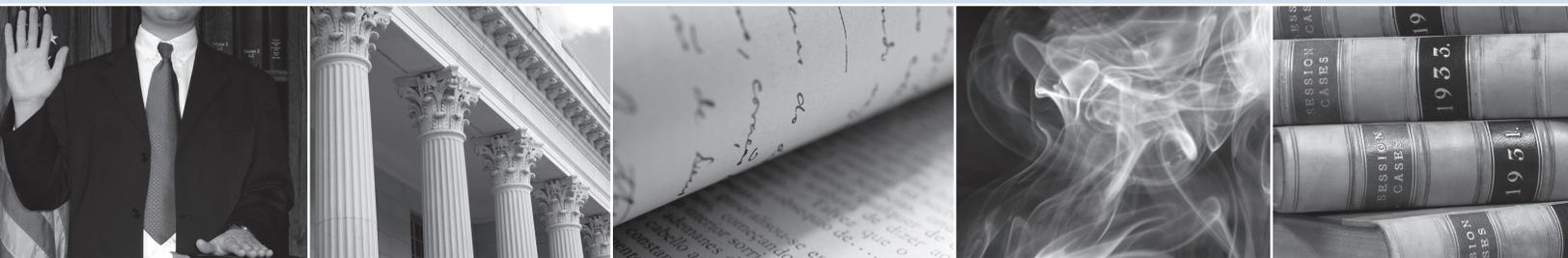


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Secondhand Smoke Seepage into Multi-Unit Affordable Housing

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Law. Health. Justice.

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Secondhand Smoke Seepage into Multi-Unit Affordable Housing

Susan Schoenmarklin

Introduction

In recent years, the smoke-free trend has swept into multi-unit housing as landlords, condominium owners and housing authorities have discovered the health and financial benefits of smoke-free multi-unit housing. Public housing authorities and owners of multi-unit subsidized housing have been on the leading edge of this trend. In 2008, the National Multi-Unit Housing Council (NMHC), which represents larger apartment firms in the United States, stated that the smoke-free trend “is actually more common in public housing than privately owned housing at this point.”¹ As an example, at the beginning of January 2005, seventeen housing authorities in six states had smoke-free policies for some or all of their buildings. By February 2010, this number had soared to 141 local housing authorities in twenty states.²

The rising popularity of smoke-free policies for subsidized or affordable housing units has led to the need for research into the legal and procedural aspects of adopting and implementing such policies. “Subsidized” and “affordable” are terms that generally refer to housing that receives government funding to assist those with lower incomes who are unable to pay the property’s full rent. Different programs establish different income levels to qualify

Key Points

- Public housing authorities and private owners of affordable multi-unit housing may prohibit smoking in individual units. A smoke-free policy adopted by a public housing authority or an owner of U.S. Department of Housing and Urban Development (HUD)-assisted housing may apply to smokers who already live in the building in addition to new residents as long as they are given “legally adequate” notice.
- HUD has strongly encouraged public housing authorities to adopt smoke-free policies to protect the health of residents, who are often more vulnerable to secondhand smoke than those of higher income.
- Smoking is not a disability under federal or state law. In fact, prohibiting smoking can protect against lawsuits by tenants with certain disabilities that are exacerbated by exposure to secondhand smoke.
- Public housing authorities may change their house rules or leases to make individual units smoke-free. Those authorities that prefer to incorporate a smoke-free policy into a lease may want to consult with their regional HUD office to confirm that such a change is considered “reasonable.” Project-based section 8 housing may adopt a smoke-free policy by changing their house rules; owners must receive approval from HUD to change their leases. In the past, HUD has denied requests to change a lease to incorporate a smoke-free policy, but HUD’s views may be changing. Providers of voucher-based housing may choose to adopt a smoke-free policy through a rules change or by changing the lease, as long as all tenants are treated equally.

for a government housing subsidy. In addition to income-based requirements, some government programs target certain segments of the population. For example, Section 202 is a U.S. Department of Housing and Urban Development (HUD)-assisted housing program for low-income seniors and Section 811 is HUD-assisted housing for those who have a disability and are low income.

While many government programs provide affordable housing, this synopsis is limited to the three most common forms of such housing, which are: (1) public housing developments; (2) project-based section 8 housing; and (3) voucher-based section 8 housing. Public housing developments are owned and managed by local city or county housing authorities. If the local housing authority receives federal subsidies, then it must follow certain regulations of HUD. Under the section 8 project-based housing program, a private multi-unit housing development receives federal HUD funding to defray a portion of tenants' rent and the subsidy remains with the property. Under the section 8 voucher program, HUD provides the eligible tenant with a voucher to offset rent at a private multi-unit development. Because the subsidy stays with the tenant, not the property, the tenant may use the voucher at a different location. Much of the information in this synopsis may apply to other kinds of affordable housing, but procedures for enacting and implementing a smoke-free policy may differ.

