Statement of Client's Rights

(As adopted by the Administrative Board of the Courts)

1. ***You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.***
2. ***You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).***
3. ***You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.***
4. ***You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.***
5. ***You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.***
6. ***You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.***
7. ***You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).***
8. ***You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.***
9. ***You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.***
10. ***You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability.***

NEW YORK STATE BAR ASSOCIATION

Statement of Client's Responsibilities

Reciprocal trust, courtesy and respect are the hallmarks of the attorney-client relationship. Within that relationship, the client looks to the attorney for expertise, education, sound judgment, protection, advocacy and representation. These expectations can be achieved only if the client fulfills the following responsibilities:

1. ***The client is expected to treat the lawyer and the lawyer's staff with courtesy and consideration.***
2. ***The client's relationship with the lawyer must be one of complete candor and the lawyer must be apprised of all facts or circumstances of the matter being handled by the lawyer even if the client believes that those facts may be detrimental to the client's cause or unflattering to the client.***
3. ***The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.***
4. ***All bills for services rendered which are tendered to the client pursuant to the agreed upon fee arrangement should be paid promptly.***
5. ***The client may withdraw from the attorney-client relationship, subject to financial commitments under the agreed to fee arrangement, and, in certain circumstances, subject to court approval.***
6. ***Although the client should expect that his or her correspondence, telephone calls and other communications will be answered within a reasonable time frame, the client should recognize that the lawyer has other clients equally demanding of the lawyer's time and attention.***
7. ***The client should maintain contact with the lawyer, promptly notify the lawyer of any change in telephone number or address and respond promptly to a request by the lawyer for information and cooperation.***
8. ***The client must realize that the lawyer need respect only legitimate objectives of the client and that the lawyer will not advocate or propose positions which are unprofessional or contrary to law or the Lawyer's Code of Professional responsibility.***
9. ***The lawyer may be unable to accept a case if the lawyer has previous professional commitments which will result in inadequate time being available for the proper representation of a new client.***
10. ***A lawyer is under no obligation to accept a client if the lawyer determines that the cause of the client is without merit, a conflict of interest would exist or that a suitable working relationship with the client is not likely.***

NEW YORK STATE BAR ASSOCIATION

BOARD OF MANAGERS - CODE OF ETHICS

ARTICLE I

A Manager has a duty of good faith and loyalty to the Condominium.

1.1 While acting in his or her official capacity a Manager owes allegiance to the Condominium and must act in the best interests of the Condominium.

1.2 A person may not use the position of Manager for personal profit, gain or other personal advantage over other Unit Owners of the Condominium.

1.3 A Manager is responsible and accountable to the Unit Owners of the Condominium.

1.4 A Manager shall remit monthly common charges payments and all other charges due to the Condominium on a timely basis and shall not otherwise permit or allow either a monetary or non-monetary default under the Declaration, By-Law and/or house rules of the Condominium.

1.5 A Manager can be held personally liable for fraud or breach of fiduciary duty in the conduct of the Condominium's affairs.

1.6 A Manager shall conduct his or her private life in a manner that befits the dignity of a Manager.

1.7 A Manager who is an attorney or other professional many not a) represent anyone including a Unit Owners in a dispute with the Condominium or b) represent a purchaser or seller of a Unit unless they recuse themselves from making admission decisions. A Manager who is a realtor may not participate in decisions regarding the purchase, sale or right of first refusal of an Unit in the building if the realtor has a client who is negotiating to purchase the Unit.

ARTICLE II

A Manager has a duty to use care, skill and diligence.

2.1 A Manager is required to act a) in good faith, b) in a manner reasonably believed to be in the best interests of the Condominium, and c) with the care that a prudent person in a similar position would use under similar circumstances.

2.2 A Manager should use his or her best efforts to keep apprised of legislation or regulations that affect the Condominium.

2.3 A Manager should be diligent to ensure that the Condominium's interests are pursued during the course of a meeting of the Board of Managers.

2.4 A Manager should seek the advise of experts when making decisions on behalf of the Condominium in areas of competence in which the Manager has not been trained.

2.5 A Manager must serve all Unit Owners impartially and without bias.

2.6 A Manager must advocate that the Condominium comply with applicable laws, codes, contracts, and agreements to which the Condominium is bound.

ARTICLE III

A Manager has a duty to act within the boundaries of his or her authority.

3.1 The authority of a Board of Managers is defined in the Declaration and By-Laws of the Condominium.

3.2 An individual Manager's authority is limited to decision making during the course of a duly called meeting of the Board of Managers with a quorum present.

3.3 Except for officers with delegated duties, a Manager may not act in an official capacity except in the context of a meeting of the Board of Manager unless specifically empowered to act by a majority of Managers present and voting in the affirmative at a duly called meeting.

3.4 A Manager may not violate the Condominium's Declaration, By-Laws or House Rules.

ARTICLE IV

A Manager must disclose every personal conflict of interest when voting on an issue.

4.1 A Manager may not use the position to advance his or her personal interest at the expense of the Condominium or any of its Unit Owners. A Manager should attempt to avoid and endeavor to avert an actual, apparent or potential conflict of interest, as well as an appearance of impropriety.

4.2 A Manager is required to make a prompt and full disclosure of any actual personal conflict of interest, either direct or indirect, he/she may have in a transaction to which the Condominium is a party, including but not limited to the Manager's relationship with someone with whom the Condominium is doing business.

4.3 A Manager shall not vote on or participate in discussions or deliberations on matters when a conflict of interest is deemed to exist other than to present factual information or to respond to questions presented.

4.4 A Manager shall assure that the Minutes properly record his or her abstention on any votes on matters for which a conflict may exist.

ARTICLE V

A Manager shall not divulge or profit from confidential information learned while performing office duties.

5.1 A Manager may not divulge or otherwise use for personal gain any personal information learned during the performance of official duties as a Manager.

5.2 A Manager holds confidential all matters involving the Condominium until such time as there has been general disclosure of that information, except such non-disclosure shall be inapplicable in the event the Manager justifiably believes there is credible evidence of a breach of someone's fiduciary duty, act of malfeasance, impropriety, wrongdoing or violation of either the by-laws, rules or at law.

5.3 A Manager shall not have access to the files and records of a Unit Owners without the consent of the Board of Managers.

ARTICLE VI

A Manager shall not interfere in the operations of the Condominium without Board authorization.

6.1 A Manager primary obligation is to participate in the governance of a Condominium, not its operations, except in the event of self-management.

6.2 A Manager should not interfere with the enforcement of the Declaration, By-Laws and/or house rules outside of a meeting of the Board of Managers.

6.3 A Manager should not interfere with the enforcement of policies except during a meeting of the Board of Managers.

New York Business Corporations Law

§ 717. Duty of Directors.

(a) A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. In performing his duties, a director shall be entitled to rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by:

(1) one or more officers or employees of the corporation or of any other corporation of which at least fifty percentum of the outstanding shares of stock entitling the holders thereof to vote for the election of directors is owned directly or indirectly by the corporation, whom the director believes to be reliable and competent in the matters presented,

(2) counsel, public accountants or other persons as to matters which the director believes to be within such person's professional or expert competence, or

(3) a committee of the board upon which he does not serve, duly designated in accordance with a provision of the certificate of incorporation or the by-laws, as to matters within its designated authority, which committee the director believes to merit confidence, so long as in so relying he shall be acting in good faith and with such degree of care, but he shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs his duties shall have no liability by reason of being or having been a director of the corporation.

(b) In taking action, including, without limitation, action which may involve or relate to a change or potential change in the control of the corporation, a director shall be entitled to consider, without limitation, (1) both the long-term and the short-term interests of the corporation and its Unit Owners and (2) the effects that the corporation's actions may have in the short-term or in the long-term upon any of the following:

(i) the prospects for potential growth, development, productivity and profitability of the corporation;

(ii) the corporation's current employees;

(iii) the corporation's retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation;

(iv) the corporation's customers and creditors; and

(v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business. Nothing in this paragraph shall create any duties owed by any director to any person or entity to consider or afford any particular weight to any of the foregoing or abrogate any duty of the directors, either statutory or recognized by common law or court decisions. For purposes of this paragraph, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the corporation, whether through the ownership of voting stock, by contract, or otherwise.

BOARD OF MANAGERS - CODE OF ETHICS:

ACKNOWLEDGMENT:

I HEREBY ACKNOWLEDGE RECEIPT OF THE CODE OF ETHICS AND AGREE TO ACT IN COMPLIANCE WITH MY FIDUCIARY DUTIES AS A MEMBER OF THE BOARD OF MANAGERS AND ABIDE BY THE CODE OF ETHICS.

_____

NAME:

DATE:

Safeguarding your Co-op/Condo's Funds

(Funds under Control of the Board or Managing Agent)

1. **DON'T** sign blank checks, i.e. those without a payee or amount
2. **DON'T** sign checks unless they are backed up with a bill, invoice or voucher approved by at least two authorized board members.
3. **DON'T** sign blank withdrawal slips.
4. **DON'T** sign withdrawal slips without a full explanation for the withdrawal.
5. **DON'T** have any accounts that are controlled by only one signature.
6. **DON'T** forgive any evidence of fraud or fail to investigate any suspicion of fraud, otherwise you may not recoup loses from the bonding company.
7. **DON'T** fail to report evidence or suspicion of fraud immediately to your attorney and insurance broker.
8. **DON'T** abdicate the board's fiscal responsibility to any one person.
9. **DON'T** ignore your fiduciary relationship to the co-op/condo. (As a board member, you hold a position of trust in relationship to the property and funds of the members.)
10. **DON'T** accept bonds for less than the amount of money under the control of both the board and the managing agent.
11. **DON'T** be apathetic or indifferent about the cooperative's finances because "We trust him (or her) with everything."
12. **DON'T** do all the bookkeeping "in house" if you have a managing agent.
13. **DON'T** permit a person who is authorized to sign checks to reconcile bank statements.
14. **DON'T** be shy about asking to see bank books and records. Ask for an explanation of any large withdrawals and deposits of a similar amount within a short period of time.
15. **DON'T** fail to get a detailed monthly financial reports from management.
16. **DON'T** accept a financial statement unless all accounts balances and interest have been verified
17. **DON'T** run your co-op/condo without an annual certified financial statement from an independent accountant.

