, if not more so, than cigarette smoke. There are ways to ingest marijuana other than by smoke, such as by vaporizers, capsules and sprays, edibles (e.g. brownies and lozenges) and liquids (e.g. marijuana cooking oil), and, based on the circumstances, an association may be able to require an owner or resident to ingest marijuana by one of these alternate means.

There are two side issues related to medical marijuana that should be mentioned for consideration. First, if an owner or resident is exposed to a high level of marijuana smoke by the use of medical marijuana by his or her neighbor, that owner or resident could potentially test positive for marijuana use in a drug test, which could cause employment or parole problems for that owner or resident. And, second, marijuana is not included within the definition of "personal agriculture" which owners and residents are permitted to grow in their back yards pursuant to The California Neighborhood Food Act; however, owners and residents with a valid medical marijuana card are permitted to grow a limited number of marijuana plants in accordance with applicable state statute.

Conclusion

While there is no constitutional right to smoke, the adoption of smoking restrictions or bans within common interest developments can elicit emotional responses from owners and residents who smoke. Community managers should be proactive in addressing issues relating to secondhand smoke in communities they manage, and understand the liabilities to the associations they serve if secondhand smoke issues are not properly and timely addressed.

If an association elects to take a position to not regulate smoking, the association's manager should be prepared to address secondhand smoke if (and when) smoking is raised as a concern by residents in the community. As with many issues facing community associations, there is no magic bullet to solve problems involving secondhand smoke. However, advance planning can go a long way toward an association being able to address secondhand smoke-related issues when they arise in the community.