Options for Condo Owners Suffering from Drifting Secondhand Smoke

June 2009

If you own a condo and a neighbor’s secondhand smoke is entering your unit, you may be concerned about the implications for your health. Breathing secondhand smoke can be dangerous, and when it enters your home, it becomes difficult to escape.

This fact sheet outlines six options for condo owners who want to avoid unwanted exposure to secondhand smoke at home. It focuses on options for those whose complex is not quite ready to restrict smoking on the property. If you are renting a condo, there are options available to your unit’s owner, along with some steps you can take. If you rent an apartment, see our other fact sheets on smokefree rental housing at www.changelabsolutions.org/tobacco-control.

Option #1
Work out a solution with your neighbor

Before you take any other action, it is often best to try and reach an agreement with your smoking neighbor. The neighbor could agree to limit where s/he smokes, for example, or the times when s/he smokes. This type of agreement is not legally binding but may solve the problem.

While you could work out an agreement informally on your own, there are mediation and dispute resolution programs that can be helpful for disputes like this. Nolo (www.nolo.com) has free information on mediation that explains what it is and how it works (select “Search Entire Site” from the drop-down menu and search for the term “Mediation FAQ”). We have a listing of alternative dispute resolution services categorized by county, available at www.changelabsolutions.org/tobacco-control.

Option #2
Use the nuisance provision in the CC&Rs

Nearly all CC&Rs contain a provision saying that certain conditions or activities will be considered a “nuisance” and not permitted by the homeowners’ association (HOA). Some CC&Rs’ nuisance provisions list specific examples, such as loud noise at certain hours or foul odors, while others merely make a general statement that any activity or thing affecting residents’ health or welfare will not be permitted.

If secondhand smoke is drifting into your unit and your neighbor won’t agree to work out an informal solution, you may ask the HOA to enforce the nuisance provision against the neighbor. You should submit your
request in writing and keep a copy for yourself. Because the drifting smoke may violate the nuisance provision of the CC&Rs, the condo board of directors (“board”) has a duty to investigate the complaint and make a good faith determination of whether or not the secondhand smoke constitutes a nuisance. To be deemed a nuisance, the secondhand smoke must cause an unreasonable disturbance to your use of your property.

When making your request to the HOA, you must follow the procedures set out by your complex’s governing documents. If the board members agree with you that the drifting secondhand smoke is substantial enough to constitute a nuisance, they must take appropriate action to stop the nuisance. A simple phone call or warning letter from the board may cure the problem.

It is important to note that the person making the complaint cannot dictate how to resolve the nuisance; the smoking neighbor, in conjunction with the HOA, will make that decision. The HOA doesn’t have the power to order anyone to quit smoking altogether. But it might, for instance, be able to limit smoking to outdoors and away from the building or only indoors at certain times of day when the neighbors are not home; or it could require the unit be altered by sealing the air gaps or installing a HEPA filter.

If your neighbor ignores the board’s initial warning, it may require the smoking owner to appear at a board hearing and impose a fine or suspend privileges for each nuisance violation. If the fines do not solve the problem, the HOA can seek a court order to stop the owner from creating a nuisance.

Option #3
Sue the HOA
The HOA may not agree that the amount of secondhand smoke in your apartment violates the nuisance provision and decline to get involved, or it may make only a token effort to enforce the nuisance provision. If you believe your HOA has failed to fulfill its duty to enforce any part of the CC&Rs, including the nuisance provision, you can take the HOA to court to compel it to do so. A condo owner in Massachusetts recently filed suit against her HOA after she formally requested that they act because drifting secondhand smoke was causing a “hazardous condition” in her unit, and the HOA did nothing to stop it. The HOA asked the court to dismiss the suit, but the court refused.

Option #4
Sue the neighbor
If going to the board doesn’t solve the problem, another option is to bring a lawsuit against the neighbor who allows the secondhand smoke to drift into your unit. (Even if the smoker is a guest or tenant, the lawsuit must be brought against the condo owner, because, in a condo, owners are responsible for ensuring that guests and tenants follow all HOA rules and restrictions.) You should only consider a lawsuit against your neighbor after you have exhausted all other options.

Filing a lawsuit should be your last resort. Lawsuits are time consuming, expensive, and contentious, and the outcome is always uncertain. In addition, some CC&Rs contain an “attorneys’ fees provision.” If a homeowner sues the HOA and loses—whether in superior court or small claims court—this provision would allow the HOA to charge that homeowner for the costs the HOA incurred defending itself against the lawsuit. Before suing you should consult an attorney to learn whether your CC&Rs contain such a provision.
If you decide to proceed with a lawsuit against your neighbor, you might base it on one or more of the following grounds, depending on your situation:

**Violating the CC&Rs**
All owners agree to abide by the restrictions contained in the CC&Rs when they purchase a condo. In essence, because CC&Rs include a clause that owners will not create a nuisance, your lawsuit would claim the neighbor broke this contract by permitting secondhand smoke to enter your unit.\(^{13}\)

**Nuisance**
Some California cities have a law expressly stating that drifting secondhand smoke constitutes a nuisance.\(^{14}\) If there is no such law in your city, you must rely on state law, which does not identify secondhand smoke as a nuisance.\(^{15}\) To win in court under California law, you would have to show that the secondhand smoke drifting into your apartment amounts to a “substantial” and “unreasonable” interference with the use and enjoyment of your property.\(^{16}\)

Other possible causes of action in a lawsuit against your neighbor include *trespass, negligence, harassment, battery,* or *intentional infliction of emotional distress.* Each of these legal claims is explained in the glossary of the publication “Legal Options for Tenants Suffering from Secondhand Smoke,” available at [www.changelabsolutions.org/tobacco-control/products/legal-options-tenants](http://www.changelabsolutions.org/tobacco-control/products/legal-options-tenants).\(^{17}\)

If you decide to sue your neighbor, you’ll need to decide whether to go to regular court or small claims court—a decision that depends on what you want to get out of your lawsuit and whether you can hire an attorney. There are pros and cons to using each court.

**Small claims court**
In small claims court, neither side is allowed to have attorneys, so you would represent yourself, which would save you money. Although small claims court can’t directly order anyone to stop smoking inside the unit, it does have an option called a “conditional judgment,” which allows a losing defendant to choose between paying a fine or taking an action. For example, you could ask the judge to issue an order that says the smoker either has to pay you a certain amount of money or stop smoking in the unit. If the smoker chooses to pay the money, however, small claims court is unable to prevent him or her from continuing to smoke in the unit.

Small claims court does have the power to order the neighbor to reimburse you for any money you’ve spent or lost due to the smoking, known as *damages*—for instance, out-of-pocket expenses for items such as air filters or medical costs, or lost income if you missed work because the smoke made you sick. (In small claims court, the maximum amount of a claim is $7,500.)

To learn more about bringing a suit in small claims court, a booklet from the California Department of Consumer Affairs is a great resource ([www.dca.ca.gov/publications/small_claims](http://www.dca.ca.gov/publications/small_claims)), as well as the information at the California Courts website ([www.courtinfo.ca.gov/selfhelp/smallclaims](http://www.courtinfo.ca.gov/selfhelp/smallclaims)).

**Superior Court**
If you file your case in Superior Court, you may ask the court to issue an injunction—an order to stop doing something, in this case smoking—and you also can seek money damages if you wish. If you decide to go this route, you’ll probably need to hire a lawyer, which can become expensive. The California Legal & Dispute Resolution Services for Tenants & Smokers Injured by Tobacco ([available at www.changelabsolutions.org/tobacco-control](http://www.changelabsolutions.org/tobacco-control)) includes a listing of lawyer referral services in each county.
Option #5
Make a “reasonable accommodation” request

California and federal disability laws have a process for requesting a “reasonable accommodation” to ensure that people with disabilities have an equal opportunity to access and enjoy their homes. To qualify for protection under these laws, you must have a medical condition that meets the legal definition of a disability—a mental or physical condition that “limits” (under California law) or “substantially limits” (under federal law) a major life activity such as breathing, walking, or performing manual tasks. Courts have generally recognized that individuals are disabled when they have severe asthma, allergies, chemical sensitivities, or other respiratory conditions that limit their ability to breathe. Whether you are legally considered disabled will depend on the particular facts of your situation.

Under federal and state disability laws, HOAs must modify their rules, practices, or services when necessary to allow a person with a disability equal use and enjoyment of his or her premises. The HOA also must permit a disabled person to make reasonable modifications to a unit—installing exhaust fans or air filters, for instance—if needed to fully use and enjoy the premises. Such modifications would be at the owner’s expense; the HOA is not obligated to pay for them. Whether a modification to a policy or unit is “reasonable” depends on the specific facts of your situation. For a resident with a disability affected by secondhand smoke, a reasonable accommodation might be requesting that the HOA amend the CC&Rs or Rules to declare the common areas nonsmoking or to prohibit smoking in all units. (For more on how to accomplish this, see “How to Make a Condo Complex Smokefree,” a fact sheet available at www.changelabsolutions.org/tobacco-control.)

