

# MEMO

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**To:** Concord Place Homeowners' Association and Board of Directors  
**From:** Amanda Hamilton  
**Date:** 12/17/19  
**Re:** Secondhand smoke in multiunit communities.

## INTRODUCTION

This report has been prepared for the Homeowners' Association and Board of Directors of Concord Place concerning the persistent issue of drifting secondhand smoke in the community. The information provided here includes the current state of California law relative to housing and intrusive secondhand smoke, a discussion of the properties and effects of secondhand and third hand smoke, and legal expectations and constraints of tenants and property management. The report concludes with a recommendation that the Board of Directors and HOA adopt changes to the community rules and regulations in order to safeguard the health and safety of tenants by implementing a smoking ban in all areas of the community, including private residences.

## CURRENT SITUATION

### Concord Place

The Rules and Regulations of Concord Place do not currently address potential complaints about tobacco smoke and other noxious fumes, nor how residents should file complaints beyond concerns of parking, pool use, pets, and expectations of aesthetic maintenance of structures and landscaping. In terms of duty to owners and renters of Concord Place, the rules and regulations do state that their purpose is to "ensure the health and safety of residents and their guests." However, by virtue of its location in the state of California, all common areas including halls, stairways, recreation rooms and laundry facilities are designated as non-smoking areas by California Labor Code Section 6404.5 (CA Dept. of Public Health). The aforementioned common areas comprise a portion of the majority of California that has been legislated into smoke-free air space in the interest of protecting public health. Though the HOA of Concord Place has not embraced the opportunity, California Civil Code 1947.5, as of 2011, ensures the authority of multiunit housing property management entities to ban smoking throughout entire communities, including within privately owned units.

## Smoke-free Air: Legislation and Trends

Empowering landlords to banish harmful smoke from the properties is just one of the routes taken by the state to mitigate the public health menace of tobacco products. California is the nation's trendsetter in terms of smoke-free air laws, setting that trend in motion in 1995 when the state became the first to ban smoking in all restaurants with bars added to the list in 1998. At present, smoking has been banned in all work places, public transportation, foster homes, children's sporting events, public beaches, farmer's markets, correctional facilities, government buildings, day car centers, public parks, beaches, and in vehicles when minors are present (CDC).

California, like all states, must also enforce the Fair Housing Act which, as of 1998, obligates property management to accommodate tenants with recognized disabilities (Whitman). Disabilities requiring accommodations concerning exposure to a neighbor's cigarette smoke include asthma, chronic obstructive pulmonary disease (COPD), diagnosed hypersensitivity to tobacco smoke and, in some cases, multiple chemical sensitivity and environmental illness. An estimated 3.3 million adults in California, nearly 8% of the state's population, are afflicted with chronic lung diseases; that number increases when considering children's lung diseases too.

The federal and state-level fervency to curtail smoking in public places has developed over the past several decades as the devastating health outcomes of secondhand smoke exposure have been repeatedly studied and confirmed. The first mention of secondhand smoke in the Surgeon General's periodic report appeared in 1972. The Surgeon General continues to decry consumption of tobacco products as a primary user or second or third hand exposure. As of 2010, the official stance of the Surgeon General is that "there is no risk-free level of exposure to tobacco smoke (CDC).

## Health Impacts of Secondhand Smoke

Unfortunately, simple adjacency to a smoker yields results very similar to actively smoking. The following list is a small sampling of the ill effects secondhand smoke can render:

- Regular exposure to secondhand smoke increases risk of stroke by 50% (ANSRF)
- Regular exposure to secondhand smoke increases the risk of lung cancer by 20 – 30% (Unity Point Health).
- Children exposed to their parents' smoking experience more asthma attacks, pneumonia, bronchitis, difficulty breathing and ear infections (American Cancer Society).

