

Public Health Law Center
Improving health through the power of law

Secondhand Smoke and Condominiums

Webinar
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Secondhand Smoke and Common Interest Communities

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Live Smoke Free Program

- Program of the Association for Nonsmokers—Minnesota
- Member of Minnesota Multi-Housing Association (MHA) and Minnesota chapter of National Association of Housing and Redevelopment Officials (MN NAHRO)
- Grants from the Minnesota Department of Health and previous funding from American Cancer Society
- Goal:** Increase the number of smoke-free policies in apartments or other multi-housing buildings
 - Educate owners
 - Educate local policy makers
 - Educate and empower tenants
 - Promote existing smoke-free apartment buildings

Benefits of Going Smoke Free

- Market advantages
- Reduced cleaning costs
- Reduced risk of fire damage and death
- Reduced legal liability
- Reduced numbers of complaints about secondhand smoke infiltration in units
- Eliminates cost of sealing and ventilation treatments
- Healthier residents!
- Happier residents!

Typical Concerns Regarding Secondhand Smoke

- Live Smoke Free regularly receives calls from concerned residents:
 - Tobacco smoke entering their unit from another unit, hallway, patio, deck, etc.
 - Residents often frustrated by lack of assistance from management or even blatant disregard of their problem
 - Renters in senior or subsidized housing are of particular concern because of limited housing options or serious health concerns, such as asthma, SIDS, etc.
- ANSR has received calls from renters for 10+ years
- As more public places become smoke free, residents are demanding that their own living space be so as well

Secondhand Smoke is Deadly

- Group A carcinogen -- a substance known to cause cancer in humans
- The 2006 Surgeon General's Report concluded that **there is no risk-free level of secondhand smoke**
- 1,110 Minnesotan adults, children, and babies die each year from exposure to the smoking of others (Campaign for Tobacco-Free Kids, 2006)

 **Reduce Cleaning Costs**

- Residue and stains on walls, curtains, cabinets, blinds, appliances, and fixtures
- Odor in carpets, curtains, and walls
- Burn damage to tiles, carpets, curtains, countertops, bathtubs
- The cost of cleaning a unit that has been smoked in is often 2-3 times more than a smoke-free unit

Property Damage Caused by Smoking



A/C Filter With
Smoke Damage



Residue on
Electrical
Outlet



Residue on Walls

Smoking is a Fire Hazard

- The fatality rate of cigarette-related fires is 8x greater than other fires; the injury rate is 3x greater
- Almost 95% of cigarette-related fires occur outside of a trash can
- Cigarette-related fires are usually started in combination with a careless act
- Damage is done by the flames, the smoke, and the water from sprinklers

(Interview with Minneapolis Fire Department, 2010)

 **Owners Experience the Benefits of Going Smoke Free**

Many owners and managers of smoke-free buildings report positive findings:

- Less time and cost in turnovers
- Less vacancies
- Less staff time spent following up on complaints
- Positive resident reactions
- Some pre-policy anxiety, but positive post-policy experiences

“We love our smoke-free buildings!”

Air Movement in Apartment Buildings

- Research by the Center for Energy and Environment in Minnesota; Published in 2004
- Measured air movement in apartment buildings
- Tested the efficacy of air sealing and mechanical ventilation treatments

Reports available at www.mncee.org

 Center for Energy and Environment



Gaps along baseboard under carpet

Some openings are big!

Why do our clothes smell like smoke?

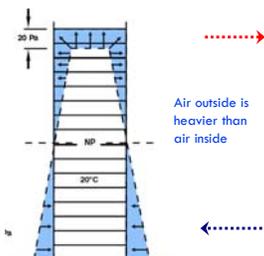


Hidden chase openings are hard to access



What drives air through the leaks?

