

**A LEGAL MEMORANDUM FOR
ADOPTION OF SMOKE-FREE POLICIES
IN MULTI-UNIT HOUSING**

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For

**New York State Smoke-Free Housing Initiative
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**This memorandum is provided for educational purposes only and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney licensed to practice in your jurisdiction. Please consult your own attorney for advice in adopting a smoke-free policy in your own multi-unit housing community.*

I. INTRODUCTION

Over the past several years, New Yorkers have become more aware of the harmful effects of smoking and the health hazards caused by environmental tobacco smoke (ETS), more commonly referred to as secondhand smoke¹. With recent legislation banning smoking in certain public areas² and increased knowledge about the lethal effects smoke-drift can cause to non-smokers,³ current trends have established that “smoke-free” is no longer the exception in New York State, but rather, it is the norm. In a survey across 17 counties in New York, 82% of adults said that smoking is not allowed anywhere inside the home and just 17% of adults currently smoke.⁴

For landlords of multi-unit housing, these changes are particularly noteworthy. Amid increasing health concerns about secondhand smoke and a declining number of smokers, the demand for smoke-free housing is on the rise.⁵ A recent survey of renters in NYC indicates that 66% of renters prefer to rent in a completely smoke-free community; given everything else being equal 58% would even pay more to live in a smoke-free building.⁶ Aside from attracting tenants, owning a smoke-free building reduces fire risk and can decrease maintenance costs by six-fold.⁷ While many landlords have taken advantage of this trend by implementing smoke-free policies in their multi-unit dwellings, others have hesitated due to apprehensions about their legal right to do so. This memorandum’s purpose is to provide assurance that private landlords, public housing authorities and other affordable housing owners in New York State have the legal right and authority to adopt a smoke-free policy in their multi-unit residences.

¹ U.S. Department of Housing and Urban Development, Office of Public and Indian Housing Office of Healthy Homes and Lead Hazard Control, “Notice: PIH-2009-21(HA)”, (July 17, 2009), *available at* <http://www.hud.gov/offices/pih/publications/notices/09/pih2009-21.pdf>, (last visited Aug. 4, 2009).

² N.Y. Clean Indoor Air Act (*codified at Pub. Health Law Art., 13-E*); American Lung Association, “*State SmokeFree Air Laws*”, <http://slati.lungusa.org/reports/SecondhandSmokeLawsFactSheet6-09.pdf> (last visited Aug. 4, 2009).

³ American Lung Association, “*State SmokeFree Air Laws*”, <http://slati.lungusa.org/reports/SecondhandSmokeLawsFactSheet6-09.pdf>, (last visited July 30, 2009); U.S. Dept. of Health and Human Services, Office of the Surgeon General, “*The Health Consequences of Involuntary Exposure to Tobacco Smoke: Secondhand Smoke Exposure in the Workplace*”, (Jan. 4, 2007), <http://www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet5.html>, (last visited July 31, 2009); World Health Organization, “*Smoke-Free Inside*”, http://www.who.int/tobacco/resources/publications/wntd/2007/Smokefree%20inside%2012pages_FINAL.pdf (last visited July 31, 2009).

⁴ Tobacco-Free Coalitions Study: “Opinions on Smoking Issues” Conducted May 3-5, 2009, Siena College Research Institute.

⁵ Centers for Disease Control and Prevention (CDC), Behavioral Risk Factor Surveillance System Survey Data (BRFSS), “*Prevalence and Trends Data: Tobacco Use – 2008*”, *available at* <http://apps.nccd.cdc.gov/brfss/list.asp?cat=TU&yr=2008&qkey=4396&state=All> (last visited July 26, 2009).

⁶ 2009 Annual NYC Tobacco Control Attitudes and Actions Poll. Conducted July 22-29, 2009 by Zogby International Survey

⁷ Survey of housing authorities and subsidized housing facilities in New England collected by Smoke-Free Housing New England, 2009.