Section I documents the urgent need for smoke-free housing for those who have lower incomes, and the health and monetary benefits of providing smoke-free housing. Section II makes it clear that it is legal to prohibit smoking in public housing and HUD-assisted residential units, debunks the mistaken belief that smoking is a disability and discusses why allowing smoking could lead to lawsuits against the housing authority. Finally, Section III outlines the procedure that public housing authorities and HUD-assisted owners must follow to enact smoke-free policies legally and provides recommendations on how to enforce such policies.

Section I – The Case for Affordable Smoke-Free Housing

The movement toward smoke-free affordable housing is accelerating in the wake of a HUD notice (“HUD Notice”), issued on July 17, 2009, strongly encouraging public housing authorities to adopt smoke-free policies in their multi-unit housing units.³ In June of 2009, HUD’s Office of Healthy Homes and Lead Hazard Control released a strategic plan targeting, among other measures, the elimination of secondhand smoke in homes “to protect the health of children and other sensitive populations in low-income households.”⁴ Concurrently with the release of the Healthy Homes Strategic Plan, the U.S. Surgeon General had released “The Surgeon General’s Call to Action to Promote Healthy Homes,” which called for the elimination of secondhand smoke to protect residents from health hazards in the home.⁵ This affirmed the Surgeon General’s earlier conclusions, in 2006, that “there is no risk-free level of exposure to secondhand smoke” and that “[s]eparating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to second-hand smoke.”⁶ The report also concluded that exposure to secondhand smoke raises the risk of heart disease by at least one quarter (25 to 30 percent).⁷

Residents of Affordable Housing are Especially Vulnerable to Secondhand Smoke

According to the HUD Notice, more than half of public housing residents (54 percent) are either children or elderly residents over age sixty-two.⁸ These populations “are especially vulnerable to the effects of [secondhand smoke].”⁹ For children, secondhand smoke increases the likelihood that they will develop bronchitis, pneumonia, asthma, poorer lung function and other breathing problems, as well as ear infections.¹⁰ For the elderly, every major cause of death in their population – cancer, heart disease, and stroke – is associated with smoking and secondhand smoke, thus causing

them “in particular [to] bear a disproportionate burden of the negative effects of smoking and secondhand smoke.”¹¹

The HUD Notice also mentioned that in addition to the young and the elderly, there are “a considerable number of [public housing] residents with chronic diseases such as asthma and cardiovascular disease who are particularly vulnerable to the effects of [secondhand smoke].”¹² A 2009 research study noted as well that low-income and underserved racial and ethnic minorities, who live disproportionately in public or subsidized housing, suffer more from “tobacco-related morbidity and mortality, [and] have an increased incidence of heart disease as well as asthma and cancer.”¹³ Additionally, according to data from Boston’s 2005 Respiratory Health of Public Housing Residents survey, a disproportionate number of smokers live in public versus private housing, as well as a higher percentage of adults with asthma.¹⁴ The special vulnerability of a substantial number of residents of low income housing makes the case for smoke-free housing even more compelling.

The Market for Smoke-Free Affordable Housing

A majority of low income individuals do not smoke, creating a demand for smoke-free units that the market currently is not meeting. Nearly three quarters (72 percent) of Americans with incomes under \$20,000 a year are non-smokers.¹⁵ Smoking rates are low in those groups disproportionately represented in low-income housing: more than 90 percent of persons age sixty-five and older do not smoke; more than 75 percent of African Americans do not smoke; and 85 percent of Hispanics are non-smokers.¹⁶

A 2009 survey of tenants in the four-county Portland, Oregon metropolitan area revealed that non-smoking tenants greatly outnumbered smoking tenants, and nearly half (46 percent) of all tenants were not comfortable renting an apartment adjacent to smokers. According to the study, “the number of applicants who will avoid smoking-

permitted units is almost 4 times greater than the number of applicants who will avoid no-smoking units.”¹⁷ The study concluded:

As to the enduring perception that lower income renters are substantially different from higher income renters on this type of question, the current data confirms what we have seen in past research as well: It simply is not true. While it is true that lower income renters are somewhat more likely to be smokers themselves, this does not translate into a greater tolerance to live next door to indoor smokers.¹⁸

In keeping with this, a recent survey of residents of public housing in Boston found that nearly half (49 percent) of tenants were experiencing secondhand smoke incursion and nearly three quarters of all tenants agreed that exposure to secondhand smoke is harmful.¹⁹

