

NEW YORK GUIDE TO SMOKE-FREE CONDOMINIUMS



This guide is based on *Going Smoke-Free: A Guide for Condominium Trustees and Associations* developed for The Massachusetts Smoke-Free Housing Project.

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SmokeFreeHousingNY is comprised of community partnerships funded by the New York State Tobacco Control Program, with the common goal of increasing the availability of smoke-free multi-unit housing throughout New York State.

This work provides educational materials only and does not constitute and cannot be relied upon as legal advice.

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INTRODUCTION

Exposure to secondhand tobacco smoke is not just an annoyance, it's a serious health hazard – but it is preventable. “Secondhand smoke” is generally broken down into two categories: direct smoke, which is smoke from a lit cigarette or other tobacco product, or indirect smoke, which is exhaled by smokers of cigarettes, cigars, pipes and other items.¹ In either case, this secondhand smoke is involuntarily or passively inhaled by someone who is not smoking.² Being exposed to secondhand smoke is dangerous, as it contains many carcinogens and other toxins and is known to kill over fifty thousand people every year.³ The Environmental Protection Agency classifies secondhand smoke as a Class A carcinogen, the same as deadly substances like asbestos, formaldehyde and arsenic.⁴

There are no safe levels of secondhand smoke for children or adults, yet non-smokers are regularly exposed to this health risk.⁵ In multi-unit buildings, secondhand smoke can seep under doors and through ventilation ducts, electrical outlets and light fixtures into neighboring units and common areas. Even ventilation systems fail to completely eliminate secondhand smoke drift.⁶

- Secondhand smoke (SHS) is toxic.
- Exposure to SHS should be avoided.
- SHS exposure may be involuntary, as when smoke drifts through apartment walls.
- SHS drift cannot be completely stopped; only a smoke-free policy ensures reduced SHS exposure.
- SF policies are a legal, effective method of preventing SHS exposure and limiting its adverse health effects.

Indoor cigarette smoking presents a further health hazard in that it is the primary cause of residential fires and fire-related deaths.⁷ Multi-unit housing, such as condos, are especially susceptible to fires spreading from neighboring units.

A smoke-free policy refers to an explicit smoking ban on condominium grounds – both inside and outside of individual units (including balconies, decks and patios) and all common areas. Smoking is prohibited in building entryways and from a designated building perimeter (if not the entire property). Only smoke-free policies that completely eliminate smoking throughout condominium property can protect residents in their home from exposure to secondhand smoke and its dangers.

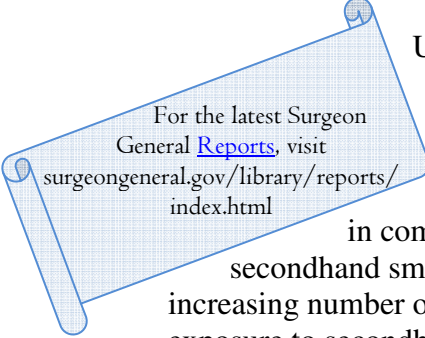
Smoke-free policies not only provide health benefits for people and pets living in these buildings, they potentially offer owners financial advantages as well. With no smoking, there is less need for the inevitable costly repairs to cigarette and smoke damage. Further, there is an increasing market for smoke-free properties, so properties with smoke-free policies in place may find increased resale value.⁸ These health, safety and economic benefits have been a collective driving force behind the implementation of smoke-free policies in condominiums throughout New York and the nation.

Good news for owners and governing boards: smoke-free policies are enforceable and implementation is straightforward. This guide outlines the steps necessary to establish a smoke-free policy in a condominium. It also contains specifics on the benefits of such a policy, an example of a smoke-free policy and other tools to aide your policy implementation efforts. With this guide and some patience, you will soon be rewarded with a healthier, safer and more desirable living environment.

BENEFITS OF A SMOKE-FREE POLICY

Health Benefits

Many health problems are caused or worsened by exposure to secondhand smoke. These include cancer, heart disease, atherosclerosis, asthma, respiratory and ear infections, Sudden Infant Death Syndrome, decreased fertility and adverse pregnancy outcomes.⁹ Children exposed to secondhand smoke are more likely to develop asthma, ear infections and wheeze illnesses.¹⁰ Reducing exposure to secondhand smoke will decrease the frequency, severity and overall likelihood of suffering from these health issues.



