

Adopting a Smoke-Free Policy:

A Guide for Minnesota Homeowners' Associations

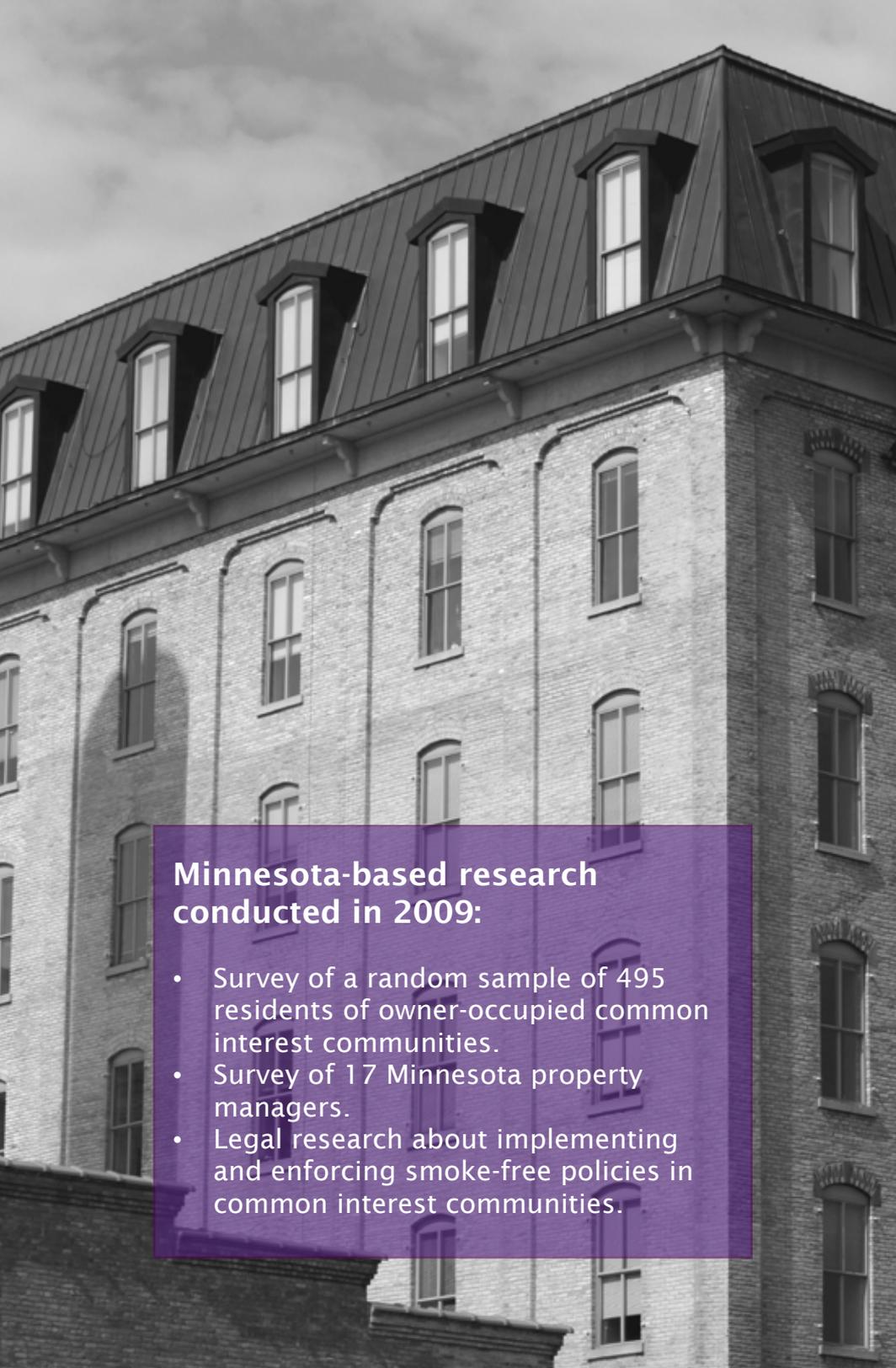


Smoke-Free Housing:
Healthier Buildings. Happier Residents.
A Smart Investment.



PUBLIC HEALTH
LAW CENTER
at Mitchell Hamline School of Law





Minnesota-based research conducted in 2009:

- Survey of a random sample of 495 residents of owner-occupied common interest communities.
- Survey of 17 Minnesota property managers.
- Legal research about implementing and enforcing smoke-free policies in common interest communities.

Background

Who Should Read This Guide?

This guide is intended for homeowners associations, residents, and property managers of owner-occupied common interest communities (such as condos, townhomes, and other attached housing). The guide is designed to assist you as you consider or plan to adopt a smoke-free policy for your community.