Winter stack effect



In at the bottom and out the top: taller building = bigger effect

Air Movement Treatment Conclusions

- Air flow between units in apartment buildings is significant, and is difficult to reduce and virtually impossible to eliminate
- Costs of mitigation exceed what most owners are willing to pay (average cost per unit = \$700*)

*2004 costs

Ventilation is not the Solution

- Secondhand smoke cannot be completely controlled by ventilation or air cleaning
- The American Society of Heating, Refrigerating & Air-Conditioning Engineers (ASHRAE) position document on secondhand smoke: "At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity." (www.ashrae.org, 2010)

Secondhand Smoke in Condominiums



Secondhand Smoke and Condominiums: Research and Legal Context

- **Research Project Objectives**
 - ▣ Assess secondhand smoke issue and perspectives of owner-occupants and property managers
 - ▣ Make recommendations for solutions
 - ▣ Develop tools for education and implementation
- **Research Project Activities**
 - ▣ Survey of owner-occupants
 - ▣ Interviews with property managers
 - ▣ Legal research

ASHRAE Statement

American Society of Heating, Refrigeration and Air-Conditioning Engineers

2010 Position Statement:

- At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity.

*ASHRAE Position Document on
Environmental Tobacco Smoke
Approved by ASHRAE Board of Directors
June 25, 2010*

Surgeon General

- The Surgeon General's Call to Action to Promote Healthy Homes – **June 2009**

How Indoor Air Quality Affects Health

Secondhand Smoke

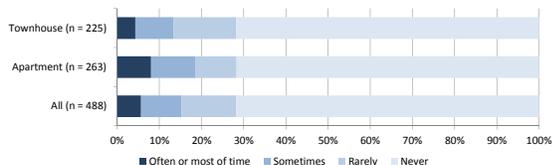
An estimated 38,112 lung cancer and heart disease deaths annually are attributed to exposure to secondhand smoke (Centers for Disease Control and Prevention 2005b). Secondhand smoke also contributes to respiratory diseases and other health problems. In 2000, more than 126 million U.S. residents ages 3 years and older were exposed to secondhand smoke; for most, the home was the primary site of exposure (U.S. Department of Health and Human Services 2006). The risk for exposure extends beyond the immediate family. Smokers living in multifamily residences (such as apartment and condominium complexes) can affect not only family members, but other residents as well.

Secondhand Smoke in Condominiums

Owner-occupant survey – preliminary results

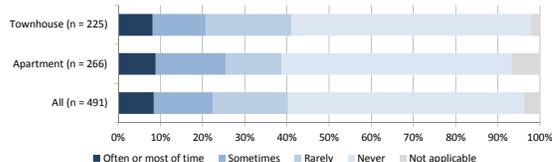
Secondhand Smoke Regularly Enters Units

In past six months, how often has tobacco smoke from somewhere else in or around the building come into your unit?



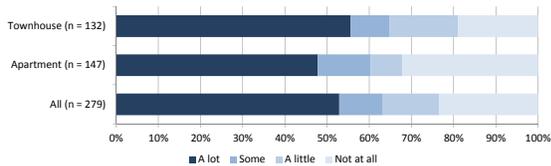
Secondhand Smoke Regularly Enters Decks/Balconies

In past six months, how often has tobacco smoke from somewhere else in or around the building come onto your unit's patio, deck or balcony?



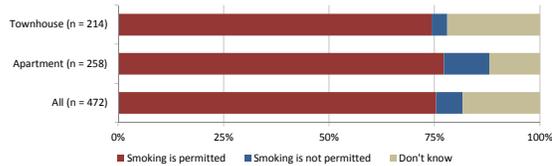
Residents are Bothered by Secondhand Smoke

How much does it bother you when tobacco smoke from somewhere else in or around the building comes into your unit?



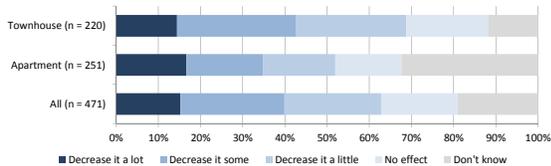
Over 10% of Buildings are Already Smoke Free

What rules does your association currently have about smoking in... residents' units?



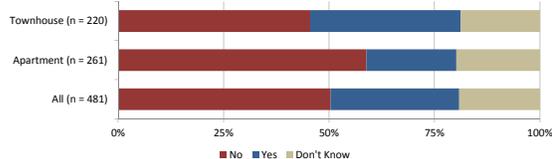
Effect of Secondhand Smoke on Resale Value

How much do you think it would affect the resale value of your unit if potential buyers knew that tobacco smoke came into it 1 day per week?



Effect of Secondhand Smoke on Purchasing

If you were considering buying a particular unit, would you still buy it if you found out that tobacco smoke came in 1 day per week?

