

Smoke 'Em Out!

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When co-ops and condominiums first came into existence, smoking was a societal norm. Residents would smoke in their apartments, on their balconies, and in the common areas. Today, based on all of the known dangers associated with smoking, smoking is less acceptable and is often banned in places like restaurants, beaches, and building hallways and lobbies. In addition, many landlords now ban smoking. Likewise, many co-ops and condominiums have experienced problems with smoking and the complaints from residents who are subject to secondhand smoke nuisances.

If a co-op or condominium board receives notice of a secondhand smoke condition, the board has an obligation to take the necessary steps to ensure this is not occurring and to prevent the secondhand smoke from entering a resident's unit. A board's obligation is twofold: (1) typically co-op proprietary leases/house rules and condominium declarations/by-laws/house rules (collectively "Governing Documents") prohibit unreasonable odors as well as prohibit nuisances; and (2) the Warranty of Habitability (New York State Law), which applies to co-ops (not condominiums).

If secondhand smoke is a disturbance and/or nuisance to a resident, same is likely a violation of the community's Governing Documents. A co-op board will typically issue a formal default notice. If the smoking/odor nuisance is not corrected, the proprietary lease can be terminated and an eviction proceeding can be commenced. For a condominium, the board would need to commence an action in Supreme Court to obtain a declaratory judgment to enforce the Governing Documents. In order to prove the smoke levels are significant enough, there are companies that can conduct a "smoke test" which tests the levels of nicotine in the apartment.

In co-ops, the failure of the board to address a smoking issue can be deemed a breach (by the co-op) of the Warranty of Habitability. In that regard, New York courts have taken the position that secondhand smoke "qualifies as a condition that invokes the protections of RPL §235-b under the proper circumstances" and can be grounds for a constructive eviction. See, *Poyck v Bryant*, 13 Misc.3d 677 (Civ. Ct. N.Y. Co. 2006). Specifically, in *Poyck*, one of the residents repeatedly smoked in the common area hallway, which caused the secondhand smoke to permeate certain units. The Court found that the Board breached the Warranty of Habitability by permitting residents to continue to smoke in the common area hallways despite numerous complaints of secondhand smoke. Therefore, if co-op boards do not take appropriate steps to eliminate secondhand smoke, the board could be in breach of the Warranty of Habitability and be exposed to potential liability.

One of the best ways to deal with smoking nuisances is to amend the Governing Documents. We recommend that all boards (both co-op and condo), at the very least, amend the community's house rules to prohibit smoking in the common areas. Most Governing Documents do not require a community vote for a house rule amendment as boards typically can enact rules forbidding the use of the common areas for activities like smoking.

Additionally, boards can also take steps to make the community a no-smoking property. Many co-ops and condominiums are now doing this. For a co-op, the board can propose an amendment to the co-op's proprietary lease to prohibit smoking in the co-op's apartments as well as in the co-op's common areas. Such an amendment usually requires the approval of 66 2/3% of the co-op's shares and can sometimes be accomplished with "written consent" of the shareholders (no formal meeting). However, for a condominium, you will almost always need to amend the Governing Documents at a special meeting of the unit owners.

Such amendments will alleviate the issue of exposure to secondhand smoke by residents and provide boards with a clear right to stop someone from causing said exposure as opposed to having to prove whether the odor created by the smoke is causing a problem for other residents. Not only are there clear health benefits, more people today view a smoke-free environment as a plus which could raise the value of your homes. The risk of fires and other dangers would be reduced as well, which may beneficially impact insurance premiums.

Please note, while there have been no recent cases in New York challenging a board's right to ban smoking in the entire building, the board might still be subject to an action by a disgruntled resident who resents being told what to do inside an apartment. However, boards already regulate the behavior of residents via rules regarding carpeting, noise, pets, etc. Should residents challenge the smoking restrictions, such restriction (with community approval) would be less likely to be subject to judicial scrutiny and more likely to be afforded the protection of the Business Judgment Rule.

The risk of a challenge to a properly amended smoking prohibition is far less than the risk of doing nothing as it is more likely that residents could bring an action against a board for a breach of the Warranty of Habitability (in a co-op) or for not enforcing the nuisance provisions and house rules regarding odors contained in the Governing Documents (in a condo).

However, we recommend before a board attempts to amend the Governing Documents to enact a smoking prohibition, the Board should poll the community in order to determine what the residents want. The board should also always consult with its attorneys to ensure it is done legally and to prevent future challenges.

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