

Veneruso, Curto, Schwartz & Curto, LLP

Co-op & Condo Newsletter

WINTER / SPRING 2013

We are pleased to present to our valued clients and associated real estate professionals our Winter/Spring 2013 Newsletter. We welcome any comments or suggestions that you may have. We hope you find the information helpful. Thank you!

SPECIAL INTEREST ARTICLES

REINING IN RENTALS



THE BATTLE BETWEEN SMOKERS AND NON-SMOKERS

WHAT IS A BOARD TO DO?



Reining In Rentals

Subletting, if left unchecked, can become a perennial problem for cooperatives with serious security, financial and quality of life side effects. The ability to regulate sublets is within the purview of the board of directors pursuant to the terms of most proprietary leases, some of which contain language strictly prohibiting subletting, and most of which permit subletting with the Board's consent. In the latter case, a cooperative is not free to prohibit subletting entirely, rather should adopt a policy that limits

subletting. It is important for cooperatives to periodically revisit their sublet policy, and if they don't have a policy currently in place, to establish one keeping in mind the considerations outlined below.

A typical proprietary lease prohibits subletting without the prior consent of the cooperative – and this is a good thing. Boards and shareholders should, and do, have legitimate concerns when it comes to subletting. The

most common concerns are the following:

- Financing concerns – many lenders refuse to approve individual unit or underlying mortgage financing/refinancing when the percentage of units in the building that are sublet exceeds approximately 20% inclusive of sponsor/investor-owned units.
 - Quality of Life – fear that
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The Battle Between Smokers and Non-Smokers

Is a person's home his or her "castle" – or is the health, comfort and safety of a person's neighbor more important than the sanctity of any "castle." Exposure to second-hand smoke, perhaps more than any other recent issue, has been on the front line of those being faced by cooperative and condominium boards. The main reason is the changing attitudes towards smoking and the recent smoke-free laws passed at the state and local level as a result of health-related studies. Over 36 states have some form of state and/or local laws in effect. In

response to an increasing number of complaints from non-smoking shareholders and unit owners, cooperative and condominium boards are introducing proprietary lease or by-law amendments that prohibit smoking completely, not just in common areas, but in individual units as well. In the face of this dispute, cooperative and condominium boards should be aware of, and keep in mind, a number of important points.

Powers of the Board and Applicable Law

According to New York law pertaining to cooperative buildings, the board of a co-

operative has the power to manage and operate the cooperative and, to that end, the board may adopt rules and regulations necessary to carry out the purposes of the cooperative, and to provide for the care, *cleanliness, safety, and the general good order* of the building. Moreover, the board owes its duty of loyalty to the cooperative; it must act for the benefit of the shareholders and residents collectively.

With respect to condominiums, unlike cooperatives, there is no landlord-tenant relationship and each unit

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The Battle Between Smokers And Non-Smokers

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Non-smoking shareholders and residents have brought actions against their neighbors and cooperative and condominium boards.

There are a number of steps that a cooperative can take in order to try to eliminate the problem altogether that can solve the problem and stop smoke originating in one unit from infiltrating other units and areas within the building.

owner holds the deed to his or her unit. Typically, a super-majority of the unit owners can amend the by-laws to include the imposition of a smoking ban or other restrictions.

Non-smoking shareholders and residents have brought actions against their neighbors and cooperative and condominium boards based on a number of legal grounds. The most common grounds for claims are nuisance, wrongful eviction, violation of the covenant of quiet enjoyment and the warranty of habitability, failure to maintain safe premises, disability discrimination, breach of covenants and restrictions of the apartment corporation, and even battery and trespass (very extreme cases). Actions can be brought against the smoking shareholder/resident, the board, as well as against the management company. The relevant case law continues to develop as this issue becomes increasingly common. It is therefore clear that, based upon court decisions thus far, a cause of action upon which relief can be granted does exist in the face of these complaints. Accordingly, boards must take reasonable steps to assist and address the legitimate complaints of occupants who wish to be free of the odor and adverse health impacts of second-hand smoke. [Responsive Action and Remedies](#)

There are a number of steps that a cooperative can take in order to try to eliminate the problem altogether or force mitigating measures to be taken that can solve the problem and stop smoke originating in one unit

from infiltrating other units and areas within the building.

1. Smoke-free Building. A very small number of multi-unit residential buildings have become "smoke-free." A number of years ago the board of a cooperative near Lincoln Center in New York City voted to ban smokers from purchasing apartments in the building. Although smoking shareholder/residents who resided in the building at the time of the vote could continue to smoke in their units, (there were "grandfathered") they could not sublet their units to people who would smoke in the unit, and no new shareholder/residents could smoke in any unit. Those that violate the new policy are subject to enforcement action pursuant to the terms of the proprietary lease.

