



FOR COMMUNITY ASSOCIATIONS

FINANCIAL BENEFITS

1. Increased Demand

As fewer people smoke and as the public becomes more aware of the adverse health effects of secondhand smoke, demand for smokefree housing increases. 91% of Oregon adults say no one is allowed to smoke anywhere inside their home (even 69% of smokers say this!)¹ 94% of Washington adults do not allow smoking anywhere in their home; more than three-fourths (76%) of Washington adults who smoke do not allow smoking in their home.²

2. Smells Don't Sell

Odors can offend and turn away ready buyers. Real estate brokers have reported that properties that smell of smoke take longer to sell and often sell at a lower price.

3. Save Money

Dealing with damages from cigarettes and picking up butts cost the homeowners association and ultimately the owners, money. Mitigation strategies such as filler shields, gaskets under electrical plates, duct audits, etc., can be pricey.

4. Fire Hazards

Between 2005 and 2009, smoking caused \$20 million in property loss in Oregon alone. Cigarettes are the top cause of residential fire deaths in Oregon and Washington and the leading cause of outside home fires, many of which become structure fires.^{3, 4}

5. Possible Insurance Discounts

Some insurance companies are offering discounts. Shop around and talk to your broker. An insurance company may discount general liability insurance premiums if a no-smoking rule is established. Why? No-smoking rules reduce the risk of fire-related property damage, injury, and death.

6. Avoid Legal Risk

Nuisance claims and reasonable accommodation requests can be avoided or met by implementing a no-smoking rule. Two primary legal challenges may arise by continuing to allow smoking: a resident could sue either the association or the smoking owner claiming a nuisance. If the resident has a health condition that is affected by exposure to secondhand smoke, he or she could seek relief using one of the disability statutes. If the courts find the condition is a disability, then the resident is entitled to a reasonable accommodation, which could include imposition of a no-smoking rule.

Find this and other tools at www.caioregon.org (member services/resource center/helpful tools...)

This information provided by the Oregon Smokefree Housing Project, funded by the Oregon Health Authority, and Clark County Public Health.

1. <http://public.health.oregon.gov/PreventionWellness/TobaccoPrevention/Documents/tobfacts.pdf>

2. http://www.doh.wa.gov/tobacco/data_evaluation/Data/data_summaries/TobFacts-Contr.pdf

3. http://www.oregon.gov/OSP/SFM/docs/Data_Services/Reports/2005-2009_Oregon_Cigarette_Fires_in_Single-And_Multi-Family_Housing.pdf

4. <http://www.wsp.wa.gov/fire/firemars.htm>



FOR COMMUNITY ASSOCIATIONS

LEGAL QUESTIONS

Overview

Residents of multi-unit dwellings are becoming increasingly aware of the secondhand smoke that drifts into their individual units. The dangers of secondhand smoke are conclusive¹. This fact sheet addresses some of the legal-related questions that may arise when community associations consider adopting no-smoking rules.

How do Oregon and Washington state laws address smoking in multi-unit buildings?

Under Oregon and Washington state laws, smoking is prohibited in most public places and workplaces. Public place means any enclosed area open to the public. Workplace means every enclosed area under the control of a public or private employer where employees frequent during the course of their regular duties. This could be lobbies, hallways, community rooms, etc. In addition, smoking is prohibited near ALL business entrances, exits, operable windows and air intake vents (within 10 feet in Oregon and 25 feet in Washington.)

Are there any legal barriers to adopting a no smoking rule for community associations?

Federal and state laws allow private property owners and associations to adopt no-smoking rules for all parts of their property, including individual residential units.

Is prohibiting smoking discriminatory in any way?

No. Smoking is not a protected right or activity. Also, an individual's status as a smoker is not a protected category of persons. Legal protections are generally limited to categories of 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 continuing to allow smoking?

If an association allows smoking, two primary legal challenges may arise. First, a resident could sue either the association or the offending resident on nuisance grounds. Most association declarations contain a generic nuisance clause stating that an owner (or resident) cannot engage in an 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. This same resident could also pursue a nuisance action against the offending owner.

Find this and other tools at www.caioregon.org (member services/resource center/helpful tools...)