NEW YORK ASSOCIATION OF REALTY MANAGERS
SEMINAR: SMOKING POLICY - OFFENSIVE ODORS

MODERATOR: MARGIE RUSSELL, EXECUTIVE DIRECTOR

I. INTRODUCTIONS

II. SMOKING POLICY- HOUSE RULES
"Smoking is Just a Pain in the Butt"
"Second Hand Smoke & Noxious Odors - Quality of Life - Serious Health Issue"
"How to Stop the Migration, Penetration & Infiltration of Smoke & Odors"
"Amendment to Proprietary Lease/By-laws-Extinguishment of Smokers Rights"

III. DISCUSSION BY PANELISTS:
Ronald A. Sher, Esq. - Partner: Himmelfarb & Sher, LLP
Bruce A. Cholst, Esq. - Partner: Rosen, Livingston & Cholst , LLP

IV. QUESTIONS AND ANSWERS - OPEN DISCUSSION

V. ARTICLES:
A. "Smoking Policy - House Rules"
Ronald A. Sher, Esq. - September, 2015

B. "Smoking Bans - A Burning Issue"
Bruce A. Cholst, Esq. - Autumn, 2011

C. "Smoking Policy Disclosure & FAQ on Disclosure Policy"

D. "What a Coop, Condo or Landlord Can Do About Smokers"
Finger & Finger, PC - November, 2006

E. "Advising Boards on Secondhand Smoke"
Adam Leitman Bailey, Esq. & John M. Desiderio, Esq. - January, 2013

VI. RESUME

October 29, 2015

SMOKING POLICY - HOUSE RULES
SECONDHAND SMOKE & OFFENSIVE NOXIOUS ODORS

The problems associated with Secondhand Smoke and Offensive Noxious Odors is a burning issue with serious health impact, quality of life concerns and fire safety considerations. The Environmental Protection Agency reports that Environmental Tobacco Smoke or second hand smoke is designated as a group A carcinogen that causes annually an estimated 3,000 deaths due to lung cancer; 35,000/50,000 heart disease related deaths and150,000/300,000 lower respiratory tract infections in children.

Moreover, secondhand smoke, together with noxious odors impacts the quality of life and health of residents in close proximity to a smoker, as well as has a material adverse affect on the ability to sell due to the migration, infiltration and penetration of smoke into adjoining apartments and common areas. When we represent a purchaser we always make an inquiry with the Managing Agent regarding the status of complaints made by the seller involving secondhand smoke.

The Board of Directors is now faced with issue of how to control a smoker who believes he/she is the King or Queen of his/her Castle and has the absolute right to smoke in the apartment. Generally, the Board of Directors relies upon the Proprietary Lease for the enabling power to obtain enforcement since Paragraph 18, entitled, "Repairs by Lessee", provides at subsection (b) entitled "Odors and Noises", specific prohibition by a lessee from causing or creating "unreasonable cooking or odors to escape into the building" ... or "permitting anything which will interfere with the rights of other lessees or unreasonable annoy them". Please note that some Proprietary Leases even provide that the reasonableness standard shall be determined in the sole discretion of the Lessor.

The term "smoking" means inhaling, exhaling, breathing, chewing or carrying a light cigar, cigarette, pipe or other tobacco product or a similar product in any manner or in any form. The next issue will be those associated with electronic smoking devices, E-cigarettes/vaping.

Accordingly, in furtherance of good governance, the Board should implement and establish a Smoking Policy - House Rules that (i)is applicable to all shareholders, residents, subtenants, guests, invitees, employees, care-givers, contractors and service personnel; and (ii) requires that any current smokers make reasonable efforts to contain such smoke and/or noxious odors and/or otherwise prevent the secondhand smoke and/or offensive noxious odors from migrating, infiltrating, penetrating and/or entering into other apartments and/or the common areas of the building.

Moreover, it is important to emphasize that based upon recent case law, [copies attached] a landlord may have a duty to intervene and prevent secondhand smoke and related odors from materially and/or substantially interfering with another resident's right to quiet enjoyment. Accordingly, a tenant's smoking may give rise to a duty to act by the landlord in order to prevent "unreasonable interference" or "substantial deprivation" of the rights of other residents. Therefore, a landlord is required to take generally appropriate actions to try to abate the smoke migration condition; however, when the initial actions prove ineffective, the landlord is apparently obligated to take further steps to alleviate the condition and/or to accommodate the tenant in a different manner.

These reasonable efforts and necessary steps include but are not limited to obtaining the cooperation of the smoking resident and/or demanding compliance to reduce the level of smoke or rooms in which smoking occurs; installation of fans inside apartment, roof fans, application of weather stripping, insulation of foam material or caulking and performing remedial work to close building gaps or cavities to prevent the migration, infiltration or penetration of secondhand smoke and odors into apartments, such as via plumbing chases, electrical fixtures, outlets, circuit breaker box or vents.

Please note that not every smoke intrusion will constitute a breach and/or nuisance since persons living in organized multiple dwelling communities and/or high rise buildings are invariably subject to minor annoyances or inconveniences from other residents. Notwithstanding the foregoing, the Proprietary Lease generally prohibits the Lessee from doing anything which will interfere with the rights of other lessees or unreasonable annoy them or obstruct the public halls or stairways. This provision can be utilized as a mechanism to obtain compliance and/or to commence litigation for enforcement or eviction.

WARRANTY OF HABITABILITY

The duty of the tenant,[shareholder], to pay rent,[maintenance charges] is coexistent with the landlord's duty to maintain the premises in a habitable condition. In accordance with the foregoing, the critical determination revolves around certain criteria as to whether the secondhand smoke and/or noxious odors were as so pervasive as to create an impermissible intrusion, that was unreasonable in character, caused a substantial interference with the rights of the resident, resulted in a constructive eviction of all or part of the premises and thereby constitutes a breach of the implied Warranty of Habitability as set forth in Real Property Law §235 -b.

ESTABLISHMENT & IMPLEMENTATION OF SMOKING POLICY

The Board of Directors or Managers generally has the enabling power to establish and implement a Smoking Policy by amending its House Rules. We have provided for your review a copy of draft Smoking Policy - House Rules. The Board can consider further measures that provides for all new shareholders and subtenants to be smoke free and certify same as a condition of their sale or occupancy. This is only effective until the next Board opts to change same. Moreover, the Board may seek to implement an amendment to the Proprietary Lease for a cooperative or By-Law for a condominium in an effort to be a smoke-free green environment. This will generally require the affirmative vote of a super majority of the shareholders or Unit Owners to implement, albeit the Board may want to consider grand-fathering existing smokers.

CONCLUSION

We hope the Seminar provided clarification and confirmation regarding the rights and remedies of the Board, in conjunction with the duties and responsibilities of the cooperative corporation or condominium with respect to this burning issue.

Submitted By: **RONALD A. SHER, ESQ.**

APARTMENT CORP.
SMOKING POLICY - HOUSE RULES

The Board of Directors of Apartment Corp.,(hereinafter referred to as the "Corporation"), has implemented and established a Smoking Policy - House Rules, ("Policy"), that strictly prohibits and specifically requires that current Shareholders and residents refrain from smoking in the designated common areas of complex, and prevent both secondhand smoke and noxious odors from migrating, infiltrating, penetrating and/or entering into the common areas and other apartments from their residence.

The rationale and purpose for the implementation and establishment of this Policy is to highlight the serious concerns of the Board of Directors for the health and safety of the cooperative community due to the known adverse health effects of secondhand smoke and increased risk of fire. This Policy applies to all Shareholders, residents, subtenants, roommates, guests, employees, contractors, caregivers and service personnel, including but not limited to members of their immediate family, (hereinafter collectively referred to as the "Resident"). The term "smoking" means inhaling, exhaling, breathing, chewing or carrying a lighted cigar, cigarette, pipe or other tobacco product or a similar light product or electronic smoking device, [E-cigarettes/vaping] in any manner, means or form. Current Shareholders and Residents of the building will be prohibited from smoking in any of the common areas of the complex, including but not limited to the lobby, entry, hallways, stairwells, corridors, elevator, garage, rooftops/decks and courtyards. Outdoor smoking is strictly prohibited on terraces, balconies and within twenty (20') feet of any entry door or garage.

Moreover, secondhand smoke can also cause and/or create a noxious offensive odor condition, and discolor the hallways walls and doors, besides adversely affecting your health. Accordingly, the Corporation reserves all of its rights and remedies to require that any current smoker make reasonable accommodations to their neighbors including but not limited taking necessary steps and realistic measures to effectively prevent the migration of secondhand smoke in order to contain such smoke and/or odors and/or otherwise prevent the secondhand smoke and odors entering into other apartments and/or the common areas of the building.

These reasonable accommodations, steps and measures include but are not limited to obtaining the cooperation of the Resident and/or demanding compliance to reduce the level of smoke or rooms in which smoking occurs, installation of fans inside apartment, recirculating filter device, application of weather stripping, and/or performing remedial work to close possible building gaps, chases or cavities to prevent the migration, infiltration or penetration of secondhand smoke into adjoining apartments and all common areas, hallways, stairwells, rooftops/decks, basements, or garages, such as using foam insulation, plaster/acoustical sealant and/or caulking in and along the baseboard openings, crawl spaces, dumbwaiter, plumbing/heating chases, conduits, radiators, vents or electrical fixtures, outlets and circuit breaker boxes.

Please note that the Corporation's adoption of the Policy does not ensure that there will be no second hand smoke or odors. Furthermore, the inability or failure by the Corporation to effectively enforce the Policy and/or respond to a complaint filed regarding smoke or odors shall not be construed as a breach of the warranty of habitability or the covenant of quiet enjoyment, nor shall it be deemed to be a constructive eviction.

In furtherance of the Policy, the failure and/or refusal to act in compliance with this Policy shall constitute a material default and substantial breach under the Proprietary Lease and the Corporation reserves all of its rights and remedies to obtain compliance and enforce the Smoking Policy - House Rules.

