

Landlords

Why

Landlords and condominium associations have a responsibility to provide safe and healthful facilities and to ensure cooperation with standards to protect occupants. They also have authority to set standards for how their buildings are to be used. (Please see the Public Places and Outdoors sections for more information on smokefree policies set by building owners for office and shopping malls, and for smokefree policies in the hospitality industry.)

Legislation, Regulation

Throughout the nation, many laws and regulations establish standards to protect the environment, standards which can be applied to dwellings. In addition, states and municipalities have enacted building codes to provide for the health and safety of building occupants. For instance, the California Health and Safety Code says, "No person shall discharge from any source whatsoever such quantity of air contaminants or other material which cause injury, detriment, nuisance...or which endanger the comfort, repose, health or safety of any persons or the public." Many California jurisdictions have adopted Section 1206(c) of the State Mechanical Code which requires that

"return air from one dwelling unit shall not be discharged into another dwelling unit through the cooling system."

New Jersey's regulations for maintenance of hotels and multiple dwellings (NJAC 5:10-6.2) mandate premises "free of hazards to the health or safety of occupants and other persons in or near the premises" and require owners to eliminate or abate odors "arising out of the use or occupancy of the premises which shall constitute a nuisance that is harmful or potentially harmful to the health and well-being of persons of ordinary sensitivity occupying or using the premises." As scientific evidence about the harmful effects of ETS accumulates, state and local regulations and laws like these are being interpreted to include protection from ETS.

Some jurisdictions have passed legislation specifically addressing tobacco smoke in multiple-occupancy dwellings. For example, the City of Long Beach, California, requires that enclosed public areas of apartment buildings be smokefree.

The Americans with Disabilities Act, federal legislation protecting persons with disabilities from discrimination in workplaces and public places, can be used by people with asthma and other smoke-sensitive tenants and members of the public to require landlords to make public-access areas of their building smokefree.



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The Federal Fair Housing Act of 1988 also gives tenants with disabilities an avenue of relief.

In 1994, a tenant with asthma, in a privately owned mobile home park in San Leandro, California was able to require management to prohibit smoking in all areas of the clubhouse in the complex, which was shared by the residents of more than 350 mobile homes. In the agreement, which was reached after the tenant asked the Department of Housing and Urban Development to file a federal discrimination lawsuit on her behalf, the park owners also agreed to enforce the policy, to post signs and notices of the policy, to inform park residents about the policy in writing, to reissue the park's residency guidelines to include the new policy, and to arrange for park management to inspect the clubhouse during the evening, when regular staff was not on duty.

Health officers can intervene to protect occupants from health hazards and nuisances created by neighbors and landlords, including ragweed growing on nearby land or disagreeable odors from garbage. As the Chief of the California Division of Occupational Safety and Health, John Howard, pointed out when testifying for smokefree legislation, "...tobacco smoke travels from its point of generation in a building to all other areas of the building. It has been shown to move through light fixtures, through ceiling crawl spaces, and into and out of doorways." Some health officers are now acting to control tobacco smoke generated by neighbors. The New Jersey Commission on Smoking OR Health has recommended that the State Department of Health

promulgate standards for the maximum amount of tobacco smoke pollution allowed to enter one dwelling from another. As complaints increase, there will be more attention to this problem.

Litigation

A body of case law is emerging that holds landlords responsible for exposing tenants to ETS. Tenants have sued on the basis of nuisance, breach of statutory duty to keep the premises habitable, breach of the common law covenant of peaceful enjoyment, negligence, harassment, battery, and intentional infliction of emotional distress.

In one of the first cases, in 1991, a Massachusetts woman sued her landlord because she was constantly exposed to the secondhand smoke of another tenant. She suffered asthma attacks, labored breathing, wheezing, prolonged coughing, clogged sinuses, and frequent vomiting. That case was settled for an undisclosed amount of money in 1992 (*Donath v. Dadah*).

A year later, a landlord in Oregon was sued by a tenant who was affected by cigarette smoke from another tenant who lived directly below. The tenant alleged that the landlord had breached his statutory duty to keep the premises habitable and the covenant of peaceful enjoyment which the common law implies in every rental agreement. A six-person jury unanimously found a breach of habitability, reduced the tenant's rent by 50 percent, and awarded her payment to cover her doctor's bills (*Fox Point Apts. v. Kippes*).

The Pentony case in New Jersey, in which a couple sued because of smoke entering their condo unit, was the subject

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of three stories in the *New York Times*, numerous other reports around the nation, and a story in the *National Law Journal* in 1994. A judge ordered the apartment complex directors to resolve the problem (the terms of the settlement are confidential).