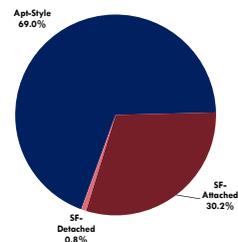


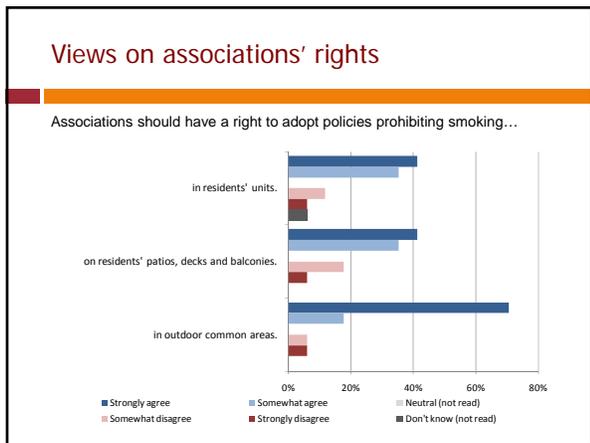
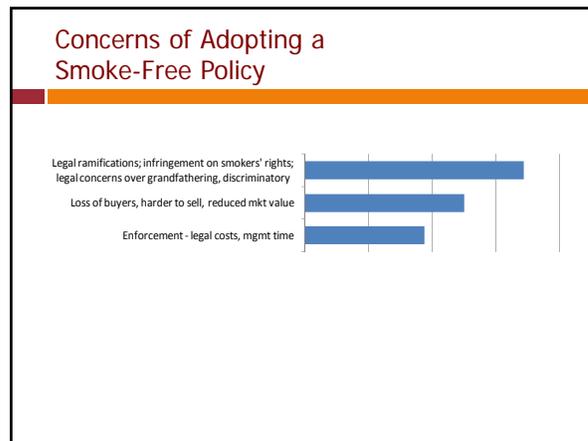
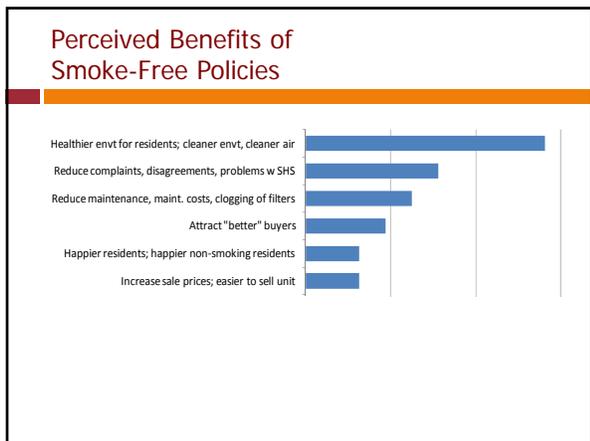
Secondhand Smoke in Condominiums

Decision-maker interviews

SHS incursion

- Total 126 smoke incursion problems since in current position
- Apt-style buildings 20% of units, 69% of problems





Secondhand Smoke in Multi-Unit Buildings

Legal Considerations

Minnesota State Law



- Minnesota Clean Indoor Air Act:
 - Condominium complexes are treated as private residences; policy on smoking in the common areas is up to the homeowners' association

Minnesota Department of Health Fact Sheet July 2010
Freedom to Breathe in Rental Apartment Buildings
How the Freedom to Breathe Provisions apply to Multi-Unit Rental Housing

Note: Rental apartment buildings are defined as buildings with 3 or more rented living units. Condominium and co-operative housing buildings are not regulated by the MCIAA.

Minnesota State Law



- Minnesota Clean Indoor Air Act:
 - Prohibits smoking in indoor public places and places of employment: sales offices and maintenance areas
 - Buildings in transition: application of the law is based on which type of units predominate
 - Law is establishing a minimum requirement
 - No law prohibits a homeowners' association from making an entire property smoke free

Adoption of Smoke Free Policies

Can we do it? **Yes**

- Minnesota Common Interest Ownership Act (MCIOA) Minn. Stat. 515B
 - Permits "any material restrictions" on use or occupancy of a unit (Declaration contents; all common interest communities)
 - Also permits rules and regulations "regulating the use of the units, and conduct of unit occupants, which may jeopardize the health, safety or welfare of other occupants, which involves noise or other disturbing activity, or which may damage the common areas or other units." (Powers of unit owners' association)

Discrimination



- Is it discriminatory to adopt and implement a smoke-free policy? **No**
 - Not a protected activity or right.
 - Not a protected category
 - Not a disability

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

Adoption of Smoke Free Policies

What factors should be considered?

