



Condominiums, Smoke-Free Policies and “Grandfathering” in Hawai’i

Introduction

Recent regulation of smoking has focused on eliminating exposure to secondhand smoke in work places and public places. While these efforts have a notably positive impact on public health, an even greater impact can occur when smoke-free policies are applied to housing because people generally spend more time in their homes than in any other location. Progress has been made in promoting smoke-free policies for multi-unit rental properties, but the adoption of policies for common interest communities, primarily condominiums, is lagging behind.

The ownership aspect of condominiums raises more complex legal issues than those that arise in apartment settings, where a landlord/tenant relationship exists. This fact sheet briefly discusses an important legal issue related to smoke-free condominium policies in Hawai’i – treatment of existing residents who smoke.

Legality of Smoke-Free Condominium Policies in Hawai’i

Smoke-free policies are legal for condominiums in Hawai’i. In March 2007, Representative Sylvia Luke of the Hawai’i Legislature requested an opinion from the Hawai’i Attorney General on “whether state or federal law prohibits a privately-owned complex or condominium from 1) renting to only non-smokers; and 2) adopting a smoke-free policy for the property, including individual units and lanais.”¹ The opinion from the Attorney General’s office reads as follows:

Accordingly, it is our opinion that state and federal law allows a privately-owned condominium to adopt a smoke-free policy for the property, including individual units and lanais, so long as such a policy is properly included in the property’s controlling documents or the condominium association has demonstrated that smoking has unreasonably interfered with other unit owners’ use and enjoyment of the property.²

¹ Letter from Shari Wong, Deputy Attorney General, Department of the Attorney General, State of Hawaii to the Honorable Sylvia Luke, Representative, 26th District, Twenty-Fourth Legislature, (March 28, 2007).

² *Id.*

Changing Use Restrictions

When buyers purchase a condominium unit, they receive a copy of the homeowners’ association’s governing documents, which usually include the declaration, bylaws, and rules and regulations. Language in the declaration or bylaws describes the procedures that must be followed to amend the bylaws or to change the rules and regulations to incorporate new use restrictions for the units. Hawai’i condominium law also establishes a minimum association membership voting requirement to amend the bylaws.³

New owners are thus put on notice, both by state law and their association governing documents, that the association has the authority to change use restrictions or rules and regulations that apply to condominium owners and residents as long as proper procedures are followed.⁴ Nevertheless, when adopting a new smoke-free policy for an existing condominium property in which some smokers reside, the homeowners’ association will need to carefully follow the process for rule-changes described in its governing documents. Particular care should be given to how the policy will impact current residents who smoke.

Is Grandfathering Required?

One way a smoke-free policy could impact current residents who smoke is to allow them to continue smoking in their homes for a period of time or under certain conditions. This concept is referred to as “grandfathering.” In discussing the legality of smoke-free policies for condominiums (see above), the Hawai’i Attorney General’s office refers to a Colorado case involving the adoption of a smoke-free policy for a condominium complex in which one unit contained residents who smoked. The Colorado court’s decision did not require that association to grandfather the occupants who were smokers. It decided that the residents were aware when they purchased their condominium that the policies could change and the association had followed all the required procedures for amending the governing documents.

In referencing this case, the Hawai’i Attorney General’s opinion on no-smoking policies does not disagree with the decision and does not create a “grandfathering” requirement for policies adopted in Hawai’i. At this point, the Attorney General’s opinion is the only authority on the topic in Hawai’i; the courts have not ruled on this issue.⁵

3 HAW. REV. STAT. § 514B-108 (2011).

4 Hawai’i Attorney General letter. *See also* Assoc. of Owners of Kukui Plaza v. Honolulu, 742 P.2d 974, 983 (Haw. 1987) (“The uniqueness of the condominium concept of ownership has caused the law to recognize that each unit owner must give up some degree of ‘freedom of choice he might otherwise enjoy in separate, privately owned properties.’”) (quoting Aquarian Foundation, Inc., v. Sholom House, Inc. 448 So.2d 1166,1168 (Fla. Dist. App. Ct. 1984)).

5 Attorney General’s opinions can be persuasive, but are not binding on a court presented with legal challenges related to the subject matter of the opinion.

Judicial Treatment of Policy Changes

Courts will generally defer to policy changes a common interest community homeowners’ association makes to its declaration or bylaws if the changes have been approved by the supermajority (67%) of homeowners required to amend these documents. Courts will not impose their judgment over that of the homeowners unless the policy or decision is illegal, against public policy or unconstitutional.⁶

However, if the policy is adopted as a simple change to the rules and regulations, which generally only requires approval by the majority of the homeowners’ association board, then the court may review the adopted policy for “reasonableness.”⁷ The meaning of “reasonableness” is not precise, but it generally results in a closer review of a rule change. A court may find that a newly-adopted smoke-free policy that prohibits smoking for individuals who have owned their unit for many years is legal, but “unreasonable,” and overturn the policy adopted by the association board.

Factors to Consider

A homeowners’ association should consider several factors when deciding on a no-smoking policy that will impact current residents who smoke:

- *Legal risks of continuing to allow smoking*
A homeowners’ association that continues to allow smoking may face legal challenges from non-smokers. Residents bothered by secondhand smoke may sue to require the association to enforce any “nuisance” provisions in the governing documents. Residents with severe health conditions that are affected by exposure to secondhand smoke may file requests for reasonable accommodations.
- *Purpose and benefits of smoke-free policy*
Allowing current residents to continue to smoke in their unit indefinitely delays the health benefits of adopting a smoke-free policy.
- *Enforcement issues*
Having units with smokers scattered among non-smoking units will make enforcement of the policy more difficult because identification of the source of the smoke will be harder to determine.
- *Strength of support for policy*
If a supermajority of association members is not interested in allowing grandfathering and instead supports a strong policy that prevents residents from smoking on the effective date of the policy without grandfathering in current smokers, then the policy may be adopted as a bylaw amendment. On the other hand, if a supermajority does not support a stronger policy or a grandfathering policy, an association can still go forward. In this circumstance it can adopt its chosen policy as a change to its rules or regulations rather than a change in its declaration or by-laws. While doing so is a completely valid and lawful exercise

⁶ Apple II Condominium Assoc. v. Worth Bank & Trust Co., 659 N.E.2d 93, 99 (Ill. App. Ct. 1995).

⁷ Hidden Harbour Estates v. Basso, 393 So.2d 637 (Fla. Dist. Ct. App. 1981).

of authority, as noted above, courts may give less deference to changes in rules and regulations than changes in declarations and by-laws.

Conclusion

Smoke-free policies are legal for condominiums in Hawai’i, including policies that cover individual units and lanais. As long as state condominium law and the homeowners’ association controlling documents are followed, smoke-free policies can be adopted for the entire complex and will be enforceable against all residents. Policies adopted by an amendment to the bylaws will be stronger against a legal challenge than policies adopted as a change to the rules and regulations.

Resources:

Fact Sheets:

- Smoke-Free Common Interest Communities: Legal Fact Sheet: http://publichealthlawcenter.org/sites/default/files/resources/phlc-condolegalsurvey-summer2010_0.pdf
- How to Make a Condo Complex Smokefree: <http://www.phlpnet.org/tobacco-control/products/how-make-condo-complex-smokefree>