

CLEARING THE AIR ON SMOKING BANS: ARE THEY LEGAL IN ASSOCIATIONS?

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“One Thousand Americans Stop Smoking Every Day – By Dying.” ~ Author Unknown

The Surgeon General’s warning on every pack of cigarettes warns of the dangers of smoking. Those dangers, of course, relate to the person smoking the cigarette. But what about the effect of smoking on the health on those around the smoker? Based on a study released on February 12, 2007, warning signs for cardiovascular disease are higher in people exposed to secondhand tobacco smoke, adding to the link between “passive smoke” and heart disease.¹ According to the lead author of the study, Dr. Andrea Venn of the University of Nottingham in Britain, “Our study provides further evidence to suggest low-level exposure to secondhand smoke has a clinically important effect on susceptibility to cardiovascular disease.” Studies such as Dr. Venn’s are only the tip of the iceberg. Research findings, health studies, and documented reports of the health risks associated with secondhand smoke abound.

In 1975, Minnesota was among the first states in the nation to adopt clean air legislation, enacting the Minnesota Clean Indoor Air Act (“MCIIA”). The MCIIA generally prohibits smoking in public places, places of

employment, public transportation and in public meetings. Through the years, MCIIA’s definition of “public places” has been expanded and, in 2007, was expanded to include, among other places, indoor areas of bars and other establishments serving food or liquor. On March 31, 2005, Hennepin County also passed an ordinance, Ordinance No. 24, prohibiting smoking in indoor areas of restaurants and bars located within Hennepin County. Several other counties have followed suit. Both the MCIIA and ordinances such as Hennepin County’s create a smoke-free environment in all licensed food and beverage establishments. The laws and ordinances related to prohibition of smoking prevent the exposure of secondhand smoke to both patrons and employees of food establishments; thereby protecting their health.² *The MCIIA, however, specifically excludes “private places” such as homes from the places where smoking is prohibited.*

If laws banning smoking exempt private homes, what do those laws have to do with community associations?

Since the various smoking bans went into effect, many of our community association clients have inquired as to whether or not their communities can ban smoking within the association. Although it is clear that community associations can govern and regulate their common elements, including banning smoking within public areas, the question continues to arise as to whether

or not an association can ban smoking within individual units. Based on recent court decisions, there is legal support for banning smoking within individual units and areas not owned by the association, even if such places are not covered by the laws banning smoking. ☐

Several years ago, Heritage Hills #1 Condominium Owners Association, located in Colorado, amended its governing documents to prohibit smoking within the community, including within individual units. Two of the owners were smokers and disagreed with the ban on smoking within units. The dispute resulted in litigation. Evidence in the case showed that the condominium had always had problems with secondhand smoke infiltrating other areas of the building. Although the association and individual unit owners attempted to take action to stop smoking infiltration from unit to unit, these efforts were ultimately unsuccessful. The building’s age and structure made it impossible to stop smoke infiltration from unit to unit. The trial court upheld the smoking prohibition. In upholding the ban, the court noted that secondhand smoke constitutes a nuisance under the association’s governing documents. The court held that the

amendment to the association’s governing documents was not unreasonable, arbitrary or capricious. The court further noted that “unit owners do not have a constitutional right to smoke.” Although Colorado law differs from Minnesota law, one thing is clear: there is no constitutional right to smoke in Minnesota, either.

While the MCIIA exempts private homes from areas subject to the ban imposed by the MCIIA, there are other statutory provisions which may provide a basis for a ban of smoking within homes in a community association. For example, for associations governed by Minnesota Statutes Section 515B, known as the Minnesota Common Interest Ownership Act (“MCIOA”), Section 515B.3-102(a)(1) specifically gives an association (through its Board of Directors) the power to:

adopt, amend and revoke rules and regulations not inconsistent with the articles of incorporation, bylaws and declaration, as follows: (i) regulating the use of the common elements; (ii) regulating the use of the units, and conduct of unit occupants, which may jeopardize the health, safety or welfare of other occupants, which involves noise or other disturbing activity.

Clearly, based on this language, an association governed by MCIOA has the right to adopt rules governing the use of units and conduct of occupants. More particularly, such an association can regulate use of a unit and the conduct within a unit which jeopardizes

the health, safety or welfare of other occupants of the community. There is no question that secondhand smoke jeopardizes the health of other residents of a common interest community, particularly apartment-style condominiums.

As a supplement to MCIOA, an association’s governing documents often include language prohibiting nuisances. Specifically, the declarations of most associations contain provisions prohibiting unit owners and occupants from engaging in activity detrimentally affecting other owners’ uses and enjoyment of the property. These phrases are commonly referred to as “nuisance clauses,” and may be a starting point to find authority for a smoking ban within your community association. By arguing that secondhand smoke that infiltrates from unit to unit causes a potential health hazard, an association can create a viable argument that a smoking ban is in the best health interests of all members of the Association. ☐

Secondhand, or environmental, smoke occurs passively or involuntarily when the exhaled ambient smoke from one person’s cigarette is inhaled by other people. This involves the inhaling of carcinogens, as well as other toxic components, present in the secondhand tobacco smoke. Credible research shows that secondhand smoke is known to harm children, infants and reproductive health through acute lower respiratory tract illness, asthma induction, chronic respiratory symptoms

and other potential illnesses.

If you are interested in advice and guidance of the implementation of a smoking ban, we can help. We regularly draft rules and regulations, policies and procedures, amendments to governing documents and related materials for our community association clients. If your association is interested in imposing a ban to address the health concerns of your residents, or if your association has questions concerning the possibility of a smoking ban, you can contact the authors, David G. Hellmuth, Esq., dhellmuth@hjlawfirm.com and/or Nancy T. Polomis, Esq., npolomis@hjlawfirm.com. ☐

¹ Article: Secondhand Smoke Raises Heart Disease Risk, Reuters, February 12, 2007.


² Source: Hennepin County Website.

³ Source: Oxford Journals, World Health Organization.

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Association residents, board members and property managers are invited to join us to review and discuss the latest developments in Community Association Law on Saturday, April 18, 2009.

This two hour session will feature an in-depth panel discussion and Q&A. We invite attendees to pose their questions confidentially to us prior to the program. Application will be made for Real Estate continuing education credit, and continental breakfast will be served.

WHEN: Saturday, April 18, 2009
9:00 a.m -11:00 a.m.

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There is no charge for the program, but space is limited. Please RSVP by April 10, 2009 to 952-746-2158 or e-mail marketing@hjlawfirm.com. 