

Going Smoke-Free

A Guide for Condominium
Trustees and Associations

The Massachusetts Smoke-Free Housing Project
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makesmokinghistory.org



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Going Smoke-Free

Executive Summary

Has your condominium association been thinking about implementing a no-smoking rule? Have residents complained about secondhand smoke drifting into their units? You are not alone.

More and more, condominiums are responding to complaints of secondhand smoke by going completely smoke-free. Just like prohibiting pets or loud music, condominiums can prohibit smoking in common areas, individual units or both. The following are just some of the benefits:

- Preserve and improve the health and comfort of residents.
- Increase property values.
- Save money on repairs and maintenance.
- Reduce conflicts among residents and potential legal liability of your condominium association.
- Eliminate the leading cause of residential fires.

Implementing a no-smoking rule is easy. The procedure is outlined in your condominium's master deed and declaration of trust, which together govern how the condominium operates.

Condominium trustees typically already have authority to establish common area rules, so can make common areas smoke-free right away. Establishing a smoke-free rule for the individual units, however, will require a vote of the unit owners.

While this Guide provides sample legal documents and advice for going smoke-free, readers should consult with an attorney about the specifics of their condominium documents and facts.

Once enacted, no-smoking rules are largely self-enforcing. Some tips for enforcement are:

- Post “No-Smoking” signs, clean up cigarette butts and remove ash trays from common areas.
- Respond quickly and consistently to potential violations.
- Tell unit owners that they will be held financially responsible for violations, even if the smoking is done by their guests or tenants.

More information about secondhand smoke and quitting smoking is available at www.makesmokinghistory.org. Free telephone support is available for all smokers and their families at 1-800-Try-To-Stop.



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Introduction

Smoking in condominiums is a concern because secondhand smoke drifts into common areas and other units. It can seep under doors, through ventilation ducts, electrical wall sockets and light fixtures. Once in neighboring units or common areas, the smoke can stay in the air for hours, exposing non-smoking residents.ⁱ Not only is secondhand smoke an immediate health hazard itself, but cigarettes are also the leading cause of residential fires, causing more than \$400 million dollars of damage annually.ⁱⁱ

Secondhand smoke is best described as a “toxic soup” with more than 4,000 chemical compounds. More than 60 of these chemicals are known or probable human carcinogens.ⁱⁱⁱ The U.S. Environmental Protection Agency classifies secondhand smoke as a “Class A” carcinogen, which puts it in the same category as asbestos, formaldehyde, benzene, arsenic and other highly toxic substances.^{iv} Children and those with chronic health conditions are particularly vulnerable to its effects.

As people have become more aware of the danger of secondhand smoke, more and more people have sought out housing where smoking is prohibited altogether. Surveys from across the country show a high demand for smoke-free housing. The trend is not surprising, given that smoking rates have dropped over the past decade, particularly in Massachusetts. Massachusetts has one of the lowest smoking rates in the country.^v

Going smoke-free is simple. The procedure for the rule change (for both the common areas and for individual units) is located in the condominium’s master deed and declaration of trust. Common areas typically can be made smoke-free right away because condominium trustees generally have authority to establish rules for common areas. A notice of the rule change should be provided to unit owners before implementation.

Establishing a smoke-free rule for individual units is also simple, but requires a few more steps. Condominium trustees must provide unit owners with notice of the proposed rule and the opportunity to vote on it. Typically, 75% to 85% of unit owners must vote in support of the rule for it to be binding on all units. If the vote is successful, the condominium trustees next amend the condominium bylaws. This is done by recording an amendment with the registry of deeds where the condominium’s master deed and declaration of trust are recorded.

If you are creating a condominium, whether the condominium involves new construction or an “as-is” conversion of an existing apartment building, you can simply include the rule in your original condominium bylaws.



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If you meet opposition to a new smoke-free rule and one or more unit owners who smoke are opposed to the change, you have the option of grandfathering their units. Smoking would be allowed in the “grandfathered” units until they are sold or transferred, at which time they become smoke-free.

Nearly all condominium bylaws in Massachusetts contain language that prohibits nuisances in general. It is important that if units are grandfathered, that language be included in the bylaw to clarify that the owner of the grandfathered unit is still subject to the prohibition against nuisances. The definition of nuisance includes drifting secondhand smoke that rises to the level of becoming a nuisance to neighboring units. The bylaw amendment also should identify each of the units and unit owners that are grandfathered.

Some resistance to smoke-free policies is based on uncertainty about the relevant laws and whether it is legal to prohibit smoking. Here are the answers to some of the most common questions.

1. Is smoking a protected right?

No. This question was answered very clearly in 2005 when the highest court in Massachusetts, the Supreme Judicial Court,^{vi} rendered its decision in the case *American Lithuanian Naturalization Club, Athol, Mass., Inc., v. Board of Health of Athol*. The Court went through a list of federal and state constitutional protections and found that **none of them protected smoking.**^{vii}

2. Are smoke-free policies discriminatory?

No. Being addicted to nicotine does not mean a smoker has special protections under federal or state anti-discrimination laws. Numerous condominiums in Massachusetts are smoke-free already. Smoke-free policies do not discriminate against the smoker. Rather they prohibit a type of behavior while in the unit or building. Smokers are welcome to live in a smoke-free property provided they follow the no-smoking rule. They may still smoke, but they need to smoke outside.