For the latest Surgeon General Reports, visit surgeongeneral.gov/library/reports/index.html

Unfortunately, even seemingly minimal exposure to secondhand smoke may inflict negative health consequences.¹¹ Residents are exposed to toxins when breathing smoke lingering near building entryways and drifting between units through windows, outlets and ductwork. Mechanical solutions to secondhand smoke drift, such as ventilation and plugging, are not successful in combating secondhand smoke.¹² The most effective way to reduce exposure to secondhand smoke drift is to make condominium grounds completely smoke-free. An increasing number of condos have successfully implemented smoke-free policies to eliminate exposure to secondhand smoke.¹³

Financial Benefits

In New York and nationwide there is growing market support for smoke-free housing. Utah's legislature enacted a state law explicitly authorizing smoke-free condo bylaws.¹⁴ Multi-unit developments across New York have successfully implemented smoke-free policies, and New York and other states and cities offer smoke-free registries to assist those exclusively seeking smoke-free housing.¹⁵

Beyond an increasing desire for smoke-free housing, surveys suggest smoke-free properties may render a higher rental or purchase price.¹⁶ In a recent survey of New York City residents, 58% reported they would pay more to live in smoke-free housing.¹⁷ As smoking rates decrease and awareness of the dangers of secondhand smoke exposure increases, demand for smoke-free housing will likely continue to rise. This increased demand will benefit owners of condos with smoke-free policies already in place.

Further, not allowing lit cigarettes, cigars and pipes on condo property reduces the incidence of property damage - such as burns, stains, and odors - that these products and their smoke frequently cause. For example, attempting to remove smoke odor, discoloration and chemicals through refurbishing upholstery, carpets and curtains is a typical yet costly fix and does not guarantee the desired result.¹⁸ Since smoke residue lingers and is difficult to remove, condos with smoke-free policies may save on building maintenance costs and present common areas and units that are more attractive for rental and sale.¹⁹

Of additional benefit, buildings with smoke-free policies are less likely to suffer unintentional fires and accompanying financial (and other) losses. A condo may even receive reduced casualty or liability insurance rates after implementing a smoke-free policy.

Legal Benefits

Condo associations may legally implement a smoke-free policy because smoking is not a right protected by the U.S. Constitution,²⁰ federal law²¹ or New York State law.²² In a case brought under the Fair Housing Act, a court ordered the implementation of a smoke-free policy to satisfy the “reasonable accommodation” requirement for a disabled tenant negatively impacted by the smoking.²³ A Colorado court found a condo’s smoke-free policy enforceable, despite owners having no notice of it.²⁴ Further, a New York court found secondhand smoke may constitute “unreasonable interference” with the use of common areas and that it is within a condo board’s right to stop smoke infiltration and seek damages for repeat violations.²⁵

Although condo boards are often concerned about the legality of implementing a smoke-free policy, boards allowing on-premises smoking may be vulnerable to legal action by residents resultantly harmed by secondhand smoke. Condo boards have a duty to act in the best interests of its members.²⁶ Failing to prevent harm from secondhand smoke infiltration could lead to successful claims of nuisance,²⁷ negligence, breach of warranty of habitability,²⁸ constructive eviction,²⁹ or breach of the covenant of quiet enjoyment against a condo board and/or individual owners. Including a smoke-free policy in the condo bylaws provides a written rule and therefore clear notice to owners and unambiguous enforcement justification by the board (or a court, should the rule be challenged). A smoke-free bylaw should increase compliance and otherwise reduce the likelihood of claims from harm caused by secondhand smoke.

Condo smoke-free policies are healthful, market-supported and legal. Reminding other owners of these benefits may motivate your condo association to implement its own smoke-free policy.

IMPLEMENTING A SMOKE-FREE POLICY: Amending Your Condo’s Bylaws

Condo Association Bylaws

An effective smoke-free policy will be included in a condo’s bylaws. Condo bylaws exist to promote the “health, happiness and peace of mind” of all the unit owners, including non-smokers.³⁰ Many condo bylaws already include provisions restricting activities that unreasonably interfere with another owner’s enjoyment. For example, it is common for condo bylaws to include restrictions on noise and rental agreements.

The Essentials:

- A written smoke-free policy.
- A passing vote by condo owners.
- Proper recordation (e.g., file with the Office of Registry of Deeds and the Department of State).

In order to create a new condo bylaw, such as a smoke-free policy, you will need a written rule which owners vote to adopt. Your condo association likely has existing bylaws which specify how to request a vote and how many votes are needed to approve a new policy.³¹ If you do not have a copy of these bylaws, you may request a set from your condo board. Reviewing your condo’s bylaws is a good way to start your quest for a smoke-free policy and may allow you to confidentially discuss procedures with other owners and the board members.³²

The following steps are designed to assist you with crafting and implementing a smoke-free policy that is right for your multiunit housing community. As they are meant to be guidelines, you may choose to reorder or otherwise adapt them to best serve your needs.