Second, if an individual 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 resident is entitled to a reasonable accommodation, which could include imposition of a no-smoking rule.

Consult your attorney about how to adopt a no-smoking rule. There are a number of ways this can be done:

- Amendment to Declaration
- Amendment to Bylaws
- Board rule or resolution

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. When choosing which method to use, consider:

- Whether the adopted restriction will be enforceable in court
- The scope of the prohibition
- Physical characteristics and location of community

Note: Currently, there is no Oregon or Washington law (statutory or case law) regarding the ability of a community association to prohibit smoking inside a condominium unit; it has not yet been tested in court. There was, however, a case in Colorado² where the court upheld a no-smoking amendment, finding it “reasonable, made in good faith and not arbitrary or capricious.”

Is it difficult to enforce a no-smoking rule?

A no-smoking rule should be enforced as the association would enforce any other rule. In both Oregon and Washington, most adults do not smoke. Conducting a survey of your association residents may help you foresee potential problems with enforcement. From the experience of rental properties and condominiums that have already adopted no-smoking rules, they tend to be self-enforcing and do not require a substantial or unique amount of effort to enforce.

Can the policy be enforced with current residents who smoke?

Most likely, yes. As long as the homeowners' association follows community association state law and any requirements in their governing documents for amending the declaration or changing the rules and regulations, the courts should support the association in enforcing the rule. In the Colorado case the court upheld the amendment and forced the resident to comply.

1. www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf <http://www.hoalegislature.com/archives/05258030.pdf>

2. <http://www.hoalegislature.com/archives/05258030.pdf>



FOR COMMUNITY ASSOCIATIONS

STEPS TO ADOPT A NO-SMOKING RULE

Step 1: Constructing your no-smoking rule

Choose the vehicle for rule change: Familiarize yourself with, and talk to your attorney about, the different methods of adopting a no-smoking rule for your community association. These include:

- Amendment to Declaration
- Amendment to Bylaws
- Board resolution

Define smoking: “Carrying, burning, or otherwise handling or controlling any lit or smoldering product containing tobacco, including but not limited to cigarettes, cigars or pipes.”

Where will the rule apply? Think about where you want to prohibit smoking on the property:

- Indoor common areas (lobby, hallways, community rooms, etc.)
- Outdoor general common areas (trails, playground, parking lot, etc.)
- Outdoor exclusive use common areas (balconies, porches, patios, etc.)
- Outdoors within a certain distance from the buildings (such as 25 feet)
- Inside units
- Everywhere on the property, inside and outside

Given that smoke drifts everywhere, consider the effect that a no-smoking rule in one area may have on other areas. Where smoking occurs, even outside, can make a difference to residents who either have to pass through the smoke or who live near a common smoking area. For example, if you prohibit smoking in individual units, more people begin to smoke on their balconies and patios. If you prohibit smoking on patios, they may start smoking outside building entrances and in other outdoor locations.

Potential solutions include extending the rule to include a certain distance from entrances, exits, operable windows and air intake vents or designating an outdoor smoking area located where smoke is unlikely to affect other residents.

When will the rule go into effect? Allow time to gather owner input and to educate residents. A rule going into effect in the warmer months may increase compliance because it gives residents a chance to get used to smoking outside.

Use the general nuisance clause: The community association’s general rule against nuisances in the declaration or CC&Rs should be reaffirmed.

Find this and other tools at www.caioregon.org (member services/resource center/helpful tools...)

Provided by the Oregon Smokefree Housing Project, funded by the Oregon Health Authority, and Clark County Public Health.

Thanks to Minnesota’s Live Smoke Free, the Public Health Law Center, and The Massachusetts Smoke-Free Housing Project for generously sharing their materials.

How will the rule be enforced? The no-smoking rule should state how it will be enforced, what the fine will be for infractions, and that board members have an obligation to ensure the rule is followed. Reference your enforcement provisions for how violations of other community association rules such as no pets, no loud music or improper garbage disposal are addressed. All rules must be needed, fair, uniformly enforceable, and penalties must relate to the severity of the violation.