- Support for the policy change by association members
- Extent of the policy – will it cover common areas, individual units, specific outdoor areas (pools, recreation areas) or entire property?
- Likelihood that the association will modify the policy in the future
- Approach towards existing smoking owners
- Expectation that the policy will be challenged by some owners
- Cost

Recommendation: Provide education to all parties and conduct survey to assess attitudes towards policy

Adoption of Smoke-Free Policies

What if we have support for a strong policy?

Adopt the policy by way of a change to the **declaration**



Positives

- More likely to withstand a legal challenge
- Courts are deferential to association decisions to amend declaration

Negatives

- More costly
- Harder to get passed; requires super-majority of association members

Adoption of Smoke Free Policies

What if we want an gradual, incremental adoption?



- Adopt the policy by way of a change to the rules and regulations

Positives

- Only requires majority vote of the association board
- Less costly to implement
- Easier to adapt over time as needed

Negatives

- Weaker if legally challenged
- Can be easily changed if board membership changes
- "Grandfathering" or other accommodations may be required

Adoption of Smoke Free Policies

Is enforcement an issue?

- Should be enforced as are other use restrictions – pets, excessive noise
- Follow documented procedures for enforcement or policy may be considered to have been waived
- Relatively new issue; only one case directly addressing the situation
- "Grandfathering" could pose enforcement issues




Alternatives to Smoke Free Policies

What are the risks of permitting smoking?

- Costs for alternative measures, such as separate ventilation systems
- Individual actions for nuisance; owner vs. owner
- Action to require the board to enforce the "nuisance" clause in the declaration
- Disability accommodation request from non-smoker



Accommodations for Nonsmokers if no Smoke-Free Policy Exists

- Federal or state disability statutes
- Disability determined on a case-by-case basis
- Accommodations also determined on a case-by-case basis
 - Modifications permitted to unit that are not in accordance with association's physical modification requirements
 - Providing outdoor shelter; MCIIA restrictions on indoor common areas would likely not apply
 - Adoption of a smoke-free policy

Accommodations for Smokers

Would an accommodation be granted to a mobility limited individual or other disabled individual allowing him or her to smoke inside?

Probably not

- "Nexus" between disability and accommodation
- "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).



Public Policy Options

- Common areas of condominiums
- Language in condominium statutes that references smoking as an example of an activity that can be controlled by the association
- Language in nuisance statutes
- Disclosure of smoking policies for condominium complexes as part of sales process



Property Manager Experience

Keith Myrmel, CMCA
 Association Manager
 Gittleman Management Corp

Gittleman Properties



La Rive Condominiums

The River Towers



Experience

- Worked with properties serving special needs from daycare to elderly housing to troubled youth
- Managing 5 major downtown condominium properties
- Over 1000 condominium units including commercial spaces
- Elementary school smoker

Reasons for Adopting Policy

- Unable to provide fair and full enjoyment of individual units
- Unable to limit odor intrusion
- Unable to contain odors
- Provide legal allowance for existing situations and improve overall "full enjoyment" by limiting future negative impact
- New findings on secondhand smoke
- Legally feasible to implement



Process (2007 – 2009)

- 2007
 - Initiated ban on smoking in common areas and 30 feet from doors
- 2008
 - Discussions with the Board of Directors
 - Open meeting for discussing the options to extend the smoking ban within units with grandfathering in existing situations
- 2009
 - Legal opinion - Board can make decision and do it as a "RULE", but best to have owner wide vote with **complete** support by entire Board
 - Vote passed

Owner / Occupant interaction

- Two open discussion meetings
 - Support limiting smoking = 50%
 - Resistance = 50%
- Annual meeting – Nov. 2009
 - Support limiting smoking = 75%
 - Resistance = 25%



Vincent Van Gogh - Skull with burning cigarette

Implementation Process

- 2010**
- Sent 6 monthly reminders to all owners that this new Rule has passed and will take effect July 1, 2010. Residents must register their unit for the "grandfathered" allowance.
 - All sales disclosures include the new Rule and related information to highlight this major change in the policies
 - Monitoring existing allowances to ensure when a change happens, to work toward an eventual elimination of the grandfathered option

