



# Tobacco Public Policy Center

## at Capital University Law School

303 E. Broad Street, Columbus, Ohio 43215 • (614) 236-6770 • Fax: (510) 636-3864  
www.tobaccopolicy.org

## Options for Condominium Owners Exposed to Drifting Secondhand Smoke<sup>1</sup>

### What Options Do Condominium Owners Have?

Secondhand smoke is not just a nuisance; it's a serious health hazard. The dangers of secondhand smoke can be magnified in close living quarters such as multi-family dwellings and condominiums. Such buildings share common patios, decks, balconies, exhaust systems, hallways, underground parking garages, and recreational facilities. Some units share common ventilation systems and lack pressurization ventilation systems that can reduce the seepage of smoke.

Condominium owners have several options if they are dealing with drifting secondhand smoke from neighboring units. Trying to address the situation informally should be the first route. If necessary, the issue can be brought to the condominium board. As discussed below, other legal options may be available, including arbitration, mediation, litigation, and Fair Housing Act (FHA) complaints.

### Educate Yourself

Before taking action, it is important to educate yourself and others about the dangers of secondhand smoke. You may refer to the [Tobacco Public Policy Center](#) or the [Smoke-Free Environments Law Project](#) for more information.

Next, review the condominium Covenant, Conditions and Restrictions (CC&Rs) and condominium rules. Many agreements include a nuisance clause that prohibits condominium owners from engaging in activities that interfere with another's peace and well-being. A nuisance provision may apply to smoking if the resulting secondhand smoke causes health problems or substantial discomfort.

### Measure Your Exposure

After educating yourself, you may want to investigate your level of nicotine exposure, which can be done through a blood, saliva, or urine test. You should go to a physician for such a test and document the results. Also, you may want to get a letter from the physician documenting the exposure to secondhand smoke and the effects on your health. This will be important when you discuss your exposure with your neighbor or if legal action becomes necessary.

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<sup>1</sup> Adapted from "Analysis of the Voluntary and Legal Options of Condominium Owners Confronted with Secondhand Smoke from another Condominium Unit" by Susan Schoenmarklin of the Smoke-Free Environments Law Project (May 2006).

Currently, monitors that test the secondhand smoke levels in the air are expensive and difficult to obtain. Such tests may become much more feasible in the near future.

### **Address the Problem Informally**

If you have followed the above advice, you should be in good shape to address this issue with your neighbor. You should present the physician's letter to the neighbor, who may not be aware of the drifting smoke or its adverse health effects.

Once informed of your concerns, the neighbor will ideally agree not to smoke in the unit. If not, you should decide whether less comprehensive measures will be acceptable. For example, the neighbor might be willing to agree not to smoke on the patio or near open windows.

There may be structural problems with the condominium which should be checked by a local inspector. If there are structural problems with the condominium, the association may be liable to the owner for repairs.

If the building is not defective, then you may be able to reduce the problem through structural remedies. Such remedies include using sealing gaps around electrical outlets and pipes, waterproofing windows and doors, and checking air systems to ensure they are operating properly. The neighbor may be willing to agree to these types of adjustments to reduce the flow of secondhand smoke into your unit. However, you should keep in mind that such efforts may reduce the seepage of secondhand smoke, but they will not completely eliminate it. Likewise, air filtration may mitigate the stench of secondhand smoke, but it does not provide protection against its harmful effects and it is not recommended.

### **Address the Condominium Board, Association, or Management**

If you are unable to resolve your problem with the neighbor informally, your next step should be to approach the condominium association, board, or management. Smaller condominiums tend to be self managed while larger ones tend to hire management companies for day-to-day operations. The management company may be empowered to enforce condominium rules, but new policies must be approved by the condominium association board and/or membership.

Currently, the vast majority of condominiums do not explicitly prohibit smoking, though secondhand smoke may be considered a prohibited nuisance in some cases. Although intervention to protect nonsmokers from secondhand smoke is lawful, condominium management will likely not get involved if there are no specific policies against smoking.

