

# **Choices: A Discussion for Landlords about Rent Control and Secondhand Smoke**

## **Background**

Staff of the Smokefree Apartment House Registry get a lot of phone calls from landlords who are concerned about drifting tobacco smoke in their rent-controlled apartment buildings. Frequently, the person who is smoking is a tenant who has lived in the building for 15 to 20 years. And the person who is complaining is a new tenant, perhaps with a lease. The person who is smoking may be below or above the new tenant or in a unit adjacent to the new tenant.

### **What can a landlord do?**

Our organization has conducted more than a thousand surveys of apartment residents in several different cities in Los Angeles County including West Hollywood, Santa Monica and Los Angeles, all cities with rent control. The surveys indicate that more than 80% of apartment residents would like to live in a non-smoking environment. Also, more than one third of these residents state they are breathing a neighbor's tobacco smoke in their own unit.

Yet our surveys also show that very few of these tenants complain to management about the smoke. Sometimes they move. Sometimes they just put up with it. Some tenants and landlords believe that there is a legal right to smoke. However, there is no constitutional right to smoke and many laws have been passed by cities, states and even nations restricting where people can smoke. Some cities have begun to pass laws restricting smoking in apartment units.

The California Department of Public Health has also been conducting surveys and has run TV spots about the danger of being exposed to tobacco smoke in an apartment or condominium. So it is likely that the number of people complaining, because they are breathing their neighbor's tobacco smoke, will increase.

According to Attorney David Wasserman in an article in the San Francisco Apartment Magazine in July 2006, ("Secondhand Smoke Now a Nuisance"), "California law requires landlords to protect tenants from foreseeable harm." The California Air Resources Board identified tobacco smoke as a Toxic Air Contaminant with no safe level of exposure in January, 2006. According to the Air Resources Board, it is as dangerous as the worst industrial air pollutants and can cause cancer, heart disease, asthma, and death. So, when tenants are complaining that they are being continually exposed to a neighbor's tobacco smoke, the smoke should be acknowledged to be a foreseeable harm.

### **Landlords in cities with rent control may believe they are caught between the rent control law and this new scientific information. Here are some possible options they might explore.**

**1.**Talk to the tenant who is smoking. Explain that new scientific information indicates that exposure to tobacco smoke can make residents of neighboring units sick, and even cause death. Explain that tobacco smoke, because it is a gas, can move from one unit into another unit in a variety of ways. It can move through the plumbing, through the electrical system; it can move through microscopic cracks in walls and floors.

Scientists have actually been able to show how tobacco smoke can move through an apartment building from one unit to another. It can also enter an apartment from someone smoking outside. In addition, the secondhand smoke in the unit will attach to walls, floors, rugs, window coverings, furniture, and even clothing. This is called third hand smoke, and it will outgas back into the room, even when no one is smoking. Scientists who have begun to study third hand smoke are stating that it becomes more dangerous than secondhand smoke over time.

**The smell of smoke in the unit is a constant reminder to the addicted tenant of the need to smoke still another cigarette or cigar.**

**1a. Offer the tenant who is smoking an upgrade for their unit.** Offer to clean and paint the walls and to replace the rug if the tenant will **first** sign an agreement not to smoke in the unit or on the balcony or patio. If there is space away from the building where the tenant could smoke, that could be a designated smoking area, or the tenant could take a walk away from the building in order to smoke. On bad weather days, tenants can smoke in their cars as long as they are parked a sufficient distance from the building.

Explain to all of the building's residents the reason for the renovation of the unit. Ask residents to report to you if the tenant violates the signed agreement after the apartment has been renovated. Smoking in the renovated unit would be a violation of the new contractual agreement.

**2. Or a landlord could give the tenant who is smoking a 3-day notice to perform (stop smoking in the unit or on the balcony or patio) or quit.** The reason: the smoke is intruding into other tenants' units and is causing a serious health hazard which can be described as a nuisance. (Tobacco smoke is not in the same category as unpleasant cooking odors. Unpleasant cooking odors don't cause cancer or heart disease.) However, it is not likely that a person who has been smoking for many years will stop smoking in their unit within 3 days. That could mean the landlord would need to attempt to evict the tenant who is continuing to smoke because he/she is causing a nuisance. **It has been suggested by an attorney that if multiple tenants put their complaints about the smoke in writing, it might be possible to secure an eviction. However, eviction should be regarded as a last resort.**

It is helpful if tenants who have complained about the smoke come to court with the landlord and be prepared to testify about the smoke. Tenants who are complaining should keep a careful "diary" of the dates and times the smoke enters their unit and how it affects them and/or their family. That diary should be brought to court as evidence for the judge. ***There is no guarantee that the judge will allow an eviction.***

**3. The landlord could send out a notice to all of the tenants in the building that as of a certain date, smoking will no longer be permitted in the units, balconies and patios and within 25 to 50 feet of the building.** The reason for this change in house rules is that tobacco smoke is a serious health hazard. If the tenant continues to smoke in his or her unit or on his or her balcony or patio, that could be a cause for eviction for creating a nuisance. But again, tenants who are suffering from tobacco smoke infiltration would need to come to court with the landlord. **This action by the landlord could also be considered a violation of the rent control law.**

**3a.** As part of the requirement of no smoking in the building, a landlord could establish a smoking-permitted area outside. The area should be at least 25 feet away from all designated non-smoking areas. If space permits, the landlord could set up a table, chairs, umbrella and ash urn to make the location more convenient for people who are smoking.

4. If the landlord utilizes #3 above, the tenant who is smoking may file a complaint with the local Rent Stabilization or Rent Control Board. The tenant who is smoking may state that he/she has lost an amenity (smoking) and demand a reduction in rent. The landlord's response could be, "I am responsible for the safety of my residents. Drifting tobacco smoke is a health hazard. I never offered smoking as an amenity as part of the housing that I provide. Smoking is an activity that the tenant has undertaken himself/herself and it has been shown to be unsafe to other residents." **Again, changing the conditions of tenancy for the tenant who smokes would be considered a violation of the Rent Control law.**

5. **If none of these appear to be reasonable solutions to a difficult problem, the landlord could offer the tenant who is complaining a release from their lease.** However, the landlord should disclose to prospective tenants for that same unit that there is a user of tobacco products in a nearby unit. People with infants and small children, the elderly, people with chronic illnesses, need that kind of information in order to protect themselves from future harm, and disclosure is also a protection to the landlord.

6. **In a building regulated by rent control, a landlord can require that new tenants do not smoke in units, balconies, patios and common areas. This requirement should be written into the lease agreement.**

*This fact sheet was created by the Smokefree Apartment House Registry (818-363-4220) to provide general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised in this fact sheet. Prepared November, 2008. Edited April, 2016.*