Homeowners Able to Eliminate Smoking As A Nuisance

News Story
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A judge says a Golden condo complex can outlaw the smoke — or the smell of it — as a "nuisance."

A Golden couple can't smoke in the townhouse they own after a judge ruled last week that their condominium association can prohibit smoking in their four-unit building.

"This is my home, and I worked for it," Colleen Sauve said Wednesday. "I can't relax and have a cigarette in my own home. If I do, I'll get fined."

Sauve and her husband, Rodger, who are both smokers, filed suit in March after the Heritage Hills #1 Condominium Owners Association amended its bylaws to ban smoking. A judge recently ruled against them.

The association was responding to complaints from the Sauves' next-door neighbor, Penny Boyd, about smoke odor seeping into her unit.

Despite caulking, filters, insulation, painting and ventilation adjustments, the smoke smell continued to bother Boyd, according to court documents.

The smoke smell, Oeffler stated, "constitutes a nuisance." Under the condo declarations, she noted, "no nuisance shall be allowed... which is a source of annoyance to residents."

Smoking for the Sauves now means leaving home, whether it's jumping in their car and driving around the block, standing on the sidewalk or wandering across the street to a friend's home.

The Court Findings

Legal Discussion: In Colorado, the overwhelming weight of cases interpreting actions by Homeowners Associations to enforce covenants uphold the actions if the exercise of power was reasonable, made in good faith; and not arbitrary and capricious. *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361, 363 (Colo. 1969). It is also true that any use restriction must be strictly construed and clearly established. *Greenbrier-Cloverdale Homeowners Ass'n v. Baca*, 763 P.2d 1, 3 (Colo. App. 1988). Finally, a restrictive covenant that is clear on its face should be enforced as it is written. *Flaks v. Wichtman*, 260 P.2d 737 (Colo. 1953).

The Condominium Ownership Act, C.R.S. ¤ 38-33-101 *et seq.*, requires that bylaws and amendments be supplied at or before the closing of any condominium sale. C.R.S. ¤ 38-33106(2). In this case, each unit owner who testified confirmed that she was given a copy of the declaration at or before closing. However, the use restriction at issue on the individual condominium units and common elements was not in place when the Declaration was originally written. The restriction was not contained in the copy of the Declaration given to unit buyers. Instead, this restriction is an amendment to the original Declaration supported by three out of the four unit owners. Some courts do not give the same deference to amendments or rule making after the original declaration is in place. (For a review of this distinction see the California Supreme Court's discussion in *Lamden v. La Jolla Shores Condominium Homeowners Ass'n*, 980 P.2d 940, 949 (Cal. 1999)). However, courts have also recognized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts the risk that the power may be used in a way that benefits the commonality but harms the individual." *Id.* at 953.

This condominium association was specifically organized under the Colorado Condominium Ownership Act, ¤ 38-33-101 *et seq*. The court heard no argument about this particular common interest community and its election to be treated as such under the Common Interest Ownership Act for property taxation or other purposes. However, ¤ 38-33.3-217(4.5) leaves no doubt that the legislature anticipated the possibility that condominium declarations could be amended, changing unit usage restrictions if a sufficient majority of the unit owners agree.

The Property under discussion here is defined by Exhibit A to the Declaration. At trial, the parties agreed that Exhibit A is the printed copy of the plat mylar found at Plat book 39 Page 32. As a consequence, the Property includes the building housing the four units and land and buildings outside the condominium building. Common elements also include the buildings exterior shell, floors, ceilings, roof and the walls separating units together with any shared use wiring, plumbing, and ducting. Plat Map Plat Book 39 Page 32 Note 6.

Article XVII of the Declaration provides the mechanism for amendment to the Declaration. The article permits amendment with a 75% approval vote and recordation. If the amendment impacts an owner's proportionate share of the common elements appurtenant to each unit or owner's assessment obligation, a unanimous vote is needed for its passage. (At trial, plaintiffs raised the issue for the first time of the propriety of the technical procedure used to pass the amendment. Defendants objected. Since no such claim was ever incorporated in the plaintiffs' pleadings, the court did not hear further argument on that point.)