Legal Considerations



- If planning to ban smoking in units, can be done via the Rules/Operating Policy
- Highly recommend the entire Board is supportive
- Highly recommend the Board bring issue to the Annual meeting for an owner vote
- Document everything

Board resolution and policy rule were written by legal counsel

Facts

- Grandfathered units = 74 out of 510 (14.5%)
- Complaints - none to date
- Fines for violations - none to date (but only been in effect from July 1, 2010)
- Lawsuits - none to date
- Lost potential buyers - unknown, but sales continue to happen
- Gained potential buyers - unknown, but no problem selling units

Facts



Costs

- Legal advice = approximately \$1,900.00 for research and meetings
- Legal counsel for document preparation = approximately \$3,000 for research, meetings, final resolution and policy rule
- Additional mailings for meetings and informational = \$0.00, we did all information via monthly management letters and included with the Annual meeting documents
- Time:
 - Board members = 10 – 20 hours each
 - Staff = 30 – 40 hours

Other

Other properties:

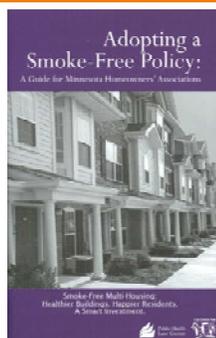
- One has ban everywhere except balconies and outside. The Board attempted to extend Rules to eliminate smoking on balconies but had strong opposition and dropped the attempt
- One is exploring a similar ban in units. They have considerable resident support to start having open meeting discussions later this year
- Insurance savings?
- In unit "cheaters" - as long as they no longer create issues with their neighbors, I consider it a non-issue

Conclusions

- In general, it looks like an overall improvement for the "atmosphere" of the property, smokers are using the outdoor areas appropriately, still have some using stairwells (until we catch them), but that has always happened
- The reduction of smoke odor in the building is noticeable, but we still have to deal with existing situations until they move or other circumstances change
- Move slowly, expect huge opposition by the minority and minimal involvement by the supporters until they have to vote on it
- It is the Board's decision, leave it on their shoulders

Resources Available to Associations

- Owner-occupant survey results fact sheet
- Property manager interviews fact sheet
- Legal issues fact sheet
- Handbook for homeowners' associations
- Model language for smoke-free policy



Resources

- Public Health Law Center
<http://publichealthlawcenter.org>
- Live Smoke Free
<http://www.mnsmokefreeshousing.org>
- Healthy Housing Law
<http://healthyhousinglaw.com>

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Resources

□ **Webinars with further information**
<http://www.mnsmokefreehousing.org/webinar>



The screenshot shows a webpage titled 'Smoke-Free Housing Institute' with a navigation menu on the left and a main content area. The main content area is titled 'Archived Webinars' and lists several webinars with links to download them. The webinars listed include: 'Secondhand Smoke and Condominiums', 'Getting to Zero: The Multi-Housing Industry (pre recorded)', 'Setting to Zero: The Multi-Housing Industry (pre recorded)', 'Building Your Smoke-Free Housing Program (pre recorded)', and 'Implementing Legal Steps (pre recorded)'. Each entry includes a title, a brief description, and a 'Download slides.pdf' link.

Resources – Healthy Housing Law

Condominium / Common Interest Community Materials

Webinar: Secondhand Smoke and Condominiums:
Originally presented February 29, 2012.

This webinar revised the results of research in Massachusetts and Minnesota on the experience of owner-occupants with smoke-free policies and the preferences of potential buyers for smoke-free properties. Representatives from Washington State and Oregon discuss methods to build relationships in the condominium community.

Watch webinar by clicking [here](#).
Download the slides [here](#).

Minnesota Common Interest Community Research Materials
 Fact Sheet: [Survey Results of Condominium Owner-Occupants](#)
 Fact Sheet: [Interview Results with Condominium Property Managers](#)
 Fact Sheet: [Condominium Smoke-Free Policy Legal Topics](#)
 Research Study: [Minnesota Owner-Occupant Survey Results](#)

Massachusetts Multi-Unit Housing Research
 Research Study: [Massachusetts Housing Survey](#)

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Questions?