Secondhand Smoke Transfer in Affordable Housing

A recent Harvard School of Public Health study suggested that greater exposure to secondhand smoke in low-income housing is likely due to higher smoking rates, smaller units, poor ventilation, and infiltration between units.²⁰ The Harvard study, which examined forty-nine low-income multi-unit residences, detected nicotine in 89 percent of non-smoking homes studied.²¹



The study concluded that secondhand smoke “may infiltrate into homes through windows, doors, shared air spaces, holes, and ventilation systems if cigarettes are smoked outside or in neighbouring residences.”²² Research demonstrates that up to 65 percent of air can be exchanged between units.²³

The recent HUD Notice cited the problem of secondhand smoke seepage as a reason to adopt a smoke-free policy in public housing. According to the Notice, “[b]ecause [secondhand smoke] can migrate between units in multifamily housing, causing respiratory illness, heart disease, cancer, and other adverse health effects in neighboring families, the Department is encouraging PHAs to adopt non-smoking policies.”²⁴ Further, the Notice stated that its issuance “will enhance the effectiveness of [HUD’s] efforts to provide increased public health protection for residents of public housing.”²⁵

The 2006 Surgeon General’s report discussed the infiltration of secondhand smoke in multi-unit housing and supported the adoption of smoke-free policies.²⁶ The report warned against reliance on air purifiers, which are often touted as a “solution” to involuntary smoke exposure.²⁷ While air purifiers may reduce smoke odor, they are not designed to remove the toxic particles from tobacco smoke.²⁸ The American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE), which sets the standard for indoor air quality, has concluded that no ventilation system or air purifier is capable of eliminating secondhand smoke. Consequently, ASHRAE does not recommend a ventilation standard for buildings that permit smoking. According to ASHRAE, “[a]t present, the only means of effectively eliminating [the] health risk associated with indoor exposure is to ban smoking activity.”²⁹ Adjusting ventilation, sealing gaps, and other remedial treatments may reduce but not eliminate secondhand smoke exposure.³⁰

As public awareness of the health risks of secondhand smoke increases, owners and managers who continue to allow smoking can expect to spend more time refereeing disputes and engaging

in remediation efforts. “Property managers say complaints about secondhand smoke in apartment communities are on the rise,” according to the National Multi-Unit Housing Council (NMHC). The Council notes, “A majority of renters would actually prefer to rent an apartment in a smoke-free community. In addition, about half say that they have moved or would move because of secondhand smoke.”³¹ The National Center for Healthy Housing has reported that secondhand smoke complaints and requests for unit transfers drop following the implementation of a smoke-free policy.³²

Smoke-Free Policies Save Money

While adopting smoke-free policies is good public health policy, it also benefits the bottom line, which is particularly critical in an economic downturn. Preventing fires from cigarettes is yet another good example of a public health measure that saves money. Cigarette smoking is a leading cause of fires in multi-unit buildings – and fires from smoking kill more people than any other kind of fire. According to statistics from the U.S. Fire Administration (USFA), smoking was responsible for more than a quarter (26 percent) of fatal fires in multi-unit building fires in the latest year in which statistics are available.³³ The USFA reports that older residents are at especially high risk for dying in a smoking-related house fire.³⁴

The National Multi-Unit Housing Council notes that restricting smoking in apartment units can help owners reduce the “extremely costly risk of sustaining a fire.” Additionally, the Council notes that “smoke-free policies, which reduce a firm’s risk of fire damage and human injury, may also reduce property insurance premiums, although no statistics are readily available to indicate what kind of premium advantage firms with smoking bans enjoy.”³⁵

Landlords and public housing authorities who go smoke-free can also save money on cleaning costs and building maintenance, stretching building budgets. For example, data collected in 2009 from housing authorities and subsidized housing facilities in New England indicated that the cost

of rehabilitating a unit was more than double for a light smoker (\$1,810) vs. a non-smoker (\$560). Even more dramatic, the cost of rehabilitating the unit of a heavy smoker was five times greater, or nearly \$3,000 more, than the cost of rehabilitating a non-smoker's unit.³⁶ According to NMHC, "Some estimates suggest that cleaning walls, carpets, appliances and fixtures exposed to smoke can add \$400 to \$3,000 to unit turnover costs, depending on the length of residency and how much the resident smoked in the unit."³⁷

In addition, banning smoking reduces the load on heating and air-conditioning equipment, lowering operating costs. According to an article in the Occupational Health and Safety Journal, "[t]he option of banning smoking from facilities brings the benefits of less need for dilution air, less cleaning, less maintenance on air handling equipment, and lower operating costs for the HVAC system."³⁸ HUD, in its 2009 notice, recommended a non-smoking policy as a lower-cost means of achieving good indoor air quality (IAQ). According to the HUD Notice, achieving good IAQ requires minimizing indoor air pollutants. Because "ETS [environmental tobacco smoke] is known to be an indoor air pollutant . . . it would be difficult for a PHA [public housing authority] to achieve good IAQ [indoor air quality] in its buildings if residents are allowed to smoke, especially indoors." The notice further stated that a non-smoking policy was an "excellent approach" for those PHAs seeking to improve their IAQ without the costs of renovation.³⁹

