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Smoking: Can an Association ban smoking?

An Association may enact a rule banning smoking in common areas, and can probably ban it in individual units/homes as well. However, an Association must consider several potential risks and benefits before enacting such a rule.

Association's Authority to Enact No-Smoking Rules
Neither federal nor state anti-discrimination laws prevent Associations from adopting no-smoking rules for all parts of the community, including individual residential units. An individual's status as a smoker is not a protected category of persons, therefore smoking is not a protected right or activity under the federal Fair Housing Act[1] or Washington's Law Against Discrimination[2]. Attempts by smokers to be considered disabled due to an addiction to nicotine have not been successful, so nicotine smokers do not receive protection or reasonable accommodation under federal[3] or state[4] disability statutes.[5]

Additionally, Washington state law expressly prohibits smoking in most public places and work places. A "public place" is any enclosed area open to the public. This could include a community clubhouse or store if it is open to the public. A "workplace" is every enclosed area under the control of a public or private employer that employees frequent during the course of their regular duties. This could be lobbies, hallways, community rooms, etc. In addition, smoking is prohibited within 25 feet of all business entrances, exits, operable windows and air intake vents.

Given the state of the law, there is nothing to abridge an Association Board's general authority, pursuant to their Governing Documents, to establish rules and regulations for common areas and limited common areas. Enacting a no-smoking rule that

applies in such areas will likely require no more than a vote of the majority of Board members. Once the rule is enacted, the Board must give notice of the rule change to owners before enforcement.

Washington courts have yet to determine whether an Association may prohibit smoking inside an owner's unit or home—an area that is not generally subject to the Board's authority. However, a Colorado court concluded that condominium Associations have the authority to adopt an amendment to the Declaration prohibiting smoking within units where a resident's smoking inside a unit interferes with the neighbors' use and enjoyment of their own units.[6] Given the growing trend toward a smoke-free society, the ubiquitous understanding of the health risks related to secondhand smoke, and the fact that no laws expressly prohibit Associations from banning smoking in units or homes, Washington courts are likely to apply this reasoning. This may be considered a "restriction on use" and require a Declaration amendment.

Methods of Enacting a No-Smoking Rule

There are three ways to enact a no-smoking rule:

1) Amendment to Declaration/CC&Rs: This method is likely the most difficult and costly way to enact a smoking ban, but it will be given the most deference by courts and be relatively strong in the face of legal challenges.

2) Amendment to Bylaws

3) Board rule or resolution: A new rule or resolution is the easiest way to implement a smoking ban, but would only be effective for common areas and limited common areas and would not be enforceable to prevent smoking in individual units or homes.

Risks and Benefits of a No-Smoking Rule

An Association that allows smoking faces two potential legal challenges. First, a resident could sue either the Association or smoking residents on nuisance grounds. Most Governing Documents contain a generic nuisance clause stating that an owner (or resident) cannot engage in an activity that affects the use and enjoyment of another owner's property. A resident bothered by secondhand smoke could bring an action against the Association to enforce this provision of the Declaration.

Second, if an individual has a serious health condition that is affected by exposure to secondhand smoke, he or she may be able to ask for relief by using one of the disability statutes. If the courts find that the condition is a disability, then the resident is entitled to a reasonable accommodation, which could include imposition of a no-smoking rule.

While a no-smoking rule could help an Association avoid these issues, it could raise others, namely legal challenges to the rule from owners and residents who wish to smoke in the community.

A no-smoking rule could have several benefits to the Association:

1) Increased desirability and demand for the community;

2) Cost savings from not having to deal with cigarette related damage and cleaning;

3) Reduction of fire risks (and possible insurance discounts); and

Avoidance of nuisance claims and reasonable accommodation requests.

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[1] 42 U.S.C. 3601, *et seq.*

[2] RCW 49.60 (Discrimination — Human Rights Commission).

[3] Americans With Disabilities Act of 1990 (ADA) (42 U.S.C. §12101, *et seq.*; 47 U.S.C. §225, *et seq.*)

[4] Washington's Law Against Discrimination (RCW 49.60).

[5] Notably, this rule also applies to marijuana smokers. Because the ADA does not define ongoing use and addiction to illegal drugs as a "disability" and marijuana is still illegal under federal law, marijuana addiction is not a basis for protection under the ADA. 42 U.S.C. § 12114(a) (1994); 29 C.F.R. § 1630.3(a) (1999). *See*, *e.g*., *Shafer v. Preston Mem'l Hosp. Corp*., 107 F.3d 274 (4th Cir. 1997) (current illegal drug user is not covered). And the Washington Supreme Court has held (in the context of employment) that, due to the federal prohibition of possession of marijuana, allowing medical marijuana use in violation of a stated drug (or smoking) policy would not be considered a reasonable accommodation of a disability. *See, Roe v. Teletech*, 171 Wn.2d 736 (2011) (In this case, an employee who claimed his employer failed to accommodate his disability after he was discharged for violating the employer's drug use policy. The Court disagreed, holding that the Washington State Medical Use of Marijuana Act does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use); *See also,* Washington State Human Rights Commission's *Guide* to Disability and Washington State Nondiscrimination Laws: Washington Non-discrimination Laws and the Use of Medical Marijuana at http://www.hum.wa.gov/Disability/medical%20marijuana.pdf.

[6] *See, Christiansen, et al., v. Heritage Hills #1 Condo. Ass'n (Colo. Dist. Ct. 2006)* (In this case, a condo Association successfully defended its smoking ban against two residents that refused to smoke outdoors. After unsuccessful attempts to eliminate secondhand smoke drift, the condo Association had enacted a total smoking ban within the units. The smokers, who occupied one of the four units in the community, challenged the ban the other three owners had approved, arguing that it interfered with their right to conduct legal activities within their home. The court acknowledged that smoking is not illegal, but likened it to "excessively loud noise." Like noise, the court said, smoke can't be confined within a unit and can create a nuisance for others that the Association had the authority to regulate. The ban was upheld because it "was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means.")