



## Understanding Legal Issues in Smoke-Free Multi-Housing

Stages of Smoke-Free Multi-Housing Program Development:  
A series for public health professionals

Part Four of Nine | December 1, 2011




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## Welcome!



- Please be sure to turn up the volume on your computer speakers
- If you have questions, please type them into the chat box at the bottom of your screen and we will answer them during or after the presentation
- The presentation will be recorded and archived on our web site at [www.mnsmokefreehousing.org/webinar](http://www.mnsmokefreehousing.org/webinar)
- Print a pdf of [today's presentations](#)

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## Today's Speakers





Brittany McFadden  
Program Director,  
Live Smoke Free



Warren Ortland  
Staff Attorney,  
Public Health Law Center



Rachel Riley  
Senior Environmental Trainer,  
Office of Healthy Homes and Lead Hazard Control  
Department of Housing and Urban Development

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**Live Smoke Free**

- Program of the Association for Nonsmokers—Minnesota
  - Working on smoke-free housing since late 1990's
  - Three full-time staff dedicated to project
  - Assisted hundreds of property managers in policy adoption, including public housing authorities; private owners; suburban, urban, and rural properties
- Recipient of MN Mentoring Supplement to provide technical assistance to Communities Putting Prevention to Work (CPPW) grantees
- Partnering with the Public Health Law Center
- Made possible by funding from the U.S. Department of Health and Human Services. Sponsored by the Minnesota Department of Health




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**Public Health Law Center**

- Legal non-profit located at William Mitchell College of Law
- Home of the Tobacco Control Legal Consortium; providing legal technical assistance nationwide on tobacco control issues
- Partnering with Live Smoke Free since 2007 on smoke-free housing




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**Technical Assistance Team**



**Brittany McFadden**  
Program Director,  
Live Smoke Free



**Warren Ortland**  
Staff Attorney,  
Public Health Law Center



**Carissa Larsen**  
Assistant Program Director,  
Live Smoke Free

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**Live Smoke Free** **Public Health Law Center**

## Technical Assistance Scope of Work

- Webinar series on the stages of developing a smoke-free housing program
- Development of a comprehensive “how-to” training manual for smoke-free housing advocates
- Individual consultations, including site visits, on strategy development, legal issues, and materials

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**Live Smoke Free** **Public Health Law Center**

## Stages of Smoke-Free Multi-Housing Program Development

**Phase 1: Understanding the Need for Smoke-Free Multi-Unit Housing**

Stages of Smoke-Free Multi-Unit Housing Program Development			
<b>The Case for Smoke-Free MUH</b>	<b>Getting to Know the MUH Industry</b>	<b>Building Your Smoke-Free MUH Program</b>	<b>Understanding Legal Issues</b>
The importance of adopting smoke-free MUH policies	Assessing the MUH stock and learning what's important to the industry	Creating goals, materials, and procedures to sustain a program	Learning the local, state, and federal laws pertaining to MUH

**Phase 2: Working Toward Smoke-Free Multi-Unit Housing Policy Adoption**

Stages of Smoke-Free Multi-Unit Housing Program Development				
<b>Strategies to Reach the Housing Industry</b>	<b>Working with MUH to Adopt a Policy</b>	<b>Providing Cessation in Smoke-Free Buildings</b>	<b>Working with Renters Exposed to Smoke</b>	<b>Program Sustainability</b>
Getting your message to landlords	The policy adoption process	Helping current residents make the transition to a smoke-free environment	Empowering renters suffering from secondhand smoke drift	Partnering with other smoke-free MUH programs

Print a pdf of the [Smoke-Free Multi-Housing Program Continuum](#)

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**Live Smoke Free** **Public Health Law Center**

## Webinar Series

Based on the Smoke-Free Multi-Unit Housing Program Continuum

- The Case for Smoke-Free Housing: October 10<sup>th</sup>; archived
- Getting to Know the Multi-Housing Industry – October 27<sup>th</sup>; archived
- Building Your Smoke-Free Housing Program – November 10<sup>th</sup>; archived
- **Understanding Legal Issues – December 1<sup>st</sup>**
- Strategies to Reach the Housing Industry – December 15<sup>th</sup>
- Working with Property Owners/Managers to Adopt a Smoke-Free Policy – January 12<sup>th</sup>
- Providing Cessation in Smoke-Free Buildings – January 26<sup>th</sup>
- Working with Renters Exposed to Secondhand Smoke – February 9<sup>th</sup>
- Program Sustainability – February 23<sup>rd</sup>

