Memorandum

Analysis of the Voluntary and Legal Options of Condominium Owners Confronted with Secondhand Smoke from another Condominium Unit

Susan Schoenmarklin, Esq.

Smoke-Free Environments Law Project

The Center for Social Gerontology, Inc.
2307 Shelby Avenue
Ann Arbor, Michigan 48103
734 665-1126 • fax 734 665-2071
sfelp@tcsg.org

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I. INTRODUCTION

As public understanding of the hazards of secondhand smoke increases, condominium owners, along with other residents of multi-unit housing, are becoming increasingly concerned about drifting smoke from adjacent units. These concerns are justified. The Environmental Protection Agency (EPA) has classified secondhand smoke as a Group A carcinogen, for which there is no safe level of exposure. Secondhand smoke (SHS) contains more than 4,000 chemicals and more than 40 carcinogens, including formaldehyde, cyanide, arsenic, carbon monoxide, benzene, and radioactive polonium-210.[1]

Secondhand smoke is especially hazardous for those who suffer from heart conditions, asthma or other lung conditions and for young children. A recent study in the BRITISH MEDICAL JOURNAL found that secondhand smoke increased the risk of heart disease in nonsmokers by as much as 60 percent.[2] The danger is so severe that the Centers for Disease Control and Prevention have issued a warning for people at risk of coronary heart disease to avoid exposure to secondhand smoke.[3] Children with asthma are also at a high risk from exposure to SHS. Children exposed to cigarette smoke in the home are twice as likely to develop and suffer persistently from asthma.[4] The EPA estimates that the health of up to one million children with asthma in the U.S. is worsened by exposure to SHS.[5] In Michigan, an estimated 2500 nonsmokers die every year from the health effects of secondhand smoke.[6]

The health hazards of tobacco smoke are magnified in the close living quarters of those who live in multi-family dwellings. John Howard, M.D., Chief of the California Division of Occupational Safety and Health (CAL OSHA), summed up the exposure of residents of multi-unit buildings in testimony before the California legislature. "Tobacco smoke travels from its point of generation in a building to all other areas of the building. It has been shown to move through light fixtures, through ceiling crawl spaces, and into and out of doorways. Once exposed, building occupants are at risk for irritant, allergic, acute and chronic cardiopulmonary and carcinogenic adverse health effects."[7]

Furthermore, in many multi-family dwellings, only a wall separates living spaces. Residents share common patios, decks, balconies, exhaust systems, hallways,

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[1] U.S. Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General*, 2000.

[2] Whincup, PH et al, *Passive smoking and risk of coronary heart disease and stroke: prospective study with cotinine measurement*, Brit. Med. J. Vol. 329, June 30, 2004.

[3] Pechacek TP, Babb S, Commentary: *How acute and reversible are the cardiovascular risks of secondhand smoke*? Brit. Med. J., Vol. 328, Apr. 24, 2004.

[4] Samet, J., *Risk Assessment and Child Health*, Pediatrics 113 (4 Supp.) 952-56 (April 2004).

[5] Fact Sheet: *Respiratory Health Effects of Passive Smoking*, Environmental Protection Agency, April 2004.

[6] Michigan Department of Community Health, Vital Records & Health Data Development, SAMMEC 3.1; 2002.

[7] Testimony before the Labor and Employment Committee, California Assembly (Oct. 20, 1994).

underground parking garages, and recreational facilities. Most units share a common ventilation system, and many buildings lack a pressurization system, which would minimize seepage of smoke.

Condominium owners exposed to secondhand smoke are in a particularly difficult situation because of their monetary investment in a particular location. Unfortunately, there are no easy answers for a condominium owner in this predicament. This memorandum will discuss various approaches a condominium owner in Michigan can take to the issue of drifting secondhand smoke from a neighboring condominium.

These approaches include: informal negotiations with the smoker; working with the condominium management or board of directors to resolve the problem, and if that fails, the condominium association; agreeing to arbitration or mediation; filing a complaint with the federal Fair Housing Administration (FHA) and/or an Americans with Disabilities' (ADA) complaint; and, as a last option, filing a lawsuit against the smoker or the condominium association.

The final section of this memorandum will analyze whether condominium associations in Michigan and elsewhere transitioning to smoke-free premises must "grandfather" or exempt owners who purchased their condominium prior to the smoking prohibition.

II. PRELIMINARY STEPS IN ADDRESSING SECONDHAND SMOKE IN CONDOMINIUMS

A. Educational Efforts

Learn About Secondhand Smoke

Before taking any action, owners confronted with secondhand smoke seepage should first educate themselves about the adverse health effects of secondhand smoke. Secondhand smoke can be life threatening to those suffering from emphysema or heart disease. It can aggravate asthma, hay fever or allergies and can cause a sore throat, itchy eyes or headaches in persons sensitive to tobacco smoke. It can contribute to the development of pneumonia, ear infections, bronchitis, coughing, and wheezing in children.

The Smoke-Free Environments Law Project (SFELP) provides a list of scientific studies from respected government and private agencies that document the health effects of secondhand smoke. These reports can be accessed from the SFELP website, which is at www.tcsg.org/sfelp.

Review the Condominium CC&Rs and Rules

Owners should also review the condominium Covenant, Conditions & Restrictions, known as the CC&Rs or "declarations," and condominium rules. Many condominium

agreements contain a "nuisance clause" that prohibits condominium owners from engaging in any activity that interferes with another owner's peace and well-being. The nuisance clause is typically invoked by residents objecting to late-night parties, offensive odors, loud music or other activities generally accepted by the public as significant annoyances.

The nuisance clause is located in the CC&Rs, and may also be present in the condominium rules.[8] For the purposes of this memorandum, the CC&Rs is part of the deed to the condominium, and can only be amended by a vote of all of the owners. The CC&Rs describe the rights and obligations of owners, including maintenance responsibilities and restrictions on the use of property. On the other hand, a "rule" is a policy adopted by the condominium's board of directors governing matters not fully described in the CC&Rs, such as parking and the use of recreational facilities.

A nuisance provision could arguably apply to smoking if the resulting secondhand smoke causes health problems or substantial discomfort to others. The use of a nuisance clause in the event of secondhand smoke seepage is discussed in detail later in this memorandum.

Investigate Local and State Laws

Finally, owners should check to see if there are any local or state laws governing smoking in condominiums. A number of communities and a few states have laws prohibiting smoking in the public areas of multi-unit buildings, including condominium complexes. In Michigan, as of May 2006, 12 counties and the Cities of Detroit and Marquette have enacted Clean Indoor Air laws that, among other provisions, require the common indoor areas of condominiums to be smoke free. These counties are: Ingham, Washtenaw, Genesee, Chippewa, Emmet, Otsego, Antrim, Marquette, Midland, Saginaw, Charlevoix and Wayne Counties. The Smoke-Free Environments Law Project provides regular updates on local and state clean air regulations in Michigan.

B. Measuring Exposure to Secondhand Smoke

Medical Tests

After educating himself or herself, the owner may want to investigate nicotine exposure. The owner can take a urine, saliva or blood test, which will identify within a range the amount of cotinine, a byproduct of nicotine, present in the body. At least one test is sensitive enough to measure exposure to as little as one hour of secondhand smoke in the previous few days.[9] These tests are administered in a physician's office, which provides independent medical verification of exposure to secondhand smoke. While there are home tests for cotinine, the Smoke-free Environments Law Project does not recommend

[8] It is unlikely that a nuisance clause would be found in the condominium bylaws. The bylaws govern the election of the board, terms of office, and other procedural matters for the board. Some bylaws may be changed by vote of the board, and some require a vote of the association membership.