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

Like any condominium rule, the condominium association should enforce the smoke-free policy. Associations are given the flexibility and time they need for enforcement. The real threat of liability comes from ignoring the problem and allowing secondhand smoke exposure to continue. In the 2008 survey of condominium residents in Massachusetts, 84% stated that they would be concerned a lot if smoke seeped into their unit from a neighboring unit.^{viii} Only 3% said they would remain unconcerned.



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Reasons for Going Smoke-Free

Health Benefits

Secondhand smoke is the third leading cause of death in the United States, and a leading cause of acute and chronic disease. The best way to deal with secondhand smoke drifting from one unit to another is to make the building completely smoke-free.

Secondhand smoke consists of the smoke from a lit tobacco product and the smoke exhaled by smokers. It is best described as a “toxic soup” with more than 4,000 chemical compounds, no fewer than 60 of which are known or probable human carcinogens.^{ix} The U. S. Environmental Protection Agency classifies secondhand smoke as a Class A carcinogen, which puts it in the same category as asbestos, formaldehyde, benzene, arsenic and other highly toxic substances.^x Here are just some of the health effects:

- Secondhand smoke causes approximately 38,000 deaths each year.^{xi}
- Children exposed to secondhand smoke are more likely to develop bronchitis, pneumonia, asthma, and ear infections.^{xii} Secondhand smoke has been linked to Sudden Infant Death Syndrome.^{xiii}
- Nonsmokers who are exposed to secondhand smoke at home increase their risk of developing heart disease by 25 - 30 percent.^{xiv}
- Nonsmokers who are exposed to secondhand smoke at home increase their risk of developing lung cancer by 20 - 30 percent.^{xv}
- Breathing secondhand smoke for even a short time can have immediate adverse effects on the cardiovascular system and increase the risk of a heart attack.^{xvi}
- Smoking is the number one cause of home fire deaths in the United States, causing 1,000 deaths per year. One in every four people killed in home fires is not the smoker whose cigarette caused the fire.
- Changes in ventilation systems might help, but are not likely to eliminate exposure. HVAC standards are established by the American Society for Heating, Refrigerating and Air Conditioning Engineers (“ASHRAE”). ASHRAE currently will not recommend a ventilation standard for removing secondhand smoke because it has concluded that no standard ventilation system or air purifier can handle the job.^{xvii}
- Installing door sweeps to seal up the space between the floor and the bottom of a door and plugging up cracks and holes in the walls, ceilings and floors through which secondhand smoke seeps are both only short term solutions. These steps may help reduce exposure, but will not eliminate it.



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Financial Benefits

As the public becomes more aware of the health effects caused by secondhand smoke, demand for smoke-free condominium buildings will very likely increase. Because of an increase in demand, the value of units located in smoke-free buildings is likely to rise.

Not only will a smoke-free rule increase the units' value but it will decrease the costs associated with repairing damage caused by secondhand smoke. This includes damage caused by someone smoking in their unit or from secondhand smoke drifting in a neighboring unit or common area.

Consider the following:

- The smoking rate in Massachusetts has decreased dramatically over the past decade.^{xviii} Massachusetts currently has one of the lowest smoking rates in the country. An increase in nonsmokers indicates a higher demand for smoke-free housing.
- Real estate brokers have reported that properties that smell of tobacco smoke take longer to sell and often sell at a price that is less than optimum.^{xix}
- Repairs due to secondhand smoke include: replacing carpets with cigarette burns, replacing burns in linoleum countertops and flooring, abating the odor of stale tobacco smoke and repainting yellow-stained walls and ceilings.
- Property damage from cigarette-caused fires exceeds \$400 million annually.^{xx} In 2006, a total of 1,513 fires were started by unattended cigarettes in Massachusetts, resulting in average damages of \$7,870 each.^{xxi}
- An insurance company may discount general liability insurance premiums if a smoke-free rule is established. No-smoking rules reduce the risk of fire-related property damage, injury and death. Ask your broker.

Compliance with the Law

Under the Massachusetts' Smoke-Free Workplace Law, any workplace with one or more employees or a common area that is open to the public must be smoke-free. Common areas of a condominium may constitute a workplace if contract employees or independent contractors, including maintenance personnel or building supervisors work in the area. In a condominium, required smoke-free areas might include hallways, stairways, laundry rooms, entranceways and other common areas.

Local boards of health and municipal governments may issue fines of up to \$300 if a violation of the law exists. Each day smoking is allowed constitutes a separate violation, which means the financial liability can increase quickly. Smokers who violate the law may receive fines of \$100. For more information on the Smoke-Free Workplace Law, or to make a complaint, call 1-800-992-1895 or visit www.mass.gov/dph/mtcp.