In 1996, Roy Platt sued his downstairs neighbor and his condo association because of cigarette smoke that entered his open windows from the unit below. In that case, filed in the Los Angeles Superior Court in June, Platt contended that he was not overly sensitive to smoke, but that the amount of smoke wafting into his home had, at times, made him sick to the point of vomiting. "I have friends who smoke and they find it difficult to be here," he said. (*Los Angeles Daily Journal*, June 28, 1996, and *Los Angeles Times*, July 5, 1996)

Injunctive relief from ETS may be available to tenants for only the cost of their time, energy, and several hundred dollars. In April 1996, the Superior Court in Long Beach, California issued a three-year restraining order to prohibit smoking by a condo owner in his garage (which he also used as an office). The ban was sought by other condo owners, Richard and Marcia-Luna Layon, because smoke was entering their unit from the garage. (*Layon et. al. vs. Jolley et. al.*) The Layons brought the action themselves, without an attorney.

Legal redress was obtained by another person lacking counsel. In 1994, a Massachusetts woman suffering from pulmonary fibrosis won a temporary injunction preventing her landlord from renting the units below her to smokers (*Snow v. Gilbert*).

(In a related development, there are now a number of cases in which people

have been ordered not to smoke in their homes around children. Courts in at least 16 states have rendered those decisions in response to the urging of child welfare agencies seeking to protect smoke-sensitive children and the request of parents in child custody cases.)

Benefits of a Smokefree Policy

Other reasons why landlords create smokefree policies:

- Most tenants don't smoke and they appreciate a smokefree policy.
- A landlord-mandated policy relieves tenants from the burden of trying to persuade others not to pollute the common environment.
- Some landlords live in their rental complexes, especially in duplexes and other relatively small buildings, and want to protect themselves from ETS.
- Maintenance costs and litter are reduced. The offensive odor of secondhand smoke, which can linger in spite of cleaning and painting, is eliminated.
- Fire danger is lessened.
- Property insurance costs can be reduced.
- Landlords are experienced property owners. They notice there is less property damage and there seem to be fewer problems, like fights, in smokefree buildings. (This may be a reflection of the fact that almost all alcoholics and illegal drug users are smokers and a smokefree policy tends to sift out these people whose personal problems often spill over onto others.)



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Landlords Are Free to Choose

Landlords are free to refuse to allow smoking, just as they are free to refuse to rent to people with pets. It's a matter of preservation of property.

The law is clear that there is no legal or constitutional right to smoke, even in one's dwelling, according to John Banzhaf, professor of law at George Washington University and director of Action on Smoking and Health. Frank J. Kelley, the Lansing, Michigan Attorney General has said that landlords may refuse to rent to smokers and they may restrict smokers to certain buildings within their complexes without violating federal and state anti-discrimination laws (*Detroit News*, May 5, 1992). Interviewed in the same report, even the tobacco industry agreed. Tom Lauria, a spokesman for the Tobacco Institute, acknowledged that private business owners have the right to determine what is best for their property.

Landlords are taking action. In Spokane, Washington, Don Wallace, who owns a number of residential units, has enforced a smokefree rule for 20 years. The newly launched Smokefree Apartment House Registry lists owners of multiple-unit residential housing in southern California with smokefree policies. Information about the registry is available from S.A.F.E. (Smokefree Air for Everyone), Newbury Park, California, phone: 805 499-8921.

One of the owners listed in the registry, Shirley Weber of South Pasadena, owns 20 units which have been smokefree since 1980. She initiated the policy after several years of renting during which she had problems with smoking, including burned carpets. But she was worried about more than minor damage. She says, "The reason

that I have kept my buildings smokefree is that smoking is a major cause of fire fatalities."

Condominium associations can set similar policies and can use standard clauses already existing in condo contracts to control ETS problems. Public building owners can act, too. In Fort Pierce, Florida, the housing authority voted unanimously to prevent new tenants from smoking in the community's 850 units. When they sign their lease, the new tenants must also sign an affidavit pledging not to smoke in their apartments (*New York Times*, May 5, 1996).

How

Communicating the policy is crucial in enforcing a smokefree policy by building owners or condominium associations. Signs should be posted on entrances, in lobbies, in elevators, and on each floor. Cigarette receptacles should be removed. If smoking is to be allowed outdoors, an area should be designated, away from entrances, windows, and air-intake vents.

All new contracts should include information on the policy, and old contracts should be renegotiated to include the new rules. The contract or lease should specify that the property is "to be occupied as a smokefree residence." It should say that the tenant will "prohibit smoking by his/her household members or guests while on the premises," that "it is the tenant's responsibility to inform his/her guests of the smokefree portion of this contract/lease," and that "the tenant agrees to vacate the premises within three



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months if the agreement to be smokefree is violated."

Lower insurance rates can be negotiated for fire, property, or homeowner's packages. Reduced fees may be negotiated with maintenance contractors. Advertisements should say the buildings (and premises) are smokefree, not that only nonsmokers may rent/buy condos.

Recognize, as owner Shirley Weber says, "It is true that the more particular you are about your prospective tenants, the longer it may take to rent a unit," but she says, "I feel very good about keeping my buildings smokefree."