APARTMENT CORP.
BY: Board of Directors

Dated: October, 2015

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ROSEN LIVINGSTON & CHOLST LLP

CO-OP CONDO LEGAL NEWS AUTUMN 2011

IN BRIEF

Smoking Bans – A Burning Issue

EMERGING ISSUES & TRENDS
- Sponsor Defect Litigation
- A Primer On How to Prosecute "Pullman Proceedings"

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R L & C and the CNYC Annual Housing Conference

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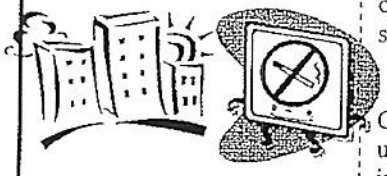


Smoking Bans – A Burning Issue

Prohibition of smoking within apartments has become a burning issue for boards throughout the greater New York area. Must a board impose such a ban on residents' conduct within their own homes? Can it do so? Should it do so? Are there any other effective and legally compliant but less drastic ways to protect against the impact of second-hand smoke within a building?

Recent court decisions have illuminated these issues, but the question of board liability for permitting second-hand smoke to permeate a building is still unresolved, and most likely hinges on the particular facts of any given case.

The liability issue was initially ignited by a 2006 New York County Civil Court decision which held that a landlord could be held liable to its residential tenant for breach of Warranty of Habitability if it fails to take effective action to abate a sufficiently egregious intrusion of second-hand smoke from a neighboring apartment.[1] In that case, a condominium unit owner's tenant moved out prior to termination of the lease because of his landlord's inability to compel the neighboring resident to control second-hand smoke emanating from his apartment. The landlord-unit owner sued his departed tenant for rent which was due over the unexpired lease term. Tenant countered that the health hazard created by unabated second-hand smoke constituted a breach of his Warranty of Habitability, thereby justifying his breaking the lease and exonerating him from any further rental obligation. (Under the Warranty of Habitability, a residential landlord is required to ensure that conditions do not render an apartment "unsafe and uninhabitable." Landlord's breach of that Warranty entitles the tenant to abate his/her rent).

The landlord moved to dismiss the case prior to trial on the ground that second-hand smoke is not a condition which would trigger the Warranty of Habitability, and in any event the third-party neighbor's conduct was beyond his control, so he should not be held accountable therefor. The Civil Court Judge rejected both arguments, holding that a sufficiently egregious second-hand smoke condition presents health hazards so as to invoke the Warranty of Habitability, and that the landlord had the power to act against his neighbor, either by seeking the Condominium's intervention or by suing the neighbor directly himself. Hence, the landlord's pre-trial motion was denied and the matter was set for trial to determine whether the second-hand smoke condition was, in fact, sufficiently egregious to constitute a breach of the Warranty of Habitability.

It must be noted that this decision does not apply to condominium boards, as they are not landlords relative to their unit owners and, therefore, are not bound by the Warranty of Habitability. Additionally, the language of the decision implies that sporadic or minor smoke intrusions do not constitute a breach of the Warranty of Habitability.

This past August another decision on second-hand smoke – the first ever Appellate Court ruling – was issued.[2] In that case, one condominium unit owner sued a neighboring unit owner for "private nuisance" and negligence arising from second-hand smoke infiltration into the Plaintiff's Unit. The trial court denied defendant's pre-trial motion to dismiss the case, but that decision was reversed on appeal and the lawsuit was dismissed.

With respect to the "private nuisance" action, the Court observed that there are five elements to such a claim: (a) an interference by one person substantial in nature; (b) intentional in origin; (c) unreasonable in character; (d) with a person's property right to use and enjoy land; and (e) caused by another's conduct.

Smoking Bans – A Burning Issue (Continued)

The Appellate Term concluded as a matter of law that, while smoke emissions into neighboring apartments may well constitute an "interference" with another person's use and enjoyment of his apartment, absent extenuating circumstances such an intrusion is not "substantial" in nature or "unreasonable" in character. The Court pointedly noted the absence of any statutory obligation by defendant to refrain from smoking in his apartment or any condominium by-law or house rule prohibiting such activity or curtailing smoke infiltration into neighboring apartments. Presumably, the existence of such an obligation would have resulted in a different ruling. Also, presumably a particularly egregious case of smoke infiltration, with provable harmful effect (evidence of which was lacking here) would have rendered the interference "unreasonable" and "substantial."

The Court also dismissed Plaintiff's negligence claim on the ground that such an action required a legal obligation on defendant's part to refrain from smoking in his apartment or acting to prevent smoke infiltration into neighboring units, and, absent any statute, by-law or house rule mandating such conduct, no such legal obligation existed. Since the two Court decisions entailed different legal theories, the Appellate case does not overrule the Civil Court decision.

Neither of these decisions *requires* a board's imposition of a building-wide smoking ban. Even the *Poyck* case, which imposed potential liability upon landlords (*i.e.*, co-op boards), for failing to take action against offending residents to contain second-hand smoke infiltration, did not mandate a building-wide ban on smoking within apartments. As will be discussed below, there are less drastic methods available for effectively controlling smoke infiltration, which is all that is required to satisfy the Warranty of Habitability.

Association governing documents on their face clearly permit imposition of such a ban by means of amendment to co-op proprietary leases and condominium by-laws, and the *Ewen* decision described above appears to sanction such provisions. However, many legal practitioners feel that an amendment to governing documents banning smoking within apartments would be vulnerable to legal challenge on the ground that it is overly intrusive and beyond the purview of a board's regulatory powers. So, the question of whether a ban can be imposed is still open. In any event, we strongly advise that any such ban be enacted by means of a shareholder-or-unit-owner-approved governing document amendment rather than by board resolution. An argument that such a ban is the "will of the people" might prove effective in countering any assertion that the prohibition strips individual owners of their freedoms. Certainly, a new construction building or newly-converted building which incorporates a smoking ban into its initial by-laws, and markets itself as a "no smoking building", would have an excellent argument that owners willingly and knowingly "bought into" the regime, and, therefore voluntarily subjected themselves to these restrictions.

Whether or not a board has the power to impose a building-wide ban on smoking within apartments, one thing is certain: such a prohibition will generate an avalanche of controversy even among non-smokers. For this reason, boards may want to consider less intrusive ways to contain second-hand smoke.

One option is to adopt a narrower by-law or lease amendment which does not ban smoking within apartments, but rather requires owners to take specified ameliorative action to curtail second-hand smoke infiltration (*i.e.* install weather stripping, modify the venting system, close cavities in the walls separating neighboring apartments, and install fans to blow smoke away from the door, all at his expense), within a prescribed time frame following receipt of the Board's Notice. This provision can also impose fines and attorney's fees for non-compliance. However, if such a provision is enacted boards must be prepared to enforce it, as courts will hold them accountable for using their newly acquired leverage against offending residents to protect other inhabitants of the building from second-hand smoke infiltration. [3]

Efforts to procure an offending resident's voluntary compliance with weather stripping, venting, closing cavities in walls separating neighboring apartments, and fan installation requests are another option.

Finally, co-op boards can effect a smoking ban through attrition, simply by rejecting any applicant who smokes. As a practical matter, this option is not available to condo boards, as few, if any are in a financial position to exercise the Right of First Refusal relative to each apartment being purchased by a smoker.

In any event if boards are going to act to curtail second hand smoke we strongly suggest that Counsel be consulted in connection with implementation of any regulations.

[1] *Poyck v. Bryant*, 13 Misc. 3d 699 (Civil Court, N.Y. Co., 2006).

[2] *Ewen v. Maccherone*, 32 Misc. 3d 12, 927 N.Y.S. 2d 274 (App. Tm, 1st Dept. 2011).

[3] *Upper East Lease Associates LLC v. Cannon*, 30 Misc. 2d 1213(A), 924 N.Y.S. 2d 312 (Dist. Ct., Nassau Co. 2011); *Herbert Paul CPA PC v. 370 Lex LLC*, 7 Misc. 3d 747, 794 N.Y.S.2d 869 (S.Ct., N.Y. Co., 2005). *Duntley v. Barr*, 10 Misc. 3d 206, 805 N.Y.S. 2d 503 (City Ct., Syracuse, 2005).

EMERGING ISSUES & TRENDS

Sponsor Defect Litigation

There was a time in the distant past when all you needed to be on a Board in New York, was to be and over the age of eighteen and have a pulse ... Today's director has to be knowledgeable about many areas of the law including the Multiple Dwelling Law, NYC Administrative Code, New York City Health Code and now the New York City Building Code.

For the past two decades, Boards of co-ops and condominiums have had to confront different waves of litigation. First came the lead paint claims, followed shortly by asbestos removal claims. Water infiltration introduced boards to the wonderful world of mold and for the past few years boards have been befuddled by bedbug infestations, which have reached epidemic proportions. In each instance, boards have faced habitability claims, nuisance claims, and other related litigation by tenants who have been adversely affected by the conditions affecting their apartments.

Fortunately, these types of claims have been reduced by boards who, along with their managing agents and legal counsel, have responded promptly and diligently to notice of these potential breaches of warranty implicating these conditions, and have investigated and remediated such conditions in accordance with relevant local laws. By doing so, boards have avoided and reduced significantly, litigation and the attendant expenses and have enhanced their building's reputation.

The newest trend in litigation, which is affecting boards, is sometimes referred to as building or sponsor defects. No, there is nothing wrong with the mental health of a sponsor, just the quality of the construction of the building that they offer for sale.

During the past five years we have experienced an avalanche of complaints filed by owners of co-op and condominium apartments in newly constructed and rehabilitated buildings. There is almost a mantra, the newer the building, the poorer the construction.

Many of the complaints have to do with the failure of a sponsor to ensure that his contractor complies with the Building Code when the building was first constructed or rehabilitated. We have seen buildings with no fire stop materials installed between apartments, drains too small to accommodate water after a storm and, most recently, a building where a waterproof membrane was missing between the stucco and cement masonry causing water infiltration throughout the top six floors of a building. The cost of remediating these types of problems can run into the hundreds of thousands of dollars. When a board learns about these types of issues which, for the most part, can be building-wide, it must act promptly in order to hold the sponsor responsible to remediate the conditions complained about.

