

## **Taking a Condominium Smoke-Free Through Your Community Association: North Carolina Law**

Smoke-free multi-unit housing is becoming increasingly popular in North Carolina and across the nation. Many rental leases for multi-unit housing complexes now ban smoking inside individual units, as well as in common areas. In community associations (CAs) where neighbors live in contiguous units, such as condominiums and townhouses, there is also interest in creating smoke-free environments. CAs desiring to implement such changes face unique circumstances in contrast with other types of multi-unit housing properties. The purpose of this document is to discuss the benefits of smoke-free multi-unit housing, the legality of smoking restrictions in CAs and the options available to CAs interested in taking properties smoke-free.

### **What are the benefits of smoke-free multi-unit housing?**

*Healthier living for everyone.* Secondhand smoke can easily travel between units in multi-unit housing, and there is no satisfactory method of cleaning it from the air.<sup>1</sup> There is no safe level of exposure to secondhand smoke, which is a Class A carcinogen, as is asbestos.<sup>2</sup> Secondhand smoke causes lung cancer, heart disease, and strokes among adults, as well as impaired lung function, lower respiratory illnesses and sudden infant death syndrome among children.<sup>3</sup> People spend more time in their homes than in any other place, so they can receive a significant amount of exposure to secondhand smoke if a neighbor's smoke is coming into their unit.

*Reduced risk of fire.* Smoking materials are the leading cause of residential fire deaths in the United States.<sup>4</sup> Any lighted tobacco product that is improperly discarded can start a fire — even products that are made to be “fire-safe.” In 2011, North Carolina experienced 3,141 smoking-related fires, resulting in 21 deaths, 66 injuries and approximately 16.1 million dollars in total losses.<sup>5</sup> Smoke-free policies reduce the risk that a smoking-related fire will kill a resident, injure them or destroy their property.

*Economic benefits.* Tobacco smoke, including secondhand smoke from other units, increases maintenance costs and negatively influences a unit's resale value. Most North Carolinians don't

---

<sup>1</sup> American Society of Heating, Refrigeration and Air Conditioning Engineers. (2010). *ASHRAE Positional Document on Tobacco Smoke*. Retrieved from <https://www.ashrae.org/about-ashrae/position-documents>

<sup>2</sup> United States Environmental Protection Agency. (1994). *Setting the record straight: secondhand smoke is a preventable health risk*. Retrieved from <http://www.epa.gov/smokefree/pubs/strsfs.html>

<sup>3</sup> Office of the Surgeon General. (2014) *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General, 2014*. Centers for Disease Control and Prevention, and Division of Health and Human Services. Retrieved from <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/>

<sup>4</sup> John R. Hall, Jr., *The Smoking-Material Fire Problem*. National Fire Protection Agency (2013). Retrieved from [http://www.nfpa.org/~media/Files/Research/NFPA\\_reports/Major\\_Causes/ossmoking.pdf](http://www.nfpa.org/~media/Files/Research/NFPA_reports/Major_Causes/ossmoking.pdf)

<sup>5</sup> 2011 smoking-related fire statistics obtained from the North Carolina Office of State Fire Marshal in 2012.

smoke,<sup>6</sup> and many of those people would hesitate or decline to buy a condominium or townhouse unit where tobacco smoke can be detected.

### **Is it legal for CAs to create smoke-free environments?**

North Carolina courts have not had occasion to rule on this particular issue. Some of the criteria courts have used in the past to decide whether CA restrictions are legally valid include: whether they bear a reasonable relationship to the health, happiness, and enjoyment of life of unit owners; whether they violate public policy; and whether they abrogate some fundamental constitutional right.<sup>7</sup> All of these factors weigh in support of finding smoking bans valid. Smoking restrictions clearly have the effect of protecting the health and safety of owners and renters. Public policy in North Carolina supports smoking restrictions; the North Carolina legislature has specifically found that “secondhand smoke has been proven to cause cancer, heart disease, and asthma attacks among smokers and nonsmokers” and that “there is no risk-free level of exposure to secondhand smoke.”<sup>8</sup> Finally, all courts which have addressed the issue have found that smoking is not a fundamental constitutional right.<sup>9</sup> Indeed, at least one other state court has found that smoking bans in condominiums are valid.<sup>10</sup> Just as many owners of multi-unit rental housing in North Carolina have implemented smoking restrictions in their buildings, CAs should be able to do the same as long as they abide by their declarations and bylaws in passing such restrictions.