[9] The Nicalert test instructions state that it can measure exposure as small as one hour of secondhand smoke in the previous two to three days.

taking such tests because they rely on self reporting. In addition, these tests do not measure the level of nicotine exposure.

The owner may want to get a letter from his or her physician documenting the exposure to secondhand smoke and its effect on the owner's health. This letter can be particularly persuasive as an owner attempts to work with the smoking neighbor or others in the condominium, such as management or the condominium board.

Air Monitoring Tests

To more directly document tobacco smoke in the unit, the owner could employ a device that measures respirable suspended particles in the air. The amount of particles in the non-smoker's unit could be compared to the air of a unit that is not adjacent to a smoker. The Michigan Department of Community Health (MDCH) has recently acquired a machine that records particulate matter in the air that is smaller than 2.5 microns in diameter. Particulates of this size are released in significant amounts from burning cigarettes, are easily inhaled deep into the lungs, and are associated with pulmonary and cardiovascular disease and mortality.[10]

To obtain the most complete results, the machine, a Sidepak, should monitor the air in the non-smoker's apartment for a 24-hour period. The non-smoker should keep a log of activities that would affect the air in the unit, such as cooking, using the fireplace, burning candles, and open windows. A second 24-hour reading should be taken of a condominium unit in the complex that is at a substantial distance from the smoker's unit to use as a comparison. Five to ten minute outdoor readings should be taken before and after the testing.

An individual interested in measuring air quality may wish to contact his or her local health department for information on a lending policy. The MDCH does not lend the machine to individuals, but does lend to local health departments, upon request.

III. VOLUNTARY STRATEGIES FOR MITIGATION OF SECONDHAND SMOKE IN CONDOMINIUMS

Condominium owners faced with exposure to smoke from a neighboring unit should first consider addressing the problem through voluntary or "informal" efforts, since lawsuits are expensive and success is not guaranteed. Owners can take a number of actions short of a lawsuit.

A. Reaching a Voluntary Agreement with the Smoking Neighbor

After completing the preliminary steps outlined above, the owner is in a good position to approach the smoking neighbor. The owner should present the physician's letter to his neighbor, who may not be aware of the drifting smoke or its adverse health effects. If the

[10] *See* Wyoming Air Monitoring Study, June 2005, University of Wyoming Survey and Analysis Center, WYSAC Technical Report CHES-513.

smoker fails to agree to refrain from smoking in the unit, the owner should decide whether other less comprehensive measures would be acceptable. For example, the smoker may agree not to smoke on his or her outside patio or near open windows, or to refrain from smoking in common areas, such as hallways, stairwells, laundry rooms, recreation rooms or the foyer.[11]

The smoker may agree to pay for the costs of measures to reduce the amount of secondhand smoke entering the non-smoker's apartment, such as sealing gaps around electrical outlets and pipes, weatherproofing doors and windows, and checking heating and air systems and vents to ensure they are operating properly. In making decisions on mitigation strategies, it is advisable to follow the recommendations from a secondhand smoke transfer study discussed in the section below.

Although they are commonly recommended, air cleaners are not an acceptable means of reducing secondhand smoke. Small cleaners are not capable of processing enough air to have any impact on the concentration of smoke, and even the large expensive air cleaners are not effective in removing gases, which contain most of the irritants in secondhand smoke. [12]

B. Structural Remedies

One simple step that can be taken in the event of secondhand smoke exposure is to check to see if a structural defect in the building is responsible for the problem. If the condominium owners suspects that the condition of the building or poor construction are to blame, he or she should contact the local city or county building inspector. A building inspector can identify any building code violations. In the event of a violation, the condominium association may be liable to the owner for the repairs.

Even if the building is not defective, structural measures can be taken to reduce secondhand smoke seepage into the owner's unit. The Center for Energy and Environment, based in Minneapolis, recently studied air flow in a number of multi-family buildings and identified some means of reducing secondhand smoke transfer among units. In a test of six multifamily buildings ranging in size from a duplex to an 11-story condominium, the Center was able, through a variety of ventilation and air sealing treatments, to reduce the transfer of contaminants among units by an average of 41%. More than half of the units treated had a reduction in contaminants of greater than 50%. It should be noted, however, that the Center was unable to completely eliminate the problem of secondhand smoke transfer in any of the buildings, and almost one third of units (29%) treated had no reduction of contaminants at all. [13]

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[11] It should be noted, however, that most associations already prohibit smoking in enclosed common areas.
[12] Repace, J.,"*Smoking in the workplace: Ventilation;* Smoking Policy: Questions and Answers, No. 5, Seattle: Smoking Policy Institute, (n.d.).
[13] Center for Energy and Environment (CEE), *Reduction of Environmental Tobacco Smoke Transfer in Minnesota Multifamily Buildings Using Air Sealing and Ventilation Treatments*, Nov. 2004, p. vii. The report is available on the CEE website at www.mncee.org/ceedocs/mpaat/summary.pdf. MCC offices are

Jim Fitzgerald, a senior building analyst who worked on the project, stated that short of a smoke-free policy the best step to take in addressing a smoking problem is to install a continuous ventilation system with quiet exhaust fans in the condominium complex. He said that in most buildings ventilation systems are not optimal and that some buildings have no effective mechanical ventilation at all. In some cases, he found that ventilation to the outside in individual units was blocked by an owner who objected to the noise of the fan. Mr. Fitzgerald recommended increasing ventilation in the smoker's unit and preferably in the unit of the affected nonsmoker as well. The ventilation flow rate should be balanced among the units.

Under the findings of the Center study, sealing treatments helped, but provided only marginal benefits if sealing was the sole method of treatment. Owners should keep this conclusion in mind because sealing treatments are often the only remedial measure proposed to reduce secondhand smoke seepage. Fizgerald said one lesson learned from the Center's project was to focus on the big leaks rather than trying to seal every leak identified. The time needed to effectively seal an apartment can vary greatly, and could require from two to eight hours of labor per unit. [14]

Although remedial treatments can reduce exposure to secondhand smoke, it is important to note that such treatments are not protection against the health hazards of environmental tobacco smoke. According to the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) in a recent position paper, "no engineering approaches including current and advanced dilution ventilation or air cleaning technologies, have demonstrated or should be relied upon to control health risks from ETS (environmental tobacco smoke) exposure in spaces where smoking occurs… Because of ASHRAE's mission to act for the benefit of the public, it encourages elimination of smoking in the indoor environment as the optimal way to minimize ETS exposure." [15]

C. Working with Condominium Management, Boards and Associations

Understanding the Management of Condominiums

If the issue of secondhand smoke exposure cannot be resolved on an individual basis with the smoker, the next step is to approach the condominium's board of directors or the condominium management company. All condominiums have a volunteer board of directors, elected by majority vote of the condominium association. The condominium association is a nonprofit corporation or unincorporated association created for the

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located at 212 3rd Avenue North, Suite 560 Minneapolis, MN 55401; Phone (612) 335-5858; Fax (612) 335-5888.

[14] Mr. Fitzgerald said to keep costs down air sealing could be limited from two to four hours. Mr. Fitzgerald is available for consulting on ETS problems in condominiums and other multi-unit housing and can be reached at the CEE offices, *supra,* note 13. In several instances, he has trained maintenance staffs on air sealing and ventilation techniques to reduce ETS transfer. In addition, weatherization companies that perform targeted air sealing of house leaks can be consulted on sealing treatments. Since they normally focus their work on exterior leaks, they need to be instructed to perform sealing of leaks between units.

[15] ASHRAE report, June 30, 2005, www.ashrae.org.

purpose of managing the condominium. Condominium owners automatically become members of the association at the time they purchase their unit. Condominiums are either self-managed, through its volunteer board of directors, or managed by a condominium management company hired by the association. In general, smaller condominiums are self managed while larger condominiums employ a professional management company.