To make a reasonable accommodation request, send a letter to the HOA explaining that you have a disability worsened by secondhand smoke and stating the specific accommodation you would like the HOA to make. You should also include a doctor’s note documenting the limitations caused by your disability and a written record of when you have experienced the drifting smoke. If you are renting a condo, you may send this letter to the owner of the condo or to the HOA.

If your request for a reasonable accommodation is rejected by the HOA (or by the unit’s owner, if you rent), you have one year to file a complaint with the California Department of Fair Employment and Housing or the U.S. Department of Housing and Urban Development. You have two years to file a lawsuit after the accommodation request has been denied.

Option #6
Work to pass a local law

If you are unable to alleviate the problem using any of these options, you may want to work with your city or county to help pass a local law (also called an ordinance) banning smoking in common areas or units of multi-unit housing, including condominiums. Belmont, California, passed the first ordinance of this kind in 2007, and many other cities have since followed its example with their own smokefree housing laws. A city or county also can pass an ordinance declaring that unwanted secondhand smoke will be considered a nuisance, allowing individuals to act to abate the nuisance. Several cities in California have done just that. If you are interested in pursuing this option, contact us to find out who in your area is working on this issue.

No matter which option you choose, it is important to consider your health. Breathing secondhand smoke that is drifting into your unit is not only annoying, it can cause serious health consequences. You can protect yourself and your family by taking action to prevent secondhand smoke from entering your home.

ChangeLab Solutions formerly existed under the name Public Health Law & Policy (PHLP). Any references to PHLP in this publication should now be understood to refer to ChangeLab Solutions. ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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A condominium or condo is housing that is subject to a Declaration of Covenants, Conditions, and Restrictions (CC&Rs) and managed by a homeowners’ association (HOA). In addition to traditional condominium complexes, the use of the word “condo” in this document may also include co-ops, subdivisions, common interest developments, and planned unit developments.


“CC&Rs” stands for Declaration of Covenants, Conditions, and Restrictions and describes restrictions on the use of property in the complex—for example, the number or ages of people permitted to live in a unit. Because the CC&Rs are legally binding restrictions that automatically apply to the buyer, they must be disclosed at the time of sale and officially recorded, like a deed. Cal. Civ. Code § 1353(a) (West 2008).

The board consists of homeowners in the condo complex elected by the HOA to enforce or enact regulations controlling the use of property within the complex.

A good faith determination usually involves the board investigating the complaint, taking into account the circumstances surrounding the complaint, and making a reasonable determination without being in collusion with any of the parties. If the HOA investigates and decides not to discipline or refuses to sue the owner of the unit the smoke is coming from, the HOA must “reasonably believe its refusal to commence the action is good business judgment in the best interest of the corporation.” Beehan v. Lido Isle Community Assn., 70 Cal. App. 3d 858, 865 (1977).

Governing Documents apply to all of the owners in the condominium complex and may include the CC&Rs, Rules, Bylaws, Condominium Plan, or Articles of Incorporation.

Altering the unit is the least desirable approach because, although it may help reduce some of the drifting smoke, it rarely eliminates it entirely. If the amount of secondhand smoke is substantially reduced, even if some smoke is still drifting into your unit, the board may feel that the nuisance has been abated, and the HOA may be unwilling to force the neighbor to take additional measures beyond what was already done.

Although the HOA has the option to go to court to enforce the nuisance provision against an owner, it is relatively unlikely that they would exercise it. This is because initiating a lawsuit is very expensive for the entire HOA, and it would only benefit those owners who are experiencing the secondhand smoke in their units.

Posey v. Leavitt, 229 Cal. App. 3d 1236, 1246-47 (4th Dist. 1991). You may also be entitled to monetary damages. Id.


In a lawsuit regarding drifting tobacco smoke in a condo, the result is especially unpredictable because there have been very few prior cases for you to rely upon.

If your condo’s CC&Rs expressly state that secondhand smoke drifting into another unit automatically constitutes a nuisance, then you won’t have to present evidence to prove that the secondhand smoke entering your unit is substantial enough to constitute a nuisance. For information about how to change your CC&Rs to add secondhand smoke to the nuisance provision, see the TALC publication “How to Make a Condo Complex Smokefree.” Available at: www.phlpnet.org.


California law more generally defines “nuisance” as “[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of the property, so as to interfere with the comfortable enjoyment of life or property.” Cal. Civ. Code § 3479. A California court held that a neighbor’s secondhand smoke can constitute a nuisance if it is a “substantial and unreasonable” invasion “comparable to the reeking manure piles” left unattended by a dairy (the subject of another case). Babbitt v. Superior Court, WL 1068817, at *3 (Cal. App. 4th Dist. 2004). A recent California court case determined that even outdoor secondhand smoke can constitute a nuisance. Birke v. Oakwood Worldwide, 169 Cal. App. 4th 1540 (2009).

This is a fairly high threshold to meet and may even require that you present evidence showing what the state of scientific research is regarding amounts of SHS that are “unreasonable” and/or air sample data demonstrating how much secondhand smoke is in the air in your apartment, which is not always easy to obtain.

While it may be helpful to know a little about the legal claims you might make, you do not need to learn the names or specific details. If you take your case to trial court, your lawyer will evaluate which claims are best suited to your situation. If you choose to bring a case in small claims court—where lawyers are not allowed—you will not be expected to know the legal specifics of these claims.

Before filing a suit, you may need to participate in a process to resolve the dispute without going to court. Cal. Civ. Code § 1369.520.

See Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq.; California Fair Employment and Housing Act (FEHA), Cal. Gov’t Code § 12900 et seq. See also Unruh Civil Rights Act, Cal. Civil Code § 54.1(b)(1–2).


22. See County of Fresno v. Fair Employment & Hous. Comm’n, 226 Cal. App. 3d 1541, 1550 (1991) (“To most people tobacco smoke is merely irritating, distasteful or discomforting. Someone suffering from a respiratory disorder and whose ability to breathe is severely limited by tobacco smoke is, nevertheless, physically handicapped within the meaning of the [Fair Employment and Housing] Act.”). See also Vickers v. Veterans Admin., 549 F. Supp. 88, 86-87 (W.D. Wash. 1982) where the court found the employee to be a “handicapped person” because the employee was unusually sensitive to tobacco smoke. Note: the legal definition of “handicapped” is equivalent to the legal definition of “disabled.” See Bragdon v. Abbott, 524 U.S. 624, 631 (1998). Holdings in employment discrimination cases may be used as guidance in housing cases. Pfaff v. U.S. Dept. of Hous. and Urban Dev., 88 F.3d 739, 745 n.1 (9th Cir. 1996).

23. California law provides residents with disabilities the same protections as federal law, though California’s protections cover more people. See Fair Housing Act (42 U.S.C. § 3601 et seq.), Fair Employment and Housing Act (Cal. Gov’t Code §12900 et seq.) and the Unruh Civil Rights Act (Cal. Civ. Code § 51 et seq.).


25. Rules contain additional restrictions on the use of property and typically expand upon areas not fully defined in the CC&Rs—for example, whether private barbecue grills are permitted on balconies or what types of vehicles may park in the parking lot.


27. See footnote 14 for a list of those cities.
How to Make a Condo Complex Smokefree

July 2008

Although California laws protect people from secondhand smoke at work and in restaurants, shops, and other places, many residents still find themselves exposed to unwanted secondhand smoke in their homes—especially if they live in multi-unit buildings. In condos, where each unit is owned separately, addressing this problem can be especially challenging. This fact sheet answers common questions about how condo owners can make their entire complex, including individual units, smokefree.

Why make a condo complex smokefree?

In addition to the health-related harm drifting tobacco smoke can cause, it can increase condo maintenance costs (for sealing and repainting walls and cabinets, replacing carpets, and cleaning the ventilation system) and decrease a unit’s resale value. Trying to block smoke from drifting between units by using air filters, installing an exhaust fan, or sealing crevices is usually ineffective. Prohibiting smoking altogether is the only sure way to avoid unwanted exposure to this toxic substance.

Who can create a smokefree policy?

Most people assume that when they buy a home, they will be the ones making decisions about their property. If you live in a condo, however, much of the decision-making power lies with the homeowners’ association (HOA). The HOA, either through its elected board of directors (“the board”) or by a vote of the full membership, has the power to enforce or enact regulations controlling the use of property within the complex.

Owning a unit automatically means you are a member of the HOA, and any member of the HOA can begin the process of making a complex smokefree. Many board members are unaware that condos may legally prohibit smoking in part or all of the complex, so it is often up to the HOA members to educate the board. This fact sheet can help.

What areas can be designated smokefree?

Smoking can be restricted on the entire property or only in certain areas.

Indoor common areas: Lobbies, elevators, stairwells, laundry facilities, mailrooms, and other indoor common areas can be designated smokefree by the HOA. Smoking is already prohibited in such areas in many condo complexes, through HOA restrictions or state or local law.
Outdoor common areas:
Courtyards, pools, playgrounds, sandboxes, gardens, pathways, parking areas, and other common areas can also be designated smokefree. In addition to protecting residents from exposure to unwanted smoke, a smokefree outdoor policy can reduce litter from cigarette butts on condo property and keep children from putting discarded butts in their mouths. Designated smoking areas in the outdoor common space are recommended so that people who smoke can do so away from shared recreational areas.