II. EXISTING LAWS ALLOW FOR SMOKE-FREE POLICY

No federal, state, or local laws prohibit a landlord, housing authority or condominium association from adopting a no-smoking policy for an entire property, including all apartment units and outdoor spaces.⁸ State and federal courts have settled that there is no constitutional “right to smoke” and that smokers are not a specially protected class of persons.⁹ Although purchase and consumption of tobacco is a legal adult activity, the act of smoking is prohibited in many locations. This is widely apparent as New Yorkers have been restricted from smoking in all workplaces, including restaurants and bars since 2003.¹⁰ Currently state and local laws in New York State do not prohibit a person from smoking in private residences. For rental properties, the authority to determine smoking policies rests with private and public apartment owners who are free to set restrictions within their property leases, including making individual units, common areas, entire buildings and/or grounds smoke-free.

Landlords who continue to allow smoking on their property face potential lawsuits from residents exposed to secondhand smoke. State courts have ruled against apartment owners under various legal theories, such as, breach of warranty of habitability, private nuisance, breach of covenant of quiet enjoyment and constructive eviction. This memorandum discusses several recent cases in detail. Apartment owners and landlords should give serious consideration to the effects that these rulings may have on them legally and financially as the smoke-free trend grows. In essence, it is not only legal to implement a smoke-free policy, but doing so may actually protect landlords from a number of lawsuits.

III. POTENTIAL LAWSUITS RESULTING FROM FAILURE TO ADOPT A SMOKE-FREE POLICY

A. In New York State, Possible Actions Brought Against Landlords Include Breach of Warranty of Habitability, Breach of the Covenant of Quiet Enjoyment, Nuisance and Constructive Eviction.

In the recent decision of *Poyck v. Brant*¹¹, a New York Court ruled that there were triable issues of fact where tenants had vacated their unit due to secondhand smoke emanating from a neighboring unit and seeping into theirs. When the landlord brought an action against the tenants to recover for unpaid rent, the tenants claimed the landlord had

⁸ Schoenmarklin, Susan, *Analysis of the authority of Housing Authorities and Section 8 multiunit housing owners to adopt smoke-free policies in their residential units*. (Ann Arbor, MI: Smoke-Free Environments Law Project, May, 2005).

⁹ There is No Constitutional Right to Smoke: 2008 by Samantha Graff; *Kurtz v. City of North Miami*, 653 So.2d 1025; *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (1990)

¹⁰ New York State Clean Indoor Air Act

http://www.health.state.ny.us/nysdoh/clean_indoor_air_act/general.htm (last visited December 7, 2009)

¹¹ *Poyck v. Bryant*, 13 Misc. 3d 699 at 705 (New York City Civ. Ct. 2006).

breached the implied warranty of habitability, codified as New York Real Property Law §235-b. Under RPL §235-b, a landlord promises and warrants in every written or oral lease or rental agreement for a residential premises, that the premises and all common areas are fit for human habitation and fit for the use intended by the parties.¹² Under this same law, every landlord also promises and warrants that the occupants of the premises will not be subjected to any conditions which are dangerous, hazardous or detrimental to life, health or safety.¹³ These rights belong to a tenant and cannot be waived.¹⁴ To make it even easier for a tenant to recover under RPL §235-b, a tenant does not need expert testimony to establish the tenant's damages.¹⁵ A landlord who has breached this warranty may be found to have constructively evicted his tenants if he allows, creates or fails to prevent conditions which have forced tenants to vacate or abandon their premises.¹⁶

The issue of whether secondhand smoke-drift gives rise to a tenant defense and cause of action under RPL §235-b in *Poyck v. Bryant* was a case of first impression, which was brought before the Court in 2006.¹⁷ The Court was charged with the duty of analyzing whether the scope and protection of §235-b was broad enough to include secondhand smoke and whether secondhand smoke endangered and caused a detriment to a tenant's life, health or safety. The Court decided that it had been clearly established by the Surgeon General, the New York State Legislature and the City Council of New York City, that "secondhand smoke qualifies as a condition that invokes the protections of Real Property Law §235-b under the proper circumstances."¹⁸ In determining whether there was a breach of the implied warranty of habitability by the landlord and whether a cause of action and defense of constructive eviction existed for the defendant tenants, the Court looked to the specific facts of the case.¹⁹

In this case, the non-smoking tenants, the Bryants, lived adjacent to smoking tenants who smoked inside their unit and outside in the hallway.²⁰ The Bryants had complained to the superintendent and wrote a letter to both the landlord and the superintendent about the smoke; although the landlord (Poyck) spoke to the smoking tenants, the tenants still continued to smoke. Despite knowledge of the tenants' continued smoking and of Mrs. Bryant's sensitive medical condition, Poyck did nothing to prevent the tenants from smoking in their apartment resulting in the Bryants vacating their unit. When Poyck attempted to collect for unpaid rent, the Bryants counterclaimed that they were constructively evicted from the residence. Poyck argued that he should not be held liable for the acts of third parties, that is, for the acts of the smoking tenants. The Court rejected this argument and stated that it had been clearly established that a landlord can be held liable for the acts of third parties under RPL §235-b, even if the acts of the third

¹² N.Y. Real Property Law §235-b(1) (1975).