Step 1: Educate Owners

Survey all owners and learn their support for and understanding of a smoke-free policy. (A sample survey is in Appendix B.) Regardless of the survey results, communicate with all owners and residents about the proposed smoke-free policy and the reasons for implementing one. You may want to address the dangers of secondhand smoke and its unstoppable drift, why a smoke-free policy is the best solution to limit exposure, as well as the other health, financial and legal benefits to going smoke-free. Ascertain owners' understanding of the policy, how it will affect them, and whether they support a smoke-free policy. Use these conversations along with the survey results to learn about concerns, correct misconceptions and gain widespread support from even reluctant owners. Focus on the problem of secondhand smoke and don't vilify smokers. Your time investment will help you tailor a policy to your associations' needs, increase overall support and minimize surprise and complaints down the road.

Keep detailed records of when and how smoke is affecting your unit and what has been done to address the issue. If applicable, include medical documentation. These records may be helpful in educating and persuading the board or other owners about the importance of the proposed smoke-free policy.

Voice concerns to the board and encourage others to do the same. Issues of widespread concern generally garner more attention and may be more quickly resolved.

Step 2: Draft the Smoke-Free Policy

Have a clear objective for your smoke-free policy in mind and begin drafting the amendment. If you get stuck while writing, it may be helpful to review this objective and consider how each clause helps achieve it. You will want to include this statement of purpose in the amendment – it creates a record of the “**why**” behind the policy. (An example bylaw amendment is provided in Appendix D.)

A policy “grandfathering” in current smokers means allowing smoking in specific units for some period of time or until that unit is sold or conveyed.

This limits the policy's health benefits and may create enforcement confusion. If a grandfather provision appears to be a required compromise, you may wish to wait until the association has enough support for a complete smoke-free policy.

What is “smoking”?

“Smoking” should be defined broadly to ensure the policy is effective. You may define smoking as “carrying, burning, or otherwise handling or controlling any lit or smoldering product containing tobacco or cloves, including but not limited to cigarettes, cigars, or pipes.”³³ Define other key terms to ensure everyone has the same understanding of their meaning.

Who will the rule apply to?

In addition to the unit owner, smoking should not be permitted by any resident, tenant, or guest anywhere on the property where the rule is in effect.

Where is smoking restricted?

Clearly state which areas are designated smoke-free. This could include common areas and individual units, indoors and out. You may define an “individual unit” to include decks, patios, balconies, and other exclusive use outdoor areas attached to the unit.

Likewise, outdoor common areas such as roof-decks, sheds and vestibules may be designated smoke-free. If your policy does not prohibit smoking from the entire condo grounds, be sure to designate a smoke-free perimeter with enough distance to ensure smoke cannot drift through windows, entryways or overcome outdoor smoke-free common areas.

When will the rule become effective?

Determine when the rule will become effective and include the date or timeframe in the rule.

How is the policy enforced?

The rule should identify who is charged with ensuring compliance and the consequences for an infraction. For guidance, look to your condo's existing enforcement provisions for other policy violations, such as loud music or personal storage in common areas. Response to any reported policy violations must be prompt and consistent; this both aides policy effectiveness and also ensures there is no misinterpretation of consent.³⁴ Consider complaint-driven progressive enforcement, beginning with a friendly reminder or warning, moving to fines and culminating with more drastic measures, such as court action or eviction.³⁵ To the extent fines are used, the value should not exceed the approximate costs smoking causes the condo association (costs may include repair, replacement and labor maintenance as well as costs administering the policy).³⁶

In addition the above policy specifics, the bylaw should address the following:

Condo information: State the name of the condominium, the date and location of the master deed and the declaration of trust (if applicable), and that the association adopts the terms set forth in the document as an amendment to the association's bylaws.

Board's Power: State the board's power to oversee the administration and operation of the condominium.

Unit Owners' Rights: Reaffirm that unit owners are entitled to exclusive ownership and possession of their units pursuant to N.Y. Real Prop. Law § 339-h, but also must abide by the rules and regulations in regards to the maintenance and repair of their units pursuant to the condominium's governing documents (i.e. bylaws, declaration of trust, etc.).

Objectives and Stated Purpose: As discussed above, outline the facts and purpose for adopting the policy. For example, state that secondhand smoke is hazardous to health and a complete prohibition is the only proven way to limit secondhand smoke exposure (e.g., ventilation systems have not been proven to reduce exposure). You may also discuss the fire hazard, maintenance and repair costs associated with smoking.