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Reduce the Potential Legal Liability

Condominium associations may be liable for the harmful environment created by secondhand smoke in common areas or individual units. The potential legal liability can be avoided by eliminating smoking. Potential sources of liability include the following:

Fair Housing and Anti-Discrimination Laws

These laws prohibit discrimination in housing, including discrimination against condominium owners who have a disability. To qualify as having a disability under Massachusetts law, a person must have a record of a “physical or mental impairment which substantially limits one or more major life activities.”^{xxii} Those with a qualified disability are entitled to reasonable accommodations and modifications to be able to “reasonably live in and enjoy the premises, including public and common areas.”^{xxiii} The requirements of the Federal Fair Housing Act of 1988 are very similar.^{xxiv}

In the context of secondhand smoke, a unit owner must first demonstrate that he or she is, disabled. For example, asthma – one of the most common respiratory illnesses in Massachusetts – interferes with the major life activity of breathing and could qualify as a disability. Secondhand smoke is a known trigger for asthma attacks.^{xxv} As such, an owner with asthma may be entitled to an accommodation to smoke abatement or elimination of secondhand smoke exposure.^{xxvi}

Massachusetts Sanitary Code

Residential condominiums must meet minimum safety and health standards established by the Massachusetts Sanitary Code. The Sanitary Code is a state regulation,^{xxvii} that was established “to protect the health, safety and well-being of the occupants of housing and of the general public, to facilitate the use of legal remedies available to occupants of substandard housing, to assist boards of health in their enforcement of this Code and to provide a method of notifying interested parties of violations of conditions which require immediate attention.”^{xxviii} Faulty ventilation systems and other code violations can cause or exacerbate the problem of secondhand smoke drifting in the building.

The condominium association is responsible for fixing violations of the Sanitary Code in common areas. This responsibility includes ventilation systems and other structural parts of a building that service the individual units. The Sanitary Code provides that “officer[s] or trustee[s] of the association of unit owners of a condominium . . . [are] bound to comply with the provisions of these minimum standards” of the Sanitary Code, and thus, are responsible for violations.^{xxix} Once a violation is found, the health inspector will order the condominium association to fix the violation for re-inspection.^{xxx}



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Common Law Actions

In addition to the above, unit owners affected by secondhand smoke may potentially bring legal action directly against a condominium association or individual unit owner under the following common law actions:

- Negligence
- Nuisance
- Trespass
- Breach of the Covenant of Quiet Enjoyment^{xxx1}
- Violation of the Warranty of Habitability^{xxxii}
- Injunctive relief (an owner may sue to enforce the nuisance clause that is included in almost every condominium association's master deed or bylaws)

As awareness of the danger of secondhand smoke increases, the potential liability from these types of lawsuits also will increase. In the following two Massachusetts cases the Boston Housing Court found secondhand smoke to be both a nuisance and a violation of the covenant of quiet enjoyment. While these cases involved smoking by renters, they indicate how a court may analyze similar cases between condominium unit owners or between an owner and the trustees.

Harwood Capital Corp. v. Carey, No. 05-SP00187, Boston Housing Court (2006).

The owner of a condominium unit who was leasing the unit out was forced to evict his tenants for smoking. The condominium trust had levied numerous fines against the unit owner after other residents in the building complained about the drifting secondhand smoke. In the eviction proceedings, the Boston Housing Court found that the secondhand smoke that was drifting out of the rented condominium unit and into neighboring units constituted a nuisance under the terms of the lease. The precedent established by this case would support claims by unit owners that drifting secondhand smoke is a nuisance.

50-58 Gainsborough St. Realty Trust v. Haile, No. 98-02279, Boston Housing Court (1998).

A judge in the Boston Housing Court awarded tenants rent abatement because of secondhand smoke seeping into their apartment. The judge found, "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the secondhand smoke that was emanating from the nightclub below."



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Prohibiting Smoking Is Legal

A no-smoking rule is entirely legal and will stand up to potential legal challenges, as long as you follow proper procedures in enacting it.

No-Smoking Rules Do Not Violate Owners' Rights

The question of whether smoking is constitutionally protected was answered clearly in the 2005 case entitled *American Lithuanian Naturalization Club, Athol, Mass., Inc., v. Board of Health of Athol*.^{xxxiii} The case involved a legal challenge to a board of health regulation that prohibited smoking in private clubs. The Massachusetts Supreme Judicial Court went through a list of federal and state constitutional protections and found that none of them protected smoking.^{xxxiv} Accordingly, smoking in condominium units – or anywhere – is not a constitutional right.^{xxxv}

Smokers may nonetheless argue that although smoking is not a right, it is a legal activity and thus should be allowed in one's home. However, the Massachusetts Appeals Court has noted that “[c]entral to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, ‘must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.’”^{xxxvi} Thus, the argument that owners have the freedom to do whatever they want inside their units does not stand. In Massachusetts, condominium by-laws will be sustained as long as they serve a legitimate purpose and are rationally related to that purpose.^{xxxvii} Rules such as those restricting pets or limiting an individual's ownership to two units in a building have met this test and been upheld in court.^{xxxviii} A no smoking rule serves the legitimate purpose of protecting the health and safety of residents.

Anti-Discrimination Laws Do Not Protect Smoking

Although the nicotine in tobacco products is highly addictive, anti-discrimination laws do not protect smoking. The ADA states, however, that, “nothing in this [law] shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking...”^{xxxix} Additionally, because smoking is treatable through cessation counseling and pharmacological aids such as the nicotine patch, it does not qualify as a protected disability. Laws, such as the American with Disabilities Act (“ADA”), the Federal Fair Housing Act of 1988, and the Massachusetts state law equivalents are designed to prevent discrimination based on race, disability and certain other characteristics. Since smoking is not a disability these laws do not stop The only way that these stop condominium associations from prohibiting smoking.

Smokers are welcome in properties with smoke-free policies. They just need to smoke outside.