Individual units: HOAs may even restrict smoking in individual units, which would prohibit all current and future owners, renters, and guests from smoking there. A smoking restriction could include the “exclusive-use” common areas such as balconies and patios.

How can a condo complex be made smokefree?
In addition to state laws that regulate all condominiums, each complex has its own governing documents. These include the Declaration of Covenants, Conditions, and Restrictions (CC&Rs) and the Rules. CC&Rs describe restrictions on the use of property in the complex—for example, the number or ages of people permitted to live in a unit. Because the CC&Rs are legally binding restrictions that automatically apply to the buyer, they must be disclosed at the time of sale and officially recorded, like a deed. Members of the HOA must vote to approve any changes to the CC&Rs.

Rules contain additional restrictions on the use of property and typically expand upon areas not fully defined in the CC&Rs—for example, whether private barbecue grills are permitted on balconies or what types of vehicles may park in the parking lot. Changes to the Rules only require a vote by the board. Because Rules are easier to pass than CC&Rs, Rules may change relatively frequently.

There are three ways to address smoking in a condo complex using these governing documents:

1. Have the HOA members (the condo owners) vote to amend the CC&Rs to restrict smoking in common areas and/or units.

2. Have the HOA members vote to amend the CC&Rs’ nuisance provision to include drifting secondhand smoke. (A condo owner can already apply the nuisance provision to unwanted secondhand smoke, but unless the provision expressly states that secondhand smoke is a nuisance, it can be difficult to prove that the amount of drifting smoke is severe enough to be considered a violation of the nuisance provision.)

3. Have the board of the HOA adopt a new Rule restricting smoking in common areas and/or units.

People do not have a “right” to smoke—especially in multi-unit housing, where others can be affected. See “There Is No Constitutional Right to Smoke,” another fact sheet from TALC available at www.talc.phi.org.
### Comparing Three Ways to Make a Condo Complex Smokefree

<table>
<thead>
<tr>
<th>Voting</th>
<th>Amend CC&amp;Rs to prohibit smoking in units or common areas</th>
<th>Amend nuisance provision of CC&amp;Rs to state that secondhand smoke is a nuisance</th>
<th>Adopt a Rule prohibiting smoking in units or common areas</th>
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<tbody>
<tr>
<td>Requires vote of condo owners, using formal voting procedures.</td>
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<td>Voted on only by the board, not all HOA members.</td>
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<tr>
<td>Drafting</td>
<td>The new provision should be written by a lawyer.</td>
<td>The new provision should be written by a lawyer but isn’t overly complicated.</td>
<td>Doesn’t need to be written by a lawyer.</td>
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<td>Expense</td>
<td>Can be expensive due to lawyer fees for drafting and cost to HOA for printing and distributing ballots.</td>
<td>Can be expensive, due to cost of printing and distributing ballots, though lawyer fees should be less than amending the CC&amp;Rs to prohibit smoking because drafting is less complicated.</td>
<td>Very inexpensive because it doesn’t incur lawyer fees or ballot costs.</td>
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<tr>
<td>Enforcement</td>
<td>The board has a duty to enforce CC&amp;Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&amp;Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).</td>
<td>The board has a duty to enforce CC&amp;Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&amp;Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).</td>
<td>Only the board can enforce a Rule, usually by fining the noncompliant owner.</td>
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<tr>
<td>Important considerations</td>
<td>Requires votes from enough owners to get passed. Because the owners vote to change the CC&amp;Rs, their participation in the decision may make them more likely to comply with the new no-smoking policy. If there is a violation, CC&amp;Rs may be enforced in more ways than a Rule.</td>
<td>Adding smoking to the nuisance provision would not eliminate smoking in the condo—it would just allow homeowners to more easily use the nuisance provision if secondhand smoke were entering their units. This approach may be useful if a ban on smoking in units isn’t feasible.</td>
<td>Because a Rule is only voted on by the board, this approach may work best for making the common areas nonsmoking—a less controversial restriction than smokefree units (although there is nothing preventing a Rule from prohibiting smoking in all parts of the complex). Adopting a smokefree Rule may work better for complexes where the board actively enforces Rules.</td>
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How do these three approaches differ?

Amending the CC&Rs is stronger and more enforceable than adopting a new Rule, but it’s also potentially more expensive and time consuming. What follows are three areas to consider when weighing the options.

**Voting Procedures:** With any change to the CC&Rs, HOA members will have to vote using a fairly complicated balloting procedure that must be followed precisely to ensure that the vote is valid. A new Rule, on the other hand, only needs to be voted on by the board rather than all of the HOA members, so it can be done relatively quickly—but it can also be overturned just as quickly by the same or a subsequent board.

**Expense:** Because the CC&Rs are a legally binding document, a new amendment should be drafted by a lawyer. This can be expensive, but it is important to ensure that the amendment is legally appropriate and enforceable. (Drafting attorneys may find it helpful to review a sample at [www.smokefreeapartments.org/condos.html](http://www.smokefreeapartments.org/condos.html).) Amending the CC&Rs means the HOA must buy and print the ballots and envelopes required for the voting procedure; making a Rule change doesn’t involve these costs. You also don’t need to hire a lawyer to draft a new Rule, though it is encouraged. If you draft the Rule without a lawyer, make sure it clearly states what activity is prohibited, which portions of the condo complex are affected, and the penalty for failing to comply with the Rule.

**Enforcement:** Either the board or an individual owner can act to enforce the CC&Rs, whether it’s a new policy prohibiting smoking or an amendment to the nuisance clause. Ordinarily, the board enforces the CC&Rs because it has a legal duty to do so, either by assessing a fine or suspending the unit owner’s right to use recreational facilities in the condo. If the board fails or refuses to enforce the CC&Rs, an owner may sue the owner violating the CC&R and, in some cases, sue the HOA, if it did not act to enforce the CC&R. (Before bringing suit, the owner may need to first participate in a process to resolve the dispute without going to court.)

When it comes to enforcing Rules, however, only the board of the HOA can take action—an owner cannot sue another owner for failing to comply. The board could fine the person who is not following the Rule. Even though individual condo owners cannot enforce the Rules against each other, if the board fails to enforce the Rules, owners can work to recall the board and elect new directors who will enforce them.

How should I decide which approach to take?

A first step could be to find out how the other condo owners in your complex feel about a no-smoking policy. You may want to distribute a survey, especially if you live in a large complex. Then you can assess whether and where owners are willing to restrict smoking.

If you want to restrict smoking inside units, a CC&R amendment is probably better suited than a new Rule, because there are more ways to enforce CC&Rs. Board members also may be reluctant to adopt a Rule that restricts smoking in units because they don’t want to upset residents who smoke, so they may be more comfortable putting the decision in the hands of the HOA membership by calling for a vote on whether to amend the CC&Rs instead.

Limiting smoking in common areas will probably be much less controversial than restricting smoking in units, so using the more informal and less costly approach of creating a new Rule might be a more appropriate route.

Another factor that will help you decide between a new Rule and a CC&R change is whether the board
tends to enforce the Rules your complex already has. Because owners cannot enforce Rules, passing a new one is not likely to solve a drifting smoke problem if your board is lax about enforcing Rules to begin with. Also, consider that if the new restriction is ever challenged in court, CC&Rs are more likely than Rules to be upheld by a judge.\(^{20}\)

If you are concerned that the condo owners or the board won’t vote for a change prohibiting smoking in units because they are hesitant to “tell others what to do,” it may be easier to add secondhand smoke to the nuisance provision of the CC&Rs.\(^{21}\) However, amending the nuisance clause will not create much (if any) immediate change unless the board or an owner takes action to enforce it, so it should be pursued only if the HOA members seem unwilling to vote for the stronger measure of prohibiting smoking in units.

Changing your condo’s policies can be a slow and political process. Getting the votes you need to support a change takes diplomacy and patience: it often can take months from the time you first raise your concerns until the day the votes are counted. For ideas about how to gather support for a new smoking policy, see www.center4tobaccopolicy.org/organizing-introduction.

**When should the smokefree provision go into effect?**

While restrictions can generally be put into effect immediately,\(^{22}\) delaying implementation—especially for new restrictions on smoking inside units—will give residents time to adjust.\(^{23}\) A reasonable delay could be anywhere from 60 to 180 days from when the change is approved.

You can also include a “grandfather clause” exempting current residents from a new restriction: this exemption would apply only to current owners (or tenants, if a unit is rented), not to future owners or tenants. In general, grandfather clauses are not recommended. Residents who are already suffering from drifting secondhand smoke will not experience any relief, nor will they see other benefits of a smokefree complex such as a reduced fire hazard. Beyond that, new owners—who are not grandfathered in—can complain that they are subject to restrictions that others aren’t; if they sue over the smoking ban, a court may agree that enforcing the provision only against certain owners is unfair and decide that the restriction is not legal.\(^{24}\) Still, a grandfather clause may provide a compromise if there is significant opposition and allow a smokefree policy to get enough votes to pass.

If grandfathering seems necessary, it is a good idea to simultaneously alter the CC&Rs’ nuisance provision to include secondhand smoke. This way, residents who suffer from secondhand smoke drifting from grandfathered units may be able to more easily enforce the nuisance provision.