It is important to distinguish that smoking restrictions are about a behavior—and where it can take place—and not about a person. People who smoke are certainly allowed to live at properties covered by smoking restrictions; they must merely abide by rules prescribing the places where they can smoke.

### **My CA is interested in making our condominium smoke-free. What do we need to do?**

- 1. Survey owners to determine the level of interest in creating smoke-free environments.** A survey can help the CA determine if there is support from owners for

---

<sup>6</sup> N.C. Department of Health and Human Services, N.C. Division of Public Health, N.C. Center for Health Statistics. (2012). *A report from the Behavioral Risk Factor Surveillance System: trends in key health objectives for North Carolina and the nation*: Retrieved from [http://www.schs.state.nc.us/schs/pdf/2010\\_Trends\\_Report\\_20120814.pdf](http://www.schs.state.nc.us/schs/pdf/2010_Trends_Report_20120814.pdf)

<sup>7</sup> MacGregor, D.S. (2007). *Condominium law in North Carolina* (pp. 270-71). Cary, NC: North Carolina Bar Association Foundation.

<sup>8</sup> N.C. Gen. Stat. § 130A-491

<sup>9</sup> Graff, S.K., Tobacco Control Legal Consortium. (2008). *There is no constitutional right to smoke: 2008 (2d ed)*. Retrieved from [http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf)

<sup>10</sup> See *Christiansen v. Heritage Hills 1 Condominium Owners Ass’n*, District Court, Jefferson County, Colorado, No. 06CV1256 where plaintiffs filed suit against the condominium association seeking declaratory and injunctive relief, requesting that the court find the condominium’s smoke-free amendment (banning smoking within the boundaries of the Project, including individual units) “void as an unreasonable restriction upon the fee simple and tenancy in common interests of the plaintiffs.” The court concluded that the passage of the smoke-free amendment to the declaration was “proper, reasonable, made in good faith and not arbitrary or capricious,” and further concluded that plaintiffs did not establish that the “amendment violate[d] public policy or otherwise abrogate[d] a constitutional right.”

the creation of smoke-free environments and help identify the areas owners are willing to designate as smoke-free.<sup>11</sup>

*“[T]he job of governance will be considerably less complicated if the executive board works to keep unit owners informed of its activities and intentions and invites participation.” –*

*Douglas Scott MacGregor, Condominium Law in North Carolina, p. 230 (2007).*

## 2. Determine which areas will be designated as smoke-free.

- *Indoor common areas.* Areas such as halls, lobbies, stairways and basements can be designated smoke-free.
- *Outdoor common areas.* Areas such as entrances to buildings, fire escapes, yards, gardens, parking areas, pools and playgrounds can be designated smoke-free.
- *Individual units.* Indoor and outdoor areas of individual units, including balconies, patios and storage units can be designated smoke-free.
- *Additional consideration:*
  - Some properties have opted to allow smoking **only** in designated outdoor areas or within a certain number of feet from buildings.

**Smoking restrictions should apply to owners, tenants, guests, condominium employees or contractors, and any other individual on the condominium property.**

## 3. Determine which method the CA will employ to create smoke-free environments. In North Carolina, there are two main methods to adopt smoking restrictions through your CA:

- *Amending the CA’s declaration to designate individual units and/or common areas as smoke-free.* In order to ban smoking in individual units, an amendment to the CA’s declaration is necessary. The declaration must be amended pursuant to the provisions of the declaration and pursuant to rules set forth in the North Carolina General Statutes.<sup>12</sup> Ideally, an attorney will be retained to review the smoke-free amendment to ensure that the instrument is legally enforceable. The amendment should describe the activity being banned, list all smoke-free areas,

<sup>11</sup> For a sample survey, visit [www.smokefreeapartments.org/condos.html](http://www.smokefreeapartments.org/condos.html), and search for “Survey for Condominiums (Homeowners Associations).”