Approval: After the amendment passes, include acknowledgment that a vote was administered according to the bylaws and approved by a sufficient majority.

Recordation & Seal: Write the date of passage on the bylaw amendment and have all trustees/board of managers sign the amendment. You may have a notary public witness the signatures and submit a signed certification statement. Bring the signed bylaw amendment and certification statement to the same registry of deeds where the condominium's master deed and declaration of trusts are recorded (likely the City Register and Department of State).

Step 3: Enact the Smoke-Free Policy

Common areas

Condominium trustees typically have the authority to establish rules for common areas. This means they could make outdoor and non-

New Building or Condo Association?

It is even more straight forward to implement a smoke-free policy in new buildings or in buildings where no units have been purchased (for example, when converting an existing building into a condominium). A smoke-free rule may simply be included as a bylaw along with other conditions, covenants and restrictions within the master deed and/or declaration of trust. Enforcement methods in new buildings may mirror those discussed in this guide.

enclosed common areas - such as fire escapes, roofs, decks, entryways, steps - smoke-free right away. Consult the condominium's master deed and declaration of trust to determine exactly what steps are required to amend common area rules.

Exclusive use areas

Enacting a smoke-free policy is a material change to the bylaws and therefore requires a passing vote by the condo owners.³⁷ The number and percentage of votes needed for an amendment to pass should be defined in your condo's bylaws. If your bylaws do not include how many votes are needed to pass a new rule, the association will follow New York's default rule, which requires at least two-thirds (66%) of owners vote in favor of the rule.³⁸

The amendment may be voted on at the owners' annual meeting or a specially scheduled meeting. Consult your condominium bylaws for rules on calling meetings and other procedural requirements.

Wait until you are confident you have the required votes to pass a comprehensive smoke-free policy before calling for a vote on the policy. Once the smoke-free policy is voted in, the new rule is added to your condo's bylaws and should be recorded at the same registry of deeds where the condominium's master deed and declaration of trusts are recorded. New York law requires also filing the amendment with the Department of State.³⁹

Step 4: Enforce the Smoke-Free Policy

The no-smoking rule will be largely self-enforcing. The following strategies may aid success:

- Provide each resident and owners a copy of the rule change or bylaw amendment.
- Post "No Smoking" or "Smoke-Free Area" signs in conspicuous places and anywhere violations occur.
- Remove ashtrays and cigarette butts from common areas and repair damage from prior smoking; this will encourage residents to abide by the smoke-free policy.
- Document potential violations. Residents who smell smoke should record when and where it was noted and from where it might have originated. Complaints should be filed with the Trustees or as specified in the bylaw.
- Violations of the smoke-free policy should be treated like any other rule violation: enforcement should be prompt, consistent and in accordance with the policy's enforcement clause.
- Ensure that owners are aware that they will be held responsible for the policy, even when it is violated by their guest or tenant.

Step 5: Contact Smoke-Free Housing NY for free advice!

For more information and support on implementing a smoke-free policy in your multiunit housing community, contact Smoke-Free Housing NY. Their [website](#) will direct you to many resources, including a community liaison available to work with your association! Check out www.SmokeFreeHousingNY.org.

¹ Targeting the Nation's Leading Killer At A Glance – 2011, Centers for Disease Control and Prevention National Center for Chronic Disease Prevention and Health Promotion, *available at* <http://www.cdc.gov/chronicdisease/resources/publications/AAG/osh.htm>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ AM. SOC'Y OF HEATING, REFRIGERATION, AND AIR-CONDITIONING ENG'RS, ASHRAE POSITION DOCUMENT ON ENVIRONMENTAL TOBACCO SMOKE § 5.0 (2010), *available at* <http://www.ashrae.org/about-ashrae/position-documents>.

⁷ Marty Ahrens, *Home Structure Fires*, National Fire Protection Association; 2011, *available at* <http://www.nfpa.org/assets/files/PDF/HomesExecSum.pdf>.

