

Property Rights
Is your home really
your castle?

*presented by
A. Richard Vial*

PROPERTY RIGHTS IS YOUR HOME REALLY YOUR CASTLE?

Most property owners believe that they have the right to do what they would like within their own unit or on their own property. However, if the person is a member of a Homeowners Association, this may not be true if their actions affect other association members.

Secondhand smoke that affects other association members may be considered a nuisance. Smoking is not a right if it affects other people.

- Many associations have clauses in their documents that prohibit noxious or offensive activities that adversely affect another's right to enjoy their unit or the common elements. If this is the case, the Board of Directors may be faced with repairing common elements to prevent smoke seepage, or prohibiting smoking in the common elements all together.

Odors that affect other association members may also be considered a nuisance.

- Again, many associations have a clause in their governing documents that prohibits noxious or offensive activities. Offensive odors that affect other members of the association may require action by the board to help to alleviate the odor.

Alcohol Abuse may create problems for an association if it results in disturbance to other owners or a threat to the life and safety of the condominium.

Mental incompetence due to mental illness or aging has resulted in associations balancing a moral obligation to attempt to care for the owner or find them help, the owner's privacy and property rights, and the effect of the owner's behavior on other association members.

Failure by the Board of Directors to address a conflict between property rights and the good of the association could result in a claim against the board for a failure to uphold the rules and regulations of the association.

- Some recent cases in other states have involved members of an Association bringing suit against the Association's Board of Directors because they failed to enforce the nuisance provisions when second-hand smoke, odors or other disturbances have affected them.
- When dealing with mental incompetence or mental illness, associations must use great care, as the Fair Housing Act requires the association to make reasonable accommodations for an owner with a disability before taking action to enforce the rules or regulations.

Smoking as a Nuisance

Although most of the smoking cases are landlord-tenant cases, the duties that a landlord owes to a tenant are similar to the duties that the Board of Directors owes to an association member to enforce the association's rules and regulations. In Clackamas, Oregon a jury held a landlord

liable of violating his duty to keep the apartments habitable when a non-smoking tenant was living above a smoking tenant, and suffering respiratory and nausea problems due to the second-hand smoke. The jury decision was unanimous.

In a Massachusetts case, a woman who suffered from a pulmonary disease won a temporary injunction against her landlord which prevented the landlord from renting the units below her to smokers.

In Los Angeles County, an owner of a condominium sought an injunction against the owners who lived below her because their smoking forced them to evacuate their home on a daily basis. The court issued a restraining order that stated that the smoking owner could not smoke in their garage any longer, as this was a serious disturbance to the owners living above them.

Odors as a Nuisance

Odors and other disturbances that affect others in the community may also fall under the nuisance provisions of an Association's governing documents.

In a local association, the Board of Directors has received complaints regarding strong and foul smelling odors coming from a neighbors unit. The neighbors have attempted to resolve the issue on their own but the problem continues. Without an interpretive resolution providing that foul odors are considered noxious or offensive activities, and therefore a violation of the associations governing documents, the association would likely have trouble enforcing this as a violation.

Alcohol Abuse

When alcohol abuse causes disturbances for an association, the association must find a balance between helping the individual, and protecting other owners in the association. While there are no specific cases reported on alcoholism and disturbances to other owners, the Board of Directors has a duty to enforce the provisions of the governing documents, and turning a blind eye on the situation may result in liability for the association.

Mental Incompetence and Mental Illness

In Illinois, the son of an association member was severely injured in a car crash and suffered brain damage. He often posed a disturbance to other owners in the condominium by yelling, swearing and threatening them. On other occasions he had become physically violent. The association attempted to fine the owners for the disturbances and the owners requested a meeting with the association to attempt to find a way to make an accommodation for the son. Instead of meeting with the family to discuss accommodations, the association filed a lien for the fines and the owners sued the association. The court stated that the association first had to determine if a reasonable accommodation would help to alleviate the disturbance, before fining the family and filing a lien. Since the association did not do so, the issue of whether the association attempted a reasonable accommodation was ordered to go to trial, and the association now faces potential liability under the Fair Housing Act.