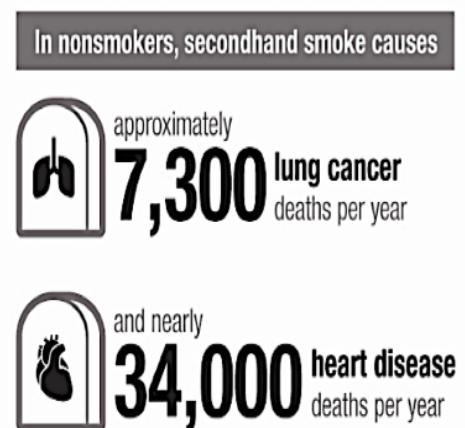


FIG. 1 . TOBACCO SETTLEMENT ENDOWMENT TRUST

- Infants of women exposed to secondhand smoke during their pregnancies are at higher risk of low birth weight, respiratory infections, chronic respiratory illnesses and SIDS (CDPH).
- 20 – 30 minutes of secondhand smoke exposure causes increased blood clotting and fat deposit build up (Cleveland Clinic).
- Pregnant women exposed to secondhand smoke are more likely to experience miscarriages and stillbirths (Unity Point Health).
- Secondhand smoke exposure of pets can double or even triple their chances of developing cancer (truth).

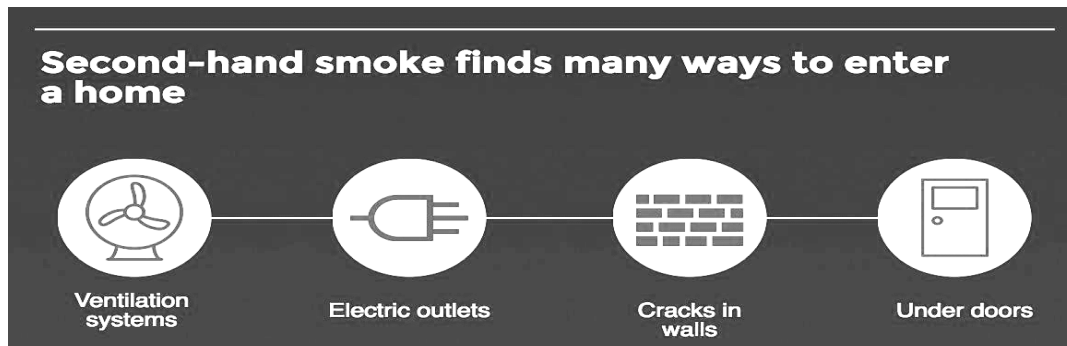


FIG. 2 NEW BRUNSWICK ANTI-TOBACCO COALITION

## Emerging Concern: Thirdhand Smoke

As the effects of tobacco products have been studied over several decades, another, more insidious after-effect of tobacco consumption known as thirdhand smoke has made itself evident to researchers. Even after the smell of a cigarette has gone from the room or the area, the toxic particles are still present—and they can linger in the air for up to 4 hours. Indoors, those particles will cling to walls and settle into carpets or other fabric where they can linger for up to 6 months. Over time, the lingering particles of the already-toxic byproduct of tobacco combustion will break down further into new chemical compositions more toxic than their parent molecules which diffuse back into the air to be inhaled and ingested—sometimes by a unit's new tenants well after the initial smoker has moved out.

Thirdhand smoke particles have been shown capable of damaging DNA, catalyzing the processes that lead to cancer. Furthermore, chemical reactions caused by contact of thirdhand smoke particles and common household cleaners creates still more toxic byproducts. This is especially problematic in a multiunit housing context where common walls, ceilings, floors, and air flow combine multiple families and multiple brand loyalties to increase the probability of these chemical reactions occurring and poisoning multiple homes with virtually undetectable and unpreventable carcinogenic clouds.

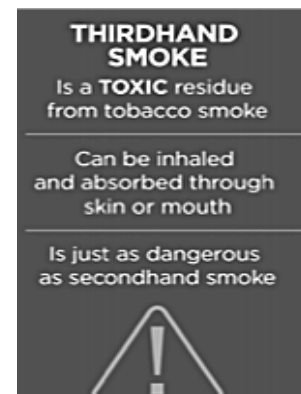


FIG 3 ASTHMA AND ALLERGY FOUNDATION OF AMERICA

## Legal Recourse

As the tremendous gravity of the effects of second and third hand smoke exposure come into focus through research, attempts at legal remedies have increased. Historically, the courts have been hesitant to overstep their bounds and dictate individual behavior in private residences. That said, there is no such thing as a “right to smoke” at the federal, state, city, or even community level—and it turns out that one person smoking in a building that shares walls or ceilings equates to every person in that building also smoking. This constitutes an emergency for people with medical conditions that leave them more vulnerable to the harmful effects of a neighbor’s toxic habit. Because federal and state laws about smoking apply to public air space, several broad categories of complaint have been loosely applied to offensive smoke complaints in order to seek damage or secure legal injunctions against it. The following approaches have succeeded in certain cases with the number of wins slowly but steadily increasing as nonsmoker demand for the safeguarding of their health is heard and honored