Secondhand Smoke* and Common Interest Communities

Over the past few decades there has been a growing movement toward smoke-free policies for multi-unit housing buildings, such as apartments and other attached rental housing. This is due, in part, to increased public awareness about the way in which secondhand smoke travels and thirdhand smoke settles in multi-housing buildings. According to a 2009 U.S. Surgeon General Report, “Smokers living in multifamily residences, such as apartment and condominium complexes, can affect not only family members, but other residents as well.”¹ Much of the smoke-free housing movement has occurred in the context of rental properties, but today many owner-occupied properties such as condominiums and townhomes are pursuing smoke-free policies as people learn how these measures benefit the health and safety of residents, guests, and pets, increase property values, and decrease hazard and litigation risk.

In 2009, in response to the need for more information on this topic, the Center for Energy and Environment, in partnership with the Public Health Law Center and the Association for Nonsmokers-Minnesota, surveyed 17 Minnesota property managers and a random sample of 495 residents of owner-occupied common interest communities to determine how often residents experience and report exposure to secondhand smoke in their common interest community (see the “Owners Survey” and “Managers Survey” tabs for results and more information). This type of data has grown over the years in multiunit housing settings. Based on housing data, legal research, and public health best practices, Live Smoke Free, a program of the Association for Nonsmokers - Minnesota, and the Public Health Law Center have created and updated this guide on implementing and enforcing smoke-free policies in common interest communities.

*The term “secondhand smoke” is generally used to refer to the smoking of commercial tobacco products (like cigarettes, cigars, and e-cigarettes) and other plant or synthetic substances.



Some of the chemicals in secondhand smoke include: Nicotine, Formaldehyde, Benzene, Polonium-210, Vinyl Chloride, Carbon Monoxide, Ammonia, Arsenic, Chromium, Lead, Cadmium, Butane and Toluene.

Healthier Buildings

Secondhand Smoke and E-Cigarette Aerosol Are Toxic

Secondhand smoke – the smoke that comes both from a lighted or activated commercial tobacco product and is exhaled by a person smoking – contains more than 7,000 chemicals.² Of these chemicals, at least 250 are known toxins, and more than 70 are cancer-causing chemicals. The composition of e-cigarettes varies greatly as they are generally unregulated products, but the toxicity of e-liquids used in e-cigarettes is also harmful to the health of the user and those exposed to the aerosol. E-cigarette aerosol contains harmful constituents and carcinogens, including nicotine, solvents, flavorants, and toxicants, and has caused acute lung injuries and death.³ There is no safe level of exposure to secondhand smoke, and the only way to protect people from the dangers of secondhand smoke is to eliminate the smoke exposure, according to the 2006 Surgeon’s General Report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*.⁴

Secondhand Smoke Is a Health Hazard

Exposure to secondhand tobacco smoke is responsible for at least 7,000 lung cancer deaths and almost 34,000 coronary heart disease deaths each year.⁵ People who are exposed to secondhand tobacco smoke increase their stroke risk by 20-30 percent.⁶ Thousands more people suffer from diseases caused or made worse by secondhand smoke, such as emphysema, asthma, pneumonia, and chronic bronchitis. Secondhand tobacco smoke also causes ear infections, sore throats, watery eyes, and coughing.

While the science is developing, marijuana (or cannabis smoke) also poses a risk to health. Some data suggests that marijuana and tobacco cigarettes contain many of the same toxic chemicals, with one study finding that marijuana joints emitted 3.5 times the pollution of a cigarette.⁷ Additionally, emissions from a marijuana joint had a slower decay rate than from a tobacco cigarette, meaning the pollutants stayed in the air longer.⁸

Owner-Occupants Are Exposed to Secondhand Smoke

According to 2009 Minnesota-based research, when asked: “In the past six months, how often has tobacco smoke from somewhere else in or around the building come into your unit?” 15 percent of owner-occupants responded “sometimes,” “often,” or “most of the time.”⁹

Indoor Air Quality

Air Flow Between Units Is Significant

Research by the Center for Energy and Environment on Minnesota buildings found significant air flow between units in multi-housing buildings. This air flow is difficult to reduce and virtually impossible to eliminate.

A 2004 study found that the average cost to seal a unit to reduce secondhand smoke leakage was approximately \$700 per unit (\$977 in 2020 dollars). However, sealing air leaks was still not enough to completely eliminate the secondhand smoke problem.¹⁰



Secondhand smoke cannot be completely controlled by ventilation or air purifiers. A smoke-free policy is the only way to eliminate secondhand smoke exposure.

