

A MAN'S HOUSE IS HIS CASTLE?

By Therese Quijano

“A Man’s House is His Castle” is the common expression illustrating the principle of individual privacy in one’s home. Tell a person what they “can’t” do in their home, and you are likely to have this phrase thrown back at you. Yet as part of being a member of an organized society, we all cede some measure of control over our homes. Whether it is in the form of zoning restrictions, criminal laws, or contract terms, limitations on the use of one’s “castle” is common place. The question is, how much control we give and by whom such limitations are to be enforced.

One area where this clash between personal liberties and group restrictions is apparent is in relation to smoking. Both landlords and condominium associations are faced with residents who demand to be able to smoke in their units while other residents object to the smells and potential health risks associated with second hand smoke. Both claim a right to “personal freedom” the freedom to smoke in their units v. the right to be free from smoke entering their unit.

These competing claims can be summed up as follows: Smokers assert that smoking is a legal activity and that few, if any, leases or condominium documents prohibit smoking in a unit. As such, they assert that they have a right to smoke in their units and that landlords and/or condominium associations can not interfere with that right. Their non-smoking neighbors, however, point to their right to quietly enjoy their units without being forced to smell cigarette smoke. They also point to the lengthy list of studies showing the danger of second hand smoke and assert a right to be free from such risks. From the property manager’s point of view, it often comes down to a review of the condominium documents and/or lease to see whether the complaining unit owner/tenant had a right to expect that their unit would be free of smoke. Generally, where the lease or condominium documents do not prohibit smoking in a unit, the resident has no right to expect that his neighbors will not be smoking. It is also an expectation of apartment style living that there is some air exchange between units. The only exception is where the amount of smoking rises to the level where it can be argued to be an “offensive” use of the premises and/or the creation of a “noxious” odor. Both of these activities are ordinarily prohibited in a standard lease and condominium documents. However, this would require some showing that the specific use of cigarettes by this resident has risen to an unreasonable level such that it reaches this higher standard.

A good example of such a case was decided last year in the Boston Housing Court. In the Harwood Capital Corp. v. Casey case, a Landlord sought to evict his tenants after the surrounding unit owners complained of excessive smoking. Even though smoking was not prohibited under the lease, the Landlord claimed that the level of smoking was such that it was a noxious and offensive use of the leased premises. The jury agreed with the Landlord which resulted in the tenants being evicted from the unit. The couple’s combined two pack a day habit lead them to be ordered out of their home even though smoking, per se, was not prohibited.

Obviously, the best approach to dealing with these competing interests is to insure that the controlling documents are clear on the issue. Whether by lease or condominium Master Deed, clear rules should be adopted either prohibiting smoking, limiting smoking, or making clear that smoking is permitted. Such a provision will, at least, clarify the expectations of the resident. In addition, resident complaints relating to smoking should be addressed in a consistent manner. To date, the only cases imputing a duty on an owner to resolve smoking complaints have been where the owner knew or should have known of unreasonable smoke coming from an adjacent unit (such as an apartment located above a smoky bar) or where the smoke was found to have entered as a result of some defect in the unit (such as a crack in the wall between the units). Otherwise, an owner generally will not have liability where there is no prohibition on smoking. Likewise, to date no court has deemed smoking to be of such an inherent danger that a landlord is per se liable for failing to eliminate it. The Association may also request the offending resident to limit their smoking, open windows, and/or use an air purifier to limit the amount of second hand smoke or odors emanating from the unit. Such responsiveness would further limit any potential claims or exposure, and could resolve such disputes expeditiously.

Finally, a growing number of property owners are now choosing to make their condominium and apartment communities smoke free due to the increased risk of liability associated with allowing smoking. However, such owners should be careful to avoid any representations that the property will in fact be smoke free, as getting into someone's "castle" can often be difficult, which renders enforcement problematic.