**What if my complex won’t adopt a new Rule or change the CC&Rs?**

You may be able to enforce the existing nuisance provision in your condo’s CC&Rs, even if it doesn’t specifically list smoking as a nuisance. If you have a disability that is made worse by secondhand smoke, you may be able to pursue a disability discrimination claim. You may also be able to bring a lawsuit against a neighbor whose smoke is causing you harm. For more information about each of these options, see “Legal Options for Condo Owners Suffering from Drifting Secondhand Smoke,” a fact sheet coming soon from TALC.

You can also encourage your elected officials to pass a local law against smoking in multi-unit housing. This way, apartments and condos throughout your city or county—not just your own building—could be made smokefree.\(^{25}\)

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The Technical Assistance Legal Center is a project of Public Health Law & Policy and the Public Health Institute. This material was made possible by funds received from the California Department of Public Health under contract #04-35336. This booklet provides 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.
1 Although the term condominium or condo will be used in this document, the information in this fact sheet may also apply to co-ops, subdivisions, common interest developments (CID), planned unit developments (PUD), or other housing that is subject to a declaration of covenants and restrictions and managed by a homeowners’ association.


3 Lingerence of secondhand smoke residue can make a home difficult to sell and drive down the selling price. Clean-up costs can range from $1,500 to $10,000 and do not guarantee that the smell or the harmful chemicals left behind from the smoke will be fully removed. Martin A. “On Tobacco Road, It’s a Tougher Sell.” New York Times, February 8, 2004.


5 The California Air Resource Control Board declared secondhand smoke a “toxic air contaminant” and concluded that there is no safe level of exposure. Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf.

6 This fact sheet uses the term HOA to refer to all homeowners’ associations, even though some complexes may use a different name.

7 If the indoor common area is a place where people such as security guards or maintenance staff work, the California smokefree workplace law prohibits smoking there. See Cal. Lab. Code § 6404.5 (West 2008). Some local governments have passed additional laws banning smoking in indoor common areas, eliminating the need for the condominium association to regulate these areas. Many condo complexes also have restrictions against smoking in indoor common spaces already in their governing documents.

8 As with indoor common areas, many condos already have restrictions on smoking in outdoor common areas either in their governing documents or under local law.

9 Some condominium associations may use a different term for this document, such as declaration or restrictive covenants, but this fact sheet will use the term CC&R to mean any of these documents.

10 Many condos also have Bylaws, a Condominium Plan, or Articles of Incorporation, but because those cannot be used to restrict smoking, they will not be discussed here.


12 Although the precise voting procedures vary, all HOAs must distribute secret ballots and two envelopes to each member 30 days before the deadline for voting. The ballot must be put into one envelope, which is put inside a second envelope. The voter is identified on the outside envelope only. These ballots and envelopes must be prepared by the HOA.

13 The chances are fairly small that another owner will sue to overturn your HOA’s new smoking prohibition. If that happens, it’s helpful to know that there has been at least one case in another state where a court upheld a new CC&R banning smoking in units. An owner who wished to continue smoking in the unit challenged the legality of a new CC&R restricting smoking inside the condos, but the court held that the new CC&R was valid. See Christiansen, et al. v. Heritage Hills #1 Condo. Ass’n, WL 4585750 (Colo. Dist. Ct. Nov. 7, 2006). Available at: http://davis-stirling.com/ds/pdf/smoking.pdf.


16 Posey v. Leavitt, 229 Cal. App. 3d 1236, 1246-47 (4th Dist. 1991). However, Boards have some discretion when it comes to enforcement of the governing documents. Boards can weigh the cost of litigation, the gravity of the violation, and the likely outcome of the litigation, and make a good faith determination not to litigate a particular violation. Beehan v. Lido Isle, 70 Cal. App. 3d 858, 866-67 (1977).


18 The method of enforcement used by the board will be different for each HOA and will be described in the governing documents.

19 A sample survey can be found at www.smokefreeapartments.org/CondominiumSurvey.doc.

20 CC&Rs are presumed valid by courts, “unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction’s benefit to the development’s residents, or violates a fundamental public policy.” Nahrstedt v. Lakeside Village Condo. Ass’n, 8 Cal. 4th 361, 386 (1994) (italics in original).

21 Some CC&Rs’ nuisance provisions list specific examples of what would be considered a nuisance, such as loud noise at certain hours and foul odors, while others merely make a general statement that any activity or thing affecting residents’ health or welfare will not be permitted. If secondhand smoke is expressly defined as a nuisance in the CC&Rs, individuals affected by the smoke no longer have to prove that the impact of the drifting smoke constitutes a “substantial and unreasonable interference” with the use of the unit. This makes it much easier to enforce the nuisance provision.

22 Your HOA’s governing documents may require a brief notice period before changes go into effect.

23 A short delay in implementation of a new smoking restriction may also make the provision seem more reasonable to a judge, if the provision is ever challenged in court by residents who disagree with the policy. As mentioned above, this scenario is unlikely but possible.

24 Posey v. Leavitt, 229 Cal. App. 3d 1236, 1246-47 (4th Dist. 1991) (holding that enforcement of CC&R restrictions must be “uniformly applied” and not place a burden on the individual owner that is “disproportionate to the benefit to the whole”).

25 Some CC&Rs’ nuisance provisions list specific examples of what would be considered a nuisance, such as loud noise at certain hours and foul odors, while others merely make a general statement that any activity or thing affecting residents’ health or welfare will not be permitted. If secondhand smoke is expressly defined as a nuisance in the CC&Rs, individuals affected by the smoke no longer have to prove that the impact of the drifting smoke constitutes a “substantial and unreasonable interference” with the use of the unit. This makes it much easier to enforce the nuisance provision.
Smokefree Housing Ordinance
A Model California Ordinance Regulating Smoking in Multi-Unit Residences
(with Annotations)

Revised June 2015
(Originally issued April 2005)

Developed by ChangeLab Solutions

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INTRODUCTION

ChangeLab Solutions developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke in multi-unit residences such as apartment buildings, condominium complexes, senior housing, and single resident occupancy hotels. By creating nonsmoking living environments in multi-unit residences, communities can provide an opportunity for everyone to live smokefree – even people who can’t afford to live in a single-family home.

Smokefree multi-unit housing is an important policy initiative to address health inequities among communities of color and low-income populations. Nearly two-thirds of residents of multi-unit housing are people of color, and close to half are low-income or below the poverty level. By adopting laws eliminating exposure to secondhand smoke in people’s homes, communities can ensure that smokefree living is not a luxury but instead made available to all residents, regardless of their economic means, race, or ethnicity.

This Model Ordinance is very broad and can be used to limit smoking in all types of multi-unit dwelling places, from hotels to long-term health care facilities to apartments and condominiums. The Model Ordinance’s comprehensive design limits exposure to secondhand smoke by

- Restricting smoking in the indoor and outdoor common areas of all types of multi-unit residences, with the option to create designated outdoor smoking areas that meet specific criteria;
- Prohibiting smoking inside all units of multi-unit residences, including apartments and condominiums; and
- Providing robust enforcement mechanisms, including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

To create this updated version of the Model Ordinance, ChangeLab Solutions conducted key informant interviews with a dozen tobacco control professionals and advocates across California. Based on their detailed feedback and experience with the rapidly evolving policy landscape – in which acceptance and appreciation of smokefree housing is constantly growing – ChangeLab Solutions made the following changes to the Model Ordinance:

- All units of multi-unit residences, rather than most units, are nonsmoking. This approach is more protective of health; when smoking is permissible in even a few units, smoke can travel between smoking and nonsmoking units, exposing residents to secondhand smoke. Several studies have confirmed that smokefree housing policies are the most effective way to fully reduce secondhand smoke exposure in
multi-unit housing. In addition, public health professionals and advocates agree that a 100 percent smokefree policy makes implementation, education, and enforcement of the law clearer and easier, since there are no exceptions to the policy.

- The prohibition of smoking in multi-unit housing includes not only traditional tobacco products, such as cigarettes and cigars, but also marijuana, used either medicinally or recreationally, and newly popular electronic smoking devices, such as e-cigarettes. Research has found that the secondhand smoke from marijuana and the aerosol emitted from electronic smoking devices contain chemicals known to the State of California to cause cancer. The gases from electronic smoking devices also have chemicals known to cause birth defects or other reproductive harm. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

For communities that wish to allow smoking in some units or create an exemption for the use of electronic smoking devices or medical marijuana, please contact ChangeLab Solutions for assistance.

Please note: while this Ordinance is not written specifically for communities with rent control laws, there are no legal restrictions that would prevent those cities from adopting a smokefree housing law. However, it is highly recommended that in such jurisdictions the city attorney and rent control board be included in selecting and adopting the specific provisions for a smokefree housing law.