¹³ *Id.*

¹⁴ Real Property Law §235-b(2)

¹⁵ Real Property Law §235-b(3)

¹⁶ *See Bryant*, 13 Misc. 3d 699 at 705. RPL §235-b does not apply as between a condominium's board of managers and an individual unit owner, but a cause of action can be brought against the landlord. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 701-702.

¹⁹ *Id.* at 702.

²⁰ *Id.*

parties are beyond the landlord's control.²¹ The Court stated that Poyck should have taken action to eliminate the hazardous condition which might have included asking the board of managers to prevent the smoking tenants from smoking in the common areas, properly ventilating the smoking tenants' unit to prevent smoke from entering any other apartments or commencing an action against the smoking tenants to enjoin them from smoking "to prevent unreasonable interference with the use of respective units and of the common elements by several unit owners."²²

Although *Poyck v. Bryant* involved the novel issue of secondhand smoke, the Court compared it to other conditions stating that "secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, excessive noise, water leaks and extreme dust penetration."²³ There are several cases involving a landlord's liability for breach of the implied warranty of habitability and constructive eviction in similar circumstances. These cases, paired with the known dangers of secondhand smoke, place landlords in a particularly vulnerable position.

For example, the New York Court of Appeals in *Park West Management Corp. v. Mitchell*²⁴ found that the landlord of an apartment complex had breached the implied warranty of habitability when he allowed for uncollected garbage to pile on the premises as the accumulated garbage exuded noxious odors and created unsanitary conditions that were dangerous to the health of his tenants.²⁵ The Court held that where adverse conditions materially affect the health and safety of the occupants, a breach of the warranty habitability has occurred for which the landlord is liable. Similarly, the Civil Court of the City of New York in *U.S. Bronsville II, HDFC v. Millicent Nelson*²⁶ held that a tenant was justified in not paying her rent because she was constructively evicted when the landlord did not take action in response to the tenant's complaints regarding roaches, the smell of marijuana in the hallway, and safety concerns. The Court held that a constructive eviction occurs when a landlord breaches his warranty of habitability and allows for or fails to prevent conditions that are "dangerous to the tenant's life, health or safety, rendering unit uninhabitable".²⁷

In *Forest Hills No. 1 Co. v. Richard Schimmel*²⁸, the Court held that the warranty of habitability may even apply to outdoor areas. This was also a case of first impression wherein the issue before the Court was whether there can be a breach of the warranty of habitability when conditions detrimental to a tenants' life, health or safety exist or which frustrate the uses for which tenants reasonably intended to make of their premises. In this case, the landlord of a garden complex had warranted that the common environmental

²¹ *Id.* at 705.

²² *Id.* at 705-706. (This case never did make it to trial, it is presumed that either the landlord dropped his suit against the Bryants or the parties thereafter reached a settlement agreement).

²³ *Id.* at 701

²⁴ See *Park West Management Corp. v. Mitchell et al.*, 47 N.Y. 2d 316 at 326 (N.Y. Ct. of App. 1979).

²⁵ See *Id.*

²⁶ See *U.S. Bronsville II, HDFC v. Nelson*, 3 Misc. 3d 1107A (N.Y. City Civ. Ct. 2004).

