



# Where there's smoke, there's ire

By Pamela Dittmer McKuen, Special to the Tribune  
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**C**hristine Athanasoulis lived in her Lansing condominium, Country Club Condominiums II, for three years when she first smelled cigarette smoke in her unit. She soon learned that the new owner below her smokes.

Athanasoulis, who is highly allergic, began to awaken each morning with a sore throat and headache. After a few weeks, in January 2004, she visited her downstairs neighbor. She explained the problem, cited the association's nuisance clause and asked her to contain the smoke.

"She looked at me like I was out of my mind," she said.

Athanasoulis complained to the board and manager. They moved a pipe and applied some caulk. When the smoke continued to waft, her attorney sent letters demanding remedial action.

"I don't want any smoke in my house day or night, and the board's response is 'learn to live with it,'" she said.

In many community associations, smoking has become a contentious issue. It's most prevalent when units are stacked or served by central heating and ventilation systems, but side-by-side town homes are not immune. And emotions run high when smokers who perceive their rights as threatened meet up with non-smokers who feel assaulted.

"Everybody seems to think, 'It's my property, I can do what I want,'" said Athanasoulis. "The problem is, your smoke doesn't stay in your unit. It travels."

"We have residents asking us again and again to please find a way" to get rid of the smoke, said property manager Rosemarie Wert of Community Specialists in Chicago.

Associations across the country are dealing with the issue with varying success. Some have banned smoking in or near common areas, including sun decks and swimming pools, and sometimes exclusive-use areas such as garages and balconies. (Chicago's Clean Indoor Air Ordinance, effective Jan. 16, covers common areas of city apartments and condominiums.) Others have levied fines on smokers, provided smoking rooms or ducked the disputes.

**"Normally, we tell people the first and easiest step is to ask the smoker to use a smoke-eater ashtray or other filtering device, which are fairly effective," said attorney David Sugar of Arnstein & Lehr in Chicago. "If the smoke is still there, my recommendation is for the unit owner to file a formal complaint with the board and the board conduct a violation hearing."**

The president of a River North condominium association, Jeffrey Silverman, said he has mixed feelings about legislating smokers.

"While we don't view what people do behind closed doors in their apartments as anything in our purview, if noxious smells and odors get into the hallway and other apartments, it becomes a problem," he said.

When cigarette butts routinely were found in a stairwell, his association posted signs and placed reminders under unit doors. It didn't work. Then a reward was offered to anyone who turned in the smoker. The smoking stopped.

"My whole goal is to get voluntary compliance," Silverman said. "If you do it right, people see the light."

Few, if any, associations have banned smoking in privately owned units. It could be done, most attorneys agree, by amending the governing documents. That, however, usually requires approval by a supermajority of owners. It's a tall order.

"For the first condos that go through the process, it's arguably difficult," said John Banzhaf III, executive director of the nonprofit Action on Smoking and Health and a professor of public interest law at George Washington University, both in Washington, D.C. "It's always hard to be first. After that, people will see how well it works out and that encourages others. Then people begin to expect it."

Four years ago after a fatal smoking-related fire, the 100 West End Avenue Cooperative in New York City banned future buyers from smoking in their units. Current smokers were grandfathered. The decision created such publicity that the board reversed itself, said the cooperative's attorney, Stuart Saft, of Wolf Haldenstein Adler Freeman & Herz in Manhattan.

In Chicago, the 100 East Huron Street Condominium Association proposed new rules last fall authorizing the board to require smokers to seal their units, run air purifiers and confine smoking to rooms that do not abut a complainant's unit.

Kathy Posner, a smoker who lives in that building, strongly objects. Armed with summaries of court cases in which non-smokers lost, she presented them to the board. No further action has been taken. If it is, she will file suit, she said.

"I own this condo and it's not against the law for me to smoke at home," she said. "If my smoke is bothering other unit owners, then they can put air purifiers in their own units. It's not my problem."

Wert, whose associations are responding with filters and sealants, doubts they can get the votes to pass further prohibitions, she said.

Another argument against smoking bans is that they will hurt resale prices. Emily Sachs Wong of Koenig & Strey GMAC Real Estate in Chicago isn't so sure.

Comparing non-smoking buildings to those with no-dog policies, she said, "Many of them have had problems in reselling. It's not that buyers want to have dogs, but they worry about resale to people who do. Any time you narrow the parameters, you're ultimately looking at a smaller pool of buyers."

Conversely, she believes there is a niche market for nonsmoking buildings.

"Even if a board believes it has the necessary power or requisite votes to create covenants and restrict owners' ability to smoke in their units, enforcement is a whole other game," said Posner's attorney, Brian Troglia, of Stahl Cowen Crowley in Chicago. "The only way for the association to accomplish what it wants to accomplish is to file a lawsuit. Then it's an economic question: Does the association want to spend thousands of dollars on legal fees when it could clearly lose?"

Lawsuits are always a gamble. Non-smokers can claim nuisance, loss of quiet enjoyment or perhaps violation of the Americans with Disabilities Act, but they have to prove it. The verdicts have been mixed. Almost all have come from lower-level courts, which may be persuasive in other jurisdictions but don't set precedents.

"We don't win every one," said Banzhaf. "But the old idea of what you did in your own home is sacrosanct is gone."

Esther Schiller, executive director of the nonprofit Smokefree Air For Everyone in Granada Hills, Calif., doesn't encourage affected nonsmokers to take legal action.

"The cost will be prohibitive and chances are you're not going to win," she said. "I believe moving is the only option if the board will do nothing."

Her approach is to educate boards and owners about the dangers of second-hand smoke in hopes of achieving voluntary restrictions. "We have to let people know the seriousness of breathing tobacco smoke on a daily basis, even in small amounts," she said.

Not much is happening on the legislative front, either. California assemblyman Joe Nation (D-6th) introduced a bill in 2003 that would, with certain exceptions, prohibit smoking in multifamily housing units. The bill died in committee because of implementation questions, and Nation is soon retiring.

Far simpler would be to for developers to create smoke-free associations in the first place. They're on the way.

"If developers marketed and sold and documented their projects as nonsmoking buildings and if purchasers are aware of this from the onset, the association's ability to enforce nonsmoking restrictions is without question more persuasive," said Troglia.

"Another good solution is if a condominium has different buildings to have some of the buildings nonsmoking and some of them where smoking is permitted," Schiller said.

In Chicago, at least two new smoking-restricted condo projects are in the works this year. Wood Dale-based Developmore hopes to test the market with a small building near the University of Illinois at Chicago and Chicago-based Greektown Partners LLC is planning a two-tower, ecologically friendly development in the West Loop that will be partially smoke free.

But until smoke-free condos are common, options are few and the debate rages on. Industry watchers on both sides are seeking direction and relief.

**"The only way I see [a significant court verdict] happening is for an advocacy group getting involved and being prepared to fund the litigation," Sugar said. "The typical unit owner is not going to crusade and spend a lot of money litigating that issue. It would be easier and cheaper to move out of the building."**

Moving is out of the question for Athanasoulis, whose health problems continue. Meanwhile, she's running air purifiers, sleeping in her living room and waiting. "If [a lawsuit] is the only recourse to save my home, I'll do it," she said.

"It's just a matter of time before we get something from a court," Saft said. "It would just be nice if we could deal with it on our own."