

How to Adopt No Smoking Policies for Your Association

When California's Second District Court of Appeal ruled in January, 2009, that a resident can sue the owners of an apartment building for allowing smoking in the outdoor common areas of the property, (on the grounds that tobacco smoke can be considered a public nuisance), it attracted the attention of condominium owners and board members. Will this decision create a new liability for Home Owner Associations (HOA's)?

Most Californians have little tolerance for exposure to secondhand tobacco smoke. According to a survey commissioned by the Center for Tobacco Policy and Organizing, a project of the American Lung Association in California, ninety-seven percent of California voters believe that secondhand smoke is harmful to those who inhale it. Also, fewer than 12% of California adults are still smoking. Among seniors and the more affluent and educated, the percentage is even lower.

When people are protected from tobacco smoke where they work and in public places inside and outside, they find it unacceptable to be breathing tobacco smoke where they live, or to even purchase a unit that has been smoked in. In fact, smoke-free condominium buildings may have higher resale value. In an article in the **New York Times**, real estate agents agreed that as the number of public places in which a person can smoke has diminished, so has the number of buyers who are even willing to consider the property of a person who has smoked in the unit. (NY Times, "Real Estate & Secondhand Smoke: On Tobacco Road, It's a Tougher Sell," Feb. 8, 2004.)

So perhaps the time has come for HOA's and their boards to consider regulating tobacco smoke on their premises. Although the use of tobacco products is legal, Homeowners' Associations do have the legal authority to regulate smoking anywhere on the property, including the units. According to the Technical Assistance Legal Center (TALC), a project of Public Health Law & Policy, there is no "right to smoke," especially in multi-unit housing, where others can be affected. In addition, the HOA has a responsibility to provide reasonable accommodations to persons who have chronic illnesses who are being exposed to a neighbor's tobacco smoke. Because of the recent decision of the California Air Resources Board to identify tobacco smoke as a Toxic Air Contaminant, for which there is no safe level of exposure, it is now appropriate to regard involuntary exposure to tobacco smoke as a nuisance. Residents who are experiencing a neighbor's tobacco smoke drifting into their unit are in effect being denied the use and enjoyment of their property.

An HOA Board can unilaterally adopt a rule banning smoking in indoor and outdoor common areas such as lobbies, elevators, mailrooms, the swimming pool and the walkways. However, banning smoking in units and exclusive use common areas such as balconies and patios may require a change in the CC & R's.

Because changing the CC & R's will require a vote of the HOA members, it is helpful to conduct a survey in order to determine whether and where owners are willing to restrict smoking. A sample survey is available on the website of the Smokefree Apartment House

Registry (www.smokefreeapartments.org) and can be edited to suit a particular building or complex. The Registry also provides model language for changes to the CC & R's.

Condominium owners may be hesitant to require no smoking in units and on balconies and patios based on not wanting to tell other owners what they can do in their own home. In that case, it may be easier to add secondhand smoke to the nuisance provision of the CC & R's. However, according to TALC, "amending the nuisance clause will not create much (if any) immediate change unless the board or an owner takes action to enforce it."

TALC also suggests that "delaying implementation-especially for new restrictions on smoking inside units-will give residents time to adjust. A reasonable delay could be anywhere from 60 to 180 days from when the change is approved."

Changing CC & R's takes time and money. Time and effort is required for voting, and funds will be needed for an attorney to draft the new language and file the documents with the appropriate government agency. Again, according to TALC, "Changing your condo's policies can be a slow and political process. Getting the votes needed to support a change takes diplomacy and patience." But it is a worthwhile endeavor to improve the health of your community, prevent tobacco-related fires, and strengthen property values. Staff of the Smokefree Apartment House Registry are available to assist you.

By Esther Schiller, Director, Smokefree Apartment House Registry with information from Public Health Law and Policy's publication: "How to Make a Condo Complex Smoke-Free" <http://www.phlpnet.org/tobacco-control/products/how-make-condo-complex-smokefree>