Secondhand Smoke Cannot be Controlled by Ventilation and Air Purifiers¹¹

In 2020, the American Society of Heating, Refrigerating & Air Conditioning Engineers (ASHRAE) reaffirmed their 2015 position document on secondhand smoke, which concluded that “the only means of avoiding health effects and eliminating indoor [secondhand smoke] exposure is to ban all smoking activity inside and near buildings.”¹² ASHRAE includes e-cigarettes and smoking cannabis as causes of secondhand smoke exposure.¹³

ASHRAE cautions that air fresheners, cleaners, purifiers, and similar devices are ineffective and should not be relied upon to control health risks from secondhand smoke.

Eliminating Smoking Is the Only Way to Protect People from the Dangers of Smoking Indoors

Eliminating smoking indoors is the only way to fully protect people from secondhand smoke. According to the U.S. Surgeon General’s report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, ventilation systems can actually distribute secondhand smoke throughout a building.¹⁴

The effects of thirdhand smoke would also be diminished by the elimination of smoking indoors. Thirdhand smoke is the residual nicotine and other chemicals left on indoor surfaces (e.g., furniture, walls, pet bowls, toys, and carpet) by tobacco smoke. These chemicals cannot be removed by airing out a room or using fans, and children, the elderly, and others are at risk of tobacco-related health problems if they are exposed to surfaces with thirdhand smoke.¹⁵

Reduced Fire Risk

Eliminating indoor smoking also acts as a preventative measure against fire. Each year, from 2012 through 2016, an average of 18,100 home fires were caused by smoking. Smoking is the number one cause of home fire deaths.¹⁶ A 2014 study predicted that making public housing in the United States smoke-free would save \$16 million in costs from smoking-caused fires.¹⁷

Owner-Occupant Survey

In 2009 the Center for Energy and Environment, in partnership with the Public Health Law Center and the Association for Nonsmokers-Minnesota, surveyed a random sample of 495 Minnesota residents of owner-occupied common interest communities. This survey was conducted in order to understand resident exposure to secondhand smoke in common interest communities and preferences for smoke-free policies. The following summarizes the findings from that survey.



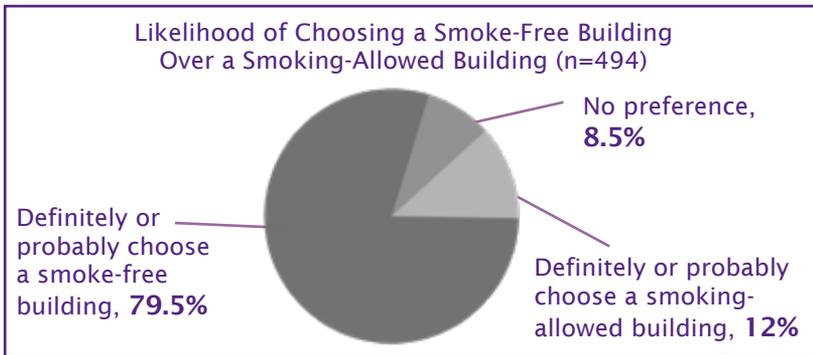
Eighty percent of owner-occupants reported that they would “Definitely” or “Probably” chose a smoke-free building over an identical smoking-allowed building.

Many Owner-Occupants Would Prefer a Smoke-Free Policy

When asked how much they are bothered by the secondhand smoke that enters their unit, the majority of owner-occupants (52 percent) reported being bothered “a lot” by tobacco smoke that entered their unit from somewhere else in or around the building. Twenty-nine percent of owner-occupants reported being bothered “a lot” by tobacco smoke that entered their personal patio, deck, or balcony.

Forty-two percent of owner-occupants reported “strongly” or “somewhat” preferring a smoke-free policy for the building where they live. Although more than one-third of owner-occupants indicated preferring a smoke-free policy, only 6 percent of owner-occupants indicated that their association had a policy that prohibited smoking in residents’ units.

Most owner-occupants (79.5 percent) reported that they would “definitely” or “probably” choose a smoke-free building over an identical smoking-allowed building.



Many Owner-Occupants Are Willing to Pay More

When asked if they were willing to pay more for a unit in a smoke-free building over a unit in a smoking-allowed building, all other things being equal:

- 34 percent of owner-occupants reported being willing to pay 1 to 5 percent more;
- 8 percent of owner-occupants reported being willing to pay 6 to 10 percent more;
- 4 percent of owner-occupants were willing to pay more than 10 percent more.

According to a Minnesota manager of a smoke-free property, implementing a smoke-free policy had no effect on:

- Length of time it took to sell units,
- Sale price of units, and
- Time required to manage the community.