²⁷ See *Id.*

²⁸ *Forest Hills No. 1 Co. v. Schimmel*, 110 Misc. 2d 429, 432-433 (N.Y. City Civ. Ct. 1981).

areas would be fit for the tenant's use, would be habitable and would not be subject to dangerous or hazardous conditions or conditions detrimental to the life health or safety of the tenant. When construction created noise and debris outside the apartments and much of the garden and shrubbery had been destroyed, the Court found that the facts of the case supported the tenants' claims for damages because the construction work had seriously and negatively impacted the tenants' habitability and frustrated the uses for which the tenant reasonably intended to make of the premises when they agreed to lease their apartments.²⁹

A private nuisance cause of action could also be brought by a tenant against their landlord or another tenant for secondhand smoke conditions.³⁰ A private nuisance is a harm, injury, inconvenience or annoyance which threatens one or relatively few persons. For example, in *Duntley v. Barr*³¹, the Court found a tenant smoker liable to an adjoining non-smoking tenant for interfering with the non-smoking tenant's use and enjoyment of his own premises. While the Court stated that private nuisance is actionable by "the person or persons whose rights have been disturbed" it did not limit the persons that a tenant could bring the action against. In 1998, a tenant law firm sued a landlord and neighboring tenant in New York State Supreme Court alleging nuisance, breach of the warranty of habitability, constructive eviction, trespass and negligence when secondhand smoke entered the firm causing ill effects on employees.³² However, the law firm dropped their suit when both the landlord and smoking tenant agreed to remedy the secondhand smoke issue.

Given that landlords can be held responsible for the conditions created by their tenants, including smoke or other foul and noxious odor conditions, it logically follows that a landlord would have the right and legal authority to take action against those tenants. In 2007, the New York Appellate Division made it clear in *Zipper v. Haroldon Court Condominium*, that landlords do in fact have that right³³. Here, the Court found that the defendant, Haroldon Court Condominium had grounds to evict a tenant where the tenant had foul odors emanating from her apartment, which constituted a nuisance.³⁴ The Court stated "[t]hat the stench may have dissipated somewhat once the apartment door was closed is of little consequence; bad odors, while much worse at the source, generally continue to permeate, even if in a somewhat less extreme form, the vicinity around their source, remaining noticeable in varying degrees to those in the vicinity."³⁵ The Court went on to conclude "[w]e find that the credible testimony clearly establishes the claimed ongoing, recurring presence of an unacceptable level of odor constituting a nuisance and

²⁹ *Id.* at 432-433.

³⁰ See National Multi-Unit Housing Council, Property/Risk Management Forum, "Smoke-Free Multi-Unit Housing: Is it right for you?", (October 29, 2007), available at http://www.law.umaryland.edu/programs/tobacco/documents/Smoke-Free_Multi-Unit_Housing.pps; See also *Gorman v. Sabo*, 210 Md. 155 (1956).

³¹ See 10 Misc. 3d 206 (N.Y. City Ct. 2005).

³² See Sweda, Jr., Edward L., "Legal Cases on Second Hand Smoke for Property Management", available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; See also *Weil, Gotshal & Manges LLP v. Longstreet Associates, L.P. et. al.*, 13.4 TPLR 3.188.

³³ *Zipper v. Haroldon Court Condominium*, 39 A.D.3d 325 (N.Y. Sup. Ct. 2007).

³⁴ *Id.*

³⁵ *Id.* at 325-326.

warranting eviction.”³⁶ Similarly, in *Lathers v. Foster Coates*, the Court found that a tenant was justified in abandoning his apartment and ceasing to pay rent where there were foul and offensive smells in the tenant’s apartment and in the hallways and also defects in the soil and waste pipes.³⁷ Here the Court stated that “It is not alone the fact that it is a disagreeable odor offensive to the smell, but that it signifies a menace to life or health, and this the testimony shows, that justifies the tenant in abandoning the premises...To suffer some inconvenience is one thing; to endanger life or health is another.”³⁸

B. Actions Brought By Tenants in States outside the State of New York

Tenants in several other states have also sued their landlords because of the harmful effects caused by secondhand smoke. In Massachusetts, a tenant sued her landlord under various legal theories including breach of warranty of habitability, nuisance, breach of the covenant of quiet enjoyment, negligence, battery and intentional infliction of emotional distress.³⁹ That case settled the following year. In Illinois, a tenant sued her landlord when secondhand smoke aggravated her respiratory condition which resulted in enforcement of a smoke-free housing policy.⁴⁰ In Ohio, a tenant sued his landlord under the theory of warranty of habitability claiming that he had not taken the proper actions to ensure his apartment was fit and habitable. The trial court ordered the landlord to take action and on appeal, the landlord lost.⁴¹

Also in Ohio, the Court of Appeals, in denying a motion to dismiss, held that there were general issues of material fact that would need to be reviewed in further court proceedings concerning a landlord’s liability to a non-smoking tenant where a smoking tenant’s noxious odors from secondhand smoke entered the non-smoker’s unit. The tenant in that case sued his landlord under the theory of breach of the covenant of quiet enjoyment.⁴² In Massachusetts, a landlord was given the authority to evict condominium tenants who breached their lease through excessive smoking thereby creating a nuisance

³⁶ *Id.* at 326.