If the condominium has a professional management company, the authority to enforce condominium policies and create new policies varies depending on the condominium's contract with its management company. Under most arrangements, management takes care of the day-to-day operations of the condominium,[16] but cannot develop new policies. The management companies can recommend policies but only the board or membership can vote to adopt policies.

Taking Action Based Upon Existing Policies

The vast majority of condominiums have no explicit policy prohibiting smoking in individual units, but action could be taken against the smoker based on the standard "nuisance clause" in most condominium agreements. As mentioned previously, the nuisance clause, found in the CC&Rs, prohibits condominium owners from interfering with another owner's peace and well being, and could apply to smoking. Acting under the authority of the nuisance clause, the condominium management company or board could place restrictions on smoking, including a prohibition on smoking in the offending smoker's unit, or could take lesser measures, such as ordering remedial repairs.

The owners have a right to appeal to the board if they disagree with the management's decision. Thus, the nonsmoker could appeal to the board if the management fails to take action and, conversely, the smoker could appeal to the board if the management takes action against the smoker.

It is important to note that it is lawful to prohibit smoking in individual condominium units. There is no constitutional right to smoke, and no state or federal laws creating the right to smoke.[17] However, in some states "grandfathering" of owners who purchased their units prior to the smoking prohibition may be necessary. The Smoke-Free Environments Law Project has concluded, based on a review of Michigan's Condominium Act and case law, that condominium owners in Michigan are not required to "grandfather" or exempt prior purchasers from a prohibition on smoking in individual units. This issue is discussed at length in the final section of this memorandum.

While intervention on a smoking issue is lawful, on a practical level, in Michigan, if the behavior of a neighbor is not against any **specific policy** then the condominium management or board generally will not get involved, according to the Michigan Chapter of the Community Associations Institute.[18] Unfortunately, this means that the nonsmoker seeking relief from secondhand smoke in a condominium unit often must look elsewhere for a solution.

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[16] *See, for example,* Community Associations Institute- Michigan Chapter, www.caimichigan.org.
[17] *See* Samantha Graff, Tobacco Control Legal Consortium, There *is No Constitutional Right to Smoke,* 2005; Kurtz v. City of N. Miami, 653 So. 2d 1025 (1995), where the court stated, "There is no state or federal constitutional right to smoke."
[18] The website for the Michigan Chapter is: www.caimichigan.org.

Changing Board Rules or CC&Rs

If the board of directors of a condominium association fails to resolve a problem of secondhand smoke (SHS) seepage, the next step is to advocate for a change in the condominium rules or a change in the condominium's CC&Rs.

Under Michigan's Condominium Act, any change in the condominium's CC & R requires at least a two thirds vote of condominium owners. The percentage necessary for passage can be higher if specified in the condominium's governing documents. [19] The percentage required for amending CC& Rs varies by state, but more than half of states have a similar two thirds requirement.[20]

While the process of changing a CC & R is cumbersome, the advantage of taking such an approach is that CC & Rs are accorded considerable weight in any legal proceedings. Courts give more weight to CC& Rs because they are recorded documents that are difficult to amend.[21] On the other hand, rules are easily amended, changing upon the majority vote of an unpaid, volunteer board of directors. The rules must not contradict the CC&Rs.

Similarly, boards are much less likely to follow through on enforcement of a policy adopted by a simple majority of the board versus a condominium CC & R. As an example, recently a management company in a Minnesota condominium notified an owner that his cigarette smoke was drifting into a neighboring unit in violation of the condominium's nuisance policy, but failed to take further action against the smoker. The nonsmoker would be in a stronger position to enforce the policy if it were in the condominium CC & Rs rather than a board rule.

Boards are wary of enforcing a more controversial rule even though most condominium contracts provide that in the event of non compliance with a rule the board has the authority to impose fines and to take legal action to enforce those fines.

D. Lobbying for a Change in Board Rules or CC&Rs

Recruiting Condominium Owners

Whether the owner decides to pursue a change in the condominium CC&Rs or in the condominium rules, it is advisable for the owner to first recruit other like-minded owners who are concerned about smoking in the condominium. Condominium owners are more

[19] MCL.190.

[20] Twenty-six states require a two thirds vote or greater to amend a CC & R. Five states have a lower minimum of 51% for a CC & R change. Thirteen states have no state mandated levels for voter approval; instead CC & Rs are amended based on the procedures specified in the governance documents of the condominium. Individuals in states other than Michigan should check their state law to determine condominium voting procedures in their state. They can access their state's condominium laws, or just the portion of their state law governing voting procedures, at the following website: www.e-condolaw.com/tables.php. There is a small fee for use of this website. Another source of information is the national Community Associations Institute, which provides services and training to condominium boards. The Institute can be reached at: (888) 224-4321 or (703) 548-8600; http://www.caionline.org.

[21] Conversation with Adrian Adams of Adams, AuCoin & Kessler, Oct. 14, 2005.

likely to respond to a request from a group rather than an individual. Groups that include children or individuals who are vulnerable to the effects of secondhand smoke due to health problems can be particularly persuasive.

Surveys of Condominium Owners

Before deciding what changes to pursue, it is helpful to take a survey of the preferences of condominium owners. The survey could ask owners their opinions about smoke-free units, smoke-free indoor common areas, and outdoor sites. Once tallied, the survey can guide decision making for advocates and can be shared with the condominium board or association. A survey of condominium owners developed by the Smokefree Apartment House Registry, www.smokefreeapartments.com, is included as an attachment to this memorandum for use as a sample survey.

A survey of condominium owners will most likely show significant demand for smoke-free units and sites. Polling indicates that the general public supports smoke-free condominiums, so it is reasonable to assume similar levels of support from condominium residents themselves. For example, according to a recent survey by the Los Angeles Department of Health, 85% of non-smokers support having designated smoke-free condominium units. Astonishingly, 60% of *smokers* supported a designated smoke-free condominium.[22]

Safety of Smoke-free Buildings

Advocates will also want to highlight the fire danger associated with smoking. According to the U.S. Fire Administration of the Federal Emergency Management Agency (FEMA), cigarettes are a leading cause of fires in buildings, and the number one cause of fires that result in death.[23] In 2002, smoking was the cause of the cause of almost half (40%) of deaths from apartment fires in the U.S.[24] In Michigan, fires resulting from smoking cost the state at least $36 million in damages in the latest year for which statistics are available.[25]

Cost Savings of Smoke-free Policies

Advocates can not only show strong support for a smoking prohibition in their complex, but can also show a cost savings for owners. The higher costs associated with smoking may be more persuasive for those condominium owners who are not convinced of the health risks of secondhand smoke. Smoking increases maintenance costs, including more frequent painting of walls and replacement of carpeting. Advocates may want to check on the insurance coverage for the complex to see if lower rates are available in the event smoking is prohibited in the complex. Some insurance companies offer discounts on fire, life, and property insurance for smoke-free premises.

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[22] Los Angeles County Department of Health Services Tobacco Control and Prevention Program, 2002-2003 survey.

[23] Federal Emergency Management, U.S. Fire Administration/National Fire Data Center, *Residential Smoking Fires and Casualties*, Topical Fire Research Series, Volume 5-Issue 5 (June 2005).

[24] National Fire Incident Reporting System, 2002.

[25] Michigan Fire Marshal, Frequently Reported Statistics Year 2003. This amount does not include the costs of fires started by matches and cigarette lighters, for which no information is available.