Other possible savings from smoke-free policies are:

- In several states (such as Maine, California and New Hampshire), developers of low-income housing are able to earn tax credits for providing smoke-free housing.⁴⁰
- Smoke-free policies can help a building earn "Green Building" program credits through programs such as the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) program.⁴¹

Section II – Prohibiting Smoking in Public Housing and HUD-Assisted Housing Units

HUD Encourages the Adoption of Smoke-Free Policies

HUD has indicated that subsidized and public housing providers are free under federal law to prohibit smoking in residential units as long as the policies comply with applicable state and local laws.⁴² There are no federal or state laws or cases that prohibit HUD-assisted property owners and PHAs from offering smoke-free rentals⁴³ and there are no constitutional protections for smokers.⁴⁴

The Chief Counsel in HUD's Detroit office concluded in a 2003 letter that private owners of HUD-assisted housing may prohibit smoking as long as they are in compliance with any state law on smoking. The letter stated that "the right to smoke or not to smoke is not a right that is protected under the Civil Rights Act of 1964 or any other HUD-enforced civil rights authorities. . . ."⁴⁵ In August 2007, the Chief Counsel of HUD's Minneapolis field office wrote a letter confirming that with respect to multi-residential properties assisted by HUD "there is no HUD policy, by statute, regulation, handbook or otherwise that restricts landlords from adopting a prohibition of smoking in common areas or in individual units."⁴⁶

A similar letter, written in January 2007 by the Field Office Director of HUD's Detroit office, noted that in Michigan "several housing authorities and private landlords and management companies have voluntarily adopted smoke-free policies for their HUD-assisted developments." The letter stated that there is no HUD policy specifically restricting smoking in HUD-assisted housing.⁴⁷

A 1996 HUD opinion permitted Nebraska's Kearney Housing Authority to ban smoking in its public housing development. That same year, a HUD opinion permitted the Fort Pierce

Housing Authority in Florida to ban smoking in its public housing.⁴⁸ HUD has also agreed to a non-smoking policy in two cases brought under the Fair Housing Act. In 1998, HUD approved a conciliation agreement providing smoke-free housing in a private HUD-assisted building for a tenant with respiratory difficulties who was exposed to smoke from a neighboring apartment.⁴⁹ In 2002, the Seattle Housing Authority entered into a consent decree providing a smoke-free unit for a tenant who had a respiratory condition after the Department of Justice brought suit. In response to the lawsuit, the housing authority made one building at a high-rise complex smoke-free and phased in a non-smoking policy in the other two buildings at the complex.⁵⁰ Most recently, in its 2009 Notice, HUD has made it clear that it not only permits smoke-free policies but now actively encourages public housing authorities to adopt them.⁵¹

Smoking is Not a Disability under Federal or State Laws

Constitutional Law

The National Multi-Unit Housing Council has noted that “one of the biggest reasons many apartment firms have been hesitant to adopt smoke-free policies is a mistaken belief that restricting a resident’s ability to smoke on the property or within [his or her] apartment could violate the law.” However, the council noted in its attorney-written memorandum, “There is no ‘right to smoke’ and smokers are not a protected class under fair housing laws. In fact, firms can actually reduce their legal liability by restricting or banning smoking.”⁵²

State and federal courts have consistently ruled that smoking is not a protected activity under the U.S. Constitution or state constitutions, and smokers are not a protected class.⁵³ The court in *Axelrod v. Fagan* stated bluntly, “[t]here is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or cocaine or run a red light.”⁵⁴

Statutory Law

Several pieces of federal legislation protect the rights of the disabled. The federal Fair Housing Act (FHA) prohibits housing discrimination based on disability (in addition to race, color, religion, sex, family status and national origin).⁵⁵ Other anti-discrimination laws, including Section 504 of the Rehabilitation Act⁵⁶ and Title II of the Americans with Disabilities Act (ADA),⁵⁷ as well as various state laws, prohibit discrimination based on disability.