If the condominium management is not willing to get involved, the next step might be to attempt to change condominium rules or CC&Rs to prohibit smoking in condominium units, to prohibit smoking in certain areas, or to clearly define drifting secondhand smoke as a prohibited nuisance. Condominium boards generally approve rules by a majority vote, but those rules are easy to amend and often not well-enforced. A better strategy might be to seek a change in CC&Rs. Ohio laws require at least 75% of the owners vote in favor in order to change CC&Rs. The number of votes required to change the CC&Rs may vary from association to association, so you should consult your condominium policies.

Though the procedure to change the CC&Rs may be cumbersome, the condominium association and/or management can be expected to enforce the new policy once it is in place. In addition, CC&Rs are given more weight in legal proceedings than condominium rules.

In an effort to change CC&Rs or condominium rules, you will need allies since condominium owners will take you more seriously if the request for a change is coming from a group of owners instead of an individual. At this point, it is recommended that you survey the preference of the condominium owners about smoke-free units and/or indoor and outdoor smoke-free areas. You may want to consider whether to advocate for a comprehensive smoke-free policy or smoke-free policy for a particular building. When promoting a smoke-free policy, it is important to mention the safety aspects of going smoke-free as well as the cost-saving aspects. For more information, please visit <http://www.law.capital.edu/Tobacco/TobaccoInTheHome/LandlordFactSheet.pdf>.

Though there is no constitutional or legal right to smoke in one's condominium unit, some states require that current residents who smoke be "grandfathered" or exempted from the new policies. Research has not revealed any such requirement in the state of Ohio, though there are no cases directly on point. Earlier cases involving changes in policies about whether pets are allowed have not required grandfathering.

### **Arbitration and Mediation**

Another voluntary approach to resolving secondhand smoke seepage problems in condominiums would be to use arbitration or mediation. In arbitration, a neutral third party decides the dispute through a binding ruling while mediation tries to settle the dispute through compromise. Arbitration or mediation may be required by your condominium policies before you litigate; therefore, you may want to check your CC&Rs and your condominium rules.

### **FHA Claims**

Condominium owners suffering from severe health effects from exposure to secondhand smoke may be able to obtain relief under the Fair Housing Act (FHA). However, only a limited number of nonsmokers qualify as disabled under the FHA. Generally speaking, you need to prove a hypersensitivity to secondhand smoke in order to qualify. You may make a complaint to Department of Housing and Urban Development (HUD), which must usually be brought within a year after exposure to secondhand smoke. Before filing such a complaint, you should seek to reach a "reasonable accommodation" with the condominium board. What constitutes a "reasonable accommodation" is determined on a case-by-case basis. In order to file a complaint with HUD online, please visit <http://www.hud.gov/complaints/housediscrim.cfm>.

### **ADA Claim**

If you qualify as disabled under the FHA due to a hypersensitivity to secondhand smoke, then you may also be able to use the Americans with Disabilities Act (ADA) to request a "reasonable accommodation" in public areas of the condominium complex. The ADA applies to "public accommodations," so it will come into effect if areas of the complex (such as the pool or exercise areas) are open to the public. If the condominium board does not offer a "reasonable accommodation" (such as prohibiting smoking in common areas), you can file an ADA complaint with the U.S. Department of Justice. Information about how to file a complaint is available at <http://ada.gov/t3compfm.htm>.

### **Litigation**

Your next option would be sue under legal theories such as nuisance, trespass, covenant of quiet enjoyment, or harassment. You will have to decide whether you want to sue the neighbor or the condominium association or both. Click [here](#) to learn more about potential legal causes of action. [\[link to "exercise your rights" page\]](#)

### **Sample Language for CC&R Amendment**

The following language can be added to the Covenant, Conditions and Restrictions (CC&Rs) and implemented immediately or at a specified future date.

Include in the "Definitions" section of the lease or CC&Rs:

**SMOKING:** The term "Smoking" means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, or other tobacco product in any manner or in any form.

Include in the restrictions section of the lease or CC&Rs:

**SMOKING:** Due to the increased risk of fire and the known adverse health effects of secondhand smoke, smoking is prohibited in any area of the property, both private and common, whether enclosed or outdoors. This policy applies to all owners, tenants, guests, employees, and service persons.