⁸ Lambeth Hochwald, *To Buy or Not to Buy in a Smoking Prohibited Building*, BUSINESS INSIDER, March 19, 2012, <http://www.businessinsider.com/58-of-new-yorkers-would-pay-more-to-live-away-from-people-who-smoke-2012-3> (reporting survey results showing 58% of New Yorkers are willing to pay more to live in smoke-free housing); CENTER FOR ENERGY & ENVIRONMENT AND TOBACCO LAW CENTER, SURVEY OF COMMON INTEREST COMMUNITY (CIC) OWNER-OCCUPANTS IN MINNESOTA REGARDING: TOBACCO SMOKE MOVEMENT IN CICS AND INTEREST IN SMOKE-FREE CICS, July 2011, *available at*

<http://dl.dropbox.com/u/23584390/Condominium%20Research/Minnesota%20Survey%20of%20Condo%20Owner%20Occupants%202011%2007.pdf>; THE MASSACHUSETTS SMOKE-FREE HOUSING PROJECT, MARKET DEMAND FOR SMOKE-FREE RULES IN MULTI-UNIT RESIDENTIAL PROPERTIES & LANDLORDS' EXPERIENCES WITH SMOKE-FREE RULES, APRIL 2009, *available at*

<http://dl.dropbox.com/u/23584390/Condominium%20Research/Massachusetts%20Housing%20Survey.pdf>. See also C.J. Hughes, *For Some Smokers, Even Home Is Off Limits*, N.Y. TIMES, Nov. 15, 2009, *available at* http://www.nytimes.com/2009/11/16/nyregion/16smoke.html?_r=1&pagewanted=all.

⁹ OFFICE OF THE SURGEON GENERAL, A REPORT OF THE SURGEON GENERAL: HOW TOBACCO SMOKE CAUSES DISEASE, 568 to 571 (2010), *available at*

http://www.surgeongeneral.gov/library/tobaccosmoke/report/full_report.pdf.

¹⁰ Surgeon General's Report (2010), *supra* note 9, at 470.

¹¹ OFFICE OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, SUMMARY OF FINDINGS (2006), at 11, *available at*

<http://www.surgeongeneral.gov/library/secondhandsmoke/report/index.html>.

¹² ASHRAE, *supra*, note 6, at 3, for discussion of environmental tobacco smoke, devices used to reduce exposure to it and the conclusion "the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity."

¹³ Kay Lazar, *Boston's largest condo goes smoke-free*, Boston.com, March 21, 2012, *available at*

http://articles.boston.com/2012-03-21/metro/31215616_1_smoking-ban-smoking-in-common-areas-cigarette-smoke; Teri Karush Rogers, *Smoking bans advance in co-ops and condos*, Brickunderground: NYC Real Estate Survival, March 16, 2011, *available at*

http://www.brickunderground.com/blog/2011/03/smoking_bans_advance_in_co_ops_and_condos; Susan Schoenmarklin and Jacque Petterson, *Clearing the Air: Industry Discusses Trend Toward Smoke-Free Housing*, UNITS magazine - A publication of the National Apartment Association, December 2007, *available at*

<http://www.tcsg.org/sfelp/UnitsDec2007.pdf>.

¹⁴ UTAH CODE ANN. § 57-22-5 (1)(h) (2008).

¹⁵ For example, <http://www.tobacco.org/> and its New York Vacancies section, *available at* http://www.smokefreeapartments.org/list_newyork.html, last checked 12/21/2011.

¹⁶ Hochwald, *supra* note 8; CENTER FOR ENERGY AND ENVIRONMENT AND TOBACCO LAW CENTER, *supra*, note 8; THE MASSACHUSETTS SMOKE-FREE HOUSING PROJECT, *supra* note 8; Hughes, *supra* note 8.

¹⁷ Hochwald, *supra* note 8.

¹⁸ Antoinette Martin, *On Tobacco Road, It's Tougher to Sell*, N.Y. TIMES, Feb. 8, 2004, *available at*

<http://www.nytimes.com/2004/02/08/realestate/on-tobacco-road-it-s-a-tougher-sell.html?scp=1&sq=On+Tobacco+Road&st=nyt> ("Lingering tobacco residue can make a home difficult to sell and

drive down the selling price. Clean-up is costly and does not guarantee that the smoke's smell or harmful chemicals will be fully removed.")

¹⁹ *Id.*

²⁰ *Grussendorf v. City of Oklahoma*, 816 F.2d 539, 541 (10th Cir. 1987) holding that the Fourteenth Amendment does not protect the right to smoke. See generally SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE: 2008, at 1-2.

²¹ See The American with Disabilities Act, 42 U.S.C. § 12201(b) (1990), which states "[n]othing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment . . . in transportation . . . or in places of public accommodation.")

²² N.Y. LAB. LAW § 201-d (McKinney) (Employment smoker protection law does not apply to housing).

²³ *In re U.S. Dep't Hous. and Urban Dev. and Kirk and Guilford Mgmt. Corp. and Park Towers Apartments*, HUD Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998) (entitling a disabled tenant in a government subsidized rental-housing complex reasonable accommodation of a smoke-free policy applied to all future tenants).

²⁴ *Christensen v. Heritage Hills 1 Condo. Ass'n*, 2006 WL 4585750 (Colo. Dist. Ct. Nov. 7, 2006).

