

Restricting the Use of Medical Marijuana in Multi-Unit Residences

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Presenter

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What we'll cover:

- Multi-unit housing and smoke-free policies in Michigan
- The rights of multi-unit housing owners to restrict the use of medical marijuana on their properties
- How restrictions are being implemented

Market Rate Housing



"Address Of Distinction"

Tourville Apartments
910 Lincoln Avenue
Marquette, MI 49855

Phone: (906) 288-9284

All properties are smoke-free.



"Affordable Housing"

Public Housing

Adams Park Apartments
Grand Rapids Housing Commission



Other Subsidized Housing

Meridian Stratford Place
East Lansing



Smoke-free apartments in 2000?

- Three PHAs in the U.S. had smoke-free policies
- Virtually no smoke-free apartments could be found in the U.S. in private or public housing
- Most apartment owners & many HUD officials thought it was illegal to have a smoke-free policy
- Most tenants didn't realize they had some rights to smoke-free housing

 **MI Smoke-Free Apartment**

2010: Market-rate housing

Hundreds of thousands of units of market-rate housing are smoke-free all across Michigan and the U.S.

Includes large, multi-state companies, moderate sized companies, small companies, and single-family home rentals.

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2010: Other affordable housing

Tens of thousands of units of affordable housing are smoke-free all across Michigan and U.S.

Includes apartment buildings owned by for-profit and non-profit entities, as well as local governments and tribes.

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2010: Smoke-Free Housing Authorities

Nov. 1, 2010: about 225 housing authorities in 27 states.

Dec. 31, 2004: about 18 housing authorities in 9 states had smoke-free policies for some or all their buildings.

An increase of about 1,300% in 70 months.
About 3 new housing authorities per month

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2010: Smoke-Free Michigan Housing Commissions

Nov. 1, 2010: 49 housing commissions have smoke-free policies; ranging from small to the largest, & including two tribal PHAs; over 8,200 apartment units.

June 30, 2005: No Michigan housing commission had a smoke-free policy.

About 1/3 of Michigan PHAs are smoke-free.

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What's the problem?

Secondhand smoke spreads throughout multi-unit dwellings.

Smoke-free policies eliminate this problem.

Smoking of medical marijuana brings the problem back.

Residents and owners object.

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Smoke-Free Policies are Legal

- Smoke-free policies are legal in HUD public housing, HUD-subsidized and other affordable housing, as well as in market-rate housing. *That is: in all housing.*
- **Neither federal nor state law prohibits an owner from making their apartment building totally smoke-free.**

Michigan Attorney General Opinion #6719, May 4, 1992

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Smoke-Free Policies are Legal

- As the HUD letters have stated:
"The right to smoke or not to smoke is not a right that is protected under the Civil Rights Act of 1964 because smokers are not a protected class under federal law."



U.S. Department of Housing and Urban Development
 Office of Public and Indian Housing
 Office of Healthy Homes and Lead Hazard Control

SPECIAL ATTENTION OF:
 Regional Directors; State and Area Coordinators; Public Housing Hub Directors; Program Center Coordinators; Tribal Agency Recovery Center Director; Special Applications Center Director; Public Housing Agencies; Resident Management Corporations; Healthy Homes Representatives

NOTICE: PH-2009-21 (HA)
 Issued: July 17, 2009
 Expires: July 31, 2010
 Cross Reference:
 24 CFR 903.7(b)(3)
 24 CFR 903.7(c)(3)

Subject: Non-Smoking Policies in Public Housing

1. **Purpose.** 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. The elderly and young populations, as well as people with chronic illnesses, are especially vulnerable to the adverse effects of smoking. This concern was recently addressed by the Family Smoking Prevention and Tobacco Control Act, P.L. 111-31, signed by the President on June 22, 2009. Because Environmental Tobacco Smoke (ETS) can migrate between units in multifamily housing, causing respiratory illness, heart disease, cancer, and other adverse health effects in neighboring families, the Department is encouraging PHAs to adopt non-smoking policies. By reducing the public health risks associated with tobacco use, this notice will enhance the effectiveness of the Department's efforts to provide increased public health protection for residents of public housing. Smoking is also an important source of fires and fire-related deaths and injuries. Currently, there is no Departmental guidance on smoking in public housing.

2. **Applicability.** This notice applies to Public Housing.

3. **Background.** Secondhand smoke, which is also known as environmental tobacco smoke (ETS), is the smoke that comes from the burning end of a cigarette, pipe or cigar, and the smoke exhaled from the lungs of smokers. ETS is involuntarily inhaled by nonsmokers, and can cause or worsen adverse health effects, including cancer, respiratory infections and asthma. The 2006 Surgeon General's report on secondhand smoke identifies hundreds of chemicals in it that are known to be toxic. The report (*The Health Consequences of Involuntary Exposure to Secondhand Smoke*) is located at www.cdc.gov/tobacco/06a_ehstudies/scg.html. Secondhand smoke causes almost 50,000 deaths in adult non-smokers in the United States each year, including approximately 3,400 from lung cancer and another 22,000 from heart disease.

Secondhand smoke exposure causes disease and premature death in children and adults who do not smoke according to the U.S. Environmental Protection Agency (EPA) at www.epa.gov/smokefree/healtheffects.html.

