

How to Make a Condo Complex Smokefree

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Although California laws protect people from secondhand smoke at work and in restaurants, shops, and other places, many residents still find themselves exposed to unwanted secondhand smoke in their homes—especially if they live in multi-unit buildings. In condos, where each unit is owned separately, addressing this problem can be especially challenging.¹ This fact sheet answers common questions about how condo owners can make their entire complex, including individual units, smokefree.

Why make a condo complex smokefree?

In addition to the health-related harm drifting tobacco smoke can cause,² it can increase condo maintenance costs (for sealing and repainting walls and cabinets, replacing carpets, and cleaning the ventilation system) and decrease a unit's resale value.³ Trying to block smoke from drifting between units by using air filters, installing an exhaust fan, or sealing crevices is usually ineffective.⁴ Prohibiting smoking altogether is the only sure way to avoid unwanted exposure to this toxic substance.⁵

Who can create a smokefree policy?

Most people assume that when they buy a home, they will be the ones making decisions about their property. If you live in a condo, however, much of the decision-making power lies with the homeowners' association (HOA).⁶ The HOA, either through its elected board of directors ("the board") or by a vote of the full membership, has the power to enforce or enact regulations controlling the use of property within the complex.

Owning a unit automatically means you are a member of the HOA, and any member of the HOA can begin the process of making a complex smokefree. Many board members are unaware that condos may legally prohibit smoking in part or all of the complex, so it is often up to the HOA members to educate the board. This fact sheet can help.

What areas can be designated smokefree?

Smoking can be restricted on the entire property or only in certain areas.

Indoor common areas: Lobbies, elevators, stairwells, laundry facilities, mail-rooms, and other indoor common areas can be designated smokefree by the HOA. Smoking is already prohibited in such areas in many condo complexes, through HOA restrictions or state or local law.⁷



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This fact sheet focuses on options for condo owners. If you are *renting* (either a condo or an apartment unit), see TALC's other fact sheets on smokefree housing available at www.talc.phil.org.

Outdoor common areas:

Courtyards, pools, playgrounds, sandboxes, gardens, pathways, parking areas, and other common areas can also be designated smokefree.⁸ In addition to protecting residents from exposure to unwanted smoke, a smokefree outdoor policy can reduce litter from cigarette butts on condo property and keep children from putting discarded butts in their mouths. Designated smoking areas in the outdoor common space are recommended so that people who smoke can do so away from shared recreational areas.



Individual units: HOAs may even restrict smoking in individual units, which would prohibit all current and future owners, renters, and guests from smoking there. A smoking restriction could include the “exclusive-use” common areas such as balconies and patios.

How can a condo complex be made smokefree?

In addition to state laws that regulate all condominiums, each complex has its own governing documents. These include the *Declaration of Covenants, Conditions, and Restrictions (CC&Rs)*⁹ and the *Rules*.¹⁰

CC&Rs describe restrictions on the use of property in the complex—for example, the number or ages of people permitted to live in a unit. Because the CC&Rs are legally binding restrictions that automatically apply to the buyer, they must be disclosed at the time of sale and officially recorded, like a deed.¹¹ Members of the HOA must vote to approve any changes to the CC&Rs.

Rules contain additional restrictions on the use of property and typically expand upon areas not fully defined in the CC&Rs—for example, whether private barbecue grills are permitted on balconies or what types of vehicles may park in the parking lot. Changes to the Rules only require a vote by the board. Because Rules are easier to pass than CC&Rs, Rules may change relatively frequently.

There are three ways to address smoking in a condo complex using these governing documents:

1. Have the HOA members (the condo owners) vote to **amend the CC&Rs to restrict smoking** in common areas and/or units.
2. Have the HOA members vote to **amend the CC&Rs’ nuisance provision** to include drifting secondhand smoke. (A condo owner can already apply the nuisance provision to unwanted secondhand smoke, but unless the provision expressly states that secondhand smoke is a nuisance, it can be difficult to prove that the amount of drifting smoke is severe enough to be considered a violation of the nuisance provision.)
3. Have the board of the HOA **adopt a new Rule restricting smoking** in common areas and/or units.

People do not have a “right” to smoke—especially in multi-unit housing, where others can be affected. See “There Is No Constitutional Right to Smoke,” another fact sheet from TALC available at www.talc.phil.org.

