

How to Propose a “No Smoking” Amendment to Your Co-op or Condo Association

By *Kenneth Jacobs*



Secondhand smoke has been deemed by the courts to create an automatic nuisance. Many co-op and condo boards have already passed regulations barring smoking within the common areas of the building (such as lobby and hallways). However, boards continue to have a hard time dealing with complaints about smoke escaping from individual units into hallways or infiltrating into other apartments.

Most house rules prohibit owners from producing “objectionable odors” or creating a nuisance. However, the association still has to identify the source of the smoke and determine whether it can prevent exfiltration by physical or mechanical means (such as installing weatherstripping or special filters, or locating and sealing small cavities and cracks at wall joins). Moreover, testing might reveal that the smoke escapes from the smoker’s unit due to specific features of the building’s ventilation system, or unexpected voids within the walls between units. In those cases, the cost of potentially expensive repairs may fall on the association rather than the person creating the nuisance.

As a result, a number of associations have tried to amend their governing documents to make their building completely “smoke-free” by prohibit smoking within units as well as in the common areas. To the surprise of the boards that propose the amendments, sometimes these efforts fail. These boards may have failed to appreciate how much preparation is needed to pass a “no-smoking” amendment, even though most owners object to smelling smoke.

Anticipate Owners’ questions, and Leave Yourself Enough Time to Answer them. Owners raise the same questions whenever a no-smoking amendment is proposed, no matter whether they smoke themselves. Boards need to address these questions long before any vote is taken.

1) Why is an amendment desirable? Discuss the complaints you’ve received and the problems you have encountered dealing with them on a case-by-case basis. Explain the potential costs to the association if the building’s HVAC system needs to be revamped. You might cite to studies from ASHRAE (the professional association of HVAC engineers) showing that modern buildings simply cannot be sealed to prevent smoke exfiltration due to the materials used in construction and their interconnected mechanical systems. You might even circulate the government and medical studies linking secondhand smoke to cancer. (Graphic reminders are persuasive.)

2) Is a smoking ban legal? You need to reassure owners that they’re not violating the legal rights of smokers. My firm has procured an injunction (a legal directive by the court) barring an owner from violating an amendment to the condo association’s by-laws that prohibited smoking within units. Courts in other states have also enforced similar rules. Fundamentally, New York courts

have agreed that the proprietary lease of a co-op and the by-laws of a condo association are contracts between owners. These contracts can be changed by a vote of the owners, even to the extent of restricting particular types of behavior within units that could adversely affect other owners. (For example, most buildings have rules barring music being played late at night in order to protect other residents.) Based on that reasoning, smoking bans adopted by the owners would be legal.

3) Why is an amendment needed? Why can’t the board simply ban all smoking? No one has tested a board-imposed ban in court, but most commentators agree that to minimize the risk of legal challenge, the ban should be imposed as an amendment to the co-op lease or condo by-laws, not by board regulation. An owner vote also reassures the board of widespread owner support if the board has to enforce the amendment.

Consider the Organizational Issues, and Prepare to Extend the Period to Vote. Amendments to the lease or by-laws usually require a “Yes” vote from at least 66-2/3% of all owners. Because the board needs a high absolute percentage of all owners to approve (not just a percentage of owners attending a meeting), a failure to vote is the same as a “No” vote. Therefore, it is vital for all owners to participate in the vote.

Suppose 75% of owners must approve an amendment and only 65% attend a meeting to vote on the issue. Can the meeting be extended to procure additional votes? What if the meeting was an annual meeting and quorum requirements had been satisfied for the election of directors but not for voting on the amendment?

What if 80% of members attended the meeting, and the vote was 72% in favor with 8% against? Now a quorum has been reached. Can the meeting still be adjourned or “continued” to a later date for the purpose of obtaining additional votes from members? If the board wants to maximize its chances to pass the amendment, it should check the by-laws in advance and know how to extend the voting period if necessary.

Conclusion. We have found that no-smoking amendments have usually been rejected not because owners’ don’t agree, but because the board has failed to prepare properly for the vote by not giving owners sufficient time to participate or by not providing sufficient information to address their concerns. With proper planning, we are confident that your building can also go “smoke-free.”

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