Finally, a smoke-free condominium is likely to have a higher resale value. One Boston realtor quoted in a Boston Globe article in 2004 commented that a condominium for sale with a strong smoke odor has less "curb appeal." She cited as an example her difficulty in selling a smoky condominium in the Back Bay area. She said that it took her five months to sell the condominium, while the average period of time for a sale in that area was a month and a half. [26] Another Boston realtor characterized tobacco residue as a "turnoff for buyers." "They are looking for something that's crisp and clean and fresh, and they are paying good money for that," he said.

The award-winning website "mismokefreeapartment.org" provides further information on the cost savings resulting from smoke-free property.

E. Smoke-free Policy Options

Before engaging in a campaign to change the condominium rules or CC & Rs, the owner and other advocates recruited for the effort need to decide what resolution to the smoking problem to pursue. Various smoking policies are listed below, in order of most comprehensive to least comprehensive. In selecting a policy to pursue, owners should be aware that in general, the more comprehensive the policy, the more opposition the policy is likely to incite. Of course, the more comprehensive the policy, the better the protection for the health of owners.

Adopt a Comprehensive Smoke-free Policy

The most comprehensive approach is a complete prohibition on smoking throughout the condominium complex. This would include a prohibition on smoking in individual units, including patios, balconies, decks, and porches and in indoor and outdoor common areas, with the exception of a designated outdoor smoking area. This approach is likely to engender the greatest opposition, but also provide the best protection for the health of owners.

Designate Individual Buildings as Smoke Free

In the case of a condominium with several buildings, one tempting option is to consider designating one building in the complex as a smoking building or alternatively to designate one building as a smoke-free building. The difficulty with this option is that any shifting within the complex would require the buying and selling of affected units. In states in which grandfathering is required, owners seeking a smoke-free building would have to wait for turnover, which could take years.

Define Drifting Secondhand Smoke as a Nuisance

Another option is to explicitly define secondhand cigarette smoke as a nuisance in the condominium rules or CC & Rs. If a resident complains of secondhand smoke exposure,

[26] Chris Berdik, *No Smoke, No Ire, More Condo Owners, Landlords Breathe Easier by Banning Smoking from Units,* BOSTON GLOBE, Oct. 17, 2004.

the association board has the authority to require the smoker to "abate" the nuisance to ensure that smoke is not entering another unit.

Under some policies, the smoker has the option of taking measures to try to reduce smoke migration, such as sealing openings in walls, ceilings, and floors. If the complaining owner is not satisfied with the abatement efforts, the owner can be required to cease smoking in his or her unit.

A leading condominium association attorney strongly recommends that condominium boards or associations adopt the "nuisance" option, stating that it has been successfully implemented by a number of condominiums in his practice.[27]

Two policies from condominiums defining secondhand smoke emitted from a unit as a nuisance are attached to this memorandum. One of the policies is accompanied by a sample warning letter that would be sent to a non-compliant smoker.

Designate Smoke-free Common Areas

It is important when considering a smoking policy for a condominium to keep in mind the outdoor portions of the complex as well as indoor common areas. These areas may include patios, balconies, courtyards, pools, playgrounds, mailboxes, and parking areas. According to a law firm that provides legal counsel to community associations in California, there is a move in many condominium associations to prohibit smoking on balconies because of problems with smoking drifting into other units.[28]

Require Fire Stopping When Remodeling

One relatively minor and non-controversial proposal is to require condominium owners to "fire stop" or seal all wall, floor and ceiling cracks whenever they remodel their units. This has the added benefit of reducing noise between the condominium units. Although most building codes require owners to fire stop during remodeling, inspectors sometimes fail to enforce this requirement. If the provision is in the association rules, enforcement against a noncompliant owner is easier.[29]

The Smokefree Apartment House Registry website has posted five model CC& R documents that cover various options for a smoke-free complex, including smoke-free common areas, outdoor areas, and new developments. These documents can be found at: www.smoke-freeapartments.org/condos.html. [30]

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[27] *Supra*, note 21.
[28] Adams AuCoin & Kessler fact sheet, available at www.Davis-Stirling.com.
[29] Adams AuCoin & Kessler fact sheet, *supra*, note 28.
[30] The Smokefree House Registry is located at: 10722 White Oak Avenue, Suite 5, Granada Hills, CA 91344. PHONE: 818/363-4220 - FAX: 818/363-2260; http://www.smokefreeapartments.org.

F. Arbitration and Mediation

A final voluntary approach to resolving a SHS seepage problem is the use of "alternative dispute" resolution, through arbitration or mediation. In arbitration, a neutral third party decides the dispute through a binding "ruling," while under mediation a neutral third party tries to settle the dispute through compromise. The mediator has no power to impose a decision on the parties participating in a mediation. Some condominiums require mediation or arbitration before a lawsuit can be filed. In addition, some state condominium laws have provisions for arbitration or mediation as a means of settling a dispute among condominium owners.[31]

Michigan's condominium law requires that condominium complexes established on or after 2002 enact bylaws that provide for binding arbitration of disputes upon the consent of the affected parties. Parties who choose binding arbitration are prohibited from appealing the decision to the courts, although parties who do not choose binding arbitration would still have access to the courts.[32]

Condominium residents who are not required to use arbitration or mediation may still decide to voluntarily choose such options as an alternative to litigation, which is often costly and lengthy process.

IV. DISABILITY CLAIMS UNDER FEDERAL AND MICHIGAN LAW

A. Federal Fair Housing Act (FHA)

Standard for Obtaining Relief under the FHA from Secondhand Smoke

Condominium owners suffering *severe* health effects from secondhand smoke may be able to obtain relief under the federal Fair Housing Act (FHA). The FHA prohibits discrimination in housing against persons with disabilities, including persons living in condominium complexes with more than four units.[33] Filing an FHA complaint is an attractive choice because it does not require an attorney. Unfortunately, only a limited number of nonsmokers exposed to secondhand smoke qualify as "disabled" under current FHA standards.

To qualify as disabled, the affected person must prove a severe and long-term hypersensitivity to cigarette smoke that substantially limits one or more major life activities. This is a fairly high standard, which could include difficulty breathing or ailments such as a cardiovascular disorder that are caused or exacerbated by exposure to secondhand smoke. Consequently, a condominium owner who is irritated by the odor of secondhand smoke, finds it distasteful or annoying or who has "mild" reactions to the

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[31] These states are: California, Florida, Hawaii, Michigan, and Wisconsin.

[32] MCLS 559.154 section 54 (8)-(11).

[33] Secondhand smoke-related illness can be considered a Multiple Chemical Sensitivity Disorder (MCS) or Environmental Illness (EI), and consequently could qualify as a disability under the Fair Housing Act. Carole Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, *Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicaps*, No. GME-0009, HUD (March 5, 1992) available on the HUD web site at www.hudclips.org.

smoke such as itchy eyes or a sore throat probably would not qualify for protection under the FHA.

Determining whether a Condominium Board Reasonably Accommodated an Owner

A condominium owner with a hypersensitivity to SHS should first try to reach a "reasonable accommodation" with the condominium board before pursuing a FHA complaint[34]. Under FHA rules, if a condominium owner is able to prove a qualifying disability, the condominium board still has the opportunity to demonstrate that it "reasonably accommodated" the owner's need for protection from secondhand smoke exposure. What constitutes a reasonable accommodation in a condominium complex would be decided on a case-by-case basis.[35]

An extensive search did not identify any published cases of a complaint by a condominium owner brought under the FHA, so it is difficult to determine what would be considered a "reasonable accommodation" in a condominium complex. However, in a case involving a rental housing complex subsidized by HUD (U.S. Department of Housing and Urban Development), the Department approved as a "reasonable accommodation" a conciliation agreement in which an existing building was made smoke free for future tenants (U.S. Department of Housing and Urban Development and Kirk and Guilford Management Corp. and Park Towers Apartments).[36]

Owners may want to seek to a remedy similar to the one applied in the Park Towers case, such as a phase-in of smoke-free units. Other options are to seek an amendment of the condominium CC&Rs or rules to define secondhand smoke as a nuisance, to seek smoke-free common areas, or any of the other policy options outlined in section II subsection E of this memorandum. In addition, the owner may seek the kind of structural remedies discussed in section II subsection B of this memorandum.