The Model Ordinance offers a variety of options. In some instances, blanks (e.g., [ ____ ] ) prompt you to customize the language to fit your community’s needs. In other cases, the ordinance offers you a choice of options (e.g., [ choice one / choice two ] ). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure the ordinance is consistent with a community’s existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

ChangeLab Solutions also has developed a separate ordinance to create smokefree outdoor areas, such as parks, dining patios, and public events. The Comprehensive Smokefree Places Ordinance also would make all indoor workplaces smokefree by eliminating the exceptions contained in California’s Labor Code section 6404.5, which prohibits smoking in most – but not all – places of employment. If you would like to adopt a more customized approach, some aspects of that ordinance can be combined with the smokefree housing ordinance.
If you have questions about how to adapt ChangeLab Solutions’ ordinances for your community, please contact ChangeLab Solutions through our website at www.changelabsolutions.org/tobaccoquestions. The model ordinances, plug-ins, and other tobacco control resources can be found on our website at www.changelabsolutions.org/tobacco-control.
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>FINDINGS</td>
<td>6</td>
</tr>
<tr>
<td>II</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*1) ]. DEFINITIONS.</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*2) ]. SMOKING RESTRICTIONS IN NEW AND EXISTING UNITS OF</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>MULTI-UNIT RESIDENCES.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*3) ]. NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>DESIGNATED SMOKING AREAS.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*4) ]. NONSMOKING BUFFER ZONES.</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*5) ]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>EXISTING UNITS IN MULTI-UNIT RESIDENCES.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*6) ]. OTHER REQUIREMENTS AND PROHIBITIONS.</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*7) ]. SMOKING AND SMOKE GENERALLY.</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>Sec. [ ____ (*8) ]. PENALTIES AND ENFORCEMENT.</td>
<td>26</td>
</tr>
<tr>
<td>III</td>
<td>CONSTRUCTION, SEVERABILITY.</td>
<td>29</td>
</tr>
</tbody>
</table>
AN ORDINANCE OF THE [CITY / COUNTY OF ____ ]
PROHIBITING SMOKING IN AND AROUND
MULTI-UNIT RESIDENCES
AND AMENDING THE [____ ] MUNICIPAL CODE

The [City Council / County Board of Supervisors] of the [City / County of ____ ] does
ordain as follows:

SECTION I. FINDINGS.

WHEREAS, tobacco use causes death and disease and continues to be an urgent public
health threat, as evidenced by the following:

- 480,000 people die prematurely in the United States from smoking-related diseases
every year, making tobacco use the nation’s leading cause of preventable death;¹
- Tobacco use can cause disease in nearly all organ systems and is responsible for 87
percent of lung cancer deaths, 79 percent of all chronic obstructive pulmonary disease
deaths, and 32 percent of coronary heart disease deaths;² and

WHEREAS, secondhand smoke has repeatedly been identified as a health hazard, as
evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to
secondhand smoke;³
- The California Air Resources Board placed secondhand smoke in the same category as
the most toxic automotive and industrial air pollutants by categorizing it as a toxic air
contaminant for which there is no safe level of exposure;⁴,⁵
- The California Environmental Protection Agency (EPA) included secondhand smoke
on the Proposition 65 list of chemicals known to the state of California to cause
cancer, birth defects, and other reproductive harm;⁶
- The American Society of Heating, Refrigerating, and Air Conditioning Engineers
(ASHRAE) recommends that multi-unit housing be free from environmental tobacco
smoke, marijuana smoke, and electronic smoking devices’ aerosol;⁷ and

WHEREAS, exposure to secondhand smoke causes death and disease, as evidenced by the
following:

- Since 1964, approximately 2.5 million nonsmokers have died from health problems
caused by exposure to secondhand smoke;⁸
- Secondhand smoke is responsible for an estimated 41,300 heart disease-related and
l lung cancer-related deaths among adult nonsmokers each year in the United States;\(^8\)
- Exposure to secondhand smoke increases the risk of coronary heart disease by about 25 percent to 30 percent\(^9\) and increases the risk of stroke by 20 percent to 30 percent;\(^10\)
- Secondhand smoke kills more than 400 infants every year;\(^11\) and

WHEREAS, secondhand aerosol emitted from electronic smoking devices has been identified as a health hazard, as evidenced by the following:

- Research has found at least ten chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm,\(^6,\) \(^12,\) \(^13,\) \(^14\) such as formaldehyde, acetaldehyde, lead, nickel, and toluene;\(^15,\) \(^16,\) \(^17\)
- More than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping;\(^15,\) \(^17,\) \(^18\)
- The State of California’s Tobacco Education and Research Oversight Committee (TEROC) “opposes the use of e-cigarettes in all areas where other tobacco products are banned;”\(^19\) and

WHEREAS, secondhand marijuana smoke has been identified as a health hazard, as evidenced by the following:

- The California EPA included marijuana smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer;\(^6,\) \(^20\)
- Marijuana smoke contains at least 33 known carcinogens;\(^20\)
- Research on the health effects of marijuana smoke has found statistically significant associations with cancers of the lung, head and neck, bladder, brain, and testes;\(^20\) and

WHEREAS, nonsmokers who live in multi-unit dwellings can be exposed to neighbors’ secondhand smoke, as evidenced by the following:

- Several peer-reviewed studies on drifting secondhand smoke in multi-unit housing have confirmed that secondhand smoke can and does transfer between units,\(^21,\) \(^22\) creeping under doorways and through wall cracks;\(^11\)
- More than one study has found that residents of multi-unit housing have high levels of cotinine (a biomarker for nicotine) in their blood and saliva;\(^21,\) \(^22\)
- 13 peer-reviewed journal articles have found that between 26 percent and 64 percent of residents of multi-unit housing report secondhand smoke drifting into their home;\(^21\) and

WHEREAS, harmful residues from tobacco smoke can be absorbed by and cling to virtually all indoor surfaces long after smoking has stopped and then be emitted back into the air, making this “thirdhand smoke” a potential health hazard, as evidenced by the following:
• Thirdhand smoke contains carcinogenic materials that accumulate over time, presenting a health hazard long after the initial smoke is gone;\textsuperscript{23}
• A study found that thirdhand smoke remains months after nonsmokers have moved into units where smokers previously lived;\textsuperscript{24}
• Human exposure to these thirdhand smoke carcinogens can be through inhalation, ingestion, or skin absorption through contact with carpeting, furnishings, or clothing;\textsuperscript{25}
• Thirdhand smoke potentially poses the greatest danger to infants and toddlers, who crawl on rugs and furnishings and suck on items in the home;\textsuperscript{25}
• Non-smoking people who are exposed to thirdhand smoke have significantly higher nicotine and cotinine levels than those who have not been exposed to thirdhand smoke;\textsuperscript{24}
• Research has shown that thirdhand smoke damages human cellular DNA;\textsuperscript{26} and

WHEREAS, smoking is the number one cause of fire deaths, is a leading cause of fire-related injury,\textsuperscript{27} and contributes to fire-related health inequities, as evidenced by the following:

• In 2011, U.S. fire departments responded to an estimated 90,000 smoking-related fires, which resulted in an estimated 1,640 injuries, 540 deaths, and $621 million in direct property damage;\textsuperscript{28}
• One in four fatalities is NOT the smoker whose cigarette started the fire, and 25 percent of those who die are neighbors or friends of the smoker;\textsuperscript{28}
• African-American males and American-Indian males have the highest fire death rates;\textsuperscript{27}
• The elderly (people 85 and older) have the highest fire death rate (49.2%),\textsuperscript{29} and the risk of dying from smoking-related fires increases with age;\textsuperscript{28}
• The U.S. Fire Administration recommends that people smoke outdoors;\textsuperscript{30} and

WHEREAS, the Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;\textsuperscript{3} and

WHEREAS, several studies have confirmed that smokefree multi-unit housing policies are the most effective method to fully reduce secondhand smoke exposure in multi-unit housing;\textsuperscript{21} and

WHEREAS, 32 percent of Californians (or 11.8 million people) live in multi-unit housing,\textsuperscript{31} which accounts for one-seventh of the total multi-unit housing population in the country,\textsuperscript{32} and and
WHEREAS, between 44 percent to 46.2 percent of Californians living in multi-unit housing with personal smokefree home policies are exposed to secondhand smoke in their home; and

WHEREAS, surveys have found that between 65 percent and 90 percent of multi-unit housing residents who experience secondhand smoke in their home are bothered by the secondhand smoke incursion; and

WHEREAS, secondhand smoke exposure in multi-unit housing contributes to tobacco-related health inequities. For example, when compared with adults who live in single family homes, adults who live in multi-unit housing are more likely to

- Be from communities of color (62.9% of residents of multi-unit homes versus 49.6% of residents of single family homes); and
- Be low-income or below the poverty line (46.8% versus 27%); and
- Have less than a high school diploma (21.4% versus 14.8%); and
- Be current smokers (17.5% versus 13.2%); as well as
- Be uninsured (23.4% versus 14.2%); and

WHEREAS, secondhand smoke in multi-unit housing is a significant threat to the health and safety of California children, as evidenced by the following:

- About a quarter of those who live in multi-unit housing (25.2%) are under the age of 18; and
- The home is the primary source of secondhand smoke for children; and
- 56.4 percent of youth living in apartment units in which no one smokes have elevated blood cotinine levels above .05 ng/mL, indicating they have been exposed to potentially dangerous levels of secondhand smoke; and
- Children who live in apartments have mean cotinine levels that are 45 percent higher than cotinine levels in children who live in detached homes; and

WHEREAS, there are significant savings from adopting a smokefree multi-unit housing policy, as evidenced by the following research:

- Multi-unit housing property owners in California would save $18.1 million in renovation expenses each year; and
- If all subsidized housing were to go smokefree in California, there would be approximately $72.4 million saved per year, including $61.1 million in secondhand smoke-related healthcare expenditures, $5.9 million in renovation expenses, and $5.4 million in smoking-attributable fire losses; and
WHEREAS, a majority of multi-unit housing residents, including a large portion of smokers, support smokefree policies in multi-unit residences, as evidenced by the following:

- 74 percent of Californians surveyed approve of apartment complexes requiring that at least half of rental units be nonsmoking;
- 69 percent of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings;
- 78 percent support laws that create nonsmoking units;

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by California law; and

WHEREAS, there is no Constitutional right to smoke; and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance; and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance; and

WHEREAS, at least 55 California cities and counties have adopted smokefree multi-unit housing ordinances, and at least 25 of these jurisdictions have restricted smoking in 100 percent of units; and

NOW THEREFORE, it is the intent of the [ City Council / County Board of Supervisors ] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around nontobacco users; by protecting children from exposure to smoking where they live and play; and by protecting the public from nonconsensual exposure to secondhand smoke in and around their homes.