The first thing a board should do is consider hiring an engineer to do a survey of the building to uncover not only the apparent defects complained about by owners, but also any latent defects. Issues which are not apparent to your eye will catch the eye of a competent engineer. For example, we have seen situations where undersized air conditioning units have been installed in the elevator control room causing elevators to malfunction only during the hot summer months. Once you have an independent engineer's report in hand, it is essential that competent professional counsel be consulted to review the Offering Plan. The Offering Plan will set forth any warranties that may still be available to protect the owners of the building, as well as set forth the obligations of the sponsor to the building and its owners to remediate any defective conditions. Those provisions usually have a short statute of limitation time period within which a complaint must be filed starting with the sale of the first apartment. If you miss the deadline, then the sponsor is off the hook with respect to having to undertake any remediation.

Courts in New York are prepared to enforce the warranties and promises of a sponsor, as well as any claims for breach of contract, or negligence. It is therefore, important that boards and managing agents respond promptly and diligently to any complaints asserted by their owners and to consult counsel with respect to the relevant laws that will protect the interests of all concerned.

A Primer On "Pullman" Proceedings

In 2003 New York State's highest court, the Court of Appeals, upheld a process for evicting obstreperous Coop shareholders solely on the basis of the Board's or shareholders' vote – not a Judge's adjudication after trial – that the shareholders' conduct is "objectionable."[1]

A *Pullman* proceeding (named for the first shareholder to be evicted by this method) can only occur in Coop buildings as it is based upon landlord-tenant principles. (Condominium unit owners are not tenants). It is predicated upon a *pattern* of "objectionable" conduct by the shareholder whose eviction is being sought, as opposed to a single incident. A successful *Pullman* eviction requires strict adherence to procedure and a complete absence of bad faith by the Board.

Pullman proceedings have become increasingly popular over the past several years. Since strict adherence to process is so crucial to the success of a *Pullman* eviction, we thought this primer would be useful to Coop boards. The process works as follows:

- The Board identifies what it perceives as an incident of "objectionable conduct" by a shareholder and sends him a "cease and desist" letter with respect to that and similar prior acts. (Remember, the eviction is predicated upon a pattern of objectionable conduct, not a single act. As such the letter is a necessary prelude to commencement of any eviction. This letter might also invite a dialogue with the offending shareholder which results in settlement of the dispute and obviates the remainder of the process.

- Upon repetition of the conduct defined in the "cease and desist" letter the Board convenes a *Special* Meeting to vote upon a Resolution to terminate the offending shareholder's proprietary lease on the ground of "objectionable conduct." The meeting must be properly noticed and a quorum in person must be present. Most proprietary leases specify that the vote must be by a two-thirds supermajority of the then existing board. We *strongly* urge that the shareholder be invited to attend this board meeting with a representative of his or her choice and be given the opportunity to explain why his lease should not be terminated, so that he cannot later challenge any eviction on the ground of lack of Due Process.

- Some, but not all, proprietary leases require a supermajority shareholder vote to terminate the lease on the ground of objectionable conduct in addition to the Board vote. If this requirement exists, compliance is essential. We again suggest that the offending shareholder be invited to attend any shareholder meeting with a representative of his choice to "make his case."

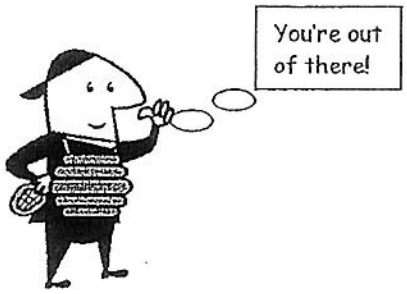
- Once all the requisite votes are obtained, the Board must send its shareholder a Notice of Termination, stating that the proprietary lease is deemed terminated within the time period specified in the lease (typically five days). Absent any court order staying the termination, it goes into effect at the expiration of this deadline.

- The Board must then sue the offending shareholder, either in Housing Court or Supreme Court, seeking legal possession of his apartment. (While the lease has been terminated the shareholder is still physically occupying the apartment, and the Coop needs a court order to be able to exclude him from the apartment). However, the Board need not litigate the issue of whether the shareholder's conduct was "objectionable"; the only issues that the offending shareholder can raise before the Court are the Board's strict compliance with process and the absence of its bad faith.

- Once the Board has obtained legal possession it can change the locks, cancel the lease and appurtenant stock, and sell the apartment in a "commercially reasonable manner." All net proceeds after payment to secured lenders, reimbursement of the Coop's legal fees, and administrative costs go to the evicted shareholder.

As the process is complex and technical, and strict compliance is so essential to the success of the eviction, we strongly recommend that counsel be engaged.

[1] *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147 (2003).



Interested in Refinancing?

For the past few years, we have been working with Fieldpoint Private Bank & Trust, a private bank with offices in Manhattan and Greenwich, CT. Fieldpoint offers exemplary white glove service, competitive rates and seamless delivery of their financing products. Fieldpoint is offering financing on underlying cooperative mortgages and consumer lending on cooperative and condominium units. Our firm has closed many of their consumer mortgages in New York. We encourage you to contact Marcus Zavattaro at (203) 413-9333 for further information.

RLC IN THE NEWS

As described below, Rosen Livingston & Cholst LLP will be well represented at the Council of New York Cooperatives and Condominiums' November 13, 2011 Annual Housing Conference

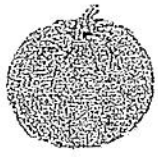
Since our last Newsletter, the firm's attorneys have been quoted in the *New York Times* on condominium right of first refusal, responsibility for water damage to the interior of a co-op apartment, sponsor responsibility for payment of a co-op flip tax, responsibility for clearing outdoor furnishings on terraces when roofs require repair, and inter-spousal transfers in co-ops; in *Habitat* on smoking bans, conduct of Annual Meetings, board recall elections; and how to handle contentious shareholder meetings; in *The Cooperator* on responsibility for repair of water damage to apartments, renters' succession and occupancy rights, superintendent dismissal, and collection of arrears; in *The Real Deal* on condominium flip taxes and capital contribution fees, land leases, and residential transfer issues

Copies of these articles are available on request. Additionally, over the past year Partner Bruce Cholst has presented workshops on Subletting Policy, and Board Member Responsibilities. He has also appeared on a podcast sponsored by *Habitat* magazine and a symposium sponsored by the Alliance of Condo and Coop Owners.

ROSEN LIVINGSTON & CHOLST LLP PARTNERS' SEMINARS AT THE COUNCIL OF NEW YORK COOPERATIVES & CONDOMINIUMS NOVEMBER 13, 2011, ANNUAL HOUSING CONFERENCE

Enforcing the Rules – Boards' power to impose rules upon community residents is the quintessential feature of cooperative and condominium living. Unfortunately, the exercise of that power often results in acrimony and costly litigation. **Partner Bruce Cholst** will discuss strategies for enforcing the rules while minimizing tension and the prospect of litigation. If litigation is unavoidable he will also explore boards' powers and legal remedies in compelling compliance with their regulations. Bring along your house rules and horror stories to help make this an informative interactive discussion. 2:30pm – 4:00pm

Apartment Renovations & Combinations – As cooperative and condominium ownership expands, the impulse to make one's home one's castle grows too. New shareholders and unit owners often plan extensive renovations before moving into their units; others decide that their apartments need a facelift, or they buy an adjacent unit and combine the two. This does bring dust, noise, and disruption to the building, which the board must keep under control. Corporate counsel provides guidance. **Partner Bruce Cholst** will share his expertise alongside Attorney Alfred Taffae about renovation rules, time frames, fees, inspections, and compliance with city and federal requirements in a class designed to help the board mitigate the stress of renovations. 9:30am – 11:30am



Frequently Asked Questions on Disclosure of Policy on Smoking for Multiple Dwellings

LAW'S EFFECTIVE DATE

Q: When will the new law take effect?

A: The law goes into effect on **ENTER DATE HERE**. From that date forward, it requires that residential leases, and contracts of sale must include a rider disclosing a building's policy on smoking. This policy is similar to other policies that require landlords to disclose information to tenants and buyers, such as history of bed bugs or lead paint.

Q: Will I have to amend existing leases once this policy goes into effect?

A: No. Existing leases are not affected by this law. But we recommend that landlords and owners use this as an opportunity to notify current tenants of the building's policy on smoking. This is important because renewal leases after **ENTER EFFECTIVE DATE** must include information about the property's policy on smoking. Notably, this law does not require any changes to a building's policy on smoking. It merely requires that landlords and owners *disclose* the building's policy to enable potential tenants and buyers to make informed decisions on where they are going to live.

SECONDHAND SMOKE EXPOSURE IN MULTIUNIT DWELLINGS

Q: Is smoke from another apartment really that dangerous?

A: Air quality monitoring studies have detected elevated levels of harmful particulates in nonsmoker's apartments during active smoking in a nearby apartment. Secondhand smoke can exacerbate asthma and create breathing difficulties and irritation for sensitive individuals.

Q: How does smoke get from a smokers' apartment into a nonsmokers' apartment?

A: Smoke from one apartment can waft through cracks in walls, ceilings and floors, through electrical outlets, and under doors. Secondhand smoke intrusion from one apartment into another depends on many things including how the building and its ventilation system are designed, wind conditions, and occupant behaviors like opening and closing windows and doors.

TENANT QUESTIONS

Q: I am a smoker. Does this new law mean I can be evicted from my apartment?

A: No. This law simply requires your landlord to disclose the smoking policy for your building to tenants during lease signing and renewal. Even if your landlord adopts a

smoke-free building policy, you cannot be evicted for being a smoker as long as you comply with the smoking policy.

Q: I just rented an apartment, but the lease did not have information about the smoking policy. Who should I contact?

A: If you signed your lease after ENTER EFFECTIVE DATE, your landlord must provide you with a copy of the smoking policy for the building and its grounds. If you have a complaint about not receiving the disclosure, please call 311.

Q: Where can I find a smoke-free residence?

A: While this data is not systematically collected, smoke-free housing is a growing trend. Sites such as http://www.smokefreehousingny.org and www.rentals.com, and http://www.apartmentguide.com list smoke-free apartments in NYC available for rent, and sites that allow you to search by this feature are increasing.