Comparing Three Ways to Make a Condo Complex Smokefree

	Amend CC&Rs to prohibit smoking in units or common areas	Amend nuisance provision of CC&Rs to state that secondhand smoke is a nuisance	Adopt a Rule prohibiting smoking in units or common areas
Voting	Requires vote of condo owners, using formal voting procedures.	Requires vote of condo owners, using formal voting procedures.	Voted on only by the board, not all HOA members.
Drafting	The new provision should be written by a lawyer.	The new provision should be written by a lawyer but isn't overly complicated.	Doesn't need to be written by a lawyer.
Expense	Can be expensive due to lawyer fees for drafting and cost to HOA for printing and distributing ballots.	Can be expensive, due to cost of printing and distributing ballots, though lawyer fees should be less than amending the CC&Rs to prohibit smoking because drafting is less complicated.	Very inexpensive because it doesn't incur lawyer fees or ballot costs.
Enforcement	The board has a duty to enforce CC&Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).	The board has a duty to enforce CC&Rs by fining, restricting the rights of, or suing the noncompliant owner. Individual owners can also enforce CC&Rs by suing the noncompliant owner (and possibly by suing the board if it failed to act to enforce the provision).	Only the board can enforce a Rule, usually by fining the noncompliant owner.
Important considerations	Requires votes from enough owners to get passed. Because the owners vote to change the CC&Rs, their participation in the decision may make them more likely to comply with the new no-smoking policy. If there is a violation, CC&Rs may be enforced in more ways than a Rule.	Adding smoking to the nuisance provision would not eliminate smoking in the condo—it would just allow homeowners to more easily use the nuisance provision if secondhand smoke were entering their units. This approach may be useful if a ban on smoking in units isn't feasible.	Because a Rule is only voted on by the board, this approach may work best for making the common areas nonsmoking—a less controversial restriction than smokefree units (although there is nothing preventing a Rule from prohibiting smoking in all parts of the complex). Adopting a smokefree Rule may work better for complexes where the board actively enforces Rules.

How do these three approaches differ?

Amending the CC&Rs is stronger and more enforceable than adopting a new Rule, but it's also potentially more expensive and time consuming. What follows are three areas to consider when weighing the options.

Voting Procedures: With any change to the CC&Rs, HOA members will have to vote using a fairly complicated balloting procedure that must be followed precisely to ensure that the vote is valid.¹² A new Rule, on the other hand, only needs to be voted on by the board rather than all of the HOA members, so it can be done relatively quickly—but it can also be overturned just as quickly by the same or a subsequent board.

Expense: Because the CC&Rs are a legally binding document, a new amendment should be drafted by a lawyer. This can be expensive, but it is important to ensure that the amendment is legally appropriate and enforceable.¹³ (Drafting attorneys may find it helpful to review a sample at www.smokefreeapartments.org/condos.html.) Amending the CC&Rs means the HOA must buy and print the ballots and envelopes required for the voting procedure; making a Rule change doesn't involve these costs. You also don't need to hire a lawyer to draft a new Rule, though it is encouraged. If you draft the Rule without a lawyer, make sure it clearly states what activity is prohibited, which portions of the condo complex are affected, and the penalty for failing to comply with the Rule.

Enforcement: Either the board or an individual owner can act to enforce the CC&Rs, whether it's a new policy prohibiting smoking or an amendment to the nuisance clause.¹⁴ Ordinarily, the board enforces the CC&Rs because it has a legal duty to do so,¹⁵ either by assessing a fine or suspending the unit owner's right to use recreational facilities in the condo. If the board fails or refuses to enforce the CC&Rs, an owner may sue the owner violating the CC&R *and*, in some cases, sue the HOA, if it did not act to enforce the CC&R.¹⁶ (Before bringing suit, the owner may need to first participate in a process to resolve the dispute without going to court.¹⁷)

When it comes to enforcing Rules, however, only the board of the HOA can take action—an owner cannot sue another owner for failing to comply.¹⁸ The board could fine the person who is not following the Rule. Even though individual condo owners cannot enforce the Rules against each other, if the board fails to enforce the Rules, owners can work to recall the board and elect new directors who will enforce them.

How should I decide which approach to take?

A first step could be to find out how the other condo owners in your complex feel about a no-smoking policy. You may want to distribute a survey, especially if you live in a large complex.¹⁹ Then you can assess whether and where owners are willing to restrict smoking.

If you want to restrict smoking inside units, a CC&R amendment is probably better suited than a new Rule, because there are more ways to enforce CC&Rs. Board members also may be reluctant to adopt a Rule that restricts smoking in units because they don't want to upset residents who smoke, so they may be more comfortable putting the decision in the hands of the HOA membership by calling for a vote on whether to amend the CC&Rs instead.