Step 2: Getting resident input

Consider doing a resident survey to assess and demonstrate support for the rule change. See *Sample Resident Letter* and *Sample Survey Questions* at www.caioregon.org (member services/resource center/helpful tools...). A survey gives owners an opportunity to voice their opinions, and it acts as a preliminary "vote". Results from this will demonstrate support and may uncover areas that need special attention before moving forward. It will make residents feel included in the process and may decrease opposition.

Step 3: Educating owners

Since a vote of a super-majority of unit owners will likely be needed to enact the rule change, it is very important to take time to educate owners about the many benefits of a no-smoking rule. Share results of the resident survey to demonstrate community support. This could be done through newsletter articles, notices on your website, flyers in newspaper tubes or door slots, signs in a lobby, etc.

Consider designating a special task force to plan educational outreach and help with the process of determining what the actual rule will include.

Step 4: Voting on the proposed rule

Take advantage of multiple communication channels to promote voting on this issue. This could include letters to owners, newsletter articles, web notices and even signs throughout the community. Since it may be difficult to obtain the required number of votes in a fixed time period (due to owner absence, etc.), you might leave the voting open until a quorum is reached. Consider knocking on doors and collecting proxies.

Step 5: Implementing the no-smoking rule

For common areas: Make sure the building and grounds comply with state law and that no-smoking signs are posted. Under Oregon and Washington state law, smoking is prohibited in most public places and workplaces. Public place means any enclosed area open to the public. Workplace means every enclosed area under the control of a public or private employer where employees frequent during the course of their regular duties (lobbies, hallways, community or laundry rooms, etc). In addition, smoking is prohibited near ALL entrances, exits, operable windows and air intake vents (within 10 feet in Oregon and 25 feet in Washington).

Since community association boards generally have the authority to establish rules for common areas, you will be able to do this right away. Check the declaration or CC&Rs. All it may take is a vote of the majority of board members at a meeting where a quorum is present. Once a common area no-smoking rule is enacted, the board must give unit owners notice of the rule change before implementing. The notice should state where smoking will be prohibited and when the rule becomes effective.

If, as in many buildings, smoking is not permitted in the enclosed common areas of your building, your next step is to implement a rule change for those common areas that are not enclosed such as fire escapes, decks, patios, exterior landings, front steps and the surrounding grounds. Because secondhand smoke often drifts from these locations back inside the building through doors and windows, it may become necessary to prohibit smoking in these areas. If a smoking area is designated, it should be far from any entrance or other area where the smoke might drift back into the building.

It is advisable to record a bylaw amendment for common area rules because it automatically provides notice to all unit owners of the rule change.

For the entire property: A no-smoking rule that restricts smoking in individual units probably requires an amendment of the community association's bylaws found in the declaration or CC&Rs. Enacting the rule will require a vote of unit owners; likely, a super-majority (75% to 95%) will be needed. Consult your own community association documents for specifics. Although you may enjoy the support of all owners, it is possible you will meet with some resistance. That is why it is critical to conduct a resident survey to gain support for the rule and educate owners about benefits.

Step 6: Enforcing the no-smoking rule

No-smoking rules are largely self-enforcing. Once the rule is established, you are likely to attract new owners who support no-smoking rules. Here are some tips:

Inform owners: Start by mailing each resident a copy of the rule change or bylaw amendment as soon as the amendment has passed.

Post no-smoking signs: Put them at the entrance, hallways and other conspicuous areas. If you find someone smoking in an area where it is prohibited, post a no-smoking sign there too.

Remove ashtrays and clean up cigarette butts: These items give the impression it is a smoking area.

Repair cigarette damage in common areas: If these areas have cigarette burns and smell like smoke, building residents may be inclined to ignore the no-smoking rule. Replace or patch carpet, floors or other surfaces that have cigarette burns, paint smoke-stained walls and ceilings, and take other steps to reduce the odor of stale tobacco smoke.

Respond promptly to resident complaints of smoking: Ask those who complain to document when and from where the smoke likely originated. Follow-up with enforcement in a timely fashion.

Be consistent: Taking the same steps in the same time period for every rule violation sends a clear message to everyone that smoking is not allowed. Likewise, treat violations of the no-smoking rule in the same way you respond to other rule violations such as loud noise or inappropriate garbage disposal.

Alert owners: Make owners aware they could be held financially responsible for violations on the premises and that the rule applies to everyone, including guests and tenants.