



About Condo

REGULATION OF SMOKING IN CONDOMINIUMS

This memorandum has been prepared in response to a number of inquiries requesting information about the rights and responsibilities of the board of directors and/or management to regulate smoking within condominiums.

Based on the current law, the issue needs to be looked at from two distinct angles: first, with respect to the common areas of the condominium; and second, with respect to its private areas, being the units and certain exclusive use common elements.

IN COMMON AREAS

The *Smoke-Free Ontario Act*, S.O. 1994, c.10. (the "SFOA") came into force in 2006 and contains a specific prohibition on smoking or holding lighted tobacco on any common area in a condominium, including, but not limited to, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas. It also contains a general prohibition on smoking or holding lighted tobacco in any enclosed public space or enclosed workplace.

It is arguable that the prohibition against smoking in any common area in a condominium should apply to any generally accessible part of the common elements. This could include parking areas and driveways, sidewalks, outdoor play areas or green-space. Although an arguable position, it is not likely that the legislature really intended to capture outdoor, open space common elements in its definition of "common areas". However, the prohibition should be considered to include any enclosed space and other confined areas (even if outdoors).

The SFOA also imposes obligations on the corporation, as representing the owners of the common areas, to take certain steps to enforce the legislation. These steps include ensuring compliance with the smoking prohibition, giving notice to each person in the common areas of the smoking prohibition, posting any prescribed signs prohibiting smoking in the common areas, ensuring that no ashtrays or similar equipment remain in the common areas, and, ensuring that persons who refuse to comply with the prohibition do not remain on the common areas.

It is important that the board of directors, management and owners be aware of the enforcement obligations of the corporation because failure to comply with them is an offence under the Act and punishable by a fine of up to \$100,000.00 for a first offence and up to \$300,000.00 for subsequent offences. In addition, if complaints about failure to enforce result in the corporation being charged with an offence and fined, this could then lead to significant increases in common expenses.

WITHIN UNITS AND EXCLUSIVE USE COMMON ELEMENTS

At the current time, the SFOA does not prohibit smoking in private areas of the condominium, including in an individuals' unit or on an exclusive use common element where the public is not ordinarily invited, such as a balcony or terrace.

We are also not aware of any municipal legislation currently in effect anywhere in Ontario which would prohibit smoking in private areas of a condominium located in that municipality.

An exception to the foregoing would be a unit where private-home day care is provided within the meaning of the *Day Nurseries Act*. In such units, and likely in their appurtenant common areas, smoking is prohibited at all times, whether or not children are present.

There will also be other non residential condominium units to which other prohibitions in the SFOA might apply.

However, for the most part (and particularly in residential condominium units) this leaves responsibility for any prohibition or regulation of smoking within private areas of a condominium to that corporation through its declaration or rules.

Declaration

The *Condominium Act, 1998*, (the "Act") provides that the declaration for a condominium corporation may specify conditions or restrictions with respect to the occupation and use of units or common elements.

This means that the declaration could contain a specific prohibition or restrictions on smoking within units and/or exclusive use common elements and such a prohibition or restriction should be enforceable by the corporation and can be enforced regardless of whether or not complaints are received from other owners.

For this to happen, the declaration would need to contain such a prohibition or restrictions when the condominium is created or would have to be amended to add the desired prohibition or restrictions. An amendment to the declaration for this purpose would require a resolution of the board of directors and the consent of the owners of at least 80% of the units. (See our *About Condo* memorandum on declaration amendments.)

Rules

The Act also allows the board of directors to make rules respecting use of the units and common elements to promote the safety, security or welfare of the owners and of the property and assets of the corporation or prevent the unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. rules enacted by the board for the above reasons must also be reasonable and consistent with the Act, the declaration and the by-laws of the corporation.

Based on current health care research and statistics on the effects of direct and second hand smoke, there should be no argument that a restriction or prohibition of smoking in units or on the common elements would promote the welfare of the owners.

Rules passed by the board of directors can take effect at any time after 30 days' notice of them is provided to the unit owners unless the unit owners require a meeting of owners which can amend or repeal rules passed by the board. Details as to the form of the notice required are set out in section 58 of the Act (also see our *About Condo* memorandum on enacting rules).

This means the board of directors can make rules prohibiting or restricting smoking within unit or on the common elements provided those rules are reasonable. To date there is no judicial precedent to provide a guide as to what level of regulation or prohibition might be considered reasonable in the condominium context, however, smoking prohibitions contained in residential apartment leases have been enforced by the courts in the past. Typically courts in Ontario have respected the discretion of a condominium Board to establish rules it considers reasonable and have enforced the same.

If a rule made by the board is found to be reasonable and is not challenged and repealed or amended at a meeting of members called for that purpose within the 30-day timeline provided, the rule should be enforceable by the corporation and can be enforced regardless of whether or not complaints are received from other owners.

Existing Nuisance Provisions or Rules

A corporation might also be able to rely on a general nuisance provision that already exists in the corporation's declaration or rules to take enforcement steps to address complaints from owners received about smoke drifting between units or from exclusive use common elements or elsewhere in the condominium.

There is currently no judicial precedent to provide guidance on this issue, but, in order for such enforcement action to be successful it would require at a minimum that the nuisance provisions be worded broadly enough to cover any nuisance that disturbs the comfort and enjoyment of other owners and that there also be evidence that such a disturbance is actually occurring.

CONCLUSION

If you are considering taking steps to make your condominium smoke free, to create restrictions on smoking in private areas of your condominium or to take enforcement action to deal with complaints about smoking in private areas of your building, you should consult your legal advisors to determine whether the provisions of the SFOA or existing provisions in your governing documents are sufficient for the purpose, or to assist you with appropriate wording to be added to your declaration or rules by amendment, as well as to provide guidance on the appropriate procedures and enforcement methods.

Karyn Sales (March, 2010)