However, none of these laws protect smokers. For example, in *Brashear v. Simms*, a federal court dismissed as “frivolous” a state prisoner’s claim that a smoking ban in Maryland’s prisons violated his rights as a smoker under the ADA. The court stated:

[C]ommon sense compels the conclusion that smoking . . . is not a “disability” within the meaning of the ADA. Congress could not possibly have intended the absurd result of including smoking within the definition of “disability,” which would render somewhere between 25 percent and 30 percent of the American public disabled under federal law because they smoke.⁵⁸

A state court expressed this same concern in a ruling against a smoker who alleged a violation of state disability laws as well as the ADA. The Court of Appeals of Michigan ruled that an employee who was fired after smoking on company property was not protected under the state’s civil rights act or the ADA.⁵⁹ The court said that classifying smoking as a disability would thwart the purposes of the state’s Handicappers’ Civil Rights Act (HCRA). “Plaintiff’s claimed ‘handicap’ is shared by countless other individuals in the workplace and in society as a whole,” the court stated.⁶⁰ It concluded that to “automatically label this condition as one that substantially impairs a major life activity is inconsistent with the HCRA and would do a gross disservice to the truly handicapped.”⁶¹

While that case’s holding applies only to Michigan disability laws, no court has found that state disability laws protect smokers. A law review article examining the issue of secondhand smoke in multi-unit residential housing noted that while smoking behavior can change frequently, state anti-discrimination laws were intended to protect only immutable characteristics. According to the author, “the reality is that more than 30 million Americans have quit and thousands more start smoking every day.”⁶²

Liability for Failure to Provide Smoke-Free Housing

While smokers cannot avail themselves of any legal protection under federal and state disability laws because smoking is not considered a disability, non-smokers exposed to smoke in multi-unit housing can access those same laws under certain limited circumstances. The National Multi-Unit Housing Council has warned its members that “courts have held that an apartment resident with severe breathing difficulty that is exacerbated by secondhand smoke may actually be entitled to a reasonable accommodation under the Fair Housing Act.” It went on to note:

In contrast to conventional wisdom, apartment owners may be held more legally liable by allowing smoking than by restricting it. Residents have become more knowledgeable about the risks of secondhand smoke and savvier about pursuing legal options to protect their health. State courts have ruled against apartment owners and have ordered significant rent reductions and other penalties under the nuisance, warranty of habitability, and quiet enjoyment theories of law.⁶³

However, simply showing an adverse health reaction to secondhand tobacco smoke is insufficient proof of a “disability” under the Fair Housing Act (FHA). To use the FHA, the affected person must prove the adverse health reaction substantially limits one or more major life activities⁶⁴ – which

could include things such as breathing, walking or performing manual tasks. A person who merely finds secondhand smoke annoying would likely not obtain FHA protection.⁶⁵ Some state disability laws define “disability” differently than the FHA, but standards under various state laws for showing a disability affected by secondhand smoke exposure appear equally high.⁶⁶

If a non-smoker has a medical condition severe enough to be considered a disability under state or federal law, then he or she is entitled to a “reasonable accommodation” to protect against secondhand smoke as long as the accommodation does not impose an “undue hardship” on the housing provider.⁶⁷ Such an accommodation could include developing or enforcing a smoke-free policy, either in the building or in the units surrounding the affected non-smoker, repairs to reduce secondhand smoke infiltration, or a transfer to a unit away from the secondhand smoke. The non-smoker may seek to have smoking banned from building common areas if secondhand smoke is seeping into his or her unit from those areas.⁶⁸ Which actions are considered a “reasonable accommodation” and which might be considered an “undue hardship” (and thus not required) are determined on a case-by-case basis.

Section III – Adopting a Smoke-Free Policy for Affordable Housing

The decision to adopt a smoke-free policy for affordable housing does not end the process. Public housing authorities and each type of HUD-assisted housing have different requirements for giving notice to tenants of the change and there are different rules on whether the change needs to be made through the lease or through a change in tenant rules. As the chief counsel of the HUD regional office in Minneapolis explained:

HUD . . . funds a substantial variety of housing programs . . . each with its own set of rules as to residency and occupancy. None, however, prohibit establishment of a

smoke-free environment. The differences might be as to whether the establishment can be through the lease, a lease addendum, or a house rule. Section 202/811 projects, for example, don't permit modification of the model lease, but a smoke-free policy could be established through the house rules.⁶⁹

Public Housing Authority (PHA)

A public housing authority can adopt a smoke-free policy through house rules⁷⁰ or through a change in the lease. House rules must be posted in a conspicuous manner and incorporated by reference in the lease.⁷¹ Before making a rule change, public housing authorities must provide residents with a 30-day notice and the opportunity to present written comments.⁷²

A public housing authority can implement a policy change through a lease addendum if the provision is considered "reasonable."⁷³ While in the past HUD officials responsible for interpretation of HUD's PHA regulations have said that HUD would be unlikely to support a smoke-free amendment to a lease,⁷⁴ the 2009 HUD notice states: "PHAs are encouraged to revise their lease agreements to include the non-smoking provisions."⁷⁵ The HUD notice is a "recommendation" to local housing authorities, and not a directive, so if the PHA would prefer to make the change in its house rules, it is permissible.