Q: What if smoke comes into my apartment from a neighbor?

A: This law does not alter a tenant's right to pursue a claim through the court system. In fact, it expressly protects a tenant's right to pursue a legal claim based on smoke intrusion, even after acknowledging a building's policy on smoking. The disclosure requirement at lease signing or renewal also gives tenants a good opportunity to let their landlords know what kind of policy they'd like to see for their residence.

LANDLORD, BUILDING MANAGER, AND OWNER QUESTIONS

Q: Does this law mean that I have to ban smoking on my property?

A: No. This rule merely requires that landlords and owners disclose their building's smoking policy before rental or purchase of a property, upon adoption of the building's smoking policy, or the making of any material change to the building's smoking policy. It will help people to make informed decisions, especially those with health conditions or other sensitivities.

Q: When I adopt or materially change the smoking policy of my building, are there requirements of how I must let current tenants know?

A: Upon adoption or a material change of a building's policy, the rule does not mandate how disclosure must be provided. Instead, discretion is left to the owner to provide disclosure in a way that is reasonable under the circumstances, such as posting a notice in a public area, or mailing notification to tenants. The timing of a policy's effective date would depend on the circumstances of each building.

Q: Isn't banning smokers discriminatory?

A: Smoke-free housing policies restrict smoking – not smokers. A smoke-free policy does not limit who can live in a residence, so long as all residents and their guests refrain from smoking in all areas where smoking is prohibited by the policy. Non-smokers with serious breathing disabilities or smoke allergies are entitled to protection against discrimination under the Americans with Disabilities Act, 42 U.S.C.S. § 12102, and the federal Fair Housing Act, 42 U.S.C.S. §3604.

Q. Can building owners and operators choose to prohibit smoking in apartments in multiple dwelling residences?

A: So long as owners and operators comply with all laws and requirements related to changing the terms of applicable leases, bylaws, house rules, etc, they may choose to adopt a smoke-free policy. The Department of Housing and Urban Development (HUD) has declared that it is both legal and advisable to prohibit smoking in multi-unit residences to prevent secondhand smoke exposure. The Surgeon General has stated that there is no safe level of exposure to secondhand smoke, and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has declared that the only way to prevent the intrusion of smoke from one housing unit into another is by prohibiting smoking in a building.

Q: What about in rent regulated apartments?

A: In a rent-controlled or rent-stabilized apartment, the terms of a lease cannot be changed materially without the tenant's express consent. However, rent regulated apartments may go smoke-free in new leases and if current tenants to agree to a smoke-free policy.

Q: How does this law benefit landlords?

A: Providing tenants with information about the smoking policy of their potential residence can help landlords avoid the complaints about secondhand smoke drift by tenants. Landlords and Boards may also be unaware that adopting smokefree building policies is legal, this law clarifies that.

Q: Will landlords who choose to prohibit smoking inside units lose tenants?

A: People who want to smoke are less likely to choose to live in a building that prohibits smoking, but overall landlords who adopt smoke-free policies may see increased demand for their units. Likewise, demand may increase for apartments for sale in buildings with smoke-free policies. In NYC, more than 85% of adults do not smoke. Less than 10% of NYC adults smoke in their homes. About half of multi-unit residents in NYC report having experienced secondhand smoke coming into their apartment,[1] and 311 receives thousands of complaints per year related to secondhand smoke drifting into apartments.

[1] New York State Adult Tobacco Survey, 2007-2008, Tobacco Control Program StatShot Vol. 2, No. 5. May 2009

This law will help people to make informed decisions, especially those with health conditions or other sensitivities. Policies that ban smoking have wide support; a recent survey of NYC adults found that 56% favored a policy banning smoking in their residential living spaces such as apartments, private balconies, and patios.[2] Another survey found that 50% of New Yorkers would be willing to pay a premium to live in a smoke-free building.[3]

Q: Will adopting a smoke-free policy save landlords money?

A: Landlords may save money on maintenance, reduced vacancy time, insurance premiums, and other costs associated with smoking. Marriott Hotels, for instance, reports that adopting smoke-free policies system-wide led to a 30% reduction in energy use for their air treatment system.[4] Insurance companies have begun to offer reduced insurance rates for smoke-free buildings.[5] Real estate professionals also say that smoking within apartments can significantly lower resale values.[6]

Q: Are there sample disclosure forms and statements available for landlords to use?

A: Yes. Sample lease language and sample disclosure statements are available for your use when notifying your tenants. They can be found here: *[Link placeholder]*

Q: How will landlords enforce a smoke-free policy?

A: Landlords and owners who have established smoke-free policies note that these regulations are largely self-enforced. Most tenants already have a smoke-free home policy and if you decide to make your building smoke-free you are likely to attract tenants who want that feature.

Q: What if I am a landlord and I have a policy that prohibits smoking, but a tenant won't stop smoking?

A: In general, smoking-related violations would be subject to the same penalties as other types of lease violations and nuisance claims. Therefore, violation of a smoking policy could factor into a possible eviction action.

Q: What if I own or manage a building, and I have a policy that prohibits smoking, but an owner of a condominium or cooperative won't stop smoking?

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[2] Ibid.
[3] Annual Tobacco Attitudes and Actions Survey, Zogby International for the NYC Coalition For A Smokefree City, December 2005.
[4] http://www.hotel-online.com/News/PR2007_1st/Mar07_MarriottEmissions.html
[5] http://www.ciginsurance.com/insurance/liability/smoke-free-credit/
[6] http://www.nytimes.com/2004/02/08/realestate/on-tobacco-road-it-s-a-tougher-sell.html

A: To ensure that a building's policy on smoking is legally enforceable for a condominium or cooperative, it should be incorporated into the building's By-Laws.[7] Each building's By-Laws should set forth a procedure for dealing with residents who refuse to comply with the building's policy on smoking.

Q: I am a landlord of a small building. Am I required to include a smoking policy on my lease?

A: Landlords and owners must disclose a property's policy on smoking if the building is a multiple dwelling in which three or more families live individually.

Q: I am selling a single family home. Do I need to provide a smoking policy?

A: This law applies to multiple dwellings as defined by the Housing Maintenance Code, Administrative Code §27-2004(7) which defines a multiple dwelling as a dwelling in which three or more families live individually.

Q: I own a condo apartment that I rent out. My condo rules don't mention anything about the building's smoking policy. How do I comply?

A: You should contact the building manager or board to clarify the building's policy on smoking for all areas of the property. You must disclose the building's policy to prospective tenants on a standard disclosure form. This does not prevent you from restricting smoking inside the unit that you are renting out, provided such a restriction is set forth in the lease.

Q: What if a renter is subleasing his or her apartment?

A: This rule applies to all rented and sold properties. Thus, disclosure of the smoking policy is required with the sublease.

Q: What if I want more information about implementing a smoke-free policy?

A: More information for those thinking about going smoke-free can be found at:

http://www.nycsmokefree.org/smoke-free-housing
http://www.smokefreehousingny.org/
http://www.cdc.gov/healthyhomes/Healthy_Homes_Manual_WEB.pdf

[7] *Ewen v. MacCherone*, 32 Misc. 3d 12 (App. Term, First Dep't 2011), rev'g 25 Misc. 3d 1235(A) (N.Y. City Civ. Ct. 2009).

SMOKING POLICY DISCLOSURE FOR NYC MULTIPLE DWELLING BUILDINGS

What is a Smoking Policy Disclosure Law?

- Requires that all residential leases and transactional documents for the sale of units within multiple dwellings must disclose the building's policy on where on the premises smoking is permitted and prohibited.
- Disclosure must address all indoor and outdoor locations of the property in question, including balconies, courtyards, rooftops, and individual apartments.
- Allows residents to understand their risk of exposure to secondhand smoke before buying or renting a residence.

Disclosure Allows Residents to Make Informed Decisions

- Disclosing a building's smoking policy will allow residents to make informed choices about whether they want to live in that building.
- This information is particularly important for the elderly and parents with young children because children and the elderly tend to be more vulnerable to the health effects of secondhand smoke, and usually spend more time at home.
- 50% of residents express a willingness to pay more to live in a smoke-free building.[1]
- Other jurisdictions have passed laws requiring disclosure of a building's smoking policy without opposition, including the states of Maine and Oregon; Amherst, MA; Duluth, MN; Oakland, CA; and Buffalo, NY.

Disclosure Allows Residents Consider the Risk of Exposure to Secondhand Smoke

- There is no safe level of exposure to secondhand smoke[2] and there is increasing evidence of risks from even low levels of smoke exposure.[3]
- Air monitoring studies have shown that smoke can travel from a smoker's apartment into a non-smoker's apartment.[4,5,6] Nicotine has been found in the air of 89% of apartments in multi-unit dwellings where smoking was never allowed by the tenants in that unit.[7]
- Non-smokers exposed to secondhand smoke in the home have higher risks of asthma, heart disease, lung cancer, chronic respiratory disease. [8,9,10,11]
- Children are especially vulnerable to secondhand smoke and can have higher risks of:
    - Asthma attacks, reduced cardiovascular function, respiratory infections, tooth decay, and ear problems.[12,13,14]
    - Increased risk of Sudden Infant Death Syndrome (SIDS). One study found that with every 1% increase in smoke-free homes, there was a decrease in SIDS of 0.4%.[15]

Many NYC Residents are Currently Exposed to Secondhand Smoke in their Apartment

- Half of New Yorkers living in multi-unit dwellings report being exposed to secondhand smoke from neighboring apartments.[16]
- Studies show that of children with parents who do not smoke in the home, those who live in multi-unit apartments buildings have 45% more blood cotinine (a biomarker for smoke exposure) than children who live in detached houses.[17]
- Secondhand smoke infiltration in residences is a frequent complaint to 311.
- 57% of non-smoking NYC residents have elevated levels of cotinine in their blood, indicating that they have been exposed to secondhand smoke, even though smoking is prohibited in most indoor public places.[18]

[1] Annual Tobacco Attitudes and Actions Survey, Zogby International for the NYC Coalition For A Smokefree City, December 2005.