²⁵ *Poyck v. Bryant*, 820 N.Y.S.2d 774, 780 (2006).

²⁶ *Caprer v. Nussbaum*, 825 N.Y.S.2d 55, 69 (2006).

²⁷ *Herbert Paul, CPA, PC v. 370 Lex., LLC*, 7 Misc. 3d 747, N.Y. Sup. Ct. (2005), wherein the court holds that a tenant may pursue a nuisance suit against an offending neighboring tenant. See *Upper E. Lease Associates, LLC v. Cannon*, 30 Misc. 3d 1213(A), 924 N.Y.S.2d 312 (Dist. Ct. 2011), wherein the court identifies secondhand smoke as a nuisance that landlords must rectify. Compare *Ewen v. Maccherone*, 32 Misc. 3d 12, 927 N.Y.S.2d 274 (App. Term 2011), wherein the court explains that secondhand smoke is "but one of the annoyances one must endure in a multiple dwelling building" and thus dismisses a negligence suit from one unit owner against another, when the plaintiff did not join the Condominium Board as a party to the lawsuit.

²⁸ *Poyck*, *supra* at 25, wherein the court finds secondhand smoke infiltration adequate to allow tenants' to proceed with a claim of a breach of implied warranty of habitability against their landlord.

²⁹ *Id.* wherein the court permits tenants' claim against landlord for constructive eviction caused by secondhand smoke infiltration. See *Upper E. Lease*, *supra* at 27, wherein a court held that a landlord's failure to adequately address secondhand smoke infiltration justifies rent abatement and excused the tenant from rent payment after her constructive eviction.

³⁰ *Murphy v. State*, 787 N.Y.S.2d 120, 124 (2004).

³¹ 15A AM. JUR. 2D CONDOMINIUMS, ETC. § 11 (2011).

³² Lisa Iannuci, *Changing the Rules: Altering Bylaws in Co-ops and Condos*, THE COOPERATOR, June 2005, available at <http://www.cooperator.com/articles/1158/1/Changing-the-Rules/Page1.html>.

³³ David B. Ezra, "Get Your Ashes Out Of My Living Room!": *Controlling Tobacco Smoke In Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 188 (2001).

³⁴ Richard Siegler and Eva Talel, ENFORCING HOUSING RULES – THE POWER TO FINE, N.Y.L.J., May 5, 2004 (Vol. 231, no. 86).

³⁵ See, for example, Vivian S. Toy, *Upper West Side Condo Votes to Ban Smoking*, N.Y. TIMES, May 12, 2011, available at <http://www.nytimes.com/2011/05/15/realestate/upper-west-side-condo-votes-to-ban-smoking.html?pagewanted=all>, which reports that a large Upper West Side condominium adopted a smoke-free policy with an enforcement policy specifying a \$150 fine for the first complaint and fines increasing by \$150 for each succeeding complaint.

³⁶ *Vernon Manor Co-op. Apartments v. Salatino*, 15 Misc. 2d 491, 497 (Civ. Ct. N.Y. Co. 1958) where a late charge equal to 100 percent of the payment in default is found not reasonably related to the loss which might be incurred by the co-op and is therefore impermissible. See also, *Behler v. Ten-Eighty Apartment Corp.*, N.Y. L.J., April 11, 2001, at 18, col. 4 (Sup. Ct. N.Y. (2001), where a liquidated damage clause in an alteration agreement is disproportionate to any real loss suffered by the co-op is held as an unenforceable penalty; Siegler and Talel, *supra* at 34.

³⁷ See *Yusin v. Saddle Lakes Home Owners Ass'n*, 902 N.Y.S.2d 139, 142 (N.Y.A.D. 2 Dept., 2010) where a board-made rule prohibiting dog walking in common areas, is found to be a "material" rule change and therefore requires a majority two-third vote of the homeowners.

³⁸ N.Y. REAL PROP. LAW § 339-v(j) (McKinney 2011), which dictates that The New York Condominium Act requires a minimum of two-thirds of condo owners approve a bylaw change.

³⁹ *Id.*

APPENDICES

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IMPLEMENTING A SMOKE-FREE POLICY: FREQUENTLY ASKED QUESTIONS

1. Are there any legal barriers to adopting a smoke-free policy for community associations?

Federal and state laws allow private property owners and associations to adopt a smoke-free policy for all parts of their property, including individual residential units.

2. Is prohibiting smoking discriminating 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. 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. A number of condominiums in New York and across the country have successfully implemented smoke-free policies in their condominiums.

