

Smoke-Free Apartments: Is It Time for a New Amenity in Multi-Unit Housing?



By Heidi Poppe

Over the last decade, there has been a significant change in Californian's expectations regarding exposure to environmental tobacco smoke. As a result of state laws limiting smoking, people are no longer exposed to tobacco smoke where they work, eat, or shop.

In response to patron demand, hotels and motels have been providing separate smoking and non-smoking accommodations for years with great success. Health advocates are now beginning the "second generation" of policy work in this area – smoke-free college campuses, parks, and apartment buildings.

Recent surveys indicate that over 80 percent of renters in California prefer housing with smoke-free areas, but residents are reluctant to ask for non-smoking areas because policy or law does not require it. In response to member inquiries and to enable the industry to address this resident demand voluntarily, CAA has made available an Addendum for Tobacco Smoke Free Areas (see sidebar). According to the Smoke Free Apartment Registry, more than 200 building owners in Los Angeles have successfully adopted smoke-free policies.

In April, a conference was convened in Los Angeles to answer the questions and concerns of local government officials, affordable and market rate multi-unit housing developers, landlords, tenants, health advocates, and others about smoke-free housing. The focus of the conference was to raise awareness of the demand for, and feasibility of, smoke-free housing, to confirm the legality of lease provisions and local ordinances regulating smoking in residential rental properties, and to educate housing industry members about how to make such policies work, i.e., managing the transition to non-smoking properties or units. Conference participants shared their experience managing smoke-free apartments, and health advocates encouraged both the housing industry and local governments to address the issue.

Rising Demand for Smoke-Free Units

Eighty-four percent of Californians do not smoke. A new statewide telephone survey commissioned by the American Lung Association of California's Center for Tobacco Policy and Organizing of 602 California apartment residents throughout California found that:

- 69% favored regulations requiring all apartment buildings to offer non-smoking sections, where all the apartments, patios, and balconies in that section were non-smoking.
- 39% would prefer to live in a building where smoking is not allowed anywhere.
- 46% experience secondhand smoke drifting into their own apartment.
- 61% favor a law requiring landlords to inform new tenants if there is a smoker in the apartment next door to the unit they are about to rent.
- 70% of survey respondents believed a tenant should be evicted for repeated violations of smoking prohibitions in a lease (43% definitely should / 27% probably should). Interestingly, this also means 30% of respondents did not think a tenant should be evicted for repeated violations of the lease.

It Is Legal to Prohibit Smoking in Residential Rental Property?

Yes, both governmental restrictions and private restrictions in a lease are legal.



There is no law that prohibits an owner from imposing restrictions. This type of policy is no different than restrictions on noise, quiet hours, pool use, pets, and guests – these are all house rules that protect residents and the owner's property. There is no constitutional "right to smoke." As long as it is a property owner's policy to prohibit smoking, rather than to refuse to rent to smokers, there should be no claim of unlawful arbitrary discrimination.

According to a 1999 Legislative Counsel Opinion, "Discrimination against smokers by landlords serves legitimate business interests by potentially reducing the risk of fire damage and, in turn, reducing insurance and maintenance costs." In addition, civil rights suits in the employment context suggest that smoking is not a disability, and smokers not a protected class. By contrast, a 'resident with an unusual sensitivity to tobacco smoke (*i.e.*, *asthma*, *hypothyroid*, *allergies*, *etc.*) would be considered disabled under both California and federal law. Such a resident would be entitled to a reasonable accommodation which could include limitations on smoking in common areas and nearby units from which smoke may drift, allowing the tenant to relocate to another unit or letting them out of the lease.

The key liability risk in offering smoke-free housing is that residents will argue that you have made a promise of higher air quality. This concern can be minimized by language in the rental agreement (*see sidebar*).

In Common Areas, Smoking May Already Be Prohibited By State Law

Although tenants view the apartment building and their individual units as their home, larger complexes are also the workplace of the building managers and maintenance personnel. California's Labor Code Section 6404.5 bars smoking in any enclosed work area. Although "private residences" are exempt from this law, according to California's Legislative Counsel, common areas of apartment or condominium buildings or complexes such as lobbies, hallways, laundry rooms, stairways, elevators and recreation rooms remain subject to the Labor Code's smoking prohibition if the areas are enclosed and are places of employment.

The smoking prohibition also applies to residences licensed as family daycare homes during the hours of operation as a family daycare home and in those areas where children are present. The Labor Code requires the posting of 'no smoking' signs and requires employers to ask smokers to stop smoking in any enclosed work area. Local health departments and other local law enforcement agencies enforce the Labor Code. Penalties start at \$100 for a first violation and increase thereafter.

CAA ADDENDUM FOR TOBACCO SMOKE-FREE AREAS NOW AVAILABLE

In response to member demand, CAA has created Form 34.0, an addendum to the rental/lease agreement that notifies Residents about the areas of the property where smoking of tobacco products is prohibited. Pursuant to this form, smoking may be prohibited on the entire property or in selected interior and/or exterior areas. This form also addresses responsibilities and liability with respect to smoking on the property.

