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A DIRECTOR'S GUIDE TO SMOKING IN CONDOS

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A DIRECTOR'S GUIDE TO SMOKING IN CONDOS

In the 1950's and 1960's smoking was perceived as being glamorous and sophisticated and was permitted everywhere. The rights of smokers have steadily been eroded as more scientific evidence became available confirming the danger posed by smoking and second-hand smoke. There are increasingly less places where smoking is permitted.

This pamphlet provides practical advice that directors need to know about smoking in condos.

SMOKE FREE ONTARIO ACT - DOES IT APPLY TO CONDOS?

The *Smoke Free Ontario Act* ("**SFOA**") prohibits smoking in any "enclosed public place". This is defined as including the inside of any place, building or structure that is covered by a roof and to which the public is ordinarily invited. What does this mean in the context of condos?

- Smoking is clearly prohibited "in any common area in a condominium" including foyers, elevators, stairwells, exercise rooms, party rooms, parking garages and corridors, among others.
- The SFOA does not apply to units in condos.
- Exclusive-use common elements such as balconies, patios or terraces are not captured by the SFOA as these are not areas where the public is ordinarily invited or permitted access.
- Outdoor common elements that are not enclosed also do not fall within the ambit of the SFOA.

CITY OF TORONTO BY-LAW

The City of Toronto has a by-law that prohibits smoking in most public places (i.e. indoors). It also has a provision making it an offence to smoke within a 9-meter radius surrounding any entrance or exit of a public building. This includes multi-residential buildings, such as condos, that can be accessed by the public. Many other municipalities have similar by-laws.

CONDO RULES ON SMOKING

The board of directors has the authority under the *Condominium Act*, 1998 (the "**Act**") to enact reasonable rules created for the safety, security and welfare of the owners and the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and the other units. While the SFOA does not prohibit smoking in the units and exclusive-use common elements, the right to smoke in these areas may be restricted by the rules, as the migration of smoke from one unit to other units and/or the common elements could unreasonably interfere with other residents' use and enjoyment of their units and/or the common elements.

Rules relating to smoking can, among other things: prevent owners from permitting smoke to migrate to other units or the common elements; require owners to take steps necessary to rectify smoke migration; prevent throwing of cigarette butts off balconies; and prohibit smoking on balconies.

NUISANCE

If there are any complaints about smoke migration into the common elements or the units and the condo corporation does not have specific rules that address smoking, the board would have to rely on any general provision in its declaration or rules that prohibits the creation of a nuisance. It is, however, preferable to have specific smoke provisions in the rules to minimize any chances of an owner challenging the applicability of the nuisance provision.

Nuisance has a specific meaning in law – it is an **unreasonable interference** with the use and enjoyment of property. It is not any interference with the use and enjoyment of property that would constitute a nuisance, as some interference has to be tolerated by neighbours. Given the proven health effects of second-hand smoke, this threshold would likely be met with a minor amount of smoke migration.

To prove nuisance, there does not need to be intent, negligence, or even fault of the person causing the nuisance. Only the nuisance has to exist.

WHAT TO DO ABOUT SMOKING-RELATED COMPLAINTS

Corporations should not ignore smoke complaints! They should be taken very seriously and investigated and acted upon swiftly. Those who make smoking-related complaints should not be branded as complainers.

Smoke Migration Complaints

First, the corporation has to determine where the smoke is coming from and the reason that smoke is migrating. Sometimes, this can be as easy as walking up next to a unit door and smelling the smoke. Other times, it may be more difficult and will require expert advice, as it involves smoke traveling through ducts, vents or common elements. Where expert advice is obtained, it should not be ignored.

Having owners keep logs and report smoke migration expediently can provide useful information to assist in determining the source and cause of smoke migration.

Section 90 of the Act imposes a duty on the corporation to maintain the common elements. Where smoke migration occurs as a result of a deficiency in the common elements, the corporation is obligated to carry out reasonable remedial work in a timely manner. The corporation should obtain expert advice as to the extent of the remedial work that is required, having regard to the age and construction of the building. The courts have held that the standard is one of reasonableness, not perfection. If a corporation fails to act upon the advice and recommendations of its experts, it risks being found in breach of its duty to maintain the common elements.

Where there is no deficiency in the common elements that is causing the migration of smoke, the governing documents may contain provisions that will enable the corporation to require that the smoking unit owner pay for the costs of any work needed to the unit and/or to the ventilation system in order to prevent the smoke from permeating into the common elements or to other units of the building. Alternatively, the governing documents may require residents not to permit smoke to migrate or may prevent nuisance from occurring; in this scenario, the corporation should enforce the governing documents against the smoker to prevent the smoke from migrating, including sending compliance letters, and if necessary, commencing a court application, mediation or arbitration.

Complaints About Cigarette Butts

Cigarette butts thrown from balconies not only creates a litter problem on the common elements, but is also a safety and fire hazard, as butts could land on other balconies or people below.

Management must do their utmost to determine where the butts are coming from. Owners should be encouraged to report any sighting of people throwing butts from balconies or butts landing on their balconies to management. Residents should be continually reminded of the dangers associated with throwing butts.

HOW TO MAKE THE CONDO SMOKE-FREE

A complete ban on smoking on the property, including the units, is an extremely controversial issue.

It is questionable whether a complete ban in the rules will be valid and enforceable as the reasonableness of this type of rule has not yet been challenged in an Ontario court. For those corporations that want to go completely smoke-free, amending the declaration is the preferable method, as a declaration provision prohibiting smoking would be valid and enforceable. This will require the written consent of the owners of 80% of the units.

E-CIGARETTES

E-cigarettes have exploded in popularity recently, and so have concerns about their use in public settings, including condos.

In May, 2015, *Electronic Cigarettes Act, 2015* was created. Only certain parts of the legislation are currently in force. Once the legislation is entirely in force, it will prohibit the use of e-cigarettes in any enclosed public place. Section 10 of the *Electronic Cigarettes Act, 2015* will specifically prohibit the use of e-cigarettes in common areas in a condo, including elevators, hallways, parking garages, party and entertainment rooms, laundry facilities, lobbies and exercise areas.

Until that section is proclaimed in force though, e-cigarettes may be permitted in the common areas of a condo, unless there are other provisions in the rules or the declaration that a corporation can rely on to prevent them.

MARIJUANA

Marijuana smoke migration can be treated in much the same way that cigarette smoke is treated. Both can be a nuisance to neighbours and be dealt with through the rules or other provisions of the governing documents.

Some individuals use marijuana for therapeutic reasons to treat a medical condition. In such circumstances the corporation may be required to accommodate the disability to permit medical marijuana to be smoked within a unit. A balancing of rights must be done to determine the appropriate course of action and what accommodation, if any, must be done by the corporation. Each case will need to be reviewed on an individual basis since the facts of each situation will vary.

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The laws on smoking have evolved (primarily by restricting the rights of smokers) and continue to evolve. Directors will be challenged with balancing the rights of smokers against non-smokers in the community. Because smoking is such a controversial issue and due to the evolution of smoking laws, directors should seek guidance from legal counsel on smoking-related issues.

LASH CONDO LAW

Practical Advice, Creative Solutions, Cost Effective

We are committed to helping our clients make informed decisions and create strategies to successfully resolve condominium issues.

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