

February 15, 2008

The Honorable Samuel I. "Sandy" Rosenberg  
101 Taylor House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate Rosenberg:

You have asked for advice relating to House Bill 686, "Condominiums - Rules and Regulations - Smoking." Specifically, you have asked whether current law permits a condominium board to adopt rules regulating smoking on the premises, including smoking in the units. You have also asked whether the Clean Indoor Air Act would preempt such rules. It is my view that a condominium board may adopt rules regulating smoking both in common elements and in condominium units unless the bylaws for a particular condominium limit or forbid the exercise of that power. It is also my view that the Clean Indoor Air Act does not preempt rules of this kind.

Real Property Article § 11-109(a) and (b) provide that the affairs of the condominium "shall be governed by a council of unit owners," but allow the delegation of that power to a board of directors. Section 11-109(d) provides that the council of unit owners has, "subject to any provision of this title, and except as provided in paragraph (22) of this subsection, the declaration, and bylaws" the power to "adopt and amend reasonable regulations," § 11-109(d)(2) and to "regulate the use, maintenance, repair, replacement, and modification of common elements," § 11-109(d)(12).

In *Dulaney Towers v. O'Brey*, 46 Md.App. 464 (1980), the Court of Special Appeals addressed a pet regulation that had been adopted by the board of directors of a condominium, and noted that such rules generally deal with "the use and occupancy by owners of units and common areas, patios and other exterior areas, parking, trash disposal, pets, etc.," and noted that they often prohibit conduct that could constitute a nuisance. *Id.* at 466. They held that rules could address conduct in condominium units as well as in the common elements, rejecting the suggestion that conduct in units could only be addressed with a bylaw. *Id.* at 468. They further held that the rules would be enforced if they were "reasonable, consistent with the law, and enacted in accordance with the bylaws." *Id.* at 466.

The Court of Appeals has also addressed condominium rules. While ultimately holding the rule at issue in *Ridgely Condo v. Smyrnioudis*, 343 Md. 357 (1996) invalid because it deprived seven unit owners of the full use of the common areas, the court cited with approval from a Florida case, *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla.App. 1975), where the Court stated:

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

*Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla.App. 1975) further held that while a condominium association was not at liberty to adopt "arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners," it could adopt rules that are "reasonable."

It is my view that a rule barring smoking in individual units would be reasonable, at least in cases where the smoke seeps out to the common areas or to other units. Thus, it meets the test set both in § 11-109(d)(2) and the case law. Moreover, it seems clear that such a rule would bear a relationship to the health of the residents of the condominium, both in the avoidance of secondhand smoke and by reducing the risk of fire. As a result, it is my view that current law permits condominium boards to adopt rules prohibiting smoking in condominium units, unless such a rule would be inconsistent with the bylaws for that condominium.

The Clean Indoor Air Act, passed by Chapters 501 and 502 of 2007 and codified, for the most part, at Health General Article, Title 24, Subtitle 5, provides that:

It is the intent of the General Assembly that the State protect the public and employees from involuntary exposure to environmental tobacco smoke in indoor areas open to the public, indoor places of employment and certain designated private areas.

HG § 24-502 and that:

The purpose of this subtitle is to preserve and improve the health, comfort, and environment of the people of the State by limiting exposure to environmental tobacco smoke.

HG § 24-503.

The Act prohibits smoking in most indoor places open to the public or in which people are employed, HG § 24-504, but the "subtitle does not apply to" private homes and residences or private vehicles and certain other places, HG § 24-505. This does not create a "right" to smoke in private homes and automobiles, but states only that this law does not prevent it. The Act specifies that "[n]othing in this subtitle shall be construed to preempt a county or municipal government from enacting and enforcing more stringent measures to reduce involuntary exposure to environmental

The Honorable Samuel I. "Sandy" Rosenberg  
February 15, 2008  
Page 3

tobacco smoke." HG § 24-510. Thus, it expressly states the intention to continue the lack of preemption of the field of smoking regulation found in *Fogle v. H&G Restaurant*, 337 Md. 441 (1995). Even had the State chosen to preempt local regulations, the smoking law has never been interpreted to prevent private landowners from regulating smoking on their own property, and there is nothing in the Clean Indoor Air Act that would indicate that this situation should change. Thus, it is my view that the Clean Indoor Air Act would not prevent a condominium board from regulating smoking in condominium units or anywhere else on the property.

Sincerely,

Kathryn M. Rowe  
Assistant Attorney General

KMR/kmr  
rosenberg122.wpd