



Can Community Associations Ban Smoking in Common Elements, Limited Common Elements and Units

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Published on www.lorman.com - August 2018

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CAN COMMUNITY ASSOCIATIONS BAN SMOKING IN COMMON ELEMENTS, LIMITED COMMON ELEMENTS AND UNITS?

Written by Hans C. Wahl, Esq. - 12/28/17

Smoking is not as popular as it used to be. It's now perceived as more of a nuisance than it is hip. Due to health issues and medical concerns, many private establishments enforce rules against smoking. In fact, state law prohibits smoking in many public places. This has led board members and managers to wonder whether their community associations have the ability to ban smoking in common elements, limited common elements and even units.

The Florida Clean Indoor Air Act (the "Act") applies to all types of tobacco smoke and is generally accepted to apply to a condominium or homeowners' association's indoor common elements. This Act prohibits smoking in indoor workplaces, and because many associations employ onsite management, maintenance and other workers, the law bans smoking from these common element "workplaces." The law is also broad enough to allow associations to ban smoking in clubhouses.

Because common elements are association property, community associations have the authority to implement smoking bans for certain common elements where the Act may not apply. Pools, tennis courts, dog walks, playgrounds, etc., are not "indoors" and, therefore, not governed by the Act, but community associations may still impose

smoking bans over these outdoor common elements. This simply requires a board of director vote at a duly noticed board meeting.

What about limited common elements such as balconies, terraces, and porches? This depends upon whether the association has rule-making authority over such areas expressly granted to it in the governing documents (i.e., declaration and bylaws). One example of a declaration or bylaw provision granting rule-making authority over limited common elements is as follows: "An owner's right to use the limited common elements is subject to the right of the association from time to time, and in accordance with its bylaws, to establish, modify and rescind reasonable rules and regulations regarding use of such limited common elements." Provisions such as that allow associations to preclude the storage of boxes on patios or disabled vehicles in garages, and will also allow the association to implement rules against smoking in limited common elements.

Banning smoking within the units is more complicated. Whereas an association has certain ownership rights over common elements and limited common elements, units (as defined by each association's declaration) are owned by members. Most declarations include a "nuisance" clause that allows an association to regulate and prohibit nuisances, but such clauses rarely specify smoking as a nuisance. It is doubtful a judge or state arbitrator would stretch the nuisance clause to cover smoking if smoking is not expressly mentioned in the declaration.

The key for a community association to ban smoking within the units is to amend the declaration to include this prohibition. Declarations will provide an amendment procedure with the most common process

requiring an approving vote of either two-thirds or three-fourths of the members by vote at a duly noticed meeting or by written consent. If your association consists of mostly non-smokers then it is very likely that your association can succeed in passing such an amendment. The requirements for properly drafting, passing and recording a declaration amendment in the public records can be tricky so it is recommended that an association contact an experienced association attorney for guidance through the amendment process.

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