³⁷ See *Lathers v. Foster Coates*, 18 Misc. 231, 232 (N.Y. Sup. Ct. 1896).

³⁸ *Id.* at 232.

³⁹ See Sweda, Jr., Edward L., “*Legal Cases on Second Hand Smoke for Property Management*”, available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; *Donath v. Dadah*, No. 91-CV179 (Worcester City., MA, Housing Ct. Dept. 1991);

⁴⁰ See Sweda, Jr., Edward L., “*Legal Cases on Second Hand Smoke for Property Management*”, available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; *In Re: U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments*, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998). That case resulted in the apartment complex owner deciding to start transitioning the entire building to “smoke-free” apartments.

⁴¹ See Sweda, Jr., Edward L., “*Legal Cases on Second Hand Smoke for Property Management*”, available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; *Heck v. Whitehurst Co.*, 200 Ohio 4366; 2004 Ohio App. LEXIS 3972.

⁴² See Sweda, Jr., Edward L., “*Legal Cases on Second Hand Smoke for Property Management*”, available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; *Dworkin v. Paley*, 638 N.E.2d 636 (Ohio App. 8th Dist. 1994).

that substantially interfered with the rights of other tenants.⁴³ In Florida, the court found a landlord liable for the actions of a tenant who was an excessive smoker and awarded the plaintiff tenant damages for the disturbance of their possession of the premises and interference with their property beyond mere inconvenience.⁴⁴

In light of the above, it is advantageous for every landlord to recognize that the legal landscape is changing and that Court decisions both in and outside New York State are concluding that secondhand smoke is a dangerous and hazardous condition from which a tenant is entitled to protection. As a result, landlord liabilities and duties are also changing. If landlords fail to protect their tenants from the harmful effects of secondhand smoke and seepage, it is likely that they will at some point find themselves losing income when a tenant rightfully refuses to pay rent, expending money for preventive maintenance and/or being sued under one of the theories discussed above, even if the injury complained of was caused by a third party tenant.

IV. HOW TO ADOPT SMOKE-FREE POLICIES

A. Private Market Housing

Adoption of smoke-free policies is permitted in New York State and can be easy to achieve. In housing that is privately owned and does not receive state or federal subsidies, policies that prohibit smoking can be written as a lease addendum or within a new lease. The policy should include specific language, clearly stating the purpose of the policy and outlining the restrictions and penalties. While the best and most appropriate time to make lease changes or add addendums is before a tenant first signs a lease, changes can also be made at any time by agreement with the tenant or when the tenant renews a lease⁴⁵. For a tenant already under lease, lease terms should not be changed until expiration of the lease or until the tenant has given written consent. One option for implementing a smoke-free policy is to apply the policy tenant by tenant at time of each lease renewal. Landlords may also choose to “grandfather” existing tenants, allowing them to smoke in their units, while writing in a no-smoking policy into leases for new tenants. This option can lead to difficulty with enforcement and may not solve the problem of secondhand smoke infiltration for years. In all cases, tenants should be notified well in advance of implementing the policy by written communication.

B. Affordable Housing and Housing Authorities

Due to an increased awareness of the ill-effects of smoking and increased interest in smoke-free affordable housing, the Department of Housing and Urban Development

⁴³ See Sweda, Jr., Edward L., “*Legal Cases on Second Hand Smoke for Property Management*”, available at <http://www.tobaccofreeutah.org/legalcases-shs.pdf>; *Harwood Capital Corp. v. Carey*, (Boston Housing Ct. Docket No. 05-SP-00187, 2005).

⁴⁴ *Merrill v. Bosser*, (Broward County Court, 17th Jud. Dist. FL 2005).

⁴⁵ Except in the case of N.Y. Department of Housing and Community Renewal rent-stabilized or rent-controlled apartments discussed in more detail below.