Procedure for Making an FHA Complaint

If the condominium owner decides to move forward with a complaint, he or she should contact the HUD Office of Fair Housing and Equal Opportunity. A complaint must be filed *within one year* of the owner's exposure to secondhand smoke. There are several ways to file a complaint, including calling HUD toll-free at 1-800-669-9777, filling out a HUD form, or submitting a personal letter, as long as the letter contains the full legal name of the condominium association. The owner can obtain a HUD form by downloading a form from the HUD website or completing an online form.[37]

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[34] Conversation with Jeff Brown, FHA Investigator, December 6, 2005

[35] Cliff Douglas, *The Federal Fair Housing Act and the Protection of Persons who are Disabled by Secondhand Smoke in Most Private and Public Housing,* Smoke-Free Environments Law Project Memorandum, September 2, 2002; Conversation with Jeff Brown, *supra,* note 34.

[36] HUD Case No. 05-97-0010-8, 504; Case No. 05-97-11-0005-370 (1998).

[37] www.hud.gov/complaints/housediscrim.cfm.

The complaint should include a description of the owner's smoke sensitivity, the problems occurring as a result of a neighbor's SHS and the board's response. According to Alexandria Lippincott, HUD Office of General Counsel, Fair Housing Enforcement Division, a complaint could be filed against the condominium association, the offending smoker, or both.

Further Assistance for Condominium Owners Considering an FHA Complaint

Condominium owners who are substantially affected by secondhand tobacco smoke and are considering filing a complaint under FHA may wish to review the memorandum, "*The Federal Fair Housing Act and the Protection of Persons Who are Disabled by Secondhand Smoke,"* available on the Mismoke-freeapartment.org website.[38]

B. Americans with Disabilities Act

If condominium owners qualify as "disabled" under FHA, they would be entitled to "reasonable accommodation" in the public areas of the condominium complex under the Americans with Disabilities Act (ADA).[39] Title III of the ADA protects disabled condominium owners in public accommodations. If part of the condominium complex is open to the general public and not just owners, tenants, and guests, smoking could be restricted or prohibited in those portions of the complex serving the public. This could include, for example, pool or exercise areas if memberships are sold to the general public or party rooms available for rental by the public.

What constitutes a "reasonable accommodation" in the public places of a condominium complex would be decided on a case by case basis in a similar manner to complaints against private units in the complex. In prior cases, courts have decided that a ban on smoking in a public place could constitute a "reasonable accommodation" under the ADA.[40]

To take action under the ADA, the affected condominium owner could file a complaint with the Department of Justice (DOJ) or bring a private lawsuit in U.S. District Court. In the event a complaint is filed, the case may be referred to a mediation program sponsored by the Department.

To file a complaint with the DOJ, the owner should write a letter containing the following information: his or her name, address, and telephone number, the legal name of the condominium association, and a description of the discrimination and relevant dates. The

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[38] The document can also be accessed at: ww.tcsg.org/sfelp/fha_01.pdf or is available by contacting the Smokefree Environments Law Projec**t,** 2307 Shelby Avenue, Ann Arbor, Michigan 48103; Phone 734 665-1126 • fax 734 665-2071.

[39] The FHA regulations incorporate the ADA definition of disability; therefore a person who qualifies as disabled under the FHA would automatically be considered disabled under the ADA.

[40] For example, the U.S. Circuit court in a lawsuit against McDonalds in 1995 said that under appropriate circumstances, a "reasonable accommodation" could include a ban on smoking in a public place. *Supra,* note 35.

letter should be signed and mailed to the Disability Rights section of the Civil Rights Division of DOJ.[41]

To obtain information about the ADA or obtain free ADA materials, a toll-free number is available at 1-800-514-0301. The following website provides more detailed information about how to file a Title III complaint: http://ada.gov/t3compfm.htm.

C. Michigan Law Prohibiting Discrimination in Housing

A person who suffers physical effects from secondhand smoke seepage may want to also examine state laws prohibiting discrimination in housing against the disabled. Each state has its own constitution and laws protecting the disabled. These laws in general parallel the ADA, but may vary in defining what constitutes a disability.

The Michigan Handicappers' Civil Rights Act (HCRA), which is the state equivalent of the ADA, defines a "disability" as a condition that "substantially limits" one or more of a person's "major life activities." This is nearly identical to the ADA definition. Because the HCRA does not further define the terms "substantially limits" or "major life activity," Michigan courts have looked to the ADA for guidance in interpreting those terms.[42] Thus, if a person is able to qualify as disabled under the ADA, in all probability Michigan courts would consider the person disabled under HCRA.

There is no case in which a resident of multi-unit housing in Michigan has alleged a disability under the Michigan Civil Rights Act, so it is impossible to predict exactly how such a case would fare in Michigan. However, even if a person is considered "disabled" the standard for obtaining relief in Michigan is fairly high, judging from the outcome of a HCRA claim against a hospital by a person suffering from asthma.

In Hall v. Hackley Hosp., 210 Mich. App. 48 (1995), the Michigan Court of Appeals affirmed summary judgment against an employee suffering from secondhand smoke exposure who was unable to continue working at a mental hospital due to her asthma. The employee requested that the mental hospital prohibit smoking as an accommodation under HCRA. The court held that the hospital did not have to prohibit smoking on its campus to satisfy its duty to accommodate the employee. Further, HCRA did not require the hospital to transfer the employee to another position where she would not be exposed to smoke.

If the court in Hall was unwilling to prohibit smoking within a workplace under HCRA, it is hard to believe a court would find that HCRA required a smoking prohibition in a private residence. However, on the other hand, since the case was decided in 1995, society has gained a greater understanding of the hazards of secondhand smoke and

[41] U.S. Department of Justice, 950 Pennsylvania Avenue NW, Civil Rights Division, Disability Rights – NYAVE, Washington, D.C. 20530.
[42] See Stevens v. Inland Waters, 220 Mich. App. 212, 217 (Mich. Ct. App. 1996).

support for smoke-free policies has risen. In the final analysis, whether a condominium owner can obtain relief under the Michigan Civil Rights Act is a question only the courts can answer.

V. FILING A LAWSUIT OVER SECONDHAND SMOKE SEEPAGE

A. Deciding Whether to Sue the Condominium Owner or the Condominium Association

Condominium owners can always resort to the traditional approach to dispute resolution, which is a lawsuit. Unfortunately, there are only a handful of reported cases nationally where a person suffering from secondhand smoke in a multi-unit residence has filed suit against the offending smoker, and even fewer involving condominiums. Nationally, the record is mixed, and there are no reported cases in Michigan.

Legal Advantages of a Condominium Association

If the condominium owner decides to sue, the next issue to consider is whether to sue the offending condominium owner, the condominium association, or both. It is important to note that thus far no plaintiff has prevailed against an association over a secondhand smoke issue. Associations have access to an attorney and considerable financial resources, which puts them in a superior position in any protracted legal process.

Furthermore, the standard condominium agreement requires the litigating owner to pay the fees of the association if the owner loses. If the plaintiff does decide to sue the association, he or she should expect to devote more financial resources to the effort than required for a lawsuit against the condominium owner alone.