Manager & Agent Surveys

Property Manager Survey

According to a property manager who participated in a 2009 survey of 17 Minnesota property managers of CICs, implementing a smoke-free policy had no negative impact on the:

- Length of time it took to sell units,
- Sale price of units, and
- Time required to manage the community.

In the same survey of property managers, respondents reported an average of 7.4 problems with tobacco smoke incursion since they started their current positions, or an average of 1.2 cases per year. Although apartment-style units only accounted for 20 percent of the units in these managers' portfolios, they accounted for nearly 70 percent of the secondhand smoke problems. When a problem with secondhand smoke intrusion was reported to a property manager, smoke was intruding into a resident's unit in over 92 percent of cases and onto their patio, deck, or balcony in 34 percent of cases.

Overall, respondents perceived "providing a healthier or cleaner environment for residents" as the primary potential benefit of a smoke-free policy. Other benefits mentioned were "reduced maintenance costs" and "attracting buyers." More than half of respondents supported a smoke-free policy for the entire building.

Real Estate Agent Survey

In 2015, the Association for Nonsmokers-Minnesota conducted 11 phone surveys of Twin Cities-based real estate agents to learn about their experience with and perceptions of the resale value and marketability of common interest communities (CIC) with smoke-free policies.

The majority of respondents (72 percent) felt that smoke-free CICs have a higher resale value than smoking-permitted ones. Ninety percent said that it is easier to sell smoke-free units than units in smoking-permitted buildings. Almost half (45 percent) said potential buyers would pay more for a unit in a smoke-free CIC.

Smoke-Free Policies Are Legal

“What Does Minnesota Law Say Concerning Smoking in Multi-Housing?”

Under the Minnesota Clean Indoor Air Act (MCIAA), the common areas of rental apartment buildings are considered indoor public places where smoking (including the use of e-cigarettes) is completely prohibited. The language of the law does not address common interest communities. The Minnesota Department of Health, the state department charged with enforcing the MCIAA, has adopted an interpretation that the MCIAA does not apply to common interest communities. Note that the MCIAA does prevent smoking

Smoke-Free Policies:

- Are not discriminatory
- Are legal
- Reduce potential health-related lawsuits



in places of employment, which would include condo offices.¹⁸ Condominium associations interested in protecting the health of their communities by prohibiting smoking in common areas and individual units should pass a smoke-free policy. 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.

“Is it Discriminatory to Designate an Entire Building or Property as Smoke Free?”

No. Smoking is not a protected activity or right. An individual’s status as a person who smokes is not a protected category or recognized disability.¹⁹ That being said, the best practice is to draft a smoke-free policy based on the activity of smoking and not on an individual’s status as a person who smokes because the intention is to protect residents, guests, and others from exposure, not to limit ownership or tenancy based on addiction. A policy should be written so that a person who smokes can live in a building but must refrain from smoking in the areas covered by the policy.

“What Risks Does an Association Face by Permitting Smoking?”

If an association permits smoking despite complaints and concerns by residents, two primary legal challenges may arise. First, a resident could sue either the association and/or the owner responsible for the secondhand smoke exposure, claiming a nuisance. 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 impacted by secondhand smoke could bring an action against the association and/ or an individual owner.

Second, if residents impacted by secondhand smoke have a serious health condition that is affected by exposure to secondhand smoke (e.g., COPD, asthma, high blood pressure), they may be able to seek relief under one of the laws that provide protections for people with disabilities. If the courts find that the condition is a disability, then the person impacted is entitled to a reasonable accommodation, which could include imposition of a smoke-free policy.²⁰

Adopting a Policy

“What Areas of My Property Should be Covered?”²¹

Individual residential units: Covering all residential units ensures that smoke cannot drift from one unit to another unit in the building.

Outdoor areas: Smoking can be prohibited in all outdoor areas, allowed only outside of a certain proximity from buildings (e.g., 25 feet), allowed only in designated outdoor areas located outside of a certain proximity from buildings (e.g., 25 feet), or allowed in all outdoor areas. If the grounds are not 100% smoke-free outdoors, smoking can also be prohibited in youth-oriented or recreational areas on the property such as playgrounds, pools, pet relief areas, and eating areas. If smoking is allowed outdoors, smoking areas should be a considerable distance away from entrances, storage areas, windows, patios, balconies, and ventilation intakes to prevent fires from starting in those areas and smoke from drifting into the building—25 feet is the typical distance minimum.

Common areas: Covering all indoor common areas such as lobbies, hallways, and lounges will protect all residents from secondhand smoke exposure.

