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Clearing the Air

Legal issues related to secondhand smoke in common interest developments

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Consider this scenario: Mary Manager: "Smoking is not permitted in the pool area." Harry Homeowner: "You are violating my rights!" Mary Manager: "What rights?" Harry Homeowner: "All of 'em! I have a right to smoke, under the U.S. Constitution! I also have a medical condition, so beat it, because I'm about to light up my medical marijuana joint. If you say another word to me I will sue the Magnificent Management Company and the Hamilton HOA!"

Sorry Harry Homeowner, but there's no constitutional right to smoke. In the common interest development (CID) context, where the competing "rights" of individual owners, tenants and guests are always at issue, the right of individuals to breathe smoke-free air is emerging as the winning position and CIDs are able to regulate secondhand smoke.

According to the U.S. Surgeon General, secondhand cigarette smoke is one of the leading causes of preventable death, and concentrations of many cancer-causing and toxic chemicals are higher in secondhand smoke than in the smoke inhaled by smokers. Several other items cause harmful secondhand smoke and/or vapors, including

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e-cigarettes, pipes, hookahs, fire pits and barbeques. It is no surprise that the trend toward regulating secondhand smoke is increasing.

Secondhand Smoke as a "Nuisance" and Emerging Law

Generally, "nuisance" refers to an activity or condition that is harmful or annoying to others (e.g., doing something that causes loud noises or bad odors) and interferes with their right to "quiet enjoyment."

Unwanted exposure to secondhand smoke has increasingly been considered a "nuisance" by legislatures and the courts. For example, landlords may make their properties 100% smoke-free in common areas and elsewhere, including all dwelling units and private balconies and patios (Civil Code § 1947.5). In apartment and condominium complexes, the indoor common areas (including hallways, stairwells, laundry rooms, and recreation rooms) are subject to the workplace smoking prohibitions contained in Labor Code § 6404.5 (smoke-free workplaces) if these areas are places of employment.

Localities are also passing ordinances that prohibit smoking within a certain percentage of units in multi-unit housing and in public spaces. Also, according to the American Lung Association in California, more than 29 cities and counties in California now prohibit the use of e-cigarettes in multi-unit housing. To check if your city or county has such an ordinance, see the American Lung Association's Center for Tobacco Policy at center4tobaccopolicy.org under Tobacco Policy, then Smokefree Multi-Unit Housing.

Although there is not a statute specifically permitting HOAs to do the same thing, the law and the courts are moving in that direction. For example, a jury in Orange County Superior Court recently returned a verdict holding a local HOA and management company liable for secondhand cigarette smoke exposure to an owner (*Chauncey v. Bella Palermo Homeowners' Association*, et al.).

This case was not a published appellate case so it cannot be cited as legal precedent. However, the jury's decision highlights the emerging trend against secondhand smoke. It also follows other published decisions where liability was imposed for failing to prevent exposure to secondhand smoke in the multi-unit context: *Birke v. Oakwood Worldwide* (2009) 169

Cal.App.4th 1540 (the failure to limit secondhand smoke in outdoor common areas of a multi-family residence may create a public nuisance); *Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Association* (2008) 166 Cal.App.4th 103 (condominium association had a duty to seal utility openings and repair slab penetrations which allowed smoke and odors from lower units to penetrate upper units).

It is clear that the courts are increasingly apt to protect CIDs that regulate secondhand smoke.

Disability Statutes and Reasonable Accommodations

What about medical marijuana and Harry's demand? This requires a much longer discussion, but Mary Manager should remember that any time a "reasonable accommodation" request is made, she and the board should consult with counsel, as such requests trigger disability rights and discrimination claims. Generally, however, the courts have found that the "right" of someone with a disability to smoke medical marijuana does not trump others' rights to be free from the nuisance caused by such smoking. See R*oss v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920.

Best Practices and Enforcement

Mary Manager and her board members at Hamilton HOA should review the nuisance provisions in the HOA's governing documents and consider restating or amending them. They should look to local ordinances for consistent or helpful language, as well as review the content and number of signs and warnings in common area and supplement where necessary.

Regarding medical marijuana, the HOA could restate or amend the governing documents and also draft and adopt rules and regulations on the issue with proper notice. It may also impose reasonable conditions on the smokers in the community, including requiring the use of HEPA filters; limiting the location of smoking (e.g., in unit, in garage, outside community); and requiring the ingestion of medical marijuana rather than smoking. The HOA also has its regular enforcement actions available, such as ADR/IDR; a disciplinary hearing and imposition of fines; a related small claims action; and/or a Superior Court action to obtain court order to compel compliance with the governing documents.

The good news is the law is developing to protect public health and individual "rights" to be free from nuisance. Harry Homeowner's threat of a lawsuit should not deter the HOA from regulating his activity.

ABOUT THE AUTHOR

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Sources: U.S. Surgeon General, via the Department of Health & Human Services, "Secondhand Smoke: What It Means to You," http://www.surgeongeneral.gov/library/reports/secondhand-smoke-consumer.pdf

American Lung Association in California, "Smokefree Housing Policies Including Electronic Cigarettes," http://center4tobaccopolicy.org/wp-content/uploads/2014/05/Smokefree-housing-policies-including-ecigs-May-2014.pdf

GUEST EDITOR'S NOTE

"Change is the law of life. And those who look only to the past or the present are certain to miss the future."
-John F. Kennedy

As the year draws to a close, we must remind ourselves of this famous quote so we can prepare our associations for the changes in the law that went into effect this past year, as well as new legislation that is on the horizon. The articles in this issue will provide insight as to how to deal with the new drought legislation, emerging laws related to secondhand smoke and IDR/ADR, as well as a general overview of the new case law and legislation affecting community management.

Many thanks to my co-guest editor, Susan Janowicz, CCAM and all the authors who have contributed articles to this issue of the Law Journal. Each article provides valuable information regarding the changes in the law that have occurred this past year and will assist you in preparing for the future. Remember, change is the law of life!

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