Plaintiffs contend that, with the exception of prohibiting violations of law in an individual unit, the Prohibitions section (Article VII, Section 7.4) applies only to prohibitions within the common areas. Thus the Declaration could be amended only to restrict usages or activities in those same common areas. However, when read as a whole, the section does not support plaintiffs' interpretation. Each line containing a prohibition in the section is tied to a specific term defined in Article 1 of the Declaration. The prohibitions are specifically applied to any unit, the common elements, the project or the property. The prohibition central to this controversy read as follows: "No nuisance shall be allowed upon the Property, nor shall any practice be allowed which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the Property by its residents." As already specified, the term "Property" includes the building housing the four individual condominium units.

The court then must consider whether seepage of second hand smoke or its smell constitutes a nuisance which is a source of annoyance or interferes with the peaceful possession of the property. If so, the court must additionally consider whether the remedy of banning all smoking on the Property was done reasonably and in good faith, and was not otherwise violative of any legal rights.

The term "nuisance" is not defined in the Declaration. Black's Law Dictionary (6th ed. 1990) defines "nuisance" as "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." *See State ex rel. Herman v. Cardon*, 530 P.2d 1115, 1118 n.1 (Ariz. App.1975). Also, "[t]hat which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him; e.g. smoke, odors, noise, or vibration." *Patton v. Westwood Country Club Co.*, 247 NE2d 761,763 (Ohio App. 1969). In this case, complaints were made about smoke or the smell of smoke migrating from Unit 2 into adjoining units at the very first homeowner's meeting. Despite plaintiffs' contentions that this action was taken simply to appease one tenant, testimony by several witnesses supports the fact that smoke smell seepage was a longstanding problem. The issue of whether there was actual smoke or simply a smoke smell is irrelevant. Testimony substantiated an almost constant smell of cigarette smoke which was the source of complaint by multiple tenants. Clearly, the smoke smell constitutes a nuisance under these circumstances.

Plaintiffs contend that the ban itself is an unreasonable reaction to the issue presented. Plaintiffs further argue that the ban was passed in an arbitrary and capricious manner after tempers were raised at a very volatile meeting. Clearly, the November 2005 homeowner's association meeting was extremely fractious. The testimony, however, does not in any way substantiate that the decision to make the units smoke free was undertaken in an arbitrary and capricious manner. The testimony was replete with various occupants' attempts to minimize or prevent the smoke smell. Ms. Boyd testified at length about her efforts to rid her home of the smoke smell. She undertook work herself and hired a number of contractors to complete work and even make structural changes. She spent thousands of dollars to stop the smoke and/or smoke smell infiltration. Testimony showed that an effort to reach a consensus with plaintiffs about only smoking outside the units was rebuffed. It is apparent that the shared airspace in the soffit area permits smoke or smoke smell to migrate. Thousands of dollars of contract work has not solved the problem. The smoking ban was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means. There can be no finding that the passage was arbitrary or capricious or done in bad faith.

Finally, the court considers whether the smoking ban violates any public policy or fundamental rights of any of the owners. Defendant asks the court to take judicial notice of laws recently passed in Colorado regarding cigarette smoking. Section 25-14-202, C.R.S., speaks to the concern of the legislature for protecting nonsmokers from environmental tobacco smoke in indoor areas. Section 25-14-202 also specifically states that the legislature wishes to limit any unwarranted intrusion into private spheres of conduct and choice. Plaintiffs argue that this ban impacts their ability to enjoy their private home. However, the migration of smoke and/or smoke smell in this setting is like extremely loud noise. Despite numerous efforts, it cannot be contained within a single unit. Finally, courts have not specifically extended the protections of the Fourteenth Amendment to a fundamental right to smoke. (See the court's lengthy discussion in *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10th Cir. 1987)). This is especially true here where plaintiffs' private activities are impacting so negatively on the remainder of the community that they choose to join.

The Ruling The court finds for the Defendant. The passage of the Amendment to the Declaration of Covenants, Conditions and Restrictions was proper, reasonable, made in good faith and not arbitrary and capricious. Plaintiffs have not established that the Amendment violates public policy or otherwise abrogates a constitutional right. Plaintiffs' requested relief is denied. Each party shall bear their own fees and costs.

SO ORDERED November 7, 2006.

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