(HUD) has received several inquiries regarding enforcement of smoke-free policies in affordable housing.⁴⁶ As demonstrated by their response letters, HUD's position has been that there are no HUD policies or statutes that prohibit implementation of smoke-free policies by landlords.⁴⁷ Recently, HUD has taken a more firm position on the issue: HUD now strongly encourages adoption of smoke-free policies. Citing the documented health risks of secondhand smoke and the fact that smoking is the leading cause of residential fire deaths, HUD's Office of Public and Indian Housing and Office of Healthy Homes and Lead Hazard Control issued a joint Notice on July 17, 2009, which states in part,

*"This notice strongly encourages Public Housing Authorities (PHAs) to implement non-smoking policies in some or all of their public housing units. According to the American Lung Association, cigarette smoking is the number one cause of preventable disease in the United States".*⁴⁸

To date, over 131 local public housing authorities (PHA) throughout the U.S. have adopted smoke-free policies for some or all of their apartment buildings. Many of these PHAs added no-smoking language to their house rules⁴⁹, as opposed to making lease changes, since HUD approval is needed for changes to a lease whereas house rules do not require HUD approval.⁵⁰ While both lease and house rules changes must still be in accordance with state and local laws, HUD now recommends that the addition of smoke-free policies be made to the leases themselves.⁵¹ None of the HUD funded housing programs such as Public Housing, FHA insured, Section 202/811s, Community Development Block Grant (CDBG) and Section 8 Housing Programs prohibit the establishment of smoke-free housing.⁵²

HUD has also addressed landlord concerns over suits that might be brought against them by tenants who already signed their lease prior to establishment of a no-

⁴⁶ Letter from Mark I. Hall, Director, Project Management, U.S. Dept. of HUD, Buffalo Multifamily Hub, to Jen Sheerer, Smoke-Free Housing Coordinator, Southern Adirondack Tobacco-Free Coalition (Apr. 24, 2008) (on file with Capital District Tobacco-Free Coalition); Letter from Sheila Y. Walker, Chief Counsel, U.S. Dept. of HUD Detroit Field Office, to James A. Bergman, J.D., Co-Director, The Center for Social Gerontology, Inc. (July 18, 2003) (on file with James A. Bergman, J.D.); *See also* Letter from Stephen J. Gronewold, Chief Counsel, U.S. Dept. of HUD Minneapolis Field Office, to Warren H. Ortland, Staff Attorney, U.S. Dept. of Agriculture and Rural Development, Tobacco Law Center (Aug. 1 2007) *available at*, http://www.alamn.org/smokefreehousing/Minneapolis_HUD_Letter1.pdf.

⁴⁴ *See* Letter from Sheila Y. Walker to James A. Bergman, *supra* note 43; *See also* Letter from Stephen J. Gronewold, to Warren H. Ortland, *supra* note 43 (stating that "there is no HUD policy, by statute, regulation, handbook or otherwise that restricts landlords from adopting a prohibition of smoking in common areas or individual units").

⁴⁵ U.S. Department of Housing and Urban Development, Office of Public and Indian Housing Office of Healthy Homes and Lead Hazard Control, *Notice: PIH-2009-21(HA), Issued July 17, 2009*.

⁴⁶ House rules commonly govern issues such as parking, garbage, maintenance, noise and conflict resolution.

⁴⁷ *See* Letter from Mark I. Hall to Jen Sheerer, *supra* note 43; Letter from Sheila Y. Walker to James A. Bergman, *supra* note 43; *See also* Letter from Stephen J. Gronewold, to Warren H. Ortland, *supra* note 43.

⁵¹ U.S. Dept. of HUD, *Notice: PIH-2009-21(HA), supra* note 45.

⁵² Letter from Sheila Y. Walker to James A. Bergman, *supra* note 41; *See also* Letter from Stephen J. Gronewold, to Warren H. Ortland, *supra* note 43.

smoking policy. In that situation, HUD has recommended that landlords grandfather in those tenants for a reasonable period of time and carefully draft the new lease terms to end permissible smoking in that unit when the lease is renewed or when a new tenant moves in.⁵³ As with all lease agreements, a landlord may always amend the lease at any time with the written consent of the tenant.

