

# Smoke-Free Multi-Unit Housing



Building Healthy Communities  
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# Presenter

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# Maryland Smoke Free Apartments



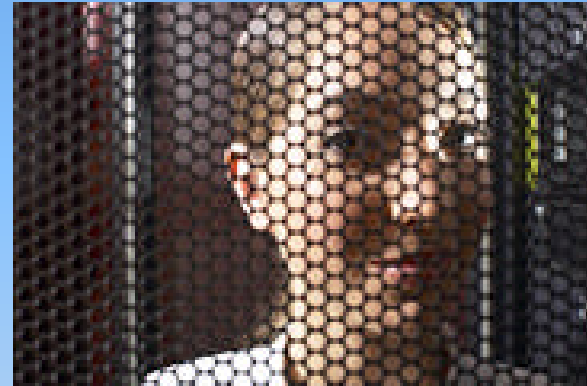
[www.mdsmokefreeapartments.org](http://www.mdsmokefreeapartments.org)

# Why Smoke-Free Housing?

- Surgeon General reports that there is no safe level of exposure to SHS, it is a known carcinogen
- It has been banned in restaurants and bars, yet affects millions of people in multi-unit dwellings
- SHS cannot be controlled by filters and ventilation systems
- There is a growing market for smoke-free apartments
- Smoke-free policies protect landlords from liability and save money in maintenance, turnover costs

# Why Smoke-Free Apartments?

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

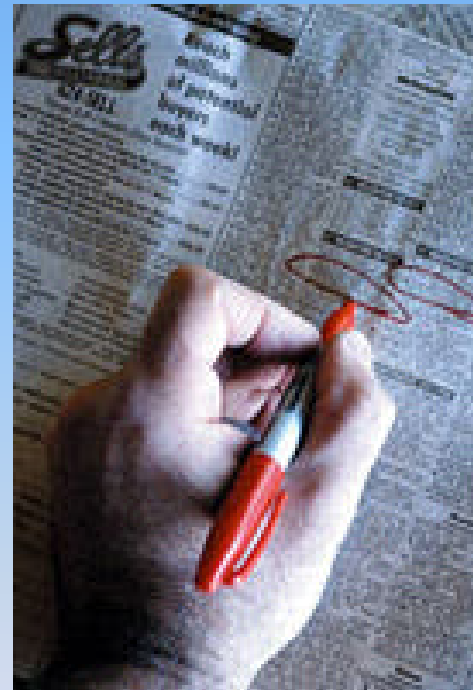


American Society of Heating,  
Refrigerating & Air Conditioning  
Engineers (ASHRAE) 2009 position  
document on secondhand smoke

# The Marketplace is Changing

## Demand Is Up

- 78 % of adults don't smoke.
- Many are willing to pay more for smoke-free housing.
- Research shows no substantial variation in indoor smoking practices by income.
- Many smoking tenants choose to smoke outdoors already.



# Marketplace Surveys Show

- **Results on average show:**
  - **9 of 10** don't smoke in their apt. (smokers and non-smokers)
  - **3/4** of renters agree: *"other things being equal,"* they would choose a rental where smoking is prohibited
  - **1/2** would choose a non-smoking buildings even if other things are *not equal* — that is, they would pay a little more, or trade out some other convenience.
  - **4 of 10** would not be comfortable renting adjacent to a smoking tenant.
  - **1/2** said they had moved or would move because of secondhand smoke seepage.
  - For more surveys: [www.tcsg.org/sfelp/public.htm](http://www.tcsg.org/sfelp/public.htm)

# Benefits of Going Smoke-Free

## Reduced Maintenance Costs

- \$500 to \$3000 extra to rehab a smoker's apartment vs. one vacated by non-smoker.
  - Remove residual smell in air, upholstery, and even paint
  - Eliminate discoloration to walls or carpets
  - Repair burns





# Benefits of Going Smoke-Free



## Reduced Fire Risk

- In 2002 an estimated \$926 million in damages occurred in apartment fires - of which cigarette smoking is among the leading causes.  
Source: NFPA Fire Analysis and Research; Fire Loss in the U.S. During 2002
- Insurers know this, and some are willing to give discounts to those with non-smoking policies.

# Is it Legal?

## There is no constitutional “right to smoke”:

All courts considering have found there is no fundamental right to smoke, smoking is not a protected liberty, and smokers are not a protected class of people.

The act of smoking is entitled to only a minimal level of protection under the Equal Protection Clause.

*McGinnis v. Royster*, 410 U.S. 263 (1973)

Addiction to nicotine or smoking is not considered a disability under the ADA.