<sup>12</sup> N.C. Gen. Stat. § 47C-2-117 (condominiums) and § 47F-2-117 (HOAs)

and communicate any penalties or fines that will be levied for violations of the smoke-free amendment. Voting procedures should be followed exactly as described in the CA's declaration. North Carolina law requires passage of an amendment to a declaration by a majority of unit owners. Once the amendment has been passed, the amended declaration should be recorded at the county register of deeds, and all owners and residents should be notified of the new policy.

- *Adopting a written policy or rule that restricts smoking in common areas.* This option is suitable for restricting smoking in common areas of the property only. Unless otherwise stated by the declaration, a CA's board of directors may independently adopt a rule to regulate the use of common elements.<sup>13</sup> As with other rules that are adopted, the board of directors should provide notice to all owners pursuant to the CA's declaration or bylaws.

In instances where there is insufficient support for a smoke-free amendment, one alternative may be to change the CA bylaws to include smoking within the units as a form of nuisance.<sup>14</sup> This option would not ban smoking in buildings and/or grounds. Instead, it could provide a basis for owners to register complaints of secondhand smoke entering their units as a violation of the nuisance clause with the HOA board of directors or take other legal action. As with amending the declaration, the CA would need to strictly adhere to the provisions for changing its bylaws and would likely require the assistance of an attorney to ensure that all legal requirements are met.

It is important to note that even if the CA itself has no smoking restrictions in place, individual owners can add smoke-free provisions to their leases if they rent their units. It is then the responsibility of the owners to enforce the smoking restrictions.

**Amended declarations that are not properly recorded, including those containing revised bylaws, may be unenforceable.**

---

<sup>13</sup> N.C. Gen. Stat. § 47C-3-102(a)(6) gives home owners' associations the right to "regulate the use, maintenance, repair, replacement, and modification of common elements." Common elements are defined by N.C. Gen. Stat. § 47C-1-103(4) as "all portions of a condominium other than the units."

<sup>14</sup> *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (the law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another; as a consequence, a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor).

4. **Apply and enforce smoking restrictions consistently with all owners and renters.** CA leadership should enforce smoking restrictions in a clear, consistent and fair manner with all owners and their renters.<sup>15</sup> The board of directors should avoid enforcing a rule in a manner that may appear selective or arbitrary. Selective or arbitrary enforcement of a rule could compromise the legitimacy of the smoke-free policy and make the policy unenforceable in a court of law.

Enforcing CA rules and restrictions may involve a range of actions such as providing written warnings, imposing fines pursuant to state statutes<sup>16</sup> and CA governing documents, and pursuing legal action against owners/violators.

#### **General Tips for the Enforcement of Provisions of the Declaration or Bylaws**

- Include a clause in the declaration that the CA itself, unit owners, and their tenants and guests must comply with all provisions of the declaration and bylaws
- Impose reasonable fines for violation of CA provisions
- In extreme situations, CAs may seek to terminate ownership rights through litigation

Douglas Scott MacGregor, *Condominium Law in North Carolina*, 2007

For more information on smoke-free housing, and to view sample documents and guides on converting a CA to smoke-free, please visit the “Condominium” section found at North Carolina’s smoke-free housing website, [www.smokefreehousingnc.com](http://www.smokefreehousingnc.com).

*The North Carolina Division of Public Health would like to thank attorney Jim Slaughter of Rossabi Black Slaughter, P.A., [www.lawfirmrbs.com](http://www.lawfirmrbs.com), for his assistance regarding North Carolina community association law.*

---

<sup>15</sup> See *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346, 352 (Fla. 1979) (court concluded that the covenant restricting age was “unreasonable and unconstitutional ... because the enforcement was selective and arbitrary.”).

<sup>16</sup> N.C. Gen. Stat. § 47C-3-107(condominiums) and § 47F-3-107.1 (HOAs)