V. CONCLUSION: THE RIGHTS OF NON-SMOKERS VS. THE RIGHTS OF SMOKERS

It has been clearly established that there is no fundamental constitutional right to smoke.⁵⁴ Conversely, in certain public areas and for persons with certain disabilities, it has already been clearly established that there is instead a fundamental right to breathe clean air.⁵⁵ Landlords need not be concerned that refusing to allow smokers to smoke in their apartments is discriminatory and should be aware that even under the Fair Housing Act, nothing “requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety or other individuals or whose tenancy would result in substantial physical damage to the property of others.”⁵⁶ It should also be clear that adopting a no-smoking policy does not preclude renting to individuals who smoke. It simply means that the individual must not smoke inside the building or prohibited outdoor areas, as defined in the rental agreement. A no-smoking policy is not a no-smoker policy. Furthermore, while suits seeking to hold a landlord liable for the acts of smoking tenants are increasing, it is still difficult, if not impossible, to find a suit in which tenants have sued landlords for being prohibited from smoking in their units.

For landlords, perhaps the most convincing argument of all is that public opinion supports a landlord’s transition to smoke-free housing, a fact revealed by the declining smoker population in New York State and in the United States in the past decade alone⁵⁷. Approximately 81% of the United States population and 83% of the New York population consists of non-smokers and of those who are smokers, most prefer not to smoke inside their apartments.⁵⁸ A simple search on the internet for smoke-free housing

⁵³ See *Id.*; See also National Multi-Unit Housing Council, Property/Risk Management Forum, “Smoke-Free Multi-Unit Housing: Is it right for you?”. (October 29, 2007), available at http://www.law.umaryland.edu/programs/tobacco/documents/Smoke-Free_Multi-Unit_Housing.pps.

⁵⁴ *Axelrod*, 146 Misc.2d. at 297.

⁵⁵ See N.Y. Clean Indoor Air Act (*codified at Pub. Health Law Art., 13-E*); See also *U.S. v. Seattle Housing Authority Consent Decree Cause No. C01-11331* (wherein United States District Judge ordered that Seattle Housing Authority reinforce its policy prohibiting no-smoking in common areas and further ordered that Seattle Housing Authority implement their proposal to turn certain buildings into non-smoking buildings).

⁵⁶ 42 U.S.C. §3604 (*Title 8 of the Fair Housing Act*).

⁵⁷ Centers for Disease Control and Prevention (CDC), Behavioral Risk Factor Surveillance System Survey Data (BRFSS), “Prevalence and Trends Data: Tobacco Use – 2008”, available at <http://apps.nccd.cdc.gov/brfss/list.asp?cat=TU&yr=2008&qkey=4396&state=All> (last visited July 26, 2009).

⁵⁸ National Multi-Unit Housing Council, Property/Risk Management Forum, “Smoke-Free Multi-Unit Housing: Is it right for you?” (October 29, 2007); Centers for Disease Control and Prevention (CDC), Behavioral Risk Factor Surveillance System Survey Data (BRFSS), “Prevalence and Trends Data:

illustrates that the smoke-free multi-unit housing market growth trend is merely a response to the demands of the public.⁵⁹

In summary, the cases, statutory interpretation and public opinion in New York are making it clear that landlords who choose to act quickly in response to the changing legal landscape and increased health concerns of the public will necessarily realize more profits and cater to a larger population of prospective tenants while simultaneously decreasing expenses, risk of fire and potential for being the subject of suits brought by tenants. As landlords are now presented with these facts in increasing regularity, they have become more educated regarding their responsibilities and potential liabilities. A significant transition to smoke-free multi-unit housing has already begun and it is anticipated that smoke-free will soon be the standard in New York.

**This memorandum is provided for educational purposes only and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney licensed to practice in your jurisdiction. Please consult your own attorney for advice in adopting a smoke-free policy in your own multi-unit housing community.*

Tobacco Use – 2008”, available at <http://apps.nccd.cdc.gov/brfss/list.asp?cat=TU&yr=2008&qkey=4396&state=US> (last visited July 26, 2009).

⁵⁹ See e.g., <http://www.luxuryasheville.com/downtownLoftsandCondos.html>; <http://smokefreerent.com/smoke-free-apartments.aspx> (listing smoke-free apartments located in Rochester, N.Y.) (last visited July 26, 2009); <http://www.philomenaapts.com> (N.Y. Natural Environment Apartments) (last visited July 26, 2009).