Forms are available online at:
www.caanet.org/asp-bin/getfile.asp?ID=4335
or can be obtained directly from a local CAA association in your community. 

Benefits of Providing Smoke-Free Housing

In addition to the obvious health and safety benefits of reducing exposure to secondhand smoke and decreasing fire danger, smoke-free housing can be a good business decision. The statistics quoted above indicate that smoke-free units are a desired amenity that can make it easier to market a unit. In addition, maintenance and turnover costs are significantly lower for non-smoking units. Refurbishing the apartment of a heavy smoker for the next resident requires more time and effort in repainting (*particularly surface preparation*). In many instances, carpeting, draperies, and upholstered furniture must be replaced rather than cleaned.

Many owners have also found fire insurance to be less expensive due to the lower risk present on non-smoking properties. According to the State Fire Marshall, in one year, cigarettes were found to have caused over 1,400 fires in California homes, apartment, and mobile homes with an estimated \$18 million loss in property and contents. According to the National Fire Protection Association, smoking materials (*i.e.*, *cigarettes and cigars, etc.*) are twice as likely to be the cause of fires in apartment buildings compared with one and two family homes and mobile homes. Lastly, voluntarily providing an amenity desired by many residents may diminish the perceived need for government regulation in this area.

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Expect to See Local Ordinances

After legislation at the statewide level to restrict smoking in apartment buildings failed in 2002 (AB 210), efforts to pass local laws addressing the issue have increased. The Technical Assistance Legal Center (TALC), funded by the California Department of Health Services, provides California communities with free technical assistance on tobacco control policy issues. TALC's web site www.phi.org/talc/ contains a host of information about local laws that address smoking, the legality of smoking prohibitions, and background regarding litigation over drifting secondhand smoke.

In addition to serving as an information resource, TALC has developed a sample local ordinance that addresses smoking in multifamily housing. The sample ordinance contains a wide variety of provisions – allowing localities to pick and choose among various approaches – ranging from provisions for clear authority for owners to limit or prohibit smoking and notification requirements about non-smoking areas, to mandates that prohibit smoking in certain areas, in a certain percent of units, etc. Other provisions include a “grandfather” clause for existing smokers when owners convert a complex over time, a declaration that secondhand smoke is a nuisance, and options for private enforcement both by tenants and the public. At this writing, the City of Oxnard is considering a local ordinance. More information about existing local ordinances is available at www.caanet.org/default.asp?id=1605

How to Implement a Smoke-free or Partially Smoke-free Apartment Community

A wise first step before imposing smoking prohibitions is to survey residents to determine whether they are interested in living in a smoke-free apartment building or smoke free section of the

building. This also provides an opportunity to communicate to residents the health and safety and business reasons for a non-smoking policy – secondhand smoke, fire dangers, maintenance, cleaning and redecorating costs, insurance costs and consumer demand for smoke-free units. The easiest time to set a new policy is when a unit or building is vacant. After conducting a survey of residents at a sister property, Con Am Management recently designated four buildings (26 units) in Coventry Park in Roseville as non-smoking. Coventry Park is a brand new garden style community still under construction. According to Marie Fournier of Con Am “the feedback [to the survey] was favorable so this is why we decided to venture into this area with Coventry. We also felt it is an untapped customer base.”

The next step for occupied units is to set a time frame for making changes; owners may wish to grandfather in existing tenants – making their units non-smoking after residents move out, rather than changing the terms of tenancy. As with any other change in terms of tenancy, residents must be provided proper notice – 30 days if the tenancy is month to month and at the time of renewal if the tenant is on a lease. An owner who prohibits smoking in common areas, where it was previously permitted – for example at poolside – also requires proper notice. In addition to adding the smoking prohibition to rental agreements, non-smoking signs should be posted on the property, and the no smoking policy advertised as part of the owner's marketing strategy.

CAA will continue to follow this issue as it progresses. We will provide updates regarding local ordinances and will provide information about members' who elect to set non-smoking policies. PM

SMOKE FREE APARTMENT REGISTRY

The Smoke Free Apartment Registry (www.smokefreeapartments.org) is one way to market your property to residents who are looking for smoke-free housing. The registry provides free listings of apartment buildings, which are totally or partially smoke-free. Funded by the Tobacco Tax Health Protection Act of 1988 (Proposition 99), the Registry began in 1995 in response to tenants' complaints about drifting smoke. The Registry's goal is to accommodate both smokers and non-smokers in multi-family housing so that all residents are able to use and enjoy their homes. The Registry web site also includes information about the legality of smoke-free multi-unit housing. Most owners listed in the Registry have adopted smoke-free policies for their buildings; some even include outdoor common areas. However, buildings of 12 or more units that offer one half of the units adjacent to each other as non-smoking (including patios or balconies) can be included in the Registry. The Registry also accepts listings of single-family homes. PM

For questions, comments, or to share your story, please contact Heidi Poppe, CAA's Research Counsel. She can be reached at (800) 967-4222, ext. 6425 or hpoppe@caanet.org.