SECTION II. [ Article / Section ] of the [ City / County of ____ ] Municipal Code is hereby amended to read as follows:

Sec. [ ____ (*1) ]. DEFINITIONS. For the purposes of this [ article / chapter ] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Adjacent Unenclosed Property” means any Unenclosed Area of property, publicly or privately owned, that abuts a Multi-Unit Residence [ , but does not include property containing detached single-family homes ].
**COMMENT:** This definition is used to describe the reach of nonsmoking “buffer zones” around Multi-Unit Residences. It defines where Smoking is prohibited when buffer zones reach beyond the property lines of the Multi-Unit Residence and extend onto neighboring property (see Section *4 “Nonsmoking Buffer Zones”).

To exclude property containing detached single-family homes (so that residents and guests at such homes may smoke notwithstanding their proximity to multi-family housing), add the bracketed language. Without the bracketed language, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence as well as adjacent outdoor areas of businesses and parking lots.

(b) “Common Area” means every Enclosed Area and every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit are entitled to enter or use, including, without limitation, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.

**COMMENT:** Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has employees, such as maintenance workers, property managers, or others who work on-site.

The definition of Common Areas does not include balconies, patios, or decks associated with individual Units because these are not shared areas. Balconies, patios, and decks are included in the definition of Unit.

(c) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

**COMMENT:** This definition is broad enough to cover all Electronic Smoking Devices that are used to deliver nicotine or other substances. Regulating the use of all varieties of Electronic Smoking Devices, regardless of their nicotine content, protects bystanders from exposure to the hazardous substances found in Electronic Smoking Device vapor, reduces the risk that people may view the use of Electronic Smoking Devices in smokefree areas as acceptable, and facilitates uniform enforcement.
(d) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has

(1) any type of overhead cover, whether or not that cover includes vents or other openings and at least three (3) walls or other physical boundaries of any height, whether or not those boundaries include vents or other openings; or

(2) four (4) walls or other vertical boundaries that exceed six (6) feet in height, whether or not those boundaries include vents or other openings.

**COMMENT:** For the purposes of this ordinance, the distinction between “enclosed” and “unenclosed” is primarily relevant to establishing designated Smoking areas (see Section *3) and nonsmoking buffer zones (see Section *4).

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). For the purposes of this ordinance, any physical boundary, regardless of composition, constitutes an “other physical boundary” for application of this definition.

**NOTE:** If the Municipal Code already has Smoking restrictions, it may contain a definition of “enclosed.” Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(e) “Landlord” means any Person or agent of a Person who owns, manages, or is otherwise legally responsible for a Unit in a Multi-Unit Residence that is leased to a residential tenant, except that “Landlord” does not include a tenant who sublets a Unit (e.g., a sublessor).

**COMMENT:** The Municipal Code may already contain a definition of “Landlord.” If so, the definition provided here can be omitted, although sublessors should specifically be excluded.

(f) “Multi-Unit Residence” means property containing two (2) or more Units, including, but not limited to, apartment buildings, condominium complexes, senior and assisted living facilities, and long-term health care facilities. [ Multi-Unit Residences do not include the following:

(1) a hotel or motel that meets the requirements of California Civil Code section 1940, subdivision (b)(2):
(2) a mobile home park;

(3) a campground;

(4) a marina or port;

(5) a single-family home, except if used as a child care or health care facility subject to licensing requirements; and

(6) a single-family home with a detached or attached in-law or second unit permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections, except if the single-family home or in-law/second unit is used as a child care or health care facility subject to licensing requirements.

COMMENT: This definition is intended to be used in conjunction with the definition of Unit in this Model Ordinance, which makes clear that this term is limited to dwelling spaces.

Because the definition of Unit in this ordinance is very broad and includes all types of dwelling places – from rooms in a hotel to tents at a campground – a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions communities are likely to consider. Hotels and motels are included in the list of optional exemptions because many communities regulate Smoking in these facilities using a smokefree workplace ordinance, but there is no legal reason why hotels and motels could not be made completely smokefree using this Model Ordinance. Single-family residences are suggested as an exemption, because the definition of Unit in this ordinance includes individual bedrooms in a single-family home. Thus, a two-bedroom free-standing house would be a Multi-Unit Residence per the definitions in this ordinance, unless the exemption is included.

Note that the definition of Multi-Unit Residence without any exemptions includes the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, disabled tenants, Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy (“SRO”) facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; as well as single-family homes and single-family homes with an in-law unit.

Should your community wish to allow Smoking inside a certain percentage of Units in apartments or condominiums and exclude those Units from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.
(g) “New Unit” means a Unit that is issued a certificate of occupancy / final inspection after [insert effective date of ordinance] and also means a Unit that is let for residential use for the first time after [insert effective date of ordinance].

**COMMENT:** This definition is used to differentiate between Units that are already built and occupied when the ordinance is adopted and Units constructed afterward. The distinction is important because, under this ordinance, all Units built after the ordinance is adopted are required to be nonsmoking as soon as they are deemed ready for occupancy. However, Smoking may be allowed in existing Units for a period of time after the effective date of the ordinance (the implementation period) to allow landlords and tenants time to become aware of and comply with the new ordinance.

The certificate of occupancy or final inspection is probably the most administrable way to distinguish between existing and New Units. Alternatively, a community could distinguish between Units for which land use entitlements have or have not been issued or Units that have or have not been occupied by a tenant for the first time.

To include existing housing that may become available to the rental market after the ordinance is adopted, such as an in-law cottage that has not been rented previously, add the optional clause at the end of the definition.

Note that the term “New Unit” is a subset of “Unit,” so whenever the term Unit is used in the ordinance, it includes all New Units.

(h) “Non-smoking Area” means any Enclosed Area or Unenclosed Area in which Smoking is prohibited by

1. this [chapter / article] or other law;

2. binding agreement relating to the ownership, occupancy, or use of real property; or

3. designation of a Person with legal control over the area.

(i) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.

**COMMENT:** The Municipal Code may contain a definition of “person.” Review any existing definition of “person” in the Municipal Code to determine whether to include this definition in your ordinance.
This definition includes most businesses. In addition, it includes governmental entities, such as a city or county.

(j) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition, or vaporization when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, Electronic Smoking Device vapors, marijuana smoke, and crack cocaine smoke.

**COMMENT**: This is a special definition that differs from the common understanding of what “smoke” is. For example, smoke from a fireplace or a barbeque grill is not “Smoke” for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhalation. The limitation placed on “Smoke” by this definition is important to prevent unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbeque grills.

At the same time, this definition is designed to be broad enough to cover any emissions released into the air as a result of combustion or heating, so long as the purpose of the combustion or heating is to inhale the byproduct, as discussed above. By clarifying that the term “Smoke” applies not just to solid particles but also to vapor and gas, this definition covers the vapor emitted by Electronic Smoking Devices, such as electronic cigarettes, electronic hookahs, etc. This definition also includes marijuana smoke. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.

(k) “Smoking” means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation.

**COMMENT**: This definition includes Smoking marijuana and the use of Electronic Smoking Devices. Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.
(l) “Unenclosed Area” means any area that is not an Enclosed Area.

(m) “Unit” means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. “Unit” includes, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, or hospital; a room in a hotel or motel; a dormitory room; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes, without limitation, a New Unit.

**COMMENT:** This definition is intentionally extremely broad. It is designed to capture all conceivable “dwelling spaces,” as the examples illustrate. However, due to the design of this Model Ordinance, any limitations on the types of housing covered by the ordinance should be added to the defined term “Multi-Unit Residence,” not to the definition of “Unit.” For example, some “mobile homes” in mobile home parks may be included in this definition and even cited in the examples, but “mobile homes” can be specifically excluded from the ordinance under the definition of “Multi-Unit Residence.”

Sec. [ ____ (*2) ]. SMOKING RESTRICTIONS IN NEW AND EXISTING UNITS OF MULTI-UNIT RESIDENCES.