Smoker Protection Laws Do Not Prohibit “No-smoking Rules”

Massachusetts does not have a smoker protection law. Even if it did, smoker protection laws only prevent employers from factoring in smoking when making employment decisions or requiring employees to quit smoking and do not create a right to smoke anywhere.^{xl}



Going Smoke-Free

Implementing a Smoke-Free Rule

STEP ONE:

Constructing Your No-Smoking Rule

There are many different scenarios that can cause you to consider a no-smoking rule. Perhaps there are no smokers in your building and you want to ensure that the building remains smoke-free. Or, maybe there are one or more smokers whose smoke is drifting into common areas and other units. You may even have smokers in your building and no major secondhand smoke issues but are still concerned about the health effects of secondhand smoke or the risk of fire. By defining the problem, you can figure out the most effective solution. When designing your no-smoking rule it is important to consider the following:^{xli}

How do you define smoking and other key terms?

Be sure to define terms precisely to eliminate ambiguity.^{xlii} For example, define the term “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.”^{xliii} To clarify the purpose of the rule, be sure to include why you are enacting it.^{xliv}

Where do you want to ban smoking?

Think about whether you want to eliminate smoking in areas such as decks, patios, roofs, and parking garages. Some of these areas may be considered common areas, even if they are designated for exclusive use to a particular unit, while others may be deeded to individual owners.

Be sure to consider the effect that banning smoking in one area may have on smoking in another. For example, if you ban smoking in individual units, more people may begin to smoke on their balconies or patios. If you go further and ban smoking on patios, then smokers may start smoking outside building entrances or in other outdoor locations. Where smokers stand, even when outside, can make a difference to residents who may have to pass through smokers on the way into the building or who live above a common smoking spot where smoke may drift into units through open windows.

While it may sound complicated, there are some potential solutions to consider while developing your policy. You may want to either extend the ban to include a certain distance from building entrances and windows or designate an outdoor smoking area located in an area where smoke is unlikely to affect other residents.

Which units should be included?

If your building is new and no units have been purchased, or if you are converting an existing building into a condominium, you may simply include a no-smoking rule within the master deed and/or declaration of trust.^{xlv}



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If your building is currently occupied you need to decide whether the no-smoking rule will apply to everyone or units owned by smokers will be grandfathered in. Grandfathering-in some units means that smoking is allowed in them until they are sold or conveyed, at which time they become smoke-free.

The rule should expressly identify each unit that is grandfathered and the current owner. If some units are grandfathered, the no-smoking rule should expressly identify each of the units by number and by current owner.

The condominium's general rule against nuisances, a rule that is in the master deed or declaration of trust of virtually every condominium in Massachusetts, should be reaffirmed. Be sure to have the no-smoking rule state that grandfathered-units are not exempt from the existing rule against causing nuisances, including if drifting secondhand smoke rises to the level of constituting a nuisance.

How will you enforce the rule? The no-smoking rule should state how it will be enforced and what the fine will be for an infraction. The easiest way to do this is to reference enforcement provision for violations of other rules of your condominium, for example, banning pets, loud music, improper garbage disposal, etc.^{xlvi} Note that the trustees has an obligation to ensure that a no-smoking rule is followed.

STEP TWO


Educate Unit Owners

You will likely need the vote of a super-majority of unit owners (as described below in Step Four) to enact a building-wide no-smoking rule. Since a super-majority will most likely be required it is very important to take the time to educate owners about the many benefits of going smoke-free and gain support. Once you have the support of other residents, present the proposed rule to them in written format. You may need to work to convince some owners, but a little work up front will pay dividends in the future.

STEP THREE

Implement the No-Smoking Rule for All Common Areas

You can begin the process of going smoke-free right away by making sure that the building complies with the Massachusetts Smoke-Free Workplace Law. Under the law, the common areas of all workplaces or any space where the public is invited must already be smoke-free. A workplace is defined as any enclosed area where one or more employees, contract employees or independent contractors work. Employees may include maintenance staff, building supervisors or even cleaning crews. In a condominium these areas may include, include hallways, stairways, laundry rooms, entrance ways and other common areas.



Also, check with your local board of health as some towns have local regulations that require that the common areas of apartment buildings or condominiums be smoke-free regardless of whether employees are present.

Since condominium trustees generally have the authority to establish rules for common areas, they are able to make common areas smoke-free right away. Check the condominium's master deed and declaration of trust. All it may take is a vote of a majority of trustees at a meeting where a quorum of the trustees is present. Once a common area no-smoking rule is enacted, the condominium trustees must give the unit owners notice of the rule change before implementing. The notice should state where smoking will be prohibited and when the rule becomes effective.

If, as in many buildings, the enclosed common areas in your building are smoke-free already, your next step is to implement a rule change for those common areas that are not enclosed such as fire escapes, decks, patios, exterior landings, front steps and the surrounding grounds. Because secondhand smoke often drifts from these locations back inside the building through doors and apartment windows, it may become necessary to prohibit smoking in these areas. If a smoking area is designated, it should be far from any entrance or other area where the smoke might drift back into the building.

A sample notice and rule is attached to this Guide. It is advisable to record a bylaw amendment for common area rules because it automatically provides notice to all unit owners of the rule change. The sample bylaws attached to this Guide cover common areas.