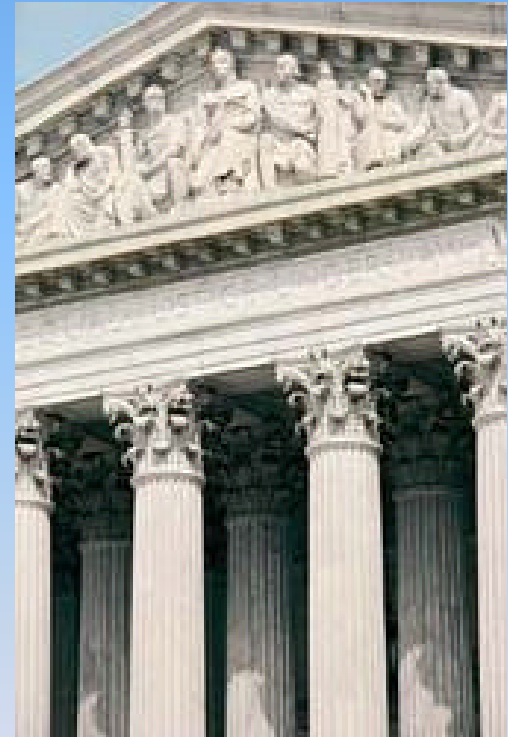


# Is it Legal?

- Property owners have a legal right to restrict smoking on their property, including individual units.
  - Just like prohibiting pets, loud music, or any other nuisance.
  - Policies draw clear lines from the beginning, preventing disputes later.
- Same analysis applies to government subsidized housing and condominiums.

# Reduction of Potential Liability

- Tenants negatively impacted by smoke drift have the right to **seek legal action against landlords** who do not make adequate provisions to protect them from second hand smoke.



# Potential Liability for Smoke Drift

## Nuisance

- A private nuisance exists when one person unreasonably interferes with another person's interest in real property.
- Defined as any smoke, smell, noise, gas or fluid which materially interferes with the ordinary comfort of an occupant or injures his property.
- The landlord may also be held liable, **even when he is not creating the nuisance**, if the landlord actively participates in the continuance or fails to take action to ameliorate the nuisance.

*Gorman v. Sabo*, 210 Md. 155 (1956).



# Potential Liability for Smoke Drift

## Warranty of Habitability and Right to Quiet Enjoyment

- Most states provide these by statute or common law.
- Landlords have a responsibility to provide safe housing which is fit for occupancy.
  - Should the smoke intrusion cause a tenant to lose use of certain rooms at certain times, the landlord would be in breach because the property is no longer fit for habitation, even where the landlord is not causing the problem.
  - In successful cases, plaintiffs have been awarded significant reductions in and reimbursement of rent, and monetary damages for moving and cleaning costs and medical bills.

# Potential Liability for Smoke Drift

The Americans with Disabilities Act and Fair Housing Act say:



- Persons **cannot be discriminated against** in workplaces, public places or in housing due to disability;
- having severe breathing problems or chemical sensitivity constitutes a disability (conversely, addiction to smoking is not)
- Therefore, these facilities are **required** by the ADA and/or FHA (and parallel state statutes) **to provide reasonable accommodations** to persons with conditions caused by or aggravated by SHS, including possibly making the facility totally smoke-free.

# Recent Smoke Drift Cases

## **Poyck v Bryant**, 2006 NYSlipOp 26343

- Secondhand smoke drift may form sufficient basis to proceed with private causes of action for breach of warranty of habitability against landlord for smoke drift from one apartment into another.

## **Harwood Capital Corp. V. Carey**, Boston Housing Court, No. 05-SP00187

- Landlord ordered tenants from a one-bedroom rental Condominium for smoke drift, despite lack of a non-smoking clause in the lease, and landlord statements that smoking would be permitted inside the unit. Court upheld eviction finding smoke drift constituted a nuisance.



# ... More Smoke Drift Cases

## **Merrill v. Bosser**, 12 Fla.L.Weekly Supp. 885b

- A Florida Circuit Court found excessive secondhand smoke drift to constitute an actionable trespass, nuisance, and breach of the covenant of quiet enjoyment. Damages and remedial expenses ordered.

## **Fox Point Apt. v. Kippes**, No. 92-6924, (Lackamas County (OR) Dist. Ct. 1992)

- Tenant sued landlord, alleging breach of the statutory duty to keep the premises habitable and the covenant of peaceful enjoyment. The jury unanimously found a breach of habitability, reduced the plaintiff's rent by 50 percent and awarded the tenant medical costs.

# Implementation

- **Hold a Meeting to Inform Tenants**
- **Establish Clear Policy**
  - Enforcing a policy is a lot less of a headache than mediating disputes between tenants without a policy in place.
- **Amend New Leases**
  - Change the language of your lease to legally include your new smoke-free policy for apartment complexes or to the “house rules” in Public Housing Authority buildings.
  - Reasonable Time for Current Residents
- **Promote Your Status**
  - Begin advertising your smoke-free status to gain new tenants



# Enforcement



- Enforceable like any other lease condition, such as a noise violation
- Have a process in place for enforcement
- Follow through with consequences

# HUD Recommendation

- In July of 2009, HUD issued a Notice encouraging public housing authorities to adopt smoke-free policies.
- **Over 220 Public Housing Authorities** in 27 states have implemented smoke free policies across the country, including:
  - Santa Barbara Housing Authority, **California**
  - Nampa Housing Authority, **Idaho**
  - Kokomo Housing Authority, **Indiana**
  - Bar Harbor Housing Authority, **Maine**
  - Marysville Housing Commission, **Michigan**
  - Helena Housing Authority, **Montana**
  - Seattle Housing Authority, **Washington**



This is about the smoke, not the smoker...

Smoking outside helps maintain healthier,  
more cost effective indoor environments.