Learn more and register at  
[www.mnsmokefreehousing.org/cppw](http://www.mnsmokefreehousing.org/cppw)

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**Understanding Legal Issues  
in  
Smoke-Free Multi-Unit Housing**

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## **Topics**

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Topics Covered Today:

- State law
- Federal law / federal action
- Federal Initiatives
- Tenants
- Landlords
- Subsidized Housing
- Policy Options
- Contacts / Resources

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## **State & Local Laws**

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- **State Clean Indoor Air Acts:**
  - Indoor common areas
  - Prohibits smoking in indoor public places and places of employment: sales offices and maintenance areas
- **Utah**
  - Secondhand smoke is a nuisance
- **City / Counties (California)**
  - Prohibits smoking in individual units

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## Federal Law

- No federal law prohibits designation of an entire rental apartment building as smoke-free
- No indefinite "grandfathering" required
- Disability statutes to reduce or eliminate exposure to secondhand smoke




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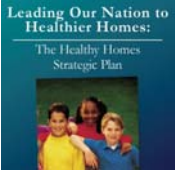
## Healthy Homes Strategic Plan

Office of Healthy Homes and Lead Hazard Control

2009 Strategic Plan

*Critical Public Health Needs*

It is important to acknowledge emerging public health needs and their relationship to the work of the OHHLHC.



1) **Smoke-Free Housing** : As the dangers of exposure to secondhand smoke and the benefits of smoke-free environments have become better understood, so has the demand for smoke-free housing. As of November 2008, over 100 local Housing Authorities nationwide had adopted smoke-free policies for some or all of their apartment buildings, 27 of which were adopted since January 2008 (TCSG, 2008). Letters from multiple HUD field offices, including one from the Chief Counsel in HUD's Detroit field office, have stated that housing authorities

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## HUD Notice Public Housing



U.S. Department of Housing and Urban Development  
Office of Public and Indian Housing  
Office of Healthy Homes and Lead Hazard Control

<p><b>SPECIAL ATTENTION OF:</b> Regional Directors; State and Area Coordinators; Public Housing Hub Directors; Program Center Coordinators; Troubled Agency Recovery Center Directors; Special Applications Center Director; Public Housing Agencies; Resident Management Corporations; Healthy Homes Representatives</p>	<p><b>NOTICE: PIH-2009-21 (HA)</b>  Issued: July 17, 2009 Expires: July 31, 2010  Cross Reference: 24 CFR 903.7(b)(3) 24 CFR 903.7(e)(1)</p>
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**Subject: Non-Smoking Policies in Public Housing**

1. **Purpose.** This notice strongly encourages Public Housing Authorities (PHAs) to implement non-smoking policies in some or all of their public housing units. According to the American

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## HUD Notice Multifamily

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-8001

ASSISTANT SECRETARY FOR HOUSING  
FEDERAL HOUSING COMMISSION

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

<b>Special Attention of:</b>	NOTICE: H 2010-21
Multifamily Hub Directors	Issued: September 15, 2010
Multifamily Program Center Directors	Expires: September 30, 2011
Rural Housing Services (RHS) Directors	Cross References:
Supervisory Housing Project Managers	
Housing Project Managers	
Contract Administrators	
Multifamily Owners and Management Agents	

**Subject: Optional Smoke-Free Housing Policy Implementation**

**I. Purpose**

The purpose of this Notice is to encourage owners and management agents (O/As) participating in one of the Multifamily Housing rental assistance programs listed in Section III of this Notice to implement smoke-free housing policies on some or all of the properties they own or manage. This Notice provides instructions to O/As on the requirements for implementing smoke-free housing policies and only applies to O/As who choose to establish such policies.

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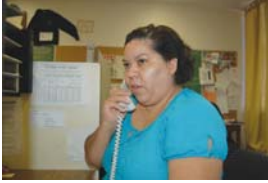
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## Tenants

**Tenants**

"I am being bothered by smoke coming into my apartment. I just rented the unit and still have several months on my lease. What can I do?"




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## Tenants

- Questions:**
  - Have you talked with the smoker?
  - Have you talked with the landlord?
  - Have you talked with other residents?
  - Are you low-income?
  - Do you have a serious health condition?




