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## Strata Corporations

### Steps that Strata Corporations Can Take to Address Second-Hand Smoke

#### Duty to Act

When strata councils or property managers receive complaints about second-hand smoke causing a significant interference to residents in a condo complex, they are often reluctant to take action because the behaviour of smoking is not specifically addressed in their bylaws, and thus they assume the behaviour is not prohibited. But they would be wrong to assume that they have no authority or responsibility to address these complaints.

Virtually all strata corporations in BC have bylaws that prohibit behaviours that create a nuisance or hazard to another person, or that unreasonably interferes with the rights of other persons to use and enjoy their premises. Section 3(1) of the Schedule of Standard Bylaws states:

An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that:

- causes a nuisance or hazard to another person,
- causes unreasonable noise,
- unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

This bylaw can be used to address a variety of situations, and smoking would fall under this bylaw, whether the strata corporation has a specific non-smoking bylaw in place or not.

Strata corporations should be aware that a complaint about an unreasonable disturbance is not just an issue that must be addressed between neighbours. Section 26 of the *Strata Property Act* requires that a strata corporation enforce the bylaws. The corporation has a duty to exercise their powers and perform the duties of a corporation, including enforcing their bylaws. An owner could sue the strata corporation for making an unfair decision by failing to enforce its bylaws against a smoker. Further, courts might be sympathetic to owners who are compelled to enforce the bylaw themselves if the corporation doesn't act. (See our legal opinion on the website).

#### Investigate Complaints

Once the strata council or property manager receives a complaint of second-hand smoke:

##### Investigate the complaint

Obtain information concerning the nature and extent of the problem. Ask the complainant to provide you with documentation of the source of the problem, severity, frequency, duration, impact of the smoke, as well as steps taken to date to mitigate the impact. The more information you collect, the easier it will be to resolve the problem. See the section above for Strata Owners: Do the groundwork.

##### Determine if the interference is a nuisance

The challenge for strata councils or property managers is to determine whether the complaint about smoke infiltration is considered a legitimate 'nuisance' within the meaning of the law. According to the Strata Property Act bylaws, the nuisance must be unreasonably interfering with the use and enjoyment of the premises.

Based on case law in BC, the Courts have found that a number of factors will impact this decision, including:

- The Courts in BC have adopted an objective test for nuisance, meaning that it's not whether the complaining resident considers the smoke as a substantial discomfort or inconvenience, but whether the average person would take the same view. (See website strata case law summaries– Popoff v. Krafczyk [1990] B.C. J. No. 1935)

- Another BC Court found that where the nuisance complaint involves residents living in a condo complex, additional factors must be considered when determining whether a nuisance is an actionable case. The Court found that in communal living complexes, residents are required to exhibit more cooperation and respect for others to ensure that all residents can enjoy their home to the fullest extent. (See website strata case law summaries – BC Supreme Court, *The Owners, Strata Plan NW 87 v Karamanian* [1989] B.C.J. No. 6729)

While it may be challenging to determine whether the interference is in fact unreasonable, there is sufficient case law to show that a strata corporation can obtain relief from the Court to stop behaviours such as smoking, where there is evidence that it is causing a nuisance to other residents of the complex. As such, the strata corporation has grounds and a duty to act.

## Consider Negotiated Solutions

If the strata corporation or property manager determines that the interference can be considered a nuisance, it is important to try to reach a solution that would minimize the impact of the behaviour on the neighbouring residents:

- Consider possible remedies that could minimize the smoke transfer, such as:
  - Weather-stripping around doors
  - Checking that the building ventilation system is working efficiently
  - Insulating air spaces around plumbing pipes and covering electrical outlets
- If the smoke cannot be eliminated, work with the affected parties to attempt a negotiated solution. You might consider having the smoking resident visit the complainant's home to get a sense of how serious and pervasive the problem is. This might induce the smoking neighbour to help find a solution.
- Consider solutions such as creating a designated smoking area outside on the building property, with a cover if necessary. The Council could also consider offering incentives such as free nicotine replacement therapy to help the smoking neighbour deal with times when smoking outside is not possible (such as evenings or weather conditions).
- If this is an escalating problem, the council could consider taking a leadership role by creating a non-smoking bylaw to ban smoking on the entire property, including individual strata units and outdoor balconies. (See *Creating a Non-Smoking Bylaw* section of the website).

## Implement Mandatory Bylaw Enforcement Procedures

If there is evidence that the smoking is causing a nuisance for other residents in the complex, and a compromised solution cannot be reached, the strata corporation has a duty to initiate bylaw enforcement procedures. Prior to obtaining a remedy for non-compliance of the smoking bylaw however, the strata corporation must first follow mandatory procedures for enforcing bylaws under Section 135 of the Strata Property Act.

This means that strata corporations must notify the smoking tenant of the complaint received against him or her, provide the particulars of the complaint and a reasonable time to answer each complaint, including the option of a hearing at a strata council meeting. It is important to emphasize that strata corporations must be especially vigilant about following the proper procedures as outlined under the Act. The Courts will not generally enforce the fines levied or other remedies initiated if the procedures have not been precisely followed. (See legal opinion)

Once the strata corporation has complied with the proper enforcement procedures, and determines that there has been a breach of the bylaws, it can then choose from a variety of remedies, including:

- Fines
- Remedy the contravention
- Deny access to a recreational facility
- Evict (final resort)

If a council is faced with enforcing a nuisance bylaw because of smoking, they may want to consider seeking legal advice before proceeding. For more information on bylaw enforcement procedures, see the *Enforcing a No-Smoking Bylaw* section of the website.