Limiting smoking in common areas will probably be much less controversial than restricting smoking in units, so using the more informal and less costly approach of creating a new Rule might be a more appropriate route.

Another factor that will help you decide between a new Rule and a CC&R change is whether the board



tends to enforce the Rules your complex already has. Because owners cannot enforce Rules, passing a new one is not likely to solve a drifting smoke problem if your board is lax about enforcing Rules to begin with. Also, consider that if the new restriction is ever challenged in court, CC&Rs are more likely than Rules to be upheld by a judge.²⁰

If you are concerned that the condo owners or the board won't vote for a change prohibiting smoking in units because they are hesitant to "tell others what to do," it may be easier to add secondhand smoke to the nuisance provision of the CC&Rs.²¹ However, amending the nuisance clause will not create much (if any) immediate change unless the board or an owner takes action to enforce it, so it should be pursued only if the HOA members seem unwilling to vote for the stronger measure of prohibiting smoking in units.

Changing your condo's policies can be a slow and political process. Getting the votes you need to support a change takes diplomacy and patience: it often can take months from the time you first raise your concerns until the day the votes are counted. For ideas about how to gather support for a new smoking policy, see www.center4tobaccopolicy.org/organizing-introduction.

When should the smokefree provision go into effect?

While restrictions can generally be put into effect immediately,²² delaying implementation—especially for new restrictions on smoking inside units—will give residents time to adjust.²³ A reasonable delay could be anywhere from 60 to 180 days from when the change is approved.

You can also include a "grandfather clause" exempting *current* residents from a new restriction: this exemption would apply only to current owners (or tenants, if a unit is rented), not to future owners or tenants. In general, grandfather clauses are not recommended. Residents who are already suffering from drifting secondhand smoke will not experience any relief, nor will they see other benefits of a smokefree complex such as a reduced fire hazard. Beyond that, new owners—who are not grandfathered in—can complain that they are subject to restrictions that others aren't; if they sue over the smoking ban, a court may agree that enforcing the provision only against certain owners is unfair and decide that the restriction is not legal.²⁴ Still, a grandfather clause may provide a compromise if there is significant opposition and allow a smokefree policy to get enough votes to pass.

If grandfathering seems necessary, it is a good idea to simultaneously alter the CC&Rs' nuisance provision to include secondhand smoke. This way, residents who suffer from secondhand smoke drifting from grandfathered units may be able to more easily enforce the nuisance provision.

What if my complex won't adopt a new Rule or change the CC&Rs?

You may be able to enforce the existing nuisance provision in your condo's CC&Rs, even if it doesn't specifically list smoking as a nuisance. If you have a disability that is made worse by secondhand smoke, you may be able to pursue a disability discrimination claim. You may also be able to bring a lawsuit against a neighbor whose smoke is causing you harm. For more information about each of these options, see "Legal Options for Condo Owners Suffering from Drifting Secondhand Smoke," a fact sheet coming soon from TALC.

You can also encourage your elected officials to pass a local law against smoking in multi-unit housing. This way, apartments and condos throughout your city or county—not just your own building—could be made smokefree.²⁵

