

Butt Out?

Give & Take Helps in Dealing with Smoke

BY MARIE N. AUGER

In the ongoing effort to limit the non-smoking public's exposure to second-hand cigarette smoke, municipal governments across the country are coming up with increasingly strict bans on smoking in public places—even on public streets and in parks in some communities. Perhaps not surprisingly, more and more condominium associations are following suit.

Fourteen New York City residential buildings are slated to be the first recipients of the American Cancer Society's Healthy High-Rises certification. The program recognizes multi-unit residential buildings that have enacted policies banning smoking from anywhere inside the building—including individual apartment units. The 14 participating buildings include more than 2,700 units and nearly 5,000 total residents. The buildings will be given a highly visible Healthy High-Rise decal for display indicating that the residence is smoke-free.

"I manage a building that has implemented a smoking ban," says Georgia Lombardo-Barton, president of Barton Management, LLC in New York City. "In the case of the building that I manage, it was the condo board's idea and they didn't get a lot of resistance from the residents. The residents voted over 70 percent in favor of the smoking ban."

As recently as this past May, the 29-story, 647-unit Zeckendorf Towers in Union Square became the largest smoke-free condominium in New York City when it banned smoking in both residential units and public areas.

"It was an effort that started three years ago as a result of various complaints from neighbors being involuntarily affected by secondhand smoke," says Maria Pico, borough manager of the Manhattan Smoke-Free Partnership, a health advocacy group that supports the efforts of buildings adopting smoke-free policies. "The board reached out to us for guidance on how to turn the building into a smoke-free environment. So we partnered with them and provided them information, primarily education. It took three years—it's a process, especially with a building this large, but in the end over 85 percent of the residents voted to go smoke-free. Smoke-free housing is a growing national trend and we congratulate the board and management company on this landmark move."



Health concerns seem to be driving the discussion. "I've found that there has been an increase of complaints in what we believe is quality of life issues involving secondhand smoke," says Ronald A. Sher, Esq. of the law firm of Himmelfarb & Sher, LLP in White Plains. "I think people are definitely more concerned with health issues, especially due to the fact that smoking is a known carcinogen and there are many areas where smoke could travel from one apartment into another."

The surge of aversion is largely a reflection of changing attitudes toward smoking. About 20 percent of the population nationwide consider themselves smokers and growing numbers of non-smokers are concerned about the health hazards of exposure to secondhand smoke. A 2006 Surgeon General's report concluded that "There is no risk-free level of exposure to secondhand smoke," and claims that a staggering 65,000 people die per year as a result of illnesses caused or exacerbated by exposure to secondhand smoke.

New York City passed its first Smoke

Free Air Act in 1988, banning smoking in public restrooms and taxis. Since then, the law has been amended three times. In 2003, smoking was banned in bars, restaurants and construction sites, but most notably in 2011 smoking became illegal in New York City's 1,700 parks, on the city's 14 miles of public beaches and in pedestrian plazas like Times Square. There is a current bill that seeks to raise the smoking age of 18 to 21 and hike penalties for selling illegal untaxed smokes.

"Smoking in parks and beaches not only harms people trying to enjoy recreational facilities, it also causes a litter problem that harms the beauty of our parks," New York City Mayor Michael R. Bloomberg said before signing the bill into law.

Kicking the Habit

Given the groundswell of opposition to smoking in most communities, real estate insiders and legal experts point out that it is possible to prohibit smoking throughout a condo property—even within each unit—but to do so requires a change in the building or HOA's by-

laws.

"If it's a condo then the bylaw of the condominium would have to be amended and that would probably require a vote of two thirds of the owners of all the units, even though every condominium has its own amendment procedure," says Stuart M. Saft, a partner with the New York City-based law firm Holland & Knight. "But because the ban would prevent people from smoking inside of their apartments it would probably be subject to a challenge by one or more of the unit owners saying 'We own our units, and you can't tell us what we can or cannot do inside the unit. In a cop, theoretically the board could pass a house rule preventing people from smoking in their apartments, but that would probably be challenged also.'"

"[Declarations of Condominium] and bylaws typically require a super-majority vote in order to amend those bylaws, and the declaration," adds Sher. "It is much more difficult in a condominium to have a smoking ban, but a condo board could still establish a rule or regulation banning smoking."

TRENDS

Impact on Market Value?

Some condominium owners and developers worry that a smoking ban could diminish the number of prospective buyers for their units, while other owners that view a smoking restriction as an enhancement of the property.

"Several years ago, people had the impression that a smoking ban would limit the population of available purchasers interested in buying," says Sher. "But I think that that impression has somewhat changed. Lots of people now think that the 'greening' of a building will in fact appreciate the purchase prices. People are so concerned with preventing adverse health effects of secondhand smoke that they want to live in a no-smoking environment."

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"I've heard that some developments are either leasing rentals or condos and they are advertising that the building is smoke free," says Lombardo-Barton. "We are starting to see a trend in that direction. There really isn't much data to [conclude] whether a smoking ban increases property value or decreases it, but a lot of common opinion has been that given the trend to be healthier and to live in a healthier environment, a smoking ban is a benefit."

New construction may be another matter, however. Real estate experts agree that the main interest of developers is to sell units, so they are perhaps less likely to impose restrictions that could prevent them from doing just that.

"I'm not seeing developers create non-smoking condos," says Saft. "Whenever we meet to discuss a new project and how to structure it and what the amenities are going to be, the question of smoking comes to the table. The general consensus is that the people we are

selling to, many of whom are foreigners, are used to smoking at home, and we don't want to cut that market. So I haven't seen a new construction building where there is a ban on smoking."

Court Battle

As smoking bans become increasingly common, many smokers are finding that the last place they can puff away freely is at home—and perhaps not for

long if home is a condominium. In the meantime, having smokers and non-smokers living side-by-side in harmony can be a difficult balancing act.

Last year, a shareholder in a Midtown residential building sued her co-op and board president over secondhand smoke she alleged was seeping in her apartment and causing her to suffer tightness in her chest, coughing,

headaches and watering eyes. The building superintendent suggested she re-caulk certain parts of her unit—which she did—but she insisted that the smoke continued to enter her home. After the board took little action, the shareholder took them to court. The court eventually concluded that the co-op was negligent, as a matter of law, be-

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cause it had notice of the smoke condition yet did nothing to remediate it.

The battle between smoking and non-smoking condominium residents isn't new, but as complaints about second-hand smoke increase and the evidence of its dangers prove more damning, some conflicts are now being hashed out in court, with the courts being more inclined to support the right of homeowners to breathe clean air in their homes. But courts do not easily or happily restrict private property rights.

"I'm seeing fewer court cases involving secondhand smoke this year than I did last year," says Saft. "I think it might have to do with the fact that people are becoming more sensitive to their neighbor's complaints about their smoking or maybe they are giving up smoking entirely. It seemed to reach a high point early on last year but it's possible this is just aberrational and it'll be back again."

Still a Hot Topic

For managers of multi-unit buildings, smoking has always been a headache—but complaints in recent years have increased. "Smoking is another form of nuisance, very similar to noise," says Lombardo-Barton. "But smoking tends to be more of a health concern as there's more information concerning second hand smoke and the detrimental effects of breathing it in."

"I've found that there's been an increase in the number of complaints in what we believe are quality of life issues involving secondhand smoke," says Sher. "I think people are more concerned with health issues than they were in the past." ■

Marie Auger is a Massachusetts freelance writer and a frequent contributor to The Cooperator. Staff Writer Christy Smith-Sloman contributed to this article.