STEP FOUR: Implement the No-Smoking Rule for the Entire Property

A no-smoking rule that restricts smoking in individual units requires amendment of the condominium's by-laws found in the master deed and/or declaration of trust.^{xlvii} Enacting the rule will require a vote of unit owners; likely, a super-majority of typically 75% to 95% will be needed (consult your condominium documents for the rule governing your association). Although you may have the support of all owners, it is more likely that you will meet some resistance. This is why it is important to educate owners about the benefits of a no-smoking rule. A sample letter is attached to this Guide.

Despite educating other owners, some owners still may be resistant to the idea. While not the most comprehensive policy, allowing some units to be grandfathered-in could help persuade hesitant owners to vote for the policy.



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IMPORTANT: If any unit is grandfathered in, remember to include the following in the bylaw amendment:

- Identify each unit number and owner that is grandfathered.
- State that each unit that is grandfathered shall become smoke-free when the unit is conveyed or transferred.
- Reaffirm that each unit that is grandfathered shall remain subject to existing prohibition against nuisances, including for drifting secondhand smoke that rises to the level of constituting a nuisance.
- If a grandfathered-unit is rented, consider having it become smoke-free when the lease term ends or no longer than one year.

If the rule does not receive enough votes, it cannot be enacted. If the rule is voted in, record the bylaw amendment at the same registry of deeds where the condominium's master deed and declaration of trusts are recorded. Two sample voting forms, used to record the vote of unit owners, are attached to this Guide. Two sample bylaw amendments are also attached. The first sample amendment prohibits smoking in all units. The second sample amendment allows for grandfathering units.

STEP FIVE:

Enforce the No-Smoking Rule

No-smoking rules are largely self-enforcing. Once the rule is established, you are likely to attract new owners who support smoke-free policies. Here are some tips on what to do:

- Start by mailing each resident a copy of the rule change or bylaw amendment. A sample notice is attached to this Guide.
- Post “No Smoking” signs at the entrance, hallways and other conspicuous areas. If you find someone smoking somewhere, post a “No Smoking” sign there, too.
- Remove ash trays and clean up any cigarette butts. These items make people feel like they are in a smoking area.
- Repair smoking-caused damages in common areas. If these areas have cigarette burns and smell like cigarette smoke, then building residents may be inclined to ignore the no-smoking rule. Replace or patch carpet, floors and other surfaces with cigarette burns, paint smoke-stained walls and ceilings, and take other steps to reduce the odor of stale tobacco smoke.
- Document potential violations. Those who smell smoke in the building should record when and where it occurred and from where it likely originated.



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- If a resident complains about smoking, the association should respond quickly. Acknowledge the complaint and follow up with enforcement in a timely fashion.
- Be consistent. Taking the same steps in the same period of time for every rule violation sends a clear message to *everyone* that smoking is not allowed. Likewise, treat violations of the no-smoking rule in the same way you respond to other rule violations such as loud noises or inappropriate garbage disposal.
- Make owners aware that they will be held financially responsible for violating the rule, even if the smoking is done by one of their guests or tenants.

STEP SIX:

If You Have Questions, Call for Free Advice

For more information or questions on how to implement a no-smoking rule, call the Massachusetts Smoke-Free Housing Project at (617) 373-2026.

THIS GUIDE IS PROVIDED FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL OPINION OR AS A SUBSTITUTE FOR OBTAINING LEGAL ADVICE



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FROM AN ATTORNEY. READERS WITH QUESTIONS ABOUT THE APPLICATION OF THE LAW TO SPECIFIC FACTS ARE ENCOURAGED TO CONSULT LEGAL COUNSEL.

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SAMPLE VOTING LETTER

[The trustees may record the votes of unit owners by distributing this letter to them and have them complete, sign and return the letter to the trustees. The letters should be retained by the trustees for their records. The units to be grandfathered, if any, should be written in below before voting. Remember to check your condominium documents for specific requirements for recording unit owners' votes. Your condominium documents are controlling.]

*[Trustee]
[Condominium Name]
[Address]
[Address]*

We, the undersigned, being all of the current owners of unit number _____ in the _____ *[condominium name]* and having a percent interest in the Condominium, APPROVE / DO NOT APPROVE (check one) the following amendment to the bylaws of the Condominium prohibiting smoking, as follows:

[OPTION ONE: BYLAW AMENDMENT LANGUAGE WITH NO UNITS GRANDFATHERED – DELETE LANGUAGE BELOW IF NOT USED]

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium's constituent documents, approved this bylaw amendment, NOW, THEREFORE, BE IT RESOLVED, that the following rule and procedure shall be applicable:



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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 the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated or lit product.

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

*[OPTION TWO: BYLAW AMENDMENT LANGUAGE WITH UNITS
GRANDFATHERED –DELETE LANGUAGE BELOW IF NOT USED]*

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium's constituent documents, approved this bylaw amendment, NOW, THEREFORE, BE IT RESOLVED, that the following rule and procedure shall be applicable:

Going Smoke-Free

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, and 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 shall include the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated, smoldering or lit product.

Notwithstanding the said prohibition against smoking, the Board 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.

Notwithstanding the said prohibition against smoking, smoking shall be allowed in the following units (collectively the “Grandfathered Units”) but only until such time as the unit is conveyed or transferred. Grandfathered units occupied by tenants shall become no smoking upon the expiration of the current lease term, but in no event longer than one (1) year from the effective date hereof.