Leading Our Nation to Healthier Homes:

The Healthy Homes Strategic Plan




U.S. Department of Housing and Urban Development
 Office of Healthy Homes and Lead Hazard Control



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What about medical marijuana in market-rate multi-unit housing?

Smoke-free policies may include a prohibition on smoking of medical marijuana.

Federal law still considers marijuana a prohibited controlled substance.

Federal law trumps state law.

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What about medical marijuana in market-rate multi-unit housing?

Federal Controlled Substances Act

21 U.S.C. §801 *et seq.*

- Classifies marijuana as a "Schedule 1" drug.
- Prohibits the manufacture, distribution, dispensation, and possession of marijuana.

Supremacy Clause of U.S. Constitution

Article VI, Paragraph 2

- Federal law supersedes state law where there is a direct conflict of laws.

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What about a reasonable accommodation to use medical marijuana?

Federal Fair Housing Act

42 U.S.C. §3601 *et seq.*

- Defines a person as disabled if s/he has a physical or mental impairment that substantially limits one or more major activities of daily living.
- Permits a disabled person to file a Fair Housing complaint seeking a "reasonable accommodation" to permit them to have an equal opportunity to use and enjoy a dwelling unit or common space.

However: The Fair Housing Act states that a disability/handicap "does not include current, illegal use of or addiction to a controlled substance" as defined in the Controlled Substances Act.

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What about a reasonable accommodation to use medical marijuana?

Further:

- Even if the requested "reasonable accommodation" to use marijuana for medicinal purposes were granted, such accommodation need not, and should not, result in the exposure of other residents to secondhand marijuana smoke, since such an outcome should render the accommodation unreasonable.
- If a "reasonable accommodation" is deemed warranted, one should argue that an accommodation can only be reasonable if it avoids other residents exposure to secondhand smoke. One such option could be identifying and utilizing other non-smoking methods of using marijuana.

Final point: This has risk management and legal implications for multi-unit property owners and advice of legal counsel is well advised.

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What about medical marijuana in "affordable" multi-unit housing?

Public and other subsidized housing owners have the same rights as market rate owners to adopt smoke-free policies.

HOWEVER, in any HUD-subsidized housing, federal law and HUD policies are clear: the possession or use of marijuana is prohibited.

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What about medical marijuana in "affordable" multi-unit housing?

Quality Housing & Work Responsibility Act of 1998 (Public Housing Reform Act) and HUD Regulations prohibit the possession and use of marijuana for any purposes.

See September 24, 1999 HUD General Counsel memorandum titled "Medical use of marijuana in public housing", <http://www.mismokefreeapartment.org/HUD-MM1999.pdf>

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What have been the experiences thus far in multi-unit housing?

- HUD & USDA have informed public housing authorities and other HUD & USDA-subsidized apartment owners that they can evict tenants who use or possess marijuana, including those who are certified by MDCH to use it.
- A number of housing commissions and HUD & USDA-subsidized apartment owners have informed residents of the above notice.
- A number of persons have been evicted from public and affordable housing for using medical marijuana.

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What have been the experiences thus far in multi-unit housing?

- A number of market-rate apartment owners have indicated that they will be or have already amended their leases to explicitly prohibit the use or smoking of marijuana in their buildings, including those certified by MDCH to use marijuana for medicinal reasons.

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Case law

- The U.S. Supreme Court has upheld Congress's authority under the commerce clause to enact the Controlled Substances Act and prohibit the intrastate use of marijuana, even when a state's medical marijuana law allows its use, i.e., federal law trumps state law.
Gonzales v. Raich, 545 U.S. 1, 50 (2005) (Analyzing California law)
- Washington state Appeals Court upheld a housing authority eviction of a tenant who was using marijuana for medicinal reasons. The Court determined that requiring a housing authority to violate federal law was not reasonable.
Assenberg v. Anacortes Housing Authority, Wash: Court of Appeals, 1st Div. 2007

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Case law

- Oregon Supreme Court ruled that an employer did not have to accommodate a workers' medical marijuana use because federal law's prohibition on all use of marijuana trumped state law allowing its use for medical reasons. Employee's firing was upheld.**

Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries, April 14, 2010
- A federal District Court in the Eastern District of Washington determined that the Americans with Disabilities Act did not protect individuals who are currently engaged in the use of illegal drugs, regardless of whether Washington state law allowed such use.**

Barber v. Gonzales, 2005 U.S. Dist. LEXIS 37411 (2005)

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You Have Resources Online

MISmokeFreeApartment web site:
www.mismokefreeapartment.org

Smoke-Free Environments Law Project site:
www.tcsg.org/sfelp/home.htm

SFELP Apartments site:
www.tcsg.org/sfelp/apartment.htm

Medical marijuana info & analysis
www.mismokefreeapartment.org/l3rights.html



Your have resources online:

Tobacco Control Legal Consortium site
<http://tclconline.org>

Infiltration of Secondhand Smoke Into Apts & Condos
<http://tclconline.org/documents/infiltration.pdf>

There Is No Constitutional Right to Smoke
<http://tclconline.org/documents/constitutional-right.pdf>

The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure
<http://tclconline.org/documents/Douglas.pdf>

MISmoke-free Apartment

Smoke-free Apartment Decal

Welcome to Our SmokeFree Building

All Apartments are Smoke-Free!

Parkside Commons Apartment Homes

- Parkside Plan
- Apartment Features
- Amenities
- 