**THE RIGHT TO QUIET ENJOYMENT:** Typically this covenant is included in lease agreements to provide parameters for noise complaints between neighbors regarding barking dogs, loud parties, percussion enthusiasts, and the like. Essentially, if one tenant’s activities outside another tenant’s unit interferes with the second tenant’s ability to live and enjoy the inside of their unit, the offending tenant has violated this right. This is difficult to quantify and prove, but has seen growing success in litigation attempts. The right to quiet enjoyment may not be mentioned in the community guidelines, but is often part of the city’s codes.

**TRESPASS:** Much the same logic as the quiet enjoyment argument, this argument is founded on the notion of a tenant’s behavior outside affects the inside of another unit, with an emphasis on the physical matter of smoke passing into a private space where it is not wanted, rather than on the tenant’s more-difficult-to-quantify feelings about the trespass. Whether or not this argument can be employed depends on the community rules and the language of the applicable civil codes.

**NUISANCE:** This complaint is similar to trespass, but in addition to a prohibited behavior like entering a unit without permission, a nuisance is defined by the damage it causes which must be provable to make a successful argument. Nuisance arguments are effective in cases of **DISABILITY DISCRIMINATION** that can be proven through medical history if the smoke provokes an asthma attack or other situation that requires medical attention or hospitalization. Nuisance complaints would be levied against the offending tenant; disability discrimination would be levied against the property management entity relative to the Fair Housing Act which obligates them to accommodate tenants with disabilities, typically by working to correct the offending tenant’s behavior or having either tenant move units. An Orange County family was awarded \$17,000 for moving costs and emotional distress after their HOA failed to remedy a secondhand smoke complaint that exacerbated their son’s asthma (OC Register).

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS:** This argument is employed in tenant-tenant disputes wherein mediation was attempted and the offending tenant refused to alter their behavior to relieve their neighbor from the ill effects of drifting smoke. Tenant-tenant disputes are often taken up in small claims court with the complainant seeking monetary compensation. These cases are most successful when the complainant can show receipts for expenses related to the defendant's smoking such as dry cleaning bills, purchase of air filters, or installation of seals around doors and windows.

**IMPLIED WARRANTY OF HABITABILITY:** This is similar to the disability discrimination approach, but without the weight of a federally mandated protection to back it. Simply put, a tenant must be able to prove that their unit is uninhabitable by human standards. Successful arguments in this vein result in rent refunds or a tenant being relieved of their lease obligation so they can move from the unit without penalty—sometimes both. A woman who lived in an apartment above a bar used this argument to secure reimbursement for rent paid on an apartment that was constantly filled with smoke wafting into her space from downstairs (Sweda, 163).

**NEGLIGENCE:** Complaints of negligence are brought against property management entities that fail to act on tenant complaints of secondhand smoke intrusions. This constitutes a breach of the duty of landlords, managers, or homeowners associations to safeguard the health and safety of their tenants and their guests.

## CONCLUSION

Even without a thorough report of facts and figures quantifying in explicit detail the types and severity of damage that cigarette smoke can inflict on smokers and those around them, it has been common knowledge for decades that smoking kills. That the rules and regulations of Concord Place do not already address the issue of secondhand smoke intrusions in the neighborhood seems like a grievous oversight. If it is assumed that the choice not to address the issue was made in an attempt to respect the agency of individuals and their right to behave as they please in their homes, that is somewhat understandable.

On the other hand, with a deeper understanding of the insidious nature of second and third hand smoke—that the dangers they pose persist well beyond the unpleasant experience of being bombarded with unwanted smoke clouds—it would be morally and ethically indefensible to maintain the current course of blind-eye inaction and allow the problem to continue.

The Homeowners Association and Board of Directors should begin the process of amending the community's rules and regulations to include an all-area smoking ban as soon as possible. If California's current trend is to be bet upon, the state will continue pushing for more comprehensive smoking bans. The current health scare surrounding the mysterious lung disease afflicting e-cigarette users has only added fuel to the regulatory fire and strengthened the growing general public attitude of condemnation of all things tobacco and nicotine.

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