Greater Burden of Proof in Michigan

Aside from practical considerations, a condominium owner in Michigan most likely faces an additional burden when attempting to hold a condominium association liable for the actions of a condominium owner. If the court applies landlord/tenant law, as has been done in the past,[43] the non- smoking condominium owner would have to prove that the risk of exposure to secondhand smoke was foreseeable and that it posed a reasonable risk of harm to the owner.

Thus, a condominium owner cannot hold a condominium association liable for the actions of another owner or tenant without a showing that the condominium association has in some manner "sanctioned" the behavior that gave rise to the lawsuit.

[43] See Cowan v. Lakeview Village Condo Ass'n, 2005 Mich. App. LEXIS 223 (2005).

Consequently, it is essential that a condominium owner with a secondhand smoke complaint inform condominium management of the problem. Once notified, if management fails to adequately address the problem, it can be argued that the secondhand smoke exposure was foreseeable. Liability then would hinge on whether a court considers secondhand smoke to be a reasonable or unreasonable risk. There are no Michigan cases to provide guidance, but evidence on the dangers of secondhand smoke can certainly bolster the case that secondhand smoke is not a reasonable risk for a condominium owner to assume.

B. Possible Legal Theories to Use Against Smoking Condominium Owners

There are a number of legal arguments a plaintiff could make in a case against a smoking condominium neighbor. Possible theories for a lawsuit include trespass, breach of the covenant of quiet enjoyment, nuisance, harassment, negligence, battery, and intentional infliction of emotional distress, among others. This section is limited to those legal theories that have been successful in court, while recognizing that other theories might be successfully advanced in a lawsuit.

Trespass

Under common law, which is the law inherited from England, trespass is considered to be an improper physical interference with one's person or property that causes injury to health or property. It can be argued that the secondhand smoke from the defendant condominium owner improperly interferes with plaintiff's property and health. Michigan law defines trespass broadly to include intentionally causing "a thing or *substance "*to enter (the premises) in the possession of another" without consent [44] This opens the door to the argument that secondhand smoke is a "substance" that has entered the owner's condominium unit without the owner's consent.

Covenant of Quiet Enjoyment

It may be possible to invoke landlord-tenant law to argue that the offending condominium owner has breached the "covenant of quiet enjoyment" with respect to the plaintiff. The covenant of quiet enjoyment protects a tenant from serious intrusions that impair the character or value of the tenant's premises. Condominium owners typically sign an agreement that includes a covenant of quiet enjoyment. This covenant enables a plaintiff to assert that defendant's secondhand smoke constituted a serious intrusion that impaired the value of his or her condominium unit.

A court in Michigan has explicitly stated that the relationship between condominium owner and the condominium association is analogous to the landlord/tenant relationship.

[44] Michigan Civil Jurisprudence, "Trespass" section 3, p. 352 et seq.

In the case, the court applied the principles of landlord/tenant law in deciding a case in which a condominium owner sued a condominium association. The court said that, "although the relationship in the instant case is not exactly one of lessor-lessee or landlord-tenant, the analogy is close enough that the legal principles should apply." [45] The willingness of a Michigan court to apply landlord/tenant law in the context of condominiums provides a basis in which to argue breach of a condominium covenant.

Generally, the covenant of quiet enjoyment extends from the *landlord* (or condominium association) to the plaintiff. However, at least one court has held the offending condominium owner for breaching the covenant of quiet enjoyment with his neighbor due to his smoking.[46]

Nuisance

Nuisance law could also be applied to the issue of secondhand smoke infiltration. In Utah, nuisance is defined by statute, and includes secondhand smoke that drifts into a condominium more than once in each of two or more consecutive seven-day periods.[47] In all other states, the issue of whether secondhand smoke constitutes a nuisance is decided under common law, which classifies as a nuisance anything that substantially interferes with the enjoyment of life or property.

To successfully demonstrate a particular action is a nuisance in Michigan, a plaintiff must show "*significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property." [48] What constitutes "significant harm" and "unreasonable interference" is decided on a case-by-case basis. A number of courts, including courts in Michigan, have found an odor actionable. According to Michigan Civil Jurisprudence, "when stenches contaminate the atmosphere to such an extent as to substantially impair comfort or enjoyment of adjacent premises, an actionable nuisance may exist."[49]

In addition to case law on nuisance, the condominium agreement typically contains a standard "nuisance clause" in the CC&Rs. This nuisance clause prohibits condominium owners from interfering with another owner's peace and well being, and could apply to secondhand smoke. The condominium's nuisance clause may give an owner the standing to sue not only the offending smoker, but also the condominium association, which has a duty to enforce the condominium agreement.

Harassment

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[45] *Supra,* note 43.
[46] Merrill v. Bosser, (County Court of the 17th Judicial Circuit, Broward County, FL 2005). This case will be discussed at length in the subsequent section of this memorandum.
[47] UTAH CODE section 78-38-1(3).
[48] Adams v Cleveland-Cliffs Iron Co, 237 Mich. App. 51, 67; 602 N.W.2d 215 (1999).
[49] Smoke-Free Environments Law Project, *Secondhand Smoke in Apartment Buildings and Condominiums*, citing Michigan Civil Jurisprudence, "Landlord and Tenant," pp. 74-78.

Finally, an owner could claim that secondhand smoke in his or her unit constitutes "harassment." Harassment consists of words, gestures or actions that annoy or alarm another person. A court could find that the defendant condominium owner's conduct constituted "harassment" because the owner's secondhand smoke was a substantial annoyance to the plaintiff.

No court in Michigan has ruled on the issue of whether intentionally exposing another to tobacco smoke constitutes harassment, nor has "harassment" been alleged in analogous cases involving noxious noise or fumes. However, as discussed in the next section of this memorandum, the harassment allegation was successful in California, so it is worth making the case that SHS seepage constitutes harassment in Michigan.

C. Successful Lawsuits Against Condominium Owners

Harwood Capital Corp. v. Carey (Boston Housing Court)

A recent exciting development was a jury verdict in 2005 against two tenants renting a condominium unit who smoked throughout the day in their unit. In Harwood Capital Corp. v. Carey[50] the owner of the condominium in Boston sought to evict the tenants after receiving complaints from the owners of adjoining units about the strong smell of smoke emanating from their unit. The jury decided that the tenants had breached the lease under a standard lease provision prohibiting tenants from creating a nuisance. This provision also prohibited tenants from engaging in an activity that substantially interfered in the rights of other tenants. The tenants worked out of their unit and together smoked 40 to 60 cigarettes a day.

Merrill v. Bosser (Broward County Court, Florida)

Also in 2005, a Florida judge in Merrill v. Bosser[51] awarded damages to a non-smoking condominium owner against a smoker who lived one floor above her. The non-smoking condominium owner did not have a problem with secondhand smoke seepage until the defendant rented his unit to a tenant who smoked heavily. After the plaintiff made numerous complaints and threatened a lawsuit, the condominium manager removed the tenant on a "technicality" for failure to register with the association.

The plaintiff's problem with smoke ended when the tenant moved, but the plaintiff sued the condominium owner for her exposure during the time the tenant lived in the condominium unit. The court awarded the plaintiff $1,000 in damages and $275 in costs, holding that the plaintiff was subjected to an excessive amount of smoke. The court held that the defendant's actions constituted a trespass upon the plaintiff, breached the covenant of quiet enjoyment, and that the defendant had committed a nuisance.

[50] Harwood Capital Corp. v. Carey, (Boston Housing Court Docket No. 05-SP-00187, 2005).
[51] *Supra*, note 46.