Owner-Occupied Grandfathered Units

Unit #	Current Unit Owner

Renter-Occupied Grandfathered Units

Unit #	Current Unit Owner	Lease Expiration Date



Going Smoke-Free

This Amendment shall not amend, alter or otherwise affect the existing rule prohibiting Unit owners from causing nuisances. It is acknowledged hereby, that subsequent to the recording of this Amendment, drifting secondhand smoke might rise to the level of constituting a nuisance.

SO RESOLVED.

I hereby authorize the Trustees to take the necessary steps, in accordance with the Declaration of Trust of the Condominium, in furtherance of our vote on the above-referenced bylaw amendment.

Kindest regards,

_____ *[Signature]*

_____ *[Signature]*

_____ *[Print Name]*

_____ *[Print Name]*

_____ *[Date]*

_____ *[Date]*

Going Smoke-Free

SAMPLE BYLAW AMENDMENT

SPACE ABOVE INTENTIONALLY LEFT BLANK

BYLAW 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 bylaws.

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium’s constituent documents, approved this bylaw amendment, NOW, THEREFORE, BE IT RESOLVED, that the following rule and procedure shall be applicable:

Going Smoke-Free

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 the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated or lit product.

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

COMMONWEALTH OF MASSACHUSETTS

_____, ss _____, 20__

The personally appeared the above-named _____,
_____, _____, _____, identified to me by
evidencing their driver's licenses, Trustees as aforesaid, and acknowledged the foregoing to
be his free act and deed, before me.

Notary Public
My Commission Expires:

Going Smoke-Free

SAMPLE BYLAW AMENDMENT WITH UNITS GRANDFATHERED

SPACE ABOVE INTENTIONALLY LEFT BLANK

BYLAW AMENDMENT PHASED-IMPLEMENTATION OF 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 bylaws.

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium’s constituent documents, approved this bylaw amendment, NOW, THEREFORE, BE IT RESOLVED, that the following rule and procedure shall be applicable:

Going Smoke-Free

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, and 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 shall include the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated, smoldering or lit product.

Notwithstanding the said prohibition against smoking, the Board 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.

Notwithstanding the said prohibition against smoking, smoking shall be allowed in the following units (collectively the “Grandfathered Units”) but only until such time as the unit is conveyed or transferred. Grandfathered units occupied by tenants shall become no smoking upon the expiration of the current lease term, but in no event longer than one (1) year from the effective date hereof.

Owner-Occupied Grandfathered Units

Unit #	Current Unit Owner

Renter-Occupied Grandfathered Units

Unit #	Current Unit Owner	Lease Expiration Date

Going Smoke-Free

This Amendment shall not amend, alter or otherwise affect the existing rule prohibiting Unit owners from causing nuisances. It is acknowledged hereby, that subsequent to the recording of this Amendment, drifting secondhand smoke might rise to the level of constituting a nuisance.

SO RESOLVED.

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

, Trustee

, Trustee

, Trustee

, Trustee

COMMONWEALTH OF MASSACHUSETTS

_____, ss

_____, 20__

The personally appeared the above-named _____, _____, _____, _____, identified to me by evidencing their driver's licenses, Trustees as aforesaid, and acknowledged the foregoing to be his free act and deed, before me.

Notary Public
My Commission Expires:



Going Smoke-Free

SAMPLE LETER PROPOSING NO SMOKING RULE

[Date]

[Unit Owner]
[Address]
[Address]

Dear Unit Owner:

The Trustees of _____ *[Condominium name]* are writing to request your support to designate our property as smoke free.

Smoking in the building potentially exposes our nonsmoking residents to secondhand tobacco smoke. Current research shows that secondhand smoke generated in one area of a building frequently will drift into other areas by seeping under doors, through ventilation ductwork and by other means. This potential for exposure raises serious health concerns for our residents. 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.
- Breathing secondhand smoke for even a short time can have immediate adverse effects on the cardiovascular system and increase the risk of a heart attack.
- 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.

The potential for fire is also a concern. Smoking is the number one cause of home fire deaths in the United States, causing 1,000 deaths per year. One-in-four people killed in home fires are not the smoker whose cigarette caused the fire.

The only effective way to fully address these concerns is to designate our property as entirely smoke free. Note that upgrading our ventilation system appears to be impractical. HVAC standards are established by the American Society for Heating, Refrigerating and Air Conditioning Engineers, which does not recommend a ventilation standard for removing secondhand smoke based on its conclusion that no standard ventilation system or air purifier can handle the job.



Going Smoke-Free

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.

We have two options for implementation. The first option is to make the rule effective for all units immediately. The second option is to grandfather units owned by our smoking residents. Smoking would be allowed in a grandfathered-unit until it is sold or transferred, at which time the unit would become smoke free. The grandfathered-units would not be exempt from our condominium's existing rule that prohibits nuisances, including if secondhand smoke drifting from the unit becomes so severe that it constitutes a nuisance.

Before proposing a no smoking rule formally and putting it out to all owners for a vote, we want to receive as much owner input as possible. For that reason, we have scheduled a meeting at _____
_____ *[address, date, time]*. If you would like to contribute to the discussion, but are unable to attend the meeting, please contact anyone of us directly.

