



# NO SMOKING RULES FOR COMMUNITY ASSOCIATIONS

## LEGAL QUESTIONS

### Overview

Residents of multi-unit dwellings are becoming increasingly aware of the secondhand smoke that drifts into their individual units. The dangers of secondhand smoke are conclusive<sup>1</sup>. This fact sheet addresses some of the legal-related questions that may arise when community associations consider adopting no-smoking rules.

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

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

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

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

### Is prohibiting smoking discriminatory in any way?

No. Smoking is not a protected right or activity. Also, an individual's status as a smoker is not a protected category of persons. Legal protections are generally limited to categories of persons that are considered to be innate (inherited) and immutable (unchangeable) and courts have found that being a smoker does not meet those criteria. Attempts by smokers to be considered disabled due to an addiction to nicotine have not been successful, so smokers do not receive protection under state or federal disability statutes.

### What risks does an association face by continuing to allow smoking?

If an association allows smoking, two primary legal challenges may arise. First, a resident could sue either the association or the offending resident on nuisance grounds. Most association declarations contain a generic nuisance clause stating that an owner (or resident) cannot engage in an activity that affects the use and enjoyment of another owner's property. A resident bothered by secondhand smoke could bring an action against the association to enforce this provision of the declaration. This same resident could also pursue a nuisance action against the offending owner.

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Second, if an individual has a serious health condition that is affected by exposure to secondhand smoke, he or she may be able to get some relief by using one of the disability statutes. If the courts find that the condition is a disability, then the resident is entitled to a reasonable accommodation, which could include imposition of a no-smoking rule.

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

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

A change to the declaration is more difficult and costly to pass, but it will be given deference by the courts and be stronger against legal challenges. A new rule and regulation is easier to implement and change, but is also more susceptible to challenges. When choosing which method to use, consider:

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

**Note:** Currently, there is no Oregon or Washington law (statutory or case law) regarding the ability of a community association to prohibit smoking inside a condominium unit; it has not yet been tested in court. There was, however, a case in Colorado<sup>2</sup> where the court upheld a no-smoking amendment, finding it “reasonable, made in good faith and not arbitrary or capricious.”

### **Is it difficult to enforce a no-smoking rule?**

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

### **Can the policy be enforced with current residents who smoke?**

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

1. [www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf](http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf) <http://www.hoalegislature.com/archives/05258030.pdf>  
2. <http://www.hoalegislature.com/archives/05258030.pdf>