The court noted that a trespass need not be inflicted directly on property, but may be committed by "discharging a foreign polluting matter" beyond the boundary of defendant's property. In Florida, the focus of the tort of trespass is "disturbance of possession." The Merrill court held that secondhand smoke that is "customarily part of everyday life" is not a disturbance of possession and therefore not actionable in trespass. However, in the case before the court, the smoke was so excessive as to constitute a "disturbance of possession."

The condominium agreement in Merrill contained a covenant of quiet enjoyment, which the court analyzed using landlord-tenant law. According to the court, "similar to landlord-tenant situations, the covenant of quiet enjoyment is breached when a party obstructs, interferes with, or takes away from another party in a substantial degree the beneficial use of the property." [52] The covenant was breached in the Merrill case, according to the court, because secondhand smoke set off the smoke detector in one instance and in several cases forced the plaintiff's family to leave their condominium in order to sleep in a different location.

Finally, the secondhand smoke in Merrill was also classified as a "nuisance." The court noted that Florida courts have upheld a claim of nuisance based on odors created by another party, and likened the secondhand smoke to an odor. The court cautioned however that the facts of the case amounted to an "interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct." [53] The plaintiff and her family had recurring illnesses due to the smoke and on several occasions were forced out of their condominium.

Advocates in Michigan could cite the Harwood case in addition to Merrill on the issue of whether secondhand smoke emanating from a condominium unit constitutes a nuisance. On the other hand, in a 1991 Massachusetts case, a court ruled that the "annoyance" of smoke from three to six cigarettes a day was not a nuisance.[54] The plaintiff was an apartment tenant and not a condominium owner, but the distinction is unlikely to matter to a court.

Layon v. Jolley (Los Angeles County Superior Court)

A non-smoking condominium owner was able to prevail in a case in California under the theory of harassment. In 1996, condominium owners successfully enjoined a smoker from smoking in a shared garage under the owners' condominium. The plaintiffs alleged that the defendant was harassing them by smoking marijuana, cigarettes, and cigars in the garage, forcing them to leave their condominium "for hours at a time." The Superior

[52] In reaching this conclusion, the court cited: Carner v. Shapiro, 106 So. 2d 87 (Fla. 2d DCA 1958); 49 Am Jur 2d, Landlord and Tenant section 606.
[53] Merrill v. Bosser, *supra*, note 46.
[54] Lipsman v. McPherson, 6.2 TPLR 2.345, 19 M.L.W. 1605 No. 90-1918, (Middlesex, MA, Superior Court 1991).

Court of California issued a restraining order, requiring the defendant to refrain from smoking in the garage.[55]

D. Unsuccessful Lawsuits Against the Condominium Owner

Along with the recent victories for non-smoking condominium owners are losses. In 2004 a jury in Ohio decided against a non-smoking condominium owner who was exposed to smoke from the condominium owner next door. Several times a day, the defendant smoked on a front porch shared with the plaintiff's condominium unit. The plaintiff repeatedly asked the defendant to move about 30 feet to smoke, but the defendant refused. After the condominium association refused to take action, the plaintiff filed a lawsuit seeking damages and an order barring the defendant from smoking on the porch. Luckily for the plaintiff, the defendant moved to another residence after the lawsuit was filed, so secondhand smoke was no longer a problem by the time of the jury verdict. [56]

In 2000, a jury in Pasadena, California found against a nonsmoking condominium owner exposed to SHS from an elderly neighbor who lived below her. As part of the lawsuit, the condominium owner hired an air quality engineer who traced the smoke from the neighbor through the ventilation system. The neighbor smoked about a pack of cigarettes a day. According to the plaintiff's lawyer, jurors expressed the view in post-trial interviews that people should be able to smoke in their own homes.[57]

The above two cases are the only known cases in which a court has rendered judgment against a condominium owner, but likely there are other cases that have gone unrecorded.

E. Lawsuits Against the Condominium Association

The condominium cases discussed above concern the liability of the offending condominium owner. However, additional claims could be made under common law against the condominium association as a corporate entity. These claims include: breach of the warranty of habitability and the covenant of quiet enjoyment.

Warranty of Habitability

In all states, even if landlords are not at fault for a problem, they are responsible for ensuring that residential rental properties are fit for habitation. The landlord in effect makes a "warranty of habitability" to the tenant for the life of the lease.[58] In Michigan, a plaintiff could make the argument that this same warranty of habitability protects

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[55] Layon et al. v. Jolley, et al., Case No. NS004483, Superior Ct. of Calif., Los Angeles County, (1996).
[56] Zangrando v. Kuder (County Court of Common Pleas, Summit County, OH 2004)
[57] This case was brought to the author's attention by Esther Schiller, director of Smokefree Air for Everyone (S.A.F.E.). Esther believes that the abrasive personality of the plaintiff may have been a factor in the jury decision. Court records of the case have not been located.
[58] Boston Housing Authority v. Hemingway, 293 N. E. 2d 831-43 (1973).

condominium owners as well as tenants.[59] Plaintiffs in states other than Michigan should consult case law in their states to see if landlord/tenant principles have been applied in a lawsuit by an owner against a condominium association, and if not, should be prepared to make the case that these principles should apply.

In any event, a condominium owner in Michigan can argue that the presence of secondhand smoke renders his or her residence unfit for habitation and constitutes a breach of the lease. The more the plaintiff is affected by secondhand smoke, the stronger the argument that secondhand smoke is a breach of the warranty of habitability.[60] In an Oregon case, a tenant who suffered swollen membranes and respiratory problems as a result of secondhand smoke from the unit beneath her apartment successfully sued her landlord for breaching his duty to make her apartment habitable. Her rent was reduced by 50% and she was awarded funding for her medical bills. [61]

More recently, the Ohio Court of Appeals upheld a jury verdict granting a damage award and 50% rent abatement to a tenant based on a finding that secondhand smoke from an adjoining apartment was infiltrating his apartment. The jury found that the landlord failed to keep the non-smoker's apartment in habitable condition even though the landlord said he had made numerous efforts to seal the non-smoker's apartment.[62]

Covenant of Quiet Enjoyment

As discussed previously, the covenant of quiet enjoyment protects a tenant from serious intrusions that impair the character or value of the leased premises and arguably may be extended to include condominium owners. Condominium owners seeking to use this legal theory may want to cite a 1998 secondhand smoke case in which the Boston Housing court held that a landlord breached both the covenants of habitability and quiet enjoyment. In 50-58 Gainsborough St. Realty Trust v. Haile et al.[63], the plaintiff, whose apartment was situated above a bar, had withheld rent for three months because of the drifting secondhand smoke in her apartment. The judge ruled that the amount of smoke from the bar made the apartment "unfit for smokers and nonsmokers alike."

An Ohio court has also held that the covenant of quiet enjoyment can protect a tenant from secondhand smoke. The Cuyahoga County Court of Appeals in Dworkin v. Paley[64] reversed the dismissal of a secondhand smoke case on the grounds that there was an issue of material fact over the amount of secondhand smoke entering the plaintiff's duplex. The plaintiff in the case had moved out of a duplex after complaining to his landlord that her smoking was annoying him and causing him physical discomfort. While the court

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[59] As noted earlier in this memorandum, a Michigan court recently applied landlord/tenant principles in deciding a case brought by a condominium owner against the condominium association. *Supra,* note 43.
[60] Kline, Robert, "*Smoke knows no boundaries: legal strategies for environmental tobacco smoke incursions into the home within multi-unit residential dwelling*," Tobacco Control Journal 2000; 9:201-205, 204
[61] Fox Point Apt. v. Kipples, No. 92-6924 (Or. Distr. Ct. Lackamas County 1992).
[62] Heck v. Whitehurst, 2004 Ohio 4366 (Ohio Ct. App. 2004).
[63] 12 TPLR 2.302, No. 98-02279 (1998).
[64] 638 N.E. 2d 636 (Ohio Ct. App. 1994).

did not rule that a breach of quiet enjoyment had occurred, the tenant was given the opportunity to demonstrate at trial that the amount of secondhand smoke was sufficient to qualify as a breach.