Kindest regards,

[Name], Trustee

[Name], Trustee

[Name], Trustee



Going Smoke-Free

SAMPLE NO SMOKING RULE FOR COMMON AREAS

Common area rule of _____ [Condominium name]

Effective _____ [Date], smoking shall be prohibited in all indoor and outdoor common areas on the property of the Condominium including, but not limited to, hallways, stairways, foyers, common rooms and facilities, decks, patios, exterior landings, front steps, entrance ways, roof tops, fire escapes, basements, storage areas, parking areas, driveways, walkways, lawns, gardens, adjoining grounds and building facilities. No owner shall smoke in said areas or permit smoking by any occupant, agent, tenant, invitee, guest, friend, or family member in said areas. 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 the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated or lighted product.

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.



Going Smoke-Free

SAMPLE NOTICE OF NO SMOKING RULE FOR COMMON AREAS

[Date]

[Unit Owner]

[Address]

[Address]

Dear Unit Owner:

Effective immediately, smoking is prohibited in all indoor and outdoor common areas of the _____ *[Condominium name]* except in designated outdoor smoking areas. A copy of the new rule is attached.

There are several important reasons for the rule change. Most importantly, smoking in common areas exposes our nonsmoking residents to secondhand smoke, thereby increasing their risk the of numerous, well documented adverse health effects caused by exposure. Additionally, some of our common areas are potentially covered by the statewide smoking law (M.G. L. c. 270, sec. 6) and thus, are required to be smoke free.

Please inform your guests and tenants that smoking is prohibited in all common areas. You will be held responsible if your guest or tenants violates the no smoking rule.

We embrace this small change as an opportunity to ensure that the building is a healthier and cleaner place for all unit owners and guests.

Kindest regards,

[Name], Trustee

[Name], Trustee

[Name], Trustee



Going Smoke-Free

SAMPLE NOTICE OF RULE CHANGE FOR INDIVIDUAL UNITS AND COMMON AREAS

[Date]

[Unit Owner]

[Address]

[Address]

Dear Unit Owner:

Pursuant to a vote of the unit owners in support of a smoke free environment, effective immediately, smoking is prohibited throughout _____
_____ *[condominium name]* property. A copy of the new bylaw, which has been recorded at the registry of deeds, is attached.

Please inform your guests and tenants that smoking is prohibited. You will be held responsible if your guests and tenants violate the no smoking rule. If you smell secondhand smoke, please report it immediately.

A smoking area will be located outside at _____
_____ *[Insert location of area]* away from the entrance and any buildings. Note that the bylaw change allows for the relocation or elimination of the smoking area at any time, particularly if secondhand smoke drifts into individual units or exclusive use areas.

[For our residents who wish to continue smoking, we have grandfathered their units. Smoking will be allowed in the grandfathered units until they are sold or transferred, at which time they will become smoke free. Units occupied by tenants will become smoke free within one year of the effective date of this rule or sooner. The grandfathered units, however, are not exempt from the condominium's existing rule prohibiting nuisances, including potentially for drifting secondhand smoke.]

We embrace this small change as an opportunity to ensure that the building is a healthier and cleaner place for all unit owners and guests.

Kindest regards,

[Name], Trustee

[Name], Trustee

[Name], Trustee

SAMPLE VOTE REGISTER

[The trustees may record the votes of unit owners by having them sign this register. The register should be retained by the trustees for their records. The units to be grandfathered, if any, should be written in before voting. Remember to check your condominium documents for specific requirements for recording unit owners' votes. Your condominium documents are controlling.]

We, the undersigned, being the current owners of units in the _____
_____ *[condominium name]* (the "Condominium") and in possession
of a percent interest in the Condominium, approve the following amendment to the bylaws of the
Condominium prohibiting smoking, as follows:

***[OPTION ONE: BYLAW AMENDMENT LANGUAGE WITH NO UNITS
GRANDFATHERED – DELETE LANGUAGE BELOW IF NOT USED]***

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium's constituent documents, approved this bylaw 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 the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated or lit product.



Going Smoke-Free

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

*[OPTION TWO: BYLAW AMENDMENT LANGUAGE WITH UNITS
GRANDFATHERED –DELETE LANGUAGE BELOW IF NOT USED]*

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 M.G.L. c. 183A, §4 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 bylaw was duly administered; WHEREAS, by said vote, a sufficient percentage of the unit owners, pursuant to the Condominium’s constituent documents, approved this bylaw 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, and 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 shall include the inhaling, exhaling, breathing, carrying, or possession of any lighted cigarette, cigar, pipe, other product containing any amount of tobacco, or other similar heated, smoldering or lit product.

Notwithstanding the said prohibition against smoking, the Board 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.

Notwithstanding the said prohibition against smoking, smoking shall be allowed in the following units (collectively the “Grandfathered Units”) but only until such time as the unit is conveyed or transferred. Grandfathered units occupied by tenants shall become no smoking upon the expiration of the current lease term, but in no event longer than one (1) year from the effective date hereof.

Going Smoke-Free

ⁱ CA Env'tl. Prot. Agency, Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant (2005).

ⁱⁱ John R. Hall, Jr., National Fire Protection Association, The Smoking-Material Fire Problem 10 (2006).

ⁱⁱⁱ *See id.*

^{iv} *See Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Env'tl. Prot. Agency*, 313 F.3d 852 (2002).

^v *See* Stephen Smith, Adult Smoking Rate Plunges in Mass., The Boston Globe (July 31, 2008).

^{vi} 446 Mass 310 (2006).

^{vii} It is also important to note that private condominium trustees are not subject to claims that they violated a constitutional right. The United States and Massachusetts Constitutions are checks on government action, not actions by private citizens.