(a) Smoking is prohibited in all New Units of a Multi-Unit Residence, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a New Unit of a Multi-Unit Residence, on or after [insert effective date of ordinance], is a violation of this [article / chapter].

(b) Smoking is prohibited in all Units of a Multi-Unit Residence that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a Unit of a Multi-Unit Residence that is not a New Unit, on or after [insert effective date of ordinance + 1 year], is a violation of this [article / chapter].

**COMMENT:** The Smoking restrictions in existing Units become effective a year after the ordinance is adopted to allow time for people to become familiar with the new law and take the necessary steps to comply with it.

Implementing a smokefree housing law by using a reasonable phase-in period, followed by a specific date on which everyone is required to abide by the law, is generally...
perceived to be the most fair approach. This strategy balances public health needs against the potential inconvenience the ordinance puts on people who smoke and those who must implement the new policy. A 12-month phase-in period takes into account both the potential legal rights of tenants under existing rental agreements and the legal authority of Landlords to modify those agreements, as this ordinance requires.

Sec. [____ (*3)] NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN DESIGNATED SMOKING AREAS.

**COMMENT:** If your Municipal Code already has Smoking restrictions, it may contain a provision for smokefree Common Areas of multi-unit housing. Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with new ordinance language.

(a) Smoking in a Common Area, on or after, [insert effective date of ordinance], other than in a designated Smoking area established pursuant to subsection (b), is a violation of this [article / chapter].

(b) A Person with legal control over a Common Area, such as, for example, a Landlord or homeowners’ association, may designate a portion of the Common Area as a designated Smoking area provided the designated Smoking area complies with paragraph (c) below at all times.

**COMMENT:** Establishing a designated Smoking area is optional, not mandatory. While a designated Smoking area is convenient for people to use for Smoking, a Landlord or homeowners’ association may decide not to create a designated Smoking area. In this case, a person may go off-site to smoke, or remain on the property and use a smokeless tobacco product or an FDA-approved nicotine replacement therapy (e.g., nicotine gum or nicotine patch). More information on these nicotine replacement products can be found through the California Smokers’ Helpline (www.nobutts.org or 1-800-no-butts). Should a designated Smoking area be created, the following criteria are highly recommended.

(c) A designated Smoking area:

(1) Must be an Unenclosed Area;

(2) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses;
(3) Must be located at least twenty-five (25) feet from any Nonsmoking Area. The location of Nonsmoking Areas may change due to the new enactment of a law, execution of an agreement, or other event that affects the area’s Smoking designation. If an event occurs that changes a Nonsmoking Area, a Person with legal control over a designated Smoking area within less than twenty-five (25) feet of that Nonsmoking Area must modify, relocate, or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b). In the case of a Nonsmoking Area on a neighboring property established only by private agreement or designation and not by this [chapter / article] or other law, it shall not be a violation of this [chapter / article] for a Person with legal control to designate a Smoking area within twenty-five (25) feet of the Nonsmoking Area unless that Person has actual knowledge of, or a reasonable person would know of, the private agreement or designation. It shall not be a violation of this [chapter / article] for a Person to Smoke within a Nonsmoking Area if the area is erroneously designated as a Smoking area unless a reasonable person would know of the error;

COMMENT: This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering neighboring property. It includes areas designated as Nonsmoking either by law or by a neighboring business or homeowner by contract or private designation.

In some communities, it may be difficult to designate a Smoking area twenty-five (25) feet away from a Nonsmoking Area (e.g., where neighboring buildings are close together or when there are limited Unenclosed Areas on site). In this case, a community may reduce the distance requirement.

Another option is to remove the specific distance requirement. To do so, replace the first sentence of subsection (b)(2) “Must be located at least twenty-five (25) feet from any Nonsmoking Area” with “Must be located so that Smoke does not drift into an Enclosed Nonsmoking Area. Should complaints be received, the designated Smoking area must be relocated or removed.” In addition, the reference to twenty-five (25) feet in the second to last sentence of (b)(2) “…within twenty-five (25) feet of …” should be replaced with “near.”

(4) Must be no more than [ ten percent (10%) ] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;

(5) Must have a clearly marked perimeter;

(6) Must be identified by conspicuous signs; and
(7) Must not overlap any Enclosed or Unenclosed Area where Smoking is prohibited by this [ chapter / article ] or other law.

(d) No Person with legal control over a Common Area in which Smoking is prohibited by this [ chapter / article ] or other law shall knowingly permit the presence of ash trays, ash cans, or other receptacles designed for or primarily used for disposal of Smoking waste within the area.

Sec. [ ___ (4) ]. NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Adjacent Unenclosed Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area of a Multi-Unit Residence.

COMMENT: To create the most comprehensive smokefree buffer zone around Multi-Unit Residences, include this Section. Subsection (a) creates a smokefree buffer zone that extends to Unenclosed Areas on neighboring property that is within 25 feet of any doorway, window, etc., of the Multi-Unit Residence. This comprehensive provision can be fine-tuned. By using a version of the “Adjacent Unenclosed Property” definition to exempt certain types of neighboring property, such as property containing detached single-family homes, a community can still prohibit Smoking on other private property, such as bar patios or parking lots. If this Section is not included in your community’s ordinance, the defined term “Adjacent Unenclosed Property” in Section *1 should be deleted.

(b) Subsection (a) above does not apply to a Person who is Smoking in the restricted buffer zone area for less than a minute while actively passing on the way to another destination, and who does not enter the buffer zone area while Smoking more than twice per day. 

COMMENT: This optional exemption for a passerby who is Smoking (e.g., Smoking while walking or driving by) is a common component of entryway Smoking bans. However, such an exemption could prove problematic in the multi-unit housing context because a Person who is Smoking on neighboring property could claim to be just passing through but in fact be intentionally violating the ordinance. The timing restriction is an attempt to limit this problem, but it does not eliminate it completely. Without this exemption, a Person who is Smoking in a buffer zone while passing through it will be in violation of the law.
Sec. [ _____ (*5) ]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN MULTI-UNIT RESIDENCES.

**COMMENT:** This section requires that Smoking restrictions be included in a lease for the rental of a Unit in any type of Multi-Unit Residence (e.g., an apartment building, condominium complex, or single room occupancy facility). Note that the term “Unit” includes the defined term “New Unit,” so whenever the term Unit is used in the ordinance, it includes all Units, both existing and new.

By including these provisions in lease agreements, Smoking becomes a violation of both the lease and the local ordinance. Thus, Landlords may enforce the Smoking lease terms just like any other condition in the rental agreement, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the “third-party beneficiary” provision, other residents of the Multi-Unit Residence can enforce a lease’s Smoking restrictions.

In addition to the lease restrictions, Smoking is unlawful under the ordinance (see Section *2 Smoking Restrictions in New and Existing Units of Multi-Unit Residences) and local government may enforce the Smoking restrictions pursuant to the law (see Section *8 Enforcement).

(a) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [insert effective date of ordinance], shall include the provisions set forth in subsection (b) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.

**COMMENT:** This provision calls for the Landlord to amend a rental agreement at the first opportunity. It is also designed to provide tenants with adequate legal notice of the pending change in their lease terms. The overall objective is to insert the new terms into every lease as soon as legally allowable, which will generally be within one year after the effective date of the ordinance (because most standard residential leases are for one year). For multi-year leases, these terms will be added as soon as legally possible when the lease renews.

(b) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [insert effective date of ordinance], shall be amended to include the following provisions:

**COMMENT:** The following subsections contain both an explicit directive regarding the legal effect the required clause must achieve and a model clause to implement the directive. Because leases vary in terms, format, and language, it is not possible to provide verbatim wording that can be easily dropped into any lease. These clause requirements provide a Landlord with needed flexibility to conform an existing lease while using terms consistent with the rest of the lease. In many cases, a Landlord can probably just use the example language provided with minimal changes. Members of the
California Apartment Association may be able to use the Association’s Rental Lease Addendum for Tobacco and Smoke-Free Areas.

(1) A clause providing that as of [insert effective date of ordinance], it is a material breach of the agreement to allow or engage in Smoking in the Unit, including exclusive-use areas such as balconies, porches, or patios. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant to engage in smoking in the unit or exclusive use areas such as balconies, porches, or patios as of [insert effective date of ordinance].”

(2) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to engage in Smoking in any Common Area of the Multi-Unit Residence other than a designated Smoking area. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists.”

(3) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property.”

(4) A clause expressly conveying third-party beneficiary status to all occupants of the Multi-Unit Residence as to the Smoking provisions of the lease or other rental agreement. Such a clause might state, “Other occupants of the property are express third-party beneficiaries of those provisions in this agreement regarding smoking. As such, other occupants of the property may enforce such provisions by any lawful means, including by bringing a civil action in a court of law.”

**COMMENT:** Declaring other residents third-party beneficiaries grants people living in the Multi-Unit Residence limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually lack the legal right to enforce the lease terms (because they are not a “party” to the agreement), and the power to enforce the terms of the lease rests solely with the Landlord.
(c) Whether or not a Landlord complies with subsections (a) and (b) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (a) or (b) apply and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a) or (b).