3. Will legal liability increase after a smoke-free policy is instituted?

Condominium Associations have a duty to act in the best interests of its members. This means that regardless of whether or not the Association has a smoke-free policy, owners may successfully argue that the association must act to stop secondhand smoke. Implementing a smoke-free policy should deter smoking on the property, decreasing the likelihood of liability claims.

4. Is it difficult to enforce a smoke-free policy?

As with other association rules, such as those prohibiting loud music or overcrowding, it is important to create a clear policy with set consequences for policy violations. Further, enforcement must be prompt and consistent. Enforcement may be progressive, perhaps starting with written warnings and increasing to fines. Be sure to consult with those ultimately responsible for ensuring compliance to ensure that the enforcement scheme is realistic.

A smoke-free policy is largely self-enforcing. Conducting a survey of your association residents may help foresee potential compliance problems and generate thoughtful solutions. Properties that have already adopted smoke-free policies report needing only minimal effort to enforce the policy.

5. Is the process of creating smoke-free condos expensive?

Costs may be nominal and limited to printing educational materials, surveys and the policy (costs eliminated altogether if email is used), "no-smoking" signs for common areas and filing fees to record the bylaw amendment. If your association opts to hire an attorney to assist with the drafting process, or elects to construct an outdoor smoking area, it may incur additional costs for these services.

Consider any costs an investment in the building and your health. Unlike costly cleaning and mechanical devices, an effective smoke-free policy eliminates the secondhand smoke hazard and thereby reduces related health risks and discomfort. Buildings with smoke-free policies may also enjoy savings on insurance costs and building maintenance and experience a rise in market value.

CREATING A RESIDENT SURVEY

When conducting the survey, consider offering an incentive, such as a gift card or raffle ticket to encourage residents to complete the survey.

State your purpose clearly in the heading. Your objective may be to review your building's smoke-free policy or to determine receptiveness to a smoke-free policy. Advise residents and owners that their participation in the survey will help the association reduce smoking-related complaints and that their answers will be kept confidential. Be sure to leave room for additional comments and include a deadline for completing the survey. At the end, thank them for their times and answers, and let them know you will keep them informed on upcoming meetings or proposed policy changes.

A sample survey is provided in the appendix.

RESIDENT SURVEY: ASSOCIATION SMOKING POLICY

Our Condominium Association is currently reviewing the smoking policy. Your answers will help us to determine whether smoking is occurring and will help the association reduce smoking related complaints. We greatly appreciate your time and answers to the following questions. All answers will be kept confidential.

- 1. Has someone, including yourself, smoked cigarettes, cigars, or pipes anywhere inside your unit in the past 30 days?**

Yes No

- 2. How many years have you been a resident of the building?** _____

- 3. How many children live in your unit?** _____

- 4. Have you smelled tobacco smoke in your home that comes from another apartment or from outside?**

Yes No

- 5. Does smelling tobacco smoke in your home bother you?**

Yes No

- 6. Do you or someone who lives with you suffer from an illness such as asthma, chronic bronchitis, heart disease, diabetes or cancer?**

Yes No

- 7. Would you prefer to live in a non-smoking building?**

Yes No

- 8. If yes to above, would you prefer that smoking is prohibited everywhere on the property – both inside and outside?**

Yes No

- 9. What would you do if we made our building smoke-free?**

- 10. Please feel free to leave additional comments on the back of this sheet.**

Please return your survey in the enclosed envelope and/or to the following location:
_____ by _____ (date).

Thank you for your time and answers. We will keep you informed on upcoming meetings and/or proposed policy changes.

SAMPLE LETTER PROPOSING A SMOKE-FREE RULE

[Date]

[Unit Owner]
[Address]
[Address]

Dear Unit Owner:

The Board of _____ [Condominium Name] is writing to request your support to designate our property as smoke free.

Smoking in the building can expose nonsmoking residents to secondhand tobacco smoke. Research shows that secondhand smoke can drift under doors and through ventilation ducts, electrical outlets and light fixtures into neighboring units and common areas. Once in neighboring units or common areas, the smoke can stay in the air for hours. The potential for exposure raises serious health concerns for our residents, especially children and those who are especially susceptible to secondhand smoke. Some of the health effects include the following:

- Nonsmokers who are exposed increase their risk of developing heart disease by 25-30 percent.
- Nonsmokers who are exposed increase their risk of developing lung cancer by 20-30 percent.
- Children exposed to secondhand smoke are more likely to develop bronchitis, pneumonia, asthma, and ear infections.
- Secondhand smoke has been linked to Sudden Infant Death Syndrome.
- Even brief exposure to secondhand smoke can have immediate adverse effects of triggering asthma attacks and increase the risk of a heart attack.