The advantage of having a smoke-free provision in the lease rather than a house rule is that, if challenged by a non-compliant tenant, the provision is more likely to withstand judicial scrutiny. A lease provision provides a tenant with clear and conspicuous notice of any smoking ban. Before adopting a lease change, which is effective only at the end of a lease term, the public housing authority needs to give tenants at least sixty days of notice prior to the end of the term.⁷⁶ Due to the advantages of a smoke-free lease provision versus a rule change, advocates may decide to move forward with a lease addendum or may want to ask for an opinion on a lease addendum from their HUD regional office.

A smoke-free lease provision is clearly permissible for the twenty-nine housing authorities participating in a HUD pilot project for low-income housing.⁷⁷ Congress in 1996 created the "Moving to Work" program to allow a limited number of public housing authorities to design and test innovative local housing strategies for low-income families. Housing authorities under the Moving to Work program are exempt from existing HUD public housing regulations, and consequently have the discretion to add a smoke-free provision to their leases.⁷⁸ Since 2001, the Seattle housing authority has offered a smoke-free lease at its Tri-Court public housing development under this program.⁷⁹

Project-Based Section 8 Housing

In general, private multi-unit housing projects that accept federal subsidies tied to the property (i.e., project-based Section 8 housing) must use a HUD-approved lease⁸⁰ and must receive HUD approval to make any changes in the lease.⁸¹ HUD may approve changes to keep the lease in compliance with state or local law or to conform to "property management practices generally used in the project's market area."⁸²

Although not a HUD requirement,⁸³ a 2003 letter from the Chief Counsel of HUD's Detroit field office makes it clear that project owners may adopt non-smoking policies through a change in the house rules. The letter states: "[P]roject owners may devise reasonable no smoking rules at their properties that express legitimate concerns for the safety of the residents and condition of individual units and buildings as a whole. As long as no-smoking policies meet the normal house rules criteria, HUD approval is not required." The letter goes on to note that if owners want to make the non-smoking policy a condition of the lease, "HUD approval is required to the extent that the owner is bound to utilize HUD's model lease."⁸⁴ The language in the 2009 HUD Notice recommending that public housing authorities make the change in their lease provisions, bodes well for project owners seeking HUD approval for such lease changes.

Voucher-Based Section 8 Housing

Private developments that accept vouchers can adopt a smoke-free policy either through a lease addendum or through house rules. However, if the change is made through a change to the owner's standard lease form, it must apply to all residents and not just to federally assisted tenants.⁸⁵ There are no particular notice procedures required under the voucher program other than the state and local notice requirements that apply to all landlords.

Grandfathering of Existing Tenants

The 2009 HUD notice stated that public housing authorities have exercised considerable discretion in implementing their smoke-free policies. According to the notice, “[s]ome PHAs have established smoke-free buildings. Some PHAs have continued to allow current residents who smoke to continue to do so, but only in designated areas and only until lease renewal or a date established by the PHA. Some PHAs are prohibiting smoking for new residents.”⁸⁶



It is apparent from this notice, and other HUD letters, that it is permissible to enact a smoke-free policy that applies both to current as well as new residents of a PHA or HUD assisted-housing, including current smokers. PHAs and HUD-assisted housing providers are not required to permanently “grandfather” or exempt existing tenants, although they must provide “legally adequate” notice of any impending change. For example, the recent letter from the Chief Counsel of the Minneapolis HUD office affirmed that there was no HUD policy requiring HUD-assisted properties to grandfather existing tenants, but that state and local law must be followed, which would include any notice provisions.⁸⁷

A 2004 letter from the regional director of the Seattle HUD office, which was based on research by HUD legal staff, noted that HUD did not require the permanent grandfathering of any tenant in HUD-assisted housing. The letter stated that it is permissible to require existing tenants to stop smoking in their units as long as they are given sufficient notice.⁸⁸

The Chief Counsel of the HUD Detroit field office in her 2003 letter stated that owners of HUD-assisted housing must “take caution to grandfather in those smoking residents currently residing at the complex.”⁸⁹ She later clarified that the term “grandfather” as used in her letter does not mean a permanent exemption for existing smokers. She said that the landlord could either wait until the annual review or expiration of the smoker's lease, or, in the case of a long-term lease, until after the provision of legally adequate notice. She said that it was reasonable to require tenants with long-term leases to move or cease smoking, as long as the smoker received reasonably adequate advance notice.⁹⁰

It should be noted that leases in a public housing project technically do not “expire” under HUD regulations. All public housing leases are for one-year terms, and are renewable annually “in perpetuity” as long as the tenant is in compliance with certain key lease provisions. Although

the leases are renewable annually, they may be modified at any time by written agreement.⁹¹

Implementing a smoke-free policy after the lease's expiration or after providing legally adequate notice makes sense due to the length of time it would take for a building to become completely smoke-free if the owner had to wait for each tenant to move or die. Waiting for such a prolonged period defeats the purpose of a smoke-free policy, as individual units are not truly smoke-free until the entire building is smoke-free. Residents who suffer from exposure to secondhand smoke should not have to wait for every smoking tenant to leave or die in order to get relief from their symptoms.