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## Legal Options

### Common Law

- Nuisance
- Warranty of Habitability
- Trespass
- Some success
- Likely would require an attorney



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## Resources / Options

### Attorney Referral Services




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## Resources / Options

### Law School Clinics




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## Resources / Options



**Pro Bono attorney programs**

**CATHOLIC CHARITIES CENTRAL TEXAS**  
DIOCESE OF AUSTIN

*Our Services*

**Pro Bono Legal Services**

Pro bono legal services are available to the indigent community of Travis County and surrounding areas. Ten practices are organized to help address the broad range of problems confronting the low-income community.

Volunteer attorneys can provide brief advice and counseling with civil legal problems or questions in the areas of:

- Civil Litigation and Small Claims
- Contract Law
- Elder Law
- Employment and Labor Law
- Estate Law
- Family Law, Alimony, Child Support, and Custody
- Protective Orders
- Trusts and Wills
- Public Benefits

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## Resources / Options



**Online legal resource help**

**TexasLawHelp.org**  
KNOWLEDGE IS POWER

**Other States** | **Find Legal Assistance** | **About Legal Aid** | **Legal Aid Directory**

**Welcome to Texas Law Help!**

This free guide offers civil legal information to Texans who cannot afford legal help. Learn about your rights, available self-help resources, and organizations that provide free and low-cost legal aid.

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## Resources / Options



**Mediation Services**

**DRC** Dispute Resolution Center  
www.drcmediators.org

Ph: 512-371-0633 | Fax: 512-371-2411

**Resolving Disputes Through Mediation**

**Se Habla Español**  
View Cart & Checkout

Home | Contact Us | Mediation Services | Mediation Training | Voluntary | DRC Blog

**Mediation Services**

- Customized Mediation
- Civil Litigation
- Real Estate Services

**Mediation Training**

- 40 hrs. Basic Mediation
- 60 hr. Family Mediation
- Customized Mediation
- The Mediator: Ethics & DVO
- Training: Testimonials
- Models - Litigation

**Information/Resources**

- ADR Legislation
- Testimonials/Mediation

Serving Travis and Surrounding Counties Since 1983

The **Dispute Resolution Center** is an independent, nonprofit organization that provides and promotes accessible, high-quality dispute resolution services for all people in Travis County and the surrounding Austin, TX areas.

In addition, the DRC offers **Mediation Training**, **Customized Mediation**, **Training**, **Facilitation Services** and **Community Education Programs** designed to give individuals, businesses and communities the skills necessary to effectively mediate and resolve conflicts.

**\*\*Currently seeking experienced Family trained, Spanish speaking, Volunteer Attorney Mediators, available during the day time. Qualified candidates, please contact Scott at 279-1904.\*\***

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## Challenges



### Tenants / tenant advocates

- "My home is my castle"
- "I have a right to smoke in my unit"
- "Just one more way to evict tenants"
- "You are picking on poor people"

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## Landlords



### Landlords

"I would like to go smoke-free, but I have several residents who smoke. Will I get into trouble if I impose a smoke-free policy? How do I do it?"




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## Challenges / Concerns



### Landlords / property managers

- "It will reduce my market for renters / buyers"
- "It is discriminatory"
- "It will open me up for additional liability"
- "It will be a nightmare to enforce"

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 **Landlords** 

- **Questions:**
  - Have you provided information to your tenants?
  - What areas do you want to be smoke-free?
  - Have you surveyed your residents?
  - What percentage of smokers do you have?
  - Are your leases long-term or month to month?




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 **Discrimination** 

- Is it discriminatory to designate an entire building or apartment campus as smoke-free or tobacco-free? **No**
  - Smoking or use of tobacco is not a protected activity or right
  - A smoker is not a protected category
  - Individual's addiction to nicotine is not a disability

**Recommendation:** implement policy based on activity (smoking) and not individual's status.

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 **Legal Risks of Allowing Smoking** 

- **What are a landlord's potential risks if the property is designated as smoking-permitted?**
  - Nuisance, warranty of habitability
  - Disability claims
  - Negligence, failure of duty to warn




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 **Legal Liabilities of Going Smoke Free** 

- **What are a landlord's liabilities if the building is designated smoke-free?**
  - No cases have found landlord liable for not ensuring smoke-free environment
  - Best effort to provide smoke-free environment
  - Some responsibility on tenants; needs tenants' assistance




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 **Accommodations** 

**Mobility limited individual? Probably not** 

- "To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability."  
*HUD Occupancy Handbook, Civil Rights and Nondiscrimination Requirements.*