On a going forward basis, the issue of smoking is addressed during the application process and prospective purchasers are asked direct questions about whether or not they smoke and/or would allow others to smoke in their apartments. Case law upholds this line of questioning as legal and legitimate given that smokers are not a protected class, smoking is not a disability, and that it is not an unreasonable restraint on alienation. Accordingly, a board would be free to reject prospective purchasers on this basis alone.

2. Ventilation System. Another method of mitigating smoke seepage is to adjust or restructure the ventilation systems within the building. This, however, can be

costly, especially in buildings with a system that winds through the entire building. In a building-wide or section-wide ventilation system, air filters designed to alleviate smoke can be installed near smoker's vents. In a unit-specific ventilation system, the air is usually brought in from outside and is then expelled outside. If the unit ventilation functions in this manner, smoke seepage is most likely caused by smoke-filled air floating up from the outside of one unit and into another unit. Air filters can also be installed in this type of ventilation system. Smoke may also seep from under the doors of smoker's units, and into the hallways, where it may then travel to and under the doors of non-smoking units. In this case, ventilation in the hallways may be modified to create more air pressure within the hallway. A higher air pressure will be able to force air from individual units, which would otherwise seep under the doors, to stay within each individual unit.

3. Other Methods. Management may want to consider installing door sweeps and weather stripping, as well as resetting molding and caulking, and sealing all holes and cracks in walls, floors, and ceilings, which may allow smoke to enter a neighboring unit. Also, management may want to have floors, walls, ceilings, and insulation inspected.

4. Administrative. Since most people are out of their homes during working hours, a board may consider permitting smoking in individual units only during work hours. A board may also consider forbidding smoking in common
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Reining In Rentals

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cooperatives with too many sublets will become defacto “rental” buildings filled with transients who care less about the condition of the building and cooperative property.

- **Security**—inability of cooperative to properly screen apartment residents and concern that apartments will become rooming houses for strangers with people constantly coming and going. This situation creates a sense of instability in the building.

- **Dispute Resolution**—the process for resolving controversies can become more complicated and cumbersome because of the additional number of parties involved.

Once these considerations are understood, a cooperative can then better design or revise its sublet policy. The first step is to review the proprietary lease to make sure the board has the authority to restrict subletting then, if so, consider the types of restrictions and conditions to implement, the terms of which will vary from cooperative to cooperative. Examples of the more common types of restrictions and conditions are the following:

- **Term** – when it comes to length, shorter terms may promote more transients, while longer terms tend to promote sublets. The typical term is one (1) year with the right to renew with the same subtenant for an additional year upon the prior written consent of the board.

- **Fees** – reasonable fees may be charged for sublets and are typically a percentage (usually 10%) of the maintenance. Other options include one-time charges, monthly charges, percentage of the rent, etc. The key is to make sure the fees are reasonable.

- **Limit on total number** – As an absolute outside limit, it is a good idea to incorporate a maximum number of sublets, including sponsor/investor owned units, so that the total number of non-owner occupied apartments is never more than 10 - 15% of the total number of units.

- **Application process** – create an application process that enables the cooperative to review the proposed subtenant. Many cooperatives require a full personal and financial review, similar to that of new purchase applications.

- **Standard of review** – Under what circumstances will a sublet be permitted? Will they be approved on a first-come first-serve basis? Will they only be approved based on an established and recognized hardship? These are the types of conditions that could be considered.

- **Ownership/Occupancy requirement** – require that shareholders own and occupy the unit for a minimum number of years (typically 2) before they are eligible to sublet.

As you can see, there are a number of restrictions and conditions that can be imposed in connection with regulating sublets.

Condominiums which typically do not require approval are governed by by-laws and the board typically maintains a right of first refusal, the procedure for which is outlined in the by-laws. Typically, the board can make some inquiries within reason, but not nearly to the extent as with cooperatives.

In conclusion, the issue as to how to best regulate sublets ultimately comes down to a form of “balancing act” between the requirements of the cooperative and the needs of shareholders ◀

The Battle Between Smokers And Non-Smokers

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areas and permitting smokers to smoke only in certain rooms in their apartments (ideally one with a vent and/or that would be least capable of transferring smoke to a neighboring apartment). A board could encourage or demand that smoking residents purchase and use only smokeless ashtrays or air smoke digesters. Also, although it may be a complicated task, a board may consider renting only a certain section of the building to smokers, and even consider asking smoking or non-smoking shareholders to transfer units so that the building has smoking and non-smoking sections. (This route, of course, would be best suited for buildings with ventilation systems specific to particular areas of the building).

When a board receives a second hand smoke complaint it should be alert and responsive given the fact that cooperatives and condominiums can be held legally accountable for failing to address this issue. If necessary, seek advice from a qualified professional to help determine the presence and establish remediation protocols. If a board is considering a building-wide ban, it may be advisable to first obtain a sense of shareholder/resident views by conducting a survey or holding a meeting. ◀

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