^{viii} [Citation to be created from survey]

^{ix} *See supra* note 1.

^x *See Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Env'tl. Prot. Agency*, 313 F.3d 852 (2002).

^{xi} National Cancer Institute, *Health Effects of Exposure to Environmental Tobacco Smoke: The Report of the California Environmental Protection Agency, Smoking and Tobacco Control Monograph No. 10*, Bethesda, MD. U.S. Dep't of Health and Human Servs., Nat'l Inst. of Health, Nat'l Cancer Inst. (1999).

^{xii} J. DiFranza et al., *Prenatal and Postnatal Environmental Tobacco Smoke Exposure and Children's Health*, Pediatrics 113 (4 Supp.) 1007-15 (April 2004).

^{xiii} H. S. Klonoff-Cohen et al., *The Effects of Passive Smoking and Tobacco Exposure Through Breast Milk on Sudden Infant Death Syndrome*, 273(10) JAMA 818 (March 1995)

^{xiv} U.S. Dep't of Health and Human Servs., The Health Consequences of Involuntary Smoking: A Report of the U.S. Surgeon General (2006) (hereinafter Surgeon General Report).

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} American Society of Heating, Refrigerating and Air-Conditioning Engineers, Engineers Should Follow Local Codes in Regard to Smoking, <http://www.ashrae.org/pressroom/detail/13537> (last visited August 6, 2008).

^{xviii} *See supra* note 6.

^{xix} Antoinette Martin, *On Tobacco Road, It's Tougher to Sell*, New York Times (Feb. 8, 2004).

^{xx} John R. Hall, Jr., National Fire Protection Association, The Smoking-Material Fire Problem 10 (2006).

^{xxi} Massachusetts Department of Fire Services, Annual Report of the Massachusetts Fire Incident Reporting System, 136 (2006), <http://www.mass.gov/Eeops/docs/dfs/osfm/firedata/mfirs/2006annualreport.pdf>.

^{xxii} Mass. Gen. Laws c. 151B, § 1(17) (2000).

^{xxiii} Code Mass. Regs. 804, § 2.03(3).

^{xxiv} *See* Federal Fair Housing Act, 42 U.S.C. 3601 *et seq.*

^{xxv} Asthma and Allergy Foundation of America, Asthma Overview: What Causes Ashtma, <http://www.aafa.org> (last visited August 6, 2008).

^{xxvi} Additionally, the Americans with Disabilities Act ("ADA") may be a source of liability. It governs areas that are open to the general public, which could include building common areas (but not individual units). Again, the aggrieved individual must prove that he or she is "disabled," but once this threshold is met, a claim under the ADA may be actionable.

^{xxvii} The relevant portions of the Sanitary Code are adopted pursuant to Sections 3 and 127A of Chapter 111 of the Massachusetts General Laws by the Massachusetts Department of Public Health. *See* Code Mass. Regs. 105, §410.002.

^{xxviii} *See id.* at §410.001.

^{xxix} *Id.* at §410.830.

^{xxx} *Id.*

^{xxxi} Although breach of the covenant of quiet enjoyment and violation of the warranty of habitability are generally actions brought by tenants against landlords, they may be recognized in some cases of unit owners against a condominium association. Consult your association's attorney for guidance as to whether these are potential sources of liability for your particular association.

^{xxxii} *Id.*

^{xxxiii} 446 Mass 310 (2006).

^{xxxiv} *Id.*

^{xxxv} It is also important to note that private condominium trustees are not subject to claims that they violated a constitutional right. The United States and Massachusetts Constitutions are checks on government action, not actions by private citizens.

Going Smoke-Free

^{xxxvi} *Noble v. Murphy*, 34 Mass.App.Ct. 452, 456 (1993), quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 182 (Fla.Dist.Ct.App.1975) and citing *Franklin v. Spadafora*, 388 Mass. 764, 769 (1983).

^{xxxvii} Mass. Prac., Real Estate Law c. 28, § 14.10 at n. 7 (4th ed. 2007), citing *Franklin*, 388 Mass. 764 and *Noble*, 34 Mass.App.Ct. 452.

^{xxxviii} See *Franklin*, 388 Mass. 764; *Noble*, 34 Mass.App.Ct. 452.

^{xxxix} U.S. Code c. 42, § 12201 (2007).

^{xl} Samantha Graff, Tobacco Control Legal Consortium, There is No Constitutional Right to Smoke: 2008 (2008), <http://www.tclconline.org/documents/constitutional-right.pdf>.

^{xli} See David B. Ezra, “*Get Your Ashes Out Of My Living Room!*”: *Controlling Tobacco Smoke In Multi-Unit Residential Housing*, 54 Rutgers L. Rev. 135, 186-188 (2001).

^{xlii} *Id.* at 187-188.

^{xliii} *Id.* at 188.

^{xliv} *Id.* at 187.

^{xlv} *Id.*

^{xlvi} Massachusetts law authorizes associations or trusts, “[t]o impose charges or to charge interest for the late payment of common expense assessments or other charges, and to levy reasonable fines for violations of the master deed, trust, by-laws, restrictions, rules or regulations of the organization of unit owners.” Mass. Gen. Laws 183A § 10 (b)(5).

^{xlvii} Mass. Gen. Laws c. 183A §§ 8(g) & 11(e).