Hope for Future Lawsuits

At this time there is no surefire legal solution for the problem of secondhand smoke seepage. Only recently, spurred by heightened awareness of the hazards of secondhand smoke, have affected persons made attempts to address the problem legally. Although current cases are not always in favor of nonsmokers, the trend is on their side, as society gains a better understanding of secondhand smoke, and the hazards it poses in the home. A Superior Court in California, in a 2004 case allowing a nonsmoker living in a condominium to move forward with a personal injury claim of negligence against a neighboring cigar smoker, noted that the law is evolving. The court cited the following from an earlier California case:

> *The dangers of "secondhand smoke" are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court… Whether or not recovery has previously been allowed in tort for "secondhand smoke" injuries is not dispositive. "The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society…."* Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443.[65]

VI. CHANGING TO SMOKE FREE: DO CONDOMINIUM ASSOCIATIONS IN MICHIGAN AND ELSEWHERE HAVE TO "GRANDFATHER" EXISTING SMOKERS?

A. Judicial Standards for Evaluating Condominium Amendments

When a condominium implements a smoke-free policy, the potential for conflict isn't over. Smokers who purchased their condominium unit before the change are likely to argue that the smoking prohibition does not apply to them, but instead only applies to those who purchased after the new policy goes into effect. It should be noted that at this time there are no cases directly on the issue of a smoke-free amendment, but as conflicts over smoking in condominiums continue to escalate, a lawsuit becomes more likely.

Some court cases support the argument that an association does not have unlimited authority to regulate condominium owners, particularly when the owner did not have notice of the restriction at the time of purchase of the unit. See, for example, Ridgely

[65] Babbitt v. Superior Court of the County of Riverside; 2004 Cal. App. Unpub. Lexis 4679.

Condo Ass'n v. Smyrnioudis, 681 A.2d 494 (Md. 1996). Courts in some states, such as New York, presume the validity of a condominium amendment or bylaw in the absence of fraud or bad faith. However, the majority of courts apply the somewhat higher standard of "reasonableness." The condominium association must demonstrate that it acted reasonably in enacting the amendment or bylaw at issue.[66]

It is unclear what standard a Michigan court would apply in evaluating a condominium amendment or bylaw since such a case has not arisen in Michigan. In one case involving a CC& R change, Crawford v. Holiday Condominium, 2001 Mich. App. LEXIS 2248 (2001), an amendment was challenged as invalid, but only on the grounds that certain procedural requirements of the Michigan Condominium Act, MCL 559.101 et seq. had not been followed. The court in Crawford made a factual determination that the requirements had been met, and upheld the amendment.

B. Michigan Holdings Limiting the Property Rights of Condominium Owners

Regardless of what standard of review is applied, there are ample grounds to argue that Michigan courts would uphold a condominium amendment prohibiting smoking in individual units throughout the complex, although there are no cases directly on point. First, the Michigan Court of Appeals has made it made it quite plain that while a condominium owner has some property rights, they are of a much more limited nature than that of a private property owner.

In Meadow Bridge Condominium v. Humbert Bosca, 466 N.W. 2d 303 (1990), the Michigan Court of Appeals said it was "well settled" in Michigan that the "individual interest must often yield to the interest of the condominium community." The court then quoted the following from a Florida case:

> *Inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property that may exist outside of the condominium organization.* Hidden Harbour Estates v. Norman, 309 So. 2d 180 (Fla. App. 1975).

The Michigan Court of Appeals in Cohan v. Riverside Park Place Condominium, 365 N.W. 2d 201 (1985) stated that the Michigan Condominium Act "makes it clear" that the owner of a condominium unit does not have an exclusive interest in the condominium property. The court noted that throughout the act, the titleholder of a condominium unit is referred to as a "co-owner." MSA 26.50 (106) defines a co-owner as a person who owns a condominium unit within the condominium project. Under Michigan's statute, a

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[66] Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. Rev. 1, 11 (1995).

co-owner has property rights, but they are shared with other members of the condominium project.

The more limited nature of a condominium owner's rights in Michigan gives judicial latitude to uphold a smoking prohibition, even if it infringes on the rights of owners who bought into the association before the adoption of the prohibition.

C. Rulings in Other Jurisdictions

In deciding whether to uphold a condominium smoking prohibition, a Michigan court is likely to look at courts in other jurisdictions for guidance, even though such cases are not controlling. A majority of courts in the country have concluded that a condominium amendment that restricts the occupancy or leasing of units is binding on all owners, including those who bought prior to the passage of the amendment. [67]

In a similar vein, the California Supreme Court in June 2004 ruled that an amendment to prohibit pets applied retroactively to a condominium owner with a dog.[68] The Florida Court of Appeals in 2003 ruled that an amendment prohibiting the holding of religious services in a condominium auditorium was valid, although it applied to condominium owners who were using the auditorium for worship before the amendment passed.[69]

D. A Smoke-Free Prohibition Applied Equally within the Complex Addresses Important Concerns

Other reasons why a Michigan court would almost certainly approve a complex-wide smoke-free amendment are ease of enforcement, health benefits, and the practical benefits of a reduction in fire hazard and maintenance.

Courts are likely to enforce restrictions equally within a condominium, rather than creating enclaves with greater "rights" than others. Creating separate regulatory "regimes" can create resentment as well as confusion. New owners would want to know why they needed to comply with the smoke-free policy when existing owners were permitted to smoke. Since some smoking would be permissible, it would be difficult to prove that a new owner was smoking in violation of the prohibition.

In addition, it is sensible to apply smoke-free amendments to all owners because of the length of time it would take for a building to become smoke free if each smoker had to move or die. Waiting for such a prolonged period defeats the purpose of a smoke-free policy, as individual units are not smoke free until the entire building is smoke free. Applying a smoking prohibition throughout the complex is a reasonable response to the health concerns of residents who suffer from exposure to secondhand smoke. A court is

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[67] The District of Columbia Court of Appeals and the Florida Supreme Court both reached this conclusion after surveying cases nationally. *See* Burgess v. Pelkey, 738 A2d 783 (D.C. 1999); Woodside Village v. Jahren, 806 So. 2d 452 (Fla. 2002).

[68] Villa de Las Palmas Homeowners Assn v. Terifaj, 33 Cal.4th 73 (June 2004).

[69] Neuman v. Grandview at Emerald Hills, 861 So. 2d 494 (Dec. 2003).

likely to agree that condominium owners should not have to wait for every smoking owner to leave or die in order to get relief from their symptoms.

Finally, condominium owners could easily show that applying a smoking prohibition to every unit would increase fire safety, reduce building maintenance costs, and would likely increase the resale value of individual units.

As mentioned earlier, it is uncertain what kind of standard a Michigan court would use in evaluating a complex-wide amendment prohibiting smoking. However, even if the stricter "reasonableness" standard of review is applied, such an amendment should easily be approved.

VII. CONCLUSION

Condominiums are the fastest growing segment of the housing market today. With the aging of America, this trend is likely to continue, if not accelerate. As the number of condominium owners rises and more evidence on hazards of secondhand smoke emerges, local and state governments will be increasingly pressured to enact laws that protect owners from secondhand smoke. In the meantime, those condominium owners act today to protect their living space from secondhand smoke, whether by voluntary agreements or lawsuits, are pioneers who deserve public sympathy and support.