9--Smoking: Can an Association Ban Smoking?

An Association may enact a rule banning smoking in common areas. Whether smoking can be banned inside of individual Units/homes likely depends on the statute governing your particular community. For an existing HOA it is probably not possible to ban smoking in the homes. For condominiums organized under RCW 64.34, we believe that banning smoking within the Units would be considered a restriction on use which would need to be done through an amendment of the Declaration with 90% approval of the Owners. For those communities organized under RCW 64.32 or WUCIOA, our opinion is that the restriction would need to be implemented pursuant to the regular procedures for amending the Declaration. Further, an Association must consider several potential risks and benefits before enacting such a restriction. We generally treat tobacco, marijuana, and vaping any substance the same way in adopting rules.

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. Smokers are not a protected category of persons, and 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 tobacco smokers do not receive protection or reasonable accommodation under federal[3] or state[4] disability statutes. Marijuana smokers also do not qualify for accommodation.[5]

There is a growing trend towards banning smoking when it forces others to experience second-hand smoke. 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. Further illustrating this trend, localities in California have begun banning smoking, including vaping and cannabis use, inside of Units in multi-family buildings.[6]

Given the state of the law, there is nothing to limit an Association's authority, pursuant to its 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 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.[7] 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 would probably be considered a "restriction on use" and require a Declaration amendment.

In light of the growing trend towards legalization of marijuana,[8] Associations who adopt no-smoking rules should ensure that the language does not refer to "tobacco" specifically, but rather to both tobacco and marijuana smoke. With respect to medical marijuana

specifically, it is unlikely that any Washington court would require an Association to make an accommodation to smoke marijuana on the premises.[9] First, because marijuana is still illegal under federal law, the use of marijuana in any form would not be deemed "reasonable" under the FHA. Second, even if an Association were required to permit the use of medical marijuana in *some* form, it is unlikely the court would require an Association to permit *smoking* marijuana because the resident could use marijuana in other forms that were less offensive to other residents.[10]

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: This is the wrong place for a use restriction, and no more enforceable than a rule.
3) Board rule or resolution: A new rule or resolution is the easiest way to implement a smoking ban but may only be effective for common areas and limited common areas and may not be enforceable to prevent smoking in individual Units or homes.

Risks and Benefits of a No-Smoking Rule

An Association that allows smoking might face a potential legal challenge from an individual with a serious health condition that is affected by exposure to secondhand smoke. The offended occupant might ask for relief by using one of the disability statutes. If the courts find that: 1) the requesting occupant is disabled; and 2) a smoking ban is a reasonable accommodation, the Association may be required to impose one.

A resident would be unlikely to succeed in a lawsuit against either the Association or smoking residents on common law nuisance grounds. Washington courts have rejected efforts by homeowners

who pursue nuisance claims against neighbors smoking on their private residences.[11] However, a resident bothered by secondhand smoke might be able to pursue an action to enforce a nuisance clause contained in a Governing Document, prohibiting an Owner (or resident) from engaging in an activity that affects the use and enjoyment of another Owner's property.

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,
4) 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] 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) (The Court held 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).

[6] *See,* Kelly, Kevin. *Smoking Ban: Buildings in Redwood City with At Least 2 Housing Units Restricted*. Bay Area News Group. (October 4, 2017).

[7] *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. The court acknowledged that smoking is not illegal but likened it to "excessively loud noise." 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.")

[8] 29 states have now legalized medical marijuana, and 8 of the 29 have legalized the use of marijuana for recreational purposes. http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html

[9] The Washington Human Rights Commission has issued guidelines stating that "the use of medical marijuana is not a reasonable accommodation for a disability; this applies in the areas of employment, housing, and public accommodation." *Guide to Disability and Washington State Nondiscrimination Laws Washington Non-discrimination Laws and the Use of Medical Marijuana* at. http://www.hum.wa.gov/media/dynamic/files/160_medical%20marijuana.pdf.

[10] Massachusetts is the only state to permit a plaintiff to pursue a discrimination claim under state law for failure to accommodate the use of medical marijuana. However, in that case the defendant was: 1) an employer, and: 2) had fired the plaintiff for failing a drug test, not for smoking marijuana or being impaired at work. *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017).

[11] In *Boffoli v. Orton*, the Court of Appeals held that while a homeowner could pursue a claim for smoke generated by a business under a nuisance theory, it could not pursue a similar claim against an individual lawfully smoking cigarettes on private property. 155 Wash. App. 1031 (Wash. App. Div. 1 2010) (unpublished). The court noted that the statute prohibiting smoking within 25 feet of public places and places of employment, states that a private residence does not qualify as a "public place." *Id. at* 3. Accordingly, the court found that the statute did not provide a basis for the plaintiff to seek relief under a nuisance theory. *Id.*