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- ¹ Although the term *condominium* or *condo* will be used in this document, the information in this fact sheet may also apply to co-ops, subdivisions, common interest developments (CID), planned unit developments (PUD), or other housing that is subject to a declaration of covenants and restrictions and managed by a homeowners' association.
- ² For more information about the negative health impacts of exposure to secondhand smoke, see US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/Factsheets/SecondhandSmoke.htm. See also US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General—Executive Summary*. 2006. Available at: www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf.
- ³ Lingering tobacco residue can make a home difficult to sell and drive down the selling price. Clean-up costs can range from \$1,500 to \$10,000 and do not guarantee that the smell or the harmful chemicals left behind from the smoke will be fully removed. Martin A. "On Tobacco Road, It's a Tougher Sell." *New York Times*, February 8, 2004.
- ⁴ "Exposures of nonsmokers to secondhand smoke cannot be controlled by air cleaning or mechanical air exchange." US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2006, p. 649. Available at: www.surgeongeneral.gov/library/secondhandsmoke/report/chapter10.pdf. See also Center for Energy and Environment. *Reduction of Environmental Tobacco Smoke Transfer in Minnesota Multifamily Buildings Using Air Sealing and Ventilation Treatments*. 2004. Available at: www.mncee.org/pdf/research/summary.pdf.
- ⁵ The California Air Resource Control Board declared secondhand smoke a "toxic air contaminant" and concluded that there is no safe level of exposure. Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf.
- ⁶ This fact sheet uses the term HOA to refer to all homeowners' associations, even though some complexes may use a different name.
- ⁷ If the indoor common area is a place where people such as security guards or maintenance staff work, the California smokefree workplace law prohibits smoking there. See Cal. Lab. Code § 6404.5 (West 2008). Some local governments have passed additional laws banning smoking in indoor common areas, eliminating the need for the condominium association to regulate these areas. Many condo complexes also have restrictions against smoking in indoor common spaces already in their governing documents.
- ⁸ As with indoor common areas, many condos already have restrictions on smoking in outdoor common areas either in their governing documents or under local law.
- ⁹ Some condominium associations may use a different term for this document, such as *declaration* or *restrictive covenants*, but this fact sheet will use the term *CC&R* to mean any of these documents.
- ¹⁰ Many condos also have Bylaws, a Condominium Plan, or Articles of Incorporation, but because those cannot be used to restrict smoking, they will not be discussed here.
- ¹¹ Cal. Civ. Code § 1353(a) (West 2008).
- ¹² Although the precise voting procedures vary, all HOAs must distribute secret ballots and two envelopes to each member 30 days before the deadline for voting. The ballot must be put into one envelope, which is put inside a second envelope. The voter is identified on the outside envelope only. These ballots and envelopes must be prepared by the HOA.
- ¹³ The chances are fairly small that another owner will sue to overturn your HOA's new smoking prohibition. If that happens, it's helpful to know that there has been at least one case in another state where a court upheld a new CC&R banning smoking in units. An owner who wished to continue smoking in the unit challenged the legality of a new CC&R restricting smoking inside the condos, but the court held that the new CC&R was valid. See *Christiansen, et al., v. Heritage Hills #1 Condo. Ass'n*, WL 4585750 (Colo. Dist. Ct. Nov. 7, 2006). Available at: <http://davis-stirling.com/ds/pdf/smoking.pdf>.
- ¹⁴ Cal. Civ. Code § 1354(a) (West 2008).
- ¹⁵ *Duffey v. Superior Court*, 3 Cal. App. 4th 425, 431 (4th Dist. 1992) (noting legal duty of HOAs to enforce CC&Rs); *Cohen v. Kite Hill Cmty. Ass'n*, 142 Cal. App. 3d 642, 650-51 (4th Dist. 1983) (noting that HOAs owe a fiduciary duty to their members).
- ¹⁶ *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246-47 (4th Dist. 1991). However, Boards have some discretion when it comes to enforcement of the governing documents. Boards can weigh the cost of litigation, the gravity of the violation, and the likely outcome of the litigation, and make a good faith determination not to litigate a particular violation. *Beehan v. Lido Isle*, 70 Cal. App. 3d 858, 866-67 (1977).
- ¹⁷ Cal. Civ. Code § 1369.520 (West 2008).
- ¹⁸ The method of enforcement used by the board will be different for each HOA and will be described in the governing documents.
- ¹⁹ A sample survey can be found at www.smokefreeapartments.org/CondominiumSurvey.doc.
- ²⁰ CC&Rs are presumed valid by courts, "unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy." *Nahrstedt v. Lakeside Village Condo. Ass'n*, 8 Cal. 4th 361, 386 (1994) (italics in original).
- ²¹ Some CC&Rs' nuisance provisions list specific examples of what would be considered a nuisance, such as loud noise at certain hours and foul odors, while others merely make a general statement that any activity or thing affecting residents' health or welfare will not be permitted. If secondhand smoke is expressly defined as a nuisance in the CC&Rs, individuals affected by the smoke no longer have to prove that the impact of the drifting smoke constitutes a "substantial and unreasonable interference" with the use of the unit. This makes it much easier to enforce the nuisance provision.
- ²² Your HOA's governing documents may require a brief notice period before changes go into effect.
- ²³ A short delay in implementation of a new smoking restriction may also make the provision seem more reasonable to a judge, if the provision is ever challenged in court by residents who disagree with the policy. As mentioned above, this scenario is unlikely but possible.
- ²⁴ See *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1600, 1610-11 (4th Dist. 1995) (holding that enforcement of CC&R restrictions must be "uniformly applied" and not place a burden on the individual owner that is "disproportionate to the benefit to the whole").
- ²⁵ See Public Health Law & Policy, Technical Assistance Legal Center. *Sample California Ordinance Regulating Smoking in Multi-Unit Residences (with Annotations)*. 2005. Available at: http://talc.phlpnet.org/pdf_files/0072.pdf.