From a practical standpoint, it is easier to make the change to smoke-free at the time of lease review or renewal or after providing legally adequate notice because it reduces the amount of time that differing rules will apply to tenants. For example, in the case discussed in Section II involving a HUD-approved conciliation agreement providing smoke-free housing for a tenant with respiratory difficulties, existing smokers were permitted to smoke in their apartments for as long as they stayed in the apartment building.⁹² According to the building's manager, this approach has caused some enforcement difficulties. The manager reported that some new tenants were confused as to why they were required to comply with the smoke-free policy when existing tenants were permitted to smoke. In a few instances management or tenants believed that a new tenant was smoking in violation of the ban but were unable to prove it. Overall, however, the manager reported that tenant response to the new smoke-free policy is positive.⁹³

Conclusion

We owe our elderly, our children, and those with chronic illness a safe shelter that does not include secondhand tobacco smoke. When we adopt a smoke-free policy, we have a rare opportunity to do what is right while saving money and preventing lawsuits. It is not only legal to prohibit smoking

in public and HUD-assisted housing, but it also protects against lawsuits from tenants exposed to secondhand smoke.

The change to smoke-free status in multi-unit affordable housing can take place at the time of lease renewal or after legally adequate notice. Public housing directors from the twenty-nine Moving to Work program sites are urged to make the change as part of the public housing lease rather than through house rules. Housing directors and project-based Section 8 housing providers can adopt the change through house rules and possibly through a change in the lease. Providers of voucher-based Section 8 housing can either make a rules change or change the lease, as long as subsidized and non-subsidized tenants are treated equally.

Affordable housing providers are urged to join the growing smoke-free movement within the multi-unit housing market. Smoke-free housing should not be a right reserved only for the rich.

About the Author

Susan Schoenmarklin is a Consulting Attorney for the Smoke-free Environments Law Project.

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Endnotes

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- 51 HUD Notice, *supra* note 3, at 2.
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- 57 42 U.S.C. §§ 12101-12213 (2008).
- 58 *Brashear v. Simms*, 138 F. Supp. 2d 693 (D. Md. 2001).
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- 60 *Stevens*, 559 N.W.2d at at 65.
- 61 *Id.*
- 62 Ezra, *supra* note 43, at 181.
- 63 NMHC Update, *supra* note 1, at 1. For a more detailed discussion of the use of state and federal disability laws to protect a non-smoker living in multi-unit housing, including possible options for accommodation, readers should consult the fact sheet *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke*, available on the Technical

Assistance Legal Center website at <http://www.phlpnet.org/tobacco-control/products/disabilitylawsdriftingsmoke>. Additionally, The Federal Fair Housing Act and the Protection of Persons Who are Disabled by Secondhand Smoke in Most Private and Public Housing, available on the website of the Smoke-Free Environments Law Project at http://www.tcsq.org/sfelp/fha_01.pdf, gives a step-by-step guide on the procedure for making an FHA claim. For recommendations on reducing secondhand smoke transfer, see Canada Mortgage and Housing Corp., Solving Odour Transfer Problems in Your Apartment (Dec. 2006), available at http://www.cmhc-schl.gc.ca/en/co/reho/reho_002.cfm. The Tobacco Control Legal Consortium law synopsis *Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009* provides information on remedies for secondhand smoke exposure available through the courts under various common law theories and a listing of successful cases (see Schoenmarklin, *supra* note 30.).

64 42 U.S.C § 3602(h).

65 See Schoenmarklin, *supra* note 30, at 9.

66 A 2003 Massachusetts case is instructive. Analyzing a Massachusetts civil rights law modeled after the ADA, the state's Superior (trial) Court ruled that a plaintiff who claimed fatigue and itchy eyes when exposed to secondhand smoke did not qualify for protection from secondhand smoke as a disabled person. See *Donnelley v. Cohasset Housing Authority*, No. 0100933, 2003WL 21246199 at *10-11 (Mass. Super. 2003). While not controlling outside of Massachusetts, this ruling exemplifies the high standard plaintiffs may need to meet to show that their sensitivity to secondhand smoke substantially limits a major life activity.