Governing Documents: Definitions

- **Declaration** – The governing document that establishes an association. The declaration contains key information about the CIC, including whether it is a condominium, a cooperative or a planned community; the name of the community; a description of the property; and any material restrictions on use and occupancy. Minnesota state law requires a supermajority of at least 67 percent of votes in a condo association to amend the declaration.
- **Rules and Regulations** – Restrictions on the use of the units and/or conduct of unit occupants which may affect the health, safety, or welfare of other occupants and requirements in areas such as payment of fees and conduct of meetings. The rules and regulations can generally be changed by a majority vote of the association board.

“How Should My Association Adopt a Policy?”

A smoke-free 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.²² 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.”²³

“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, likelihood that the policy will be modified in the near future, and expectation that the policy will be legally challenged. A change to the declaration is more difficult and costly to pass, but the courts will give it deference and it will be stronger against legal challenges. A new rule and regulation is easier to implement and change, but also more susceptible to challenges than a declaration.

“Should My Association include E-cigarettes?”

Including e-cigarettes (e.g., vape pens, Juul, mods) in any smoke-free policy can protect the health of residents, reduce potential fire risk, avoid policy confusion, protect the property from residue, and promote an overall culture of health within the building. Scientific evidence and best practice would be to include e-cigarettes in a smoke-free policy.

“Should my Association include smoking of substances other than tobacco/nicotine?”

Smoke is smoke; secondhand exposure to any smoke or aerosol from any substance is potentially a health risk and could be addressed in a smoke-free policy.²⁴

Policy Enforcement

“Is it Difficult to Enforce a Smoke-Free Policy?”

A smoke-free policy should be enforced as the association would enforce any other policy. Based on the experience of rental properties and common interest communities that have already adopted smoke-free policies, these policies tend to be self-enforcing and do not require a substantial or unique amount of effort to enforce. In the survey conducted in Minnesota in 2009, the vast majority of condominium owners reported that they do not smoke; therefore, most owner-occupied units are likely already smoke-free and will not require enforcement actions.



To remind residents about the policy and inform guests that are temporarily visiting, place signs on the property indicating which areas are covered by the smoke-free policy. If any outdoor smoking areas are designated, make sure that they are marked and that appropriate tobacco litter receptacles are located nearby.

To help the association enforce the policy, the policy should explicitly list all procedures to warn a violator of infractions and the steps for enforcement. If enforcement becomes necessary, the association should follow the procedures as specified, and always enforce the policy uniformly (against all violators), consistently (whenever a violation occurs), and in a timely manner.

The association may also provide information to residents about free support to quit. Quit Partner (QuitPartnerMN.com or 1-800-QUIT-NOW) provides free support, including coaching and quit medications, to help people quit smoking, vaping, and chewing.

“Should we allow existing owners who smoke to continue to do so in their units?”

No; exempting (i.e., grandfathering) current residents who smoke is strongly discouraged because it can impact enforcement. With exempted smoking-allowed units scattered among non-smoking units, identifying the source of the smoke may be challenging and maximum health benefits may not be achieved. For additional tips on enforcement, visit mnsnsmokefreehousing.org.

“Can a Smoke-Free Policy Be Enforced Against Existing Smokers?”

Yes. As long as the homeowners’ association follows state law on common interest communities and any requirements in its governing documents for amending the declaration or changing the rules and regulations, then courts will likely 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 resident who was smoking in violation of the no-smoking rule to comply.²⁵

Resources

Smoke-Free Housing Programs—Minnesota

- **Live Smoke Free:** www.mnsmokefreehousing.org
- **American Lung Association of Minnesota’s Smoke-Free Multi-Housing Program:** www.alamn.org

Smoke-Free Housing Resources—National

- **Public Health Law Center:** www.publichealthlawcenter.org
- **Americans for Nonsmokers’ Rights:** www.no-smoke.org

Minnesota Common Interest Community Associations

- **CIC Midwest:** www.mmha.com/CIC-Midwest

Minnesota Department of Health

- **Minnesota Department of Health Office of Tobacco Prevention and Control:** www.health.state.mn.us/communities/tobacco/index.html
- **Minnesota Department of Health Indoor Air Unit:** (for help complying with the Minnesota Clean Indoor Air Act) 1-800-798-9050 or www.health.state.mn.us/communities/environment/air/contact.htm

Free Help to Quit Commercial Tobacco

- **Quit Partner:** www.QuitPartnerMN.com or 1-800-QUIT-NOW

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Ready to go Smoke Free?

Log on to the Live Smoke Free website to learn more about the benefits of smoke-free multi-housing and the steps you can take to create a smoke-free environment in your building.

www.mnsmokefreehousing.org



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