**Mental health accommodation request? Probably not**

- "Nothing...requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals."  
*Fair Housing Act, 42 U.S.C. 3604(f)(9).*

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 **Implementation & Enforcement** 

- Prepare everyone
  - Document everything
- Enforce every violation

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## Prepare everyone



### Prepare everyone

- Distribute information
- Have presentations and/or meetings
- Conduct a survey
- Provide generous notice




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## Document Everything



- **Use written lease addendum**
  - Regardless of size of property
- **Make it comprehensive**
  - Include all provisions
  - Make it clear and easy to understand
  - Document exceptions / grandfathering
  - Include enforcement steps




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## Enforce every violation



### Promptly –

- Enforce in a timely manner

### Uniformly

- Impose the same penalties on everyone

### Consistently

- Always enforce the penalties




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**Enforcement**

**If a violation occurs...gather the evidence**

- Identify willing witnesses
- Document violations
- Follow legal notice requirements and inspect the apartment


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**General Legal Recommendations**

- Try to avoid grandfathering current smokers
- Implement policy on activity of smoking
- Document policy and enforcement steps
- Enforce smoke-free policy consistently

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**Subsidized Housing**

**Public Housing/Section 8/  
Housing Choice Voucher**

- Notice Requirements
- Housing Authority review of policy
- Lease versus House Rules
- Eviction process




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## New trends in smoke-free housing

- Low Income Housing Tax Credit Program
- Smoking Policy Disclosure
- Condominiums

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## New trends in smoke-free housing

### Low Income Housing Tax Credit Program

- Provides financial incentive to adopt smoke-free policies
- Available in all states
- [www.healthyhousinglaw.com](http://www.healthyhousinglaw.com)




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Live Smoke Free 

## New trends in smoke-free housing

### Disclosure of smoking policy prior to rental or purchase



- Prevention for tenants
- Education for landlords

Oakland, CA; Buffalo, NY; Duluth, MN; Maine and Oregon

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## Local Regulation



### Local Ordinances

Mandate smoke-free policies for apartment dwelling units

#### Belmont, California

- Prohibits smoking in 100% of individual units of multi-unit residences, apartments and condominiums
- Medical marijuana exemption




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## Condominiums



- Smoke-free policies are legal
- Policies can be enforced against current smokers
- Resources:
  - [www.publichealthlawcenter.org/documents/publications](http://www.publichealthlawcenter.org/documents/publications)
  - <http://www.phlpnet.org/tobacco-control/products/how-make-condo-complex-smokefree>

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## Webinar Series



Based on the Smoke-Free Multi-Unit Housing Program Continuum

- The Case for Smoke-Free Housing – October 10
- Getting to Know the Multi-Housing Industry – October 27<sup>th</sup>
- Building Your Smoke-Free Housing Program – November 10<sup>th</sup>
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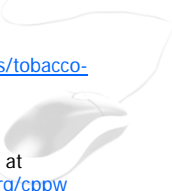
 **Resources** 

HUD Strategic Plan and Smoke-Free Policy Notices  
[www.healthyhousinglaw.com](http://www.healthyhousinglaw.com)

Educational Materials, Surveys, Model Lease Language  
[www.mnsmokefreehousing.org](http://www.mnsmokefreehousing.org)

Legal Fact Sheets  
<http://publichealthlawcenter.org/topics/tobacco-control/smoking-regulation/housing>

Learn more and register at  
[www.mnsmokefreehousing.org/cppw](http://www.mnsmokefreehousing.org/cppw)




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 **Contact Information** 

<b>Live Smoke Free</b> <a href="http://www.mnsmokefreehousing.org">www.mnsmokefreehousing.org</a>	<b>Public Health Law Center</b> <a href="http://www.publichealthlawcenter.org">www.publichealthlawcenter.org</a>
Carissa Larsen Assistant Program Director <a href="mailto:carissa@ansrmn.org">carissa@ansrmn.org</a> 651-646-3005	Warren Ortland Staff Attorney <a href="mailto:warren.ortland@wmitchell.edu">warren.ortland@wmitchell.edu</a> 651-290-7539
Brittany McFadden Program Director <a href="mailto:brittany@ansrmn.org">brittany@ansrmn.org</a> 651-646-3005	<b>Office of Healthy Homes and Lead Hazard Control</b>  Rachel Riley <a href="mailto:Rachel.M.Riley@hud.gov">Rachel.M.Riley@hud.gov</a>

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