67 Joint Statement of the Dep't of Housing & Urban Dev. and the Dep't of Justice: Reasonable Accommodations Under The Fair Housing Act, at 7 (2004), available at www.hud.gov/offices/fheo/library/huddojstatement.pdf.

68 Residents who qualify as "disabled" under the FHA would be entitled to "reasonable accommodations" in the public areas of the complex, under Title III of the ADA, which protects the disabled in "public accommodations." See *Garza v. Raft*, 1999 WL 33882969, at *3 (N.D. Cal. 1999) (holding that the FHA applies to common areas of residential complexes). But see *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1553 (Cal.App. 2 Dist. 2009) (holding that apartment and condominium residents, regardless of whether they qualify as "disabled," do not have a cause of action for ADA violations because private residential facilities do not constitute "public accommodations" covered by the Act).

69 Gronewold Letter, *supra* note 46, at 1.

70 Walker Letter, *supra* note 45, at 2.

71 Office of Public and Indian Housing, U.S. Dep't of Housing & Urban Dev., Public Housing Occupancy Guidebook, Part 5-Chapter 17 General Public Housing Lease Requirements, at 190, 205 (2003), available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

72 *Id.* at 190.

73 *Id.* at 189-90.

74 Smoke-Free Environments Law Project, Analysis, *supra* note 48, citing May 25, 2005 conversation with Harlan Stewart, HUD Office of Public Housing, Seattle.

75 HUD Notice, *supra* note 3, at 2.

76 U.S. Dep't of Housing & Urban Dev., HUD Occupancy Handbook, p. 6-26 (2007), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsggh/4350.3/43503c6HSGH.pdf>.

77 The twenty-nine housing authorities participating in the program are: Alaska; Atlanta, GA; Baltimore, MD; Boston, MA; Cambridge, MA; Chicago, IL; Charlotte, NC; Delaware; D.C.; Keene, NH; King County, WA; Lawrence-Douglas County, KS; Lincoln, NE; Louisville, KY; Massachusetts; Minneapolis; New Haven, CT; Oakland, CA; Philadelphia, PA; Pittsburg, PA; Portage, OH; Portland, OR; San Antonio; San Bernardino, CA; San Diego; San Mateo, CA; county counties of Santa Clara and San Jose, CA; Seattle, WA; Tulare, CA; and Vancouver, WA. The list of current Moving to Work states can be found at: <http://www.hud.gov/offices/pih/programs/ph/mtw/contact-list.pdf>.

78 Moving to Work is a federal program that was authorized under the Omnibus Consolidated Recissions and Appropriations Act of 1996 (Public Law 104-134, 110 Stat 1321), April 26, 1996. See U.S. Department of Housing and Urban Development, Moving to Work (MTW) Background and Purpose, available at <http://www.hud.gov/offices/pih/programs/ph/mtw/background.cfm>.

79 Seattle Housing Authority Memorandum to Board of Commissioners in Re Resolution No. 4600, at p. 2 (May 21, 2001).

80 HUD Occupancy Handbook, *supra* note 76, at 6-4.

81 *Id.* at 6-27.

82 *Id.*

83 Vacha Letter, *supra* note 47 (although "several housing authorities and private landlords [in Michigan] have voluntarily adopted smoke-free policies for their HUD-assisted developments," such policies were "[p]resumably . . . a result of concerted efforts by residents" and not a HUD requirement.)

- 84 Walker Letter, *supra* note 45, at 2.
- 85 Office of Public & Indian Housing, U.S. Dep't of Housing & Urban Dev., Voucher Program Guidebook, Housing Choice, Chapter 8: Housing Search and Leasing, 8-21 (2001), *available at* <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g08GUID.pdf> ("if the owner uses a standard lease form for rental to unassisted tenants, that lease form is used for the assisted unit as well").
- 86 HUD Notice, *supra* note 3, at 2.
- 87 Gronewold Letter, *supra* note 46, at 1.
- 88 Smoke-Free Environments Law Project, Analysis, *supra* note 48, at 7, *citing* October 13, 2004 letter from John Meyers, HUD Regional Director, Seattle office.
- 89 Walker Letter, *supra* note 45, at 2.
- 90 Smoke-Free Environments Law Project, Analysis, *supra* note 48, at 7, *citing* personal conversation with Sheila Walker, May 20, 2005.
- 91 24 CFR Part 966.4 (a)(3).
- 92 Smoke-Free Environments Law Project, Analysis, *supra* note 48, at 8, *citing* In re HUD and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998).
- 93 *Id.* at 8-9, *citing* Smoke-Free Air for Everyone (S.A.F.E.), Smoke-Free Affordable Housing Compliance Survey, March 2004.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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