COMMENT: This is a back-up provision to ensure that the Smoking-related terms are included by law, even if the Landlord fails to comply with subsections (a) or (b).

(d) A tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to (i) the Landlord; and (ii) any occupant of the Multi-Unit Residence who is exposed to Smoke or who suffers damages as a result of the breach.

COMMENT: This provision provides other tenants legal standing to seek damages or possibly an injunction against someone Smoking in violation of a lease term.

There are two additional enforcement mechanisms in this ordinance:

Section *8 “Enforcement” provides for traditional enforcement by local government officials. It also contains an optional “private enforcement” provision that grants any member of the public the right to enforce the ordinance. Thus, a Landlord, a tenant, or a member of the public could bring a lawsuit to enforce the ordinance in either Superior Court or small claims court if the optional language is included.

(e) This [article / chapter] shall not create additional liability for a Landlord to any Person for a tenant’s breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence if the Landlord has fully complied with this Section.

COMMENT: This provision expressly states that the Landlord is not the guarantor of the ordinance’s enforcement. That is, the Landlord is not contractually required to enforce the no Smoking lease terms, and other residents cannot force the Landlord to act against a tenant who violates one. Including this provision can be extremely important in efforts to gain Landlord support for the ordinance.

(f) Failure to enforce any Smoking provision required by this [article / chapter] shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision
itself.

**COMMENT:** This is a technical legal provision designed to prevent a court from inferring a permanent waiver of a Smoking-related provision from a pattern of lax enforcement.

### Sec. [ ____ ] (*6) | OTHER REQUIREMENTS AND PROHIBITIONS.

(a) Every Landlord shall deliver the following, on or before \[ insert effective date of ordinance + 6 months \], to each Unit of a Multi-Unit Residence:

1. a written notice clearly stating:
   - all Units are designated nonsmoking Units and Smoking will be illegal in a Unit, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of \[ insert effective date of ordinance + 1 year \]; and
   - Smoking in all Common Areas, except for specifically designated Smoking areas, will be a violation of this \[ chapter / article \] as of \[ insert effective date of ordinance \].

2. a copy of this \[ article / chapter \].

**COMMENT:** This subsection describes the information Landlords must give to residents of Multi-Unit Residences to notify them of the new Smoking restrictions. A copy of this ordinance must accompany the notice of the smokefree housing law so that residents may assess for themselves their full rights and obligations. Alternatively, Landlords can provide residents a summary of their rights and obligations under the law instead of (or in addition to) a copy of the ordinance itself. If this approach is adopted, steps should be taken to ensure the accuracy and appropriateness of any summary, as summaries are inherently incomplete. The city/county may also want to send information directly to renters about the new smokefree housing law. Research by the American Lung Association in California finds tenants are more likely to be aware of the new Smoking restrictions when information comes from the local government. Your community may want to provide additional recommendations or guidelines for implementing the smokefree housing law. These could include holding a tenant or building meeting to discuss the new policy and/or hosting cessation classes for residents of Multi-Unit Residences. If your community has residents who have limited English proficiency, notices regarding the smokefree housing policy could be translated. Because
smaller housing providers/managers may not have the resources to do this, the city/county could develop sample translated notices.

Communities may want additional requirements to involve tenants and landlords with implementation and enforcement of the law. These could include such things as requiring tenants to inform visitors about the no smoking requirements; requiring tenants to tell landlords promptly about drifting smoke; and/or requiring landlords to take reasonable steps to enforce the no Smoking provisions. Should your community wish to add these types of provisions, please contact ChangeLab Solutions for assistance.

(b) As of [ insert effective date of ordinance ] , every Landlord shall provide prospective tenants with written notice clearly stating that:

(i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [ insert effective date of ordinance ]; and

(ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [ insert effective date of ordinance ].

(c) As of [ insert effective date of ordinance ], every seller of a Unit in a Multi-Unit Residence shall provide prospective buyers with written notice clearly stating that:

(i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [ insert effective date of ordinance ]; and

(ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [ insert effective date of ordinance ].

(d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations in Common Areas where Smoking is prohibited by this [ article / chapter ] or other law. [ In addition, signs shall be posted in sufficient numbers and locations in the Multi-Unit Residence to indicate that Smoking is prohibited in all Units. ] Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this [ article / chapter ]. “No Smoking” signs are not required inside or on doorways of Units [ , except for hotels or motels as defined in California Civil Code section 1940, subdivision (b)(2) ].
COMMENT: If your community excludes hotels and motels from the definition of Multi-Unit Residences (Section *1 Definitions), then do NOT include the optional underlined text in the last sentence.

(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [ ____ (*3)(a) ].

Sec. [ ____ (*7) ]. SMOKING AND SMOKE GENERALLY.

(a) The provisions of this [ article / chapter ] are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (i) any provision of this [ article / chapter ] or of this Code, (ii) any failure by any Person to restrict Smoking under this [ article / chapter ], or (iii) any explicit or implicit provision of this Code that allows Smoking in any place, nothing in this Code shall be interpreted to limit any Person’s legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

COMMENT: The subsection spells out that the intent of this ordinance is to create new smokefree areas and enhance the right of nonsmokers to smokefree environments. This ordinance does not provide smokers with any “safe harbors” from existing laws that might already impose potential liability for Smoking.

Subsection (a) does not expand traditional nuisance law in any way, and should generally be included in all ordinances based on this model. Subsection (b) below does potentially expand traditional nuisance law.

(b) For all purposes within the jurisdiction of the [ City / County of ____ ], nonconsensual exposure to Smoke [ occurring on or drifting into residential property ] is a nuisance, and the uninvited presence of Smoke on [ residential ] property is a nuisance and a trespass.

COMMENT: The declaration in subsection (b) that Smoke is a nuisance extends far beyond the residential context, unless limited by including the optional language in brackets. Once Smoke is declared a nuisance, nuisance abatement laws can be used to address Smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring Smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and that such exposure is an unjustified intrusion or hazard.
California Government Code section 38771 explicitly authorizes cities to declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 7.

Sec. [ ____ (*8) ]. PENALTIES AND ENFORCEMENT.

(a) The remedies provided by this [ article / chapter ] are cumulative and in addition to any other remedies available at law or in equity.

**COMMENT:** The following provisions are designed to offer a variety of options to the drifter and the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in any given case. As a practical matter, all these enforcement options would not be applied in a single case, although multiple remedies might be used against a particularly egregious violator over time.

(b) Every instance of Smoking in violation of this [ article / chapter ] is an infraction subject to a [ one hundred dollar ($100) ] fine. Other violations of this [ article / chapter ] may, in the discretion of the [ City Prosecutor / District Attorney ], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of [ ____ ]. In addition, any peace officer or code enforcement official may enforce this chapter.

**COMMENT:** The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed $100 for a first infraction. (See California Government Code section 36900.) It is separated from the main enforcement provision that follows so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a $1,000 fine and/or six months in County Jail). Alternatively, violations can be set as either an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [ article / chapter ] are subject to a civil action brought by the [ City / County of ____ ], punishable by a civil fine not less than [ two hundred fifty dollars ($250) ] and not exceeding [ one thousand dollars ($1,000) ] per violation.
COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed $1,000 per violation. (See California Government Code section 36901.)

(d) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this [article / chapter]. Moreover, no Person shall intentionally or recklessly expose another Person to Smoke in response to that Person’s effort to achieve compliance with this [article / chapter]. Violation of this subsection shall constitute a misdemeanor.

(e) Causing, permitting, aiding, or abetting a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(f) Any violation of this [article / chapter] is hereby declared to be a public nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that violating the ordinance qualifies as a nuisance (e.g., when Smoking in a nonsmoking area, the violation is the nuisance, not the Smoke). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please see Section *7(b) for the declaration that nonconsensual exposure to secondhand is a nuisance.

(g) In addition to other remedies provided by this [article / chapter] or otherwise available at law or in equity, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, without limitation, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government’s lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in IT Corp. v. County of Imperial, 35 Cal.3d 63 (1983).
A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

(h) Any Person, including a legal entity or organization acting for the interests of itself, its members, or the general public, may bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction to prevent future such violations and may sue to recover such actual or statutory damages as he or she may prove.

COMMENT: In order to get an injunction, a plaintiff would have to sue in superior court, generally with the assistance of an attorney. A plaintiff, however, could seek a conditional judgment in small claims court and represent him/herself. Note that the difference between an injunction and a conditional judgment is that an injunction directly orders the defendant to do something (or to refrain from doing something). A conditional judgment, however, gives the defendant a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 Consumer Law Sourcebook: Small Claims Court Laws and Procedures (California Department of Consumer Affairs 2005.)) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between stopping the violations or paying even more money.

(i) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County of ____.] Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County of ____.] or its agents to compel public enforcement of this [article / chapter] against private parties.

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.
SECTION III. CONSTRUCTION, SEVERABILITY.

It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [___________] to supplement applicable state and federal law and not to duplicate or contradict such law and this Ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this “boilerplate” is found at the end of an ordinance, but its location is immaterial.


36. American Lung Association in California the Center for Tobacco Policy and Organizing. Secondhand Smoke Survey: California Voters’ Attitudes about Secondhand Smoke Exposure. 2008. Available at:


