

# Smoke-Free Common Interest Communities: Legal Fact Sheet



## Overview

As the number of indoor places that prohibit smoking increases, residents of multi-unit dwellings are becoming increasingly aware of the secondhand smoke that drifts into their individual units. The evidence of the dangers of secondhand smoke is conclusive,<sup>1</sup> so efforts to control exposure in the place where people on average spend a majority of their time will significantly contribute to public health. This fact sheet addresses some of the legal-related questions that may arise when homeowners' associations consider adopting smoking restricted or smoke-free policies.

## Doesn't Minnesota state law address smoking in multi-unit buildings?

The Freedom to Breathe Act amendments that became effective in October 2007 did strengthen state law as it applies to the common areas of *rental* apartment buildings. The common areas of rental apartment buildings are considered indoor public places and smoking is completely prohibited under the Minnesota Clean Indoor Air Act (MCIAA). The language of the law does *not* address common interest communities, and the Minnesota Department of Health has adopted an interpretation that MCIAA does not apply to common interest communities (condos, townhomes, and other owner-occupied attached housing).<sup>2</sup>

## Is it legal to adopt policies prohibiting smoking in the various areas of common interest communities?

Yes. No federal or state law prohibits private property owners and associations from adopting smoke-free policies for all parts of their property, including individual residential units.

## Would prohibiting smoking be considered discriminatory in any way?

No. Smoking is not a protected right or activity.<sup>3</sup> Also, an individual's status as a smoker is not a protected category of persons. Legal protections are generally limited to categories or persons that are considered to be innate (inherited) and immutable (unchangeable) and courts have found that being a smoker does not meet those criteria. Attempts by smokers to be considered disabled due to an addiction to nicotine have not been successful, so smokers do not receive protection under state or federal disability statutes.

## What risks does an association face by remaining smoking permitted or by adopting a smoke-free policy?

If an association remains smoking permitted, two primary legal challenges may arise. First, a resident could sue either the association or the smoking owner on nuisance grounds. Most association declarations contain a generic nuisance clause stating that an owner cannot engage in activity that affects the use and enjoyment of another owner's property. A resident bothered by secondhand smoke could bring an action against the association to enforce this provision of the declaration. The non-smoking resident could also pursue a nuisance action against the individual smoking owner.



Second, if an individual bothered by secondhand smoke has a serious health condition that is affected by exposure to secondhand smoke, he or she may be able to get some relief by using one of the disability statutes. If the courts find that the condition is a disability, then the non-smoker is entitled to a reasonable accommodation, which could include imposition of a smoke-free policy.

## How should a homeowners' association implement a smoke-free policy?

The policy can be implemented by a change to the declaration or to the rules and regulations. The Minnesota Common Interest Ownership Act (MCIOA) states that the declaration can contain, "any material restrictions" on use or occupancy of a unit. The statute also permits rules and regulations concerning "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."

## Is it better to include the policy in the declaration or in the rules?

That decision depends on a number of factors that the association should consider; such as:

- ⇒ Support for the policy change by association members
- ⇒ Extent of the policy; will it cover just common areas or all of the property?
- ⇒ Likelihood that the policy will be changed in the near future
- ⇒ Approach towards existing owners who smoke
- ⇒ Expectation that the policy will be legally challenged



A change to the declaration is more difficult and costly to pass, but it will be given deference by the courts and be stronger against legal challenges. A new rule and regulation is easier to implement and change, but is also more susceptible to challenges.

## Is enforcement of a smoke-free policy difficult?

A smoke-free policy should be enforced as the association would enforce any other policy. From the experience of rental properties and condominiums that have already adopted smoke-free policies, they tend to be self-enforcing and do not require a substantial or unique amount of effort to enforce. In a survey conducted in Minnesota in 2009, the vast majority of owner-occupants are already nonsmokers, so enforcement would only affect a few smokers (see the "Smoke-Free Common Interest Communities: Results of Survey of Minnesota Owner-Occupants" fact sheet for more information about the 2009 survey).

## Can the policy be enforced against existing smokers?

Most likely, yes. As long as the homeowners' association follows the state law on common interest communities and any of the requirements in their governing documents for amending the declaration or changing the rules and regulations, then the courts should support the association in enforcing the policy. In one case from Colorado, the court upheld a policy implemented by way of a change to the declaration and required the existing smoker to comply.

## Smoke-Free Policy Resources Are Available

For sample policy documents and more information, go to: [www.mnsmokefreehousing.org](http://www.mnsmokefreehousing.org)

### References:

1. U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General—Executive Summary*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.
2. Minnesota Department of Health, Indoor Air Unit. *Freedom to Breathe in Rental Apartment Buildings*, available at <http://www.health.state.mn.us/divs/eh/indoorair/mciaa/ftb/docs/f2brentalhousing.pdf>.
3. Samantha K. Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke: 2008* (2d edition, 2008), available at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf)



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