The risk of fire is also a concern, both for smokers as well as their non-smoking neighbors. Cigarettes are the leading cause of home fire deaths and cause \$418 million in damage each year in the United States. One of four people killed in home fires are not the smoker whose cigarette caused the fire.

The only effective way to address these concerns is by designating our property as entirely smoke free. According to the American Society for Heating, Refrigerating and Air Conditioning Engineers, no standard ventilation system or air purifier can completely remove secondhand smoke. Accordingly, we invite the members of the condominium association to consider the following proposed rule change. Smoking will be prohibited everywhere on the property, including all indoor and outdoor common areas, all individual units and all indoor and outdoor exclusive use areas (exclusive use areas include decks, patios, parking spaces and other such areas belonging to individual unit owners). The trustees may designate an outdoor smoking area, but would locate the area away from the building where there is no potential for involuntary exposure.

The condominium association is proposing an immediate no-smoking policy throughout the entire condo building, including all common areas and individual units (including balconies). We also propose a smoke-free area within 15 feet of the building.

Before formally proposing and putting it to a vote we want to first obtain as much owner input as possible. For this purpose we will hold an informal informational meeting on _____ at _____ p.m. If you are unable to attend please contact us with questions and concerns.

Thank you,
Board of Managers

SAMPLE BYLAW AMENDMENT

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BY-LAW AMENDMENT

SMOKE-FREE RULE

The undersigned members of the Board of Trustees (the “Board”) of the _____ [Name of Condominium] Condominium Association (the “Association”) under the Master Deed dated _____ [Date Master Deed Signed] and recorded with the _____ [Name of Registry] Registry of Deeds in Book _____, Page _____, and the Declaration of Trust dated _____ [Date Declaration of Trust Signed] and recorded with the _____ [Name of Registry] Registry of Deeds in Book _____, Page _____, the organization of unit owners of the _____ [Name of Condominium] Condominium (the “Condominium), do hereby adopt the following administrative resolution as an amendment to the Association’s rules and regulations pursuant to the by-laws.

WHEREAS, the Board is empowered to oversee the administration and operation of the Condominium in accordance with the terms and provisions of its constituent documents; WHEREAS, the Unit Owners are entitled to exclusive possession of their respective Units pursuant to N.Y. Real Property Law, Sec. 339-h and also have the responsibility to properly maintain and repair their respective Units pursuant to the terms and provision of the Condominium’s constituent documents; WHEREAS, secondhand tobacco smoke contains no less than 60 of which are known or probable human carcinogens, and is itself classified as a “Class A” carcinogen by the United States Environmental Protection Agency; WHEREAS, exposure to secondhand smoke substantially increases the risk in non-smokers of lung cancer, cardiovascular disease and other acute and chronic health conditions; WHEREAS, secondhand smoke is known to drift through common walls and ventilation systems and contaminate air in common areas and individual units; WHEREAS, a vote by the current unit owners of the Condominium on the language of this by-law was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium’s constituent documents, approved this by-law amendment, NOW, THEREFORE, BE IT RESOLVED, that the following rule and procedure shall be applicable:

Effective immediately, smoking shall be prohibited everywhere on the property of the Condominium including, but not limited to, individual units, indoor and outdoor exclusive use areas, indoor and outdoor common areas. No owner shall smoke, or permit smoking by any occupant, agent, tenant,

invitee, guest, friend, or family member anywhere on the property. Smoking in violation of this rule shall constitute a nuisance pursuant to the terms and provisions of its constituent documents of the Association. Smoking shall include carrying, burning, or otherwise handling or controlling any lit or smoldering product containing tobacco or cloves, including but not limited to cigarettes, cigars, or pipes.

Violations of this rule will be enforced as follows: [DETAIL YOUR ENFORCEMENT POLICY HERE.]

Notwithstanding the said prohibition against smoking, the board of trustees may designate (or remove from designation) an outdoor area for smoking, provided the smoking area(s) shall not cause secondhand smoke to drift into indoor common areas, exclusive use areas or individual units.

SO RESOLVED.

EXECUTED as a sealed instrument this _____ day of _____ 20__.

, Trustee

, Trustee

, Trustee

, Trustee

STATE OF NEW YORK

_____, ss

_____, 20__

On the ___ day in the year _____, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individuals, whose names are subscribed to the written instrument and acknowledged to me that they executed the same in their capacities, and that by their signatures of the instrument, the individuals, or the person(s) upon behalf of which the individuals acted, executed the instrument.

Notary Public
My Commission Expires