[2] US Department of Health and Human Services. The health consequences of involuntary exposure to tobacco smoke: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC; 2006. Available at http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf

[3] U.S. Department of Health and Human Services. *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General.* Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010.

[4] Klepeis, N. (2008). "Measuring the Seepage of Tobacco Smoke Particles Between Apartment Units." California's Clean Air Project.

[5] King, B. A., M. J. Travers, et al. (2010). "Secondhand Smoke Transfer in Multiunit Housing." Nicotine & Tobacco Research 12(11): 1133-1141.

[6] Klepeis, N. (2010). "Multi-Day Measurement of Airborne Particle Concentrations in a High-Rise Luxury Condominium Building in Downtown San Jose, California." Technical Report. Retrieved April 13, 2011, from http://exposurescience.org/NEK10.

[7] Kraev, T. A., G. Adamkiewicz, et al. (2009). "Indoor concentrations of nicotine in low-income, multi-unit housing: associations with smoking behaviours and housing characteristics." Tob Control 18(6): 438-44.

[8] US Department of Health and Human Services. The health consequences of involuntary exposure to tobacco smoke: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC; 2006. Available at http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf

[9] Law, M. R. and A. K. Hackshaw (1996). "Environmental tobacco smoke." British Medical Bulletin 52(1): 22-34.; Law, M. R., J. K. Morris, et al. (1997). "Environmental tobacco smoke exposure and ischaemic heart disease: an evaluation of the evidence." BMJ 315(7114): 973-980.

[10] Coultas, D. B. (1998). "Passive smoking and risk of adult asthma and COPD: an update." Thorax 53(5): 381-387.

[11] Otsuka, R., H. Watanabe, et al. (2001). "Acute Effects of Passive Smoking on the Coronary Circulation in Healthy Young Adults." JAMA: The Journal of the American Medical Association 286(4): 436-441.

[12] Aligne, C. A., M. E. Moss, et al. (2003). "Association of pediatric dental caries with passive smoking." JAMA 289(10): 1258-64.

[13] Metsios, G. S., A. D. Flouris, et al. (2010). "Passive smoking and the development of cardiovascular disease in children: a systematic review." Cardiol Res Pract 2011.

[14] US Department of Health and Human Services. The health consequences of involuntary exposure to tobacco smoke: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC; 2006. Available at http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf

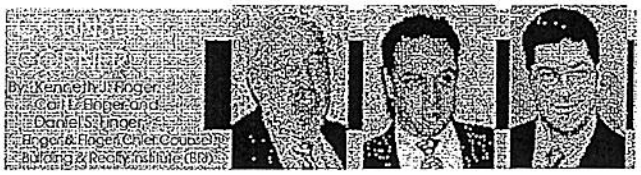
[15] Behm, I., Z. Kabir, et al. (2011). "Increasing prevalence of smoke-free homes and decreasing rates of sudden infant death syndrome in the United States: an ecological association study." Tobacco Control.

[16] New York State Adult Tobacco Survey, 2007-2008, Tobacco Control Program StatShot Vol. 2, No. 5/May, 2009

[17] Wilson, K. M., J. D. Klein, et al. (2010). "Tobacco-Smoke Exposure in Children Who Live in Multiunit Housing." Pediatrics: peds.2010-2046.

[18] Ellis, JA et al. (2009). Secondhand smoke exposure among nonsmokers nationally and in New York City. Nicotine Tob Res 11(4): 362-370.

What a Co-op, Condo or Landlord Can Do About Smokers



By Kenneth J. Finger
Carl E. Person and
Daniel S. Finger
Finger & Finger, Chief Counsel
Building & Realty Institute (BRI)

WHITE PLAINS – In a recent decision a judge has allowed a tenant to assert a warrant of habitability defense, in an action seeking payment of rent, based on the second-hand smoke emanating from a neighbors apartment into the complaining tenant's apartment. *Poyck v. Bryant. 33752 CVN 2002--, NYLJ, Sept. 1, 2006, p. 22, col. 1 (Civ. Ct. N.Y. Co.).*

In a first impression case the Court reviewed the applicable law, the current state of "urban dwelling," and went so far as to reference the "Golden Rule." The warranty of habitability is codified in Real Property Law §235-b. The Court referenced the significant case of *Park West Management Corp. v. Mitchell, 47 NY2d 316 (1979),* and found that "in every landlord-tenant relationship where the landlord impliedly warrants as follows: first, that the premises are fit for human habitation, second that the condition of the premises is in accord with the uses reasonably intended by the parties; and third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. *Park West Management Corp. v. Mitchell, at 326.*"

Additional Findings

The Court went on to find that odors, fumes, noise, water and dust all may constitute violations of the implied warranty of habitability. The Court specifically found in comparison, that "as a matter of law that secondhand smoke qualifies as a condition that invokes the protections of RPL §235-b under the proper circumstances. As such it is axiomatic that second-hand smoke can be grounds for a constructive eviction."

The Court, given that finding, held that it "must look to the operative facts to determine whether or not the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction."

The facts of the instant matter were reviewed and require notation herein. The Landlord was the owner of a condominium who had rented the unit to the tenants. The tenants had lived in the apartment for approximately three years when a neighbor moved in next door who smoked constantly and incessantly. The tenants wrote to the Landlord and advised him of the problem. They also spoke to the superintendent of the building.

They attempted to remedy the situation themselves by sealing the apartment door with weather stripping but the smoke continued to permeate the apartment. The Landlord evidently took no action and the tenants subsequently advised him that they needed to move as a result of the health issues appurtenant to second hand smoke.

"Boards of Managers, Boards of Directors and Apartment Owners should all be on notice that complaints about second-hand smoke must be dealt with seriously, as second-hand smoke can cause a constructive eviction which may be upheld by the Courts."

The tenants moved and the landlord brought an action to collect the unpaid rents accruing under the lease. The tenants raised the warranty of habitability defense and the Landlord responded that he could not be held responsible for the actions of third parties. The Court pointed out that the Landlord "could have asked the board of managers to stop the neighbors from smoking in the hallway and elevator as well to take preventive care to properly ventilate [the smoker's apartment] so that the secondhand smoke did not seep into the [tenant's] apartment."

The Court pointed out further that the Board of Managers had an obligation to "prevent unreasonable interference with the use of respective units and of the common elements by several unit owners" and could have commenced an action seeking injunctive relief against the smoking residents and/or the posting of a bond to insure compliance with the by-laws and decisions of the Board of Managers.

A Hearing

The Court thereafter required a hearing on the issues of the warranty of habitability and constructive eviction, but the fact that the Court allowed the defenses to stand and be litigated gives weight to their viability when the basis is second-hand smoke. This finding is significant. Given the language and the findings of fact required to be made it remains to be seen whether the tenants will prevail.

Nonetheless this case must serve as a wake up call for those faced with complaints as to second-hand smoke.

For current landlords it may simply behoove them to place a restriction as to smoking in their leases. For Cooperatives and Condominiums the call to action may be much more complex and may require amending the proprietary lease (Cooperatives) or by-laws/declaration (Condominium).

As to Cooperatives, the proprietary lease will most likely dictate what, if anything, can be done about a shareholder smoking in an apartment and smoke emanating from the smoker's apartment into other apartments.

Many proprietary leases contain a section which states that "The Lessee shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them."

Although not specifically directed at second-hand smoke and although there are virtually no reported cases applying such sections to same, this section would seem to be appropriate fodder for addressing a complaint as to second-hand smoke.

Additionally, most proprietary leases contain a provision allowing for the termination of the lease on the basis of objectionable conduct repeated after notice. Certainly, the defining of smoking as "objectionable conduct" has not been placed before courts to date. However, with the adoption of appropriate procedures this may also prove an effect tool.

The Condo Scenario

Condominiums by their nature invite a more complicated solution and do not face the same issue.

As the Court in *Poyk* recognized the warrant of habitability defense does not apply in a condominium (against the Condominium), but it nonetheless implied that the Landlord and the Condominium could take some action when faced with complaints of second-hand smoke.

Because the resident owns the unit, there is no lease to rely upon. A review of many condominium by-laws indicates that there are most likely few provisions as those cited heretofore in the proprietary leases of cooperatives.

A Review

However, New York State Real Property Law § 339-v 1 should be reviewed:

"The by-laws shall provide for at least the following:....(i) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners.

"The suggestion would be that based on the relevant portion of the by-laws, the smoking party was unreasonably interfering with the use of the units by other unit owners. The remedy in a condominium would also be somewhat more attenuated than the termination of the proprietary lease. New York State Real Property Law §339-j allows for the condominium to maintain an action for injunctive relief and in the case of repeated violations the condominium may seek the posting of "sufficient surety" for future compliance.

Actually evicting someone in a condominium is quite problematical.

Regardless of the precise process or remedy appurtenant to the cooperative and its proprietary lease or the condominium and its by-laws, or the lease in a rental apartment, Boards of Managers, Boards of Directors, and Apartment Owners should all be on notice that complaints about second-hand smoke must be dealt with seriously as second-hand smoke can cause a constructive eviction which may be upheld by the Courts.

***Editor's Note:** The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).*

Report: Home Prices Flat or Falling in Rockland, Orange Counties

WHITE PLAINS – The housing markets in Orange and Rockland counties entered a period of adjustment this summer, with flat or falling prices being seen in areas where values had doubled during the previous three-to-five years, according to third-quarter statistics analyzed by Prudential Rand Realty.

The market is going through a transition from a "seller's market" to a "buyer's market," said Matt Rand, managing partner with Prudential Rand Realty.

"It's a healthy thing," Rand said. "Some markets will give back a correction of five percent to 10 percent and some will just go flat. The demand is clearly there just below the surface to purchase property when it meets the buyer's pricing needs."

The median price of a single family house in Rockland County fell 3.8 percent during the third quarter to $510,000 from $529,950 a year earlier, according to figures from the Greater Hudson Valley Multiple Listing Service. The median price in Orange County was unchanged at $325,000.

Other Trends

High-end sales have slowed the most and shown the most pressure on prices, Rand said, while some parts of the entry-level market remain robust.

The median price for a condominium in Orange County, Rand noted, rose 6.4 percent to $234,000 this summer from $219,950 in the third quarter of 2005. But just across the border in Rockland County the median price for a condo fell 7.9 percent to $285,493.

MLS members sold fewer single family homes in Rockland County this summer, with 459 deals closed, down 20.3 percent from 576 a year ago. Single family houses also took longer to sell, with the year-to-date average days on the market rising to 85 days from 63 in the third quarter of 2005. Inventories rose, with 1,558 homes on the market with MLS members as of Sept. 30, an increase of 40.4 percent above last year's level of 1,110.

In Orange County, 892 single family homes were sold during the third quarter, down 19.7 percent from 1,111 during the summer of 2005. The year-to-date average days on the market was 98 at the end of the 2006 period, up from 86 a year before, and the number of homes listed for sale rose to 3,274, up 18.9 percent from 2,753 on Sept. 30, 2005.

"The region's economy is strong and interest rates are still at historic lows, so I don't see any reason to expect prices to fall dramatically," said Rand. "We're returning to a normal market and I think prices will remain relatively unchanged for the near future."

Prudential Rand Realty, founded in 1984, is the largest real estate brokerage in the Greater Hudson Valley with 21 offices in Westchester, Rockland, Orange and Sullivan counties, the company said. Based on market share, Rand is the top real estate company in Rockland, first in Orange and third in Westchester. The company has more than 700 sales associates, officials said.

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Advising Boards on Handling Secondhand Smoke Issues

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Some of the most intense combat occurring in modern times may not be that which has taken place on the battlefield, but rather in the ongoing conflicts that occur between shareholders, owners, and renters of apartments in multiple dwelling buildings, between themselves and/or with their respective cooperative boards of directors, landlords, or condominium boards of managers, over the infiltration of secondhand cigarette smoke into personal living spaces. However, like most wars, steps could have been taken to prevent the smoke and noise disputes that have occurred; steps that could have won the war without firing a shot. This article will discuss the current state of the law regarding secondhand smoke infiltration and how condominium and cooperative boards and landlords should attempt to deal with smoking issues in the future.

The law is still being developed respecting secondhand smoke. At present, there are very few reported cases, but given the amount of inferior new construction and renovations that has occurred over the past decade, it is likely there will be a significant increase of litigation over smoke issues in the near future. It should be noted, however, that the law applied to cooperative corporations and rental landlords differs in some respects from the law applied to condominiums.

There is no clear answer to the question of how much smoke infiltrating into a neighboring apartment will trigger potential liability. It is generally agreed, however, that "proof of a 'single occurrence' plainly will not suffice" and that the answer in each case is "necessarily fact sensitive."[1]

Warranty of Habitability

Cooperatives and Rental Buildings. Cooperative boards and landlords are subject to the statutory implied Warranty of Habitability contained in RPL 235-b(1) which governs all rental leases and all cooperative proprietary leases:

In every written or oral lease or rental agreement for residential purposes the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with the other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

Residential cooperative corporations and landlords of rental buildings are fully subject to the requirements of RPL 235-b and must protect their shareholders and tenants against any condition that unreasonably interferes with the ability of the shareholders and tenants to use their apartments for their intended residential purposes.

The cases of *Poyck v. Bryant*[2] and *Reinhard v. Connaught Tower Corporation*[3] have held that a landlord and a cooperative corporation (as landlord) can be held liable for breach of the RPL 235-b implied warranty of habitability, which applies to both ordinary rental leases and cooperative leases, for not preventing conditions that allow secondhand smoke to infiltrate from a common area and/or from a smoker resident's apartment to a neighboring resident's apartment. However, at present, there are no appellate rulings holding secondhand tobacco smoke subject to the RPL 235-b implied warranty of habitability.

In addition, under *Reinhard*, the corporation may be held liable (a) for breach of contract where secondhand smoke infiltration interferes with the peaceable possession and use of the apartment, and (b) for negligence where it had actual notice of the condition and failed to take any action to remediate the condition. *Reinhard* also holds that, despite a building's construction (which may facilitate the smoke infiltration from one apartment to another) being typical for the time in which it was built, that low standard will not be a defense to claims that the corporation was not also negligent for failing to take action to remediate the condition.

Moreover, although proprietary leases generally provide that the cooperative shall not be responsible for the nonobservance or violation of house rules by any other shareholder-tenant, cooperative boards, nevertheless, "must act for the benefit of the residents collectively."[4]

To the extent, therefore, that a board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the cooperative to possible suit for breach of the warranty of habitability, the board can be said to be acting contrary to the collective interests of all residents in breach of its fiduciary duty.[5] Shareholder-tenants aggrieved by a smoking neighbor may thus sue the board for failing to enforce the anti-smoking bylaw if, by failing to enforce the bylaw, the board has permitted a condition to exist that denies aggrieved shareholder-tenants peaceable possession and use of their apartments.

Condominiums. Not being subject to the warranty of habitability requirement of RPL 235-b, the condominium board's obligation is based on RPL 339-v(b)(i) which requires all condominium by-laws to include:

Such restrictions on and requirements *respecting the use and maintenance of the units* and the use of the common elements, not set forth in the declaration, *as are designed to prevent unreasonable interference with the use of their respective units* and of the common elements by the several unit owners. (Emphasis added).

As stated in *Ewen v. Maccherone*,[6] the only appellate court that has ruled on secondhand smoke issues:

In this regard, the board of managers of the subject condominium is specifically authorized to make determinations regarding the operation, care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners.

Condominium boards, like cooperative boards, "must act for the benefit of the residents collectively," and they likewise have a fiduciary duty to enforce, in a non-discriminatory fashion, their bylaws and rules among unit owners. To the extent, therefore, that a condominium board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the condominium to possible suit and recovery of damages by aggrieved unit owners, the board is acting contrary to the collective interests of all residents in breach of its fiduciary duty.

Under *Ewen*, in the event that the board fails to enforce a bylaw designed to limit the effects of secondhand smoke, or fails to prevent secondhand smoke from infiltrating into apartments from the common areas, or where a building-wide ventilation problem facilitates the circulation of the secondhand smoke, the offended unit owners' sole recourse against "unintentional" secondhand smoke infiltration (from a neighbor's apartment or from a common area) is against the condominium board.

Tools to Regulate Smoking

Most older proprietary leases, by-laws, and house rules do not prohibit smoking within the building or within individual apartments. However, authority to do so can be established through provisions of the proprietary lease signed by each shareholder of the cooperative and in provisions of the cooperative's by-laws and house rules. Nevertheless, changing the terms of existing proprietary leases and bylaws is not an easy task. Obtaining either a majority of shareholder votes cast or, when provided in the certificate of incorporation, a two-thirds vote of all voting shareholders,[7] is difficult to achieve.

Cooperative proprietary leases and rental leases generally provide that shareholder-tenants and rental tenants are obliged to comply with all laws affecting the occupancy and use of the property. Accordingly, cooperative boards and landlords may enforce smoking restrictions by reference to the New York City Air Pollution Control Code which, by virtue of such lease and bylaw provisions, is necessarily incorporated into their leases and by-laws.

NYC Administrative Code, Title 24, Chapter 1 (Air Pollution Control), Sub-Chapter 6, §24-141, provides as follows:

No person shall cause or permit the emission of air contaminant, including odorous air contaminant, or water vapor if the air contaminant or water vapor causes or may cause detriment to the health, safety, welfare or comfort of any person, or injury to plant and animal life....

This code provision expressly provides that "the prohibition of this section includes...contaminants" derived from "coal tar products manufacture," the kind of contaminants that are typically found within secondhand cigarette smoke. Such laws should provide enough ammunition to seek a court's intervention to regulate a smoking problem between residents. For cooperatives, in extreme cases, the business judgment rule permits an offending shareholder's cooperative tenancy to be terminated, if the proprietary lease contains a provision authorizing such termination (known as a "*Pullman*" clause), and if the termination is based on a board or shareholder's vote terminating the lease as a result of the shareholder-tenant's objectionable conduct and done in accordance with the procedures specified in the corporate documents.[8]

A condominium's authority to act on smoking problems derives from RPL 339-j of the Condominium Act, which requires each unit owner to "comply strictly with the by-laws and with the rules, regulations, and resolutions adopted pursuant thereto," and which empowers the condominium board to sue an offending unit owner for damages or injunctive relief, or both, or "in any case of flagrant or repeated violation by a unit owner," to require the offending unit owner to "give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions."[9]

Condominium by-laws also generally require that unit owners comply with all laws, regulations, zoning ordinances, and requirements of any governmental agency relating to any portion of the property. Therefore, condominium boards may also take action against smoking based on the New York City Air Pollution Control Code, without amendment of their bylaws, by levying a fine and foreclosing on a lien on the fine, if the bylaws otherwise permit.

However, while cooperatives may pursue a fairly quick eviction proceeding, condominiums must sue in state Supreme Court for injunctive relief and damages or foreclosure. As a result of the cost of litigation and the lack of any eviction-type leverage, such proceedings by condominiums can extend for several years without a satisfactory result.

Reducing Liability

To reduce their potential liability from secondhand smoke-related issues, condominium and cooperative boards and landlords of rental buildings can attempt to adopt rules and by-laws or lease terms that clearly address smoking issues. (Although changing the terms of a rent-stabilized lease, even at renewal time, is virtually always prohibited).

However, knowing the difficulty of this task, our firm has been using some unorthodox means to achieve the same goals. As cooperatives can reject an application for any reason that does not violate anti-discrimination laws, our clients have been adding an agreement to the application whereby the prospective tenant-shareholder signs that he/she agrees to not smoke in the apartment or interfere with another resident's privacy. These signed contracts can be used to enforce the building's "no smoking" rules. Many landlords have been using the newest Blumberg lease forms that prohibit smoking entirely within the apartment or that permit the tenant to be evicted for interfering "with the health, comfort, or safety of other occupants of the Building."[10]

Condominiums have less leverage to ban or regulate smoking, but many have been adding these no smoking agreements to their entrance applications. Unfortunately, in the event that a prospective owner refuses to sign the "no smoking" agreement, the condominium can only exercise its right of first refusal to purchase the selling unit owner's apartment or delay the waiver of its right of first refusal until the closing. However, as most condominiums are in no position to exercise their right of first refusal, a new purchaser who refuses to sign an anti-smoking agreement is likely to prevail if the condominium refuses to waive the right of first refusal.

Other peaceful, but less effective, means that boards and landlords may employ to ban or regulate smoking include (1) displaying "public notices" on building bulletin boards and/or in letters circulated to all apartment residents stating clearly where in the building smoking is permitted and where it is not permitted and what residents may do to alleviate the effects of smoking upon their neighbors; (2) giving periodic written notice to all residents of the building's policies, rules, and by-laws regarding the building smoking policy; and (3) upon receiving notice of violation of building smoking policies, sending letters directly to the offending resident restating the rules and demanding compliance.

Other non-litigation measures that have been successful in the past include holding meetings with the offenders and the alleged victims of secondhand smoke, sending letters with the threat of litigation, and reminding offenders that if the building prevails in litigation, the bylaws or the lease, as is true in most cases, contains a clause entitling the building to an award of its attorney fees. (For cooperatives and rentals, RPB §234 makes this right reciprocal for the tenant.)

Overseeing Repairs

Shoddily constructed buildings are one of the main causes of smoke infiltration, but so too are gut renovations of existing apartments. Boards and landlords should also be diligent in overseeing alterations and repairs, to ensure that unit owners, shareholders, and tenants comply with building codes when such work is done in their apartments. Care should be taken to ensure that gut renovations of apartments do not result in conditions that will allow secondhand smoke to travel through walls, floors, ceilings, or passageways.

Building alteration agreements customarily require that the scope of work and plans and specifications for any proposed work within an apartment be submitted to the board, for review by the building's engineer or architect, before the alteration is approved and work is permitted to start. In addition, residents seeking approval for the work are normally required to pay for the building's engineer to inspect and approve the planned alterations. This practice should be followed to ensure compliance with smoking abatement code requirements and any additional requirements imposed by the building.

Engineers are more important than lawyers when considering the various ways to abate noise, smoke, and other forms of nuisance. The engineer is in a position not only to discover potential defects in construction, but also to evaluate whether the proposed construction is lawfully permissible. The engineer and the alteration agreement go hand in hand. Requiring an inspection by an engineer as part of the alteration agreement is essential to enforcing the obligations set forth in the agreement. The alteration agreement should require that the building's engineer "sign-off" on the work after it is completed.

Conclusion

Battles over secondhand smoke are, besides noise disputes, the "hottest" problem affecting buildings at the present time. Hopefully, adoption by boards and landlords of the recommendations contained in this article will not only save buildings tons of money, but may also enable boards and landlords to achieve the peaceful resolution of these disputes when they arise.

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Endnotes:

1. *Upper East Lease Associates v. Cannon*, 30 Misc.3d 1213(A), 924 NYS2d 312 (District Court, Nassau Co., 2011); see also *East End Temple v. Silverman*, 199 AD2d 94, 606 NYS2d 56 (1st Dept. 1993).

2. 13 Misc.3d 699, 820 NYS2d 774 (N.Y. Civil Court, 2006).

3 2011 WL 6119800 (Trial Order) (Sup. Ct., New York County, 2011).

4. *Levandusky v. One Fifth Avenue*, 75 NY2d 530, At 538 (1990).

5. See *Board of Managers of the Fairways at North Hills Condominium v. Fairway at North Hills*, 193 AD2d 322, 603 NYS2d 867 (2d Dept. 1993); see also *Yuko Ito v. Suzuki*, 57 AD3d 205 (1st Dept. 2008).

6. 32 Misc.3d 12, 927 NYS2d 274 (App. Term, 1st Dept., 2011).

7. See BCL §614(b).

8. See, e.g., *40 West 67th Street v. Pullman*, 100 NY2d 147 (2003).

9. See *Ewen v. Maccherone*, Note 6 supra; see also *Board of Managers of Village House v. Frazier*, 81 AD2d 760, 439 NYS2d 360 (1st Dept. 1981) (Permanent injunction granted enjoining unit owner from leasing or otherwise permitting occupancy of his unit other than in strict conformity with the condominium's by-laws).

10. See, e.g., Blumberg Form 86: Sublease of a Cooperative Apartment in New York (drafted by the authors' firm and available at http://alblawfirm.com/index.cfm?pageid=63&itemid=1289) and Blumberg Form 102: Lease For a Rental of a Condominium Unit in New York (drafted by the authors' firm and available at http://alblawfirm.com/siteFiles/News/043344A29C80022899DF5A7E6C5B551B.pdf). Smoking within the apartment is banned in the cooperative sublease and banned within the unit in the condominium lease.

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RE: RESUME - RONALD A. SHER, ESQ.

Our Firm handles all phases of real estate law involving Condominiums, Cooperative Corporations and Homeowner Associations, inclusive of its representation of Boards of Directors and Managers.

The Firm presently represents numerous cooperatives, condominiums and homeowner associations, as retained counsel, reviewing their ongoing legal needs and governance concerns, review of By-Laws, House Rules and Articles of Incorporation/Declaration, as well as attending to any special litigation or legal issues, including some of the following: preparation and review of capital improvement contracts; mortgage refinancing or debt restructuring; alteration policy, laundry and/or storage facilities; tax certiorari petitions; landlord tenant proceedings; litigation involving a default by a shareholder/unit owner relative to the collection of arrears, improper subletting, unauthorized harboring of dogs, excessive noise complaints, unreasonable disturbances, smoking issues or objectionable conduct, prosecution of cases against contractors relative to construction claims; and foreclosure proceedings.

Moreover, we have litigated residential, condominium and cooperative foreclosures, as well as complex commercial matters and have lectured on the topics of Capital Improvement Projects, Condominium Collection Procedures, Representing Purchasers/Sellers in the Sale or Purchase of a Cooperative and Condominium; and Mortgage Foreclosures.

Furthermore, we have extensive experience relative to the negotiation and/or litigation and ultimate resolution of issues regarding a sponsor's or successor holder of unsold units compliance with the provisions of the offering plan, as well as its adherence to statutory mandates and the Rules and Regulations promulgated by the NYS Department of Law.

Over the past thirty six years, we have been retained by over 250 tenant associations in the Counties of Bronx, Brooklyn, New York, Putnam, Queens and Rockland and Westchester, as well as surrounding metropolitan areas. During this time we have obtained significant concessions from various sponsors, including but by no means limited to: reductions in mortgages placed upon the Corporation; sponsor financing for purchasing tenants; reductions in purchase prices of individual apartments; increased reserve funds; Board control from inception for purchasing tenants; repair of and/or improvement to the condition of buildings; and increased rights for senior citizens and non-purchasing tenants.

Our Firm has unique experience in real estate transactions including acquisition, development, litigation, syndication and closings, and has represented numerous sponsors relative to offering plans to convert and/or develop property. We feel that this experience is extremely beneficial in our representation of cooperatives and condominiums.

Additionally, our Firm is involved in all phases of bank representation involving residential mortgage and commercial loan closings, as well as foreclosure litigation. Furthermore, we serve as closing counsel for Wells Fargo Mortgage for residential closings and Webster Bank for commercial transactions.

As a point of information, we feel proud of the fact that we have been designated by Martindale - Hubbell Law Directory in the Bar Register of Pre-Eminent Lawyers, having achieved the highest rating of legal ability, "AV" since 1997. This rating signifies that both our legal abilities and professional ethics are of the highest standard. Please note that this rating is based upon an independent peer review and constitutes a real honor in the legal community since it represents an acknowledgment of the quality of work associated with our Firm.

Moreover, we were recently designated as a "Super Lawyer" for 2014 and 2015, in the *New York Times,* October 5, 2014; and noted in *New York Magazine*, December, 2013 and 2014 as one of "New York Area's Top Rated Lawyers". Please note, as a result of an independent survey by *The New York Cooperator*, we were previously named among the Top Ten most active law firms in the New York metropolitan area for the representation of cooperative corporations and condominiums.

Furthermore, we have lectured before the New York State Bar Association Real Property/Cooperative-Condominium Committee; as well as various bar associations. We were also appointed a member of various committees for the New York State Bar Association Real Property/Cooperative-Condominium Committee, including the Ombudsman Legislation Sub-Committee with respect to the recent rules promulgated by the New York State Attorney General and/or Federal Housing Finance Agency.

In addition, we have written articles concerning governance issues relative to cooperatives and condominiums, which have previously been published in the *Habitat Magazine and The Cooperator*, and New York Association of Residential Managers(NYARM)

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Bruce A. Cholst joined Rosen Livingston & Cholst LLP in June, 1989 as a senior litigation associate, and became a partner in January, 1996. He represents the firm's cooperative and condominium clients in complex sponsor defect and sponsor arrears litigation, shareholder controversies, commercial and residential non-payment actions, vendor claims, board election disputes, and governing document analysis. He has also negotiated and drafted commercial leases, management agreements, and handled several successful board election campaigns on behalf of both management and insurgent slates.

Mr. Cholst graduated from New York Law School in 1977. He clerked for two New York State Supreme Court Justices and worked at two other law firms prior to his current association.

Mr. Cholst currently serves on the New York City Bar Association Sub Committee on Cooperatives and Condominiums. He has also served on the Condominiums and Cooperatives (Liens Sub-Committee) of the New York State Bar Association, the Real Estate Committee of the New York County Lawyers Association (Cooperative and Condominium Subcommittee), the Association of Residential Boards Ltd. (Cost Control Committee), the Condominium/Cooperative Council of Long Island, and the Queens Borough President's Task Force on Cooperatives and Condominiums.

Mr. Cholst frequently lectures and writes on issues regarding cooperatives and condominiums for various community organizations and trade groups, and is regularly quoted in trade journals and in the *New York Times* Real Estate Section. He has authored a booklet *When to Litigate, When to Mediate: a Guide to Dispute Resolution for Co-op and Condo Boards* and co-authored an article published in the *New York Law Journal* titled "Overcoming Limitations of Condo Boards In Dealing With Unruly Residents." Mr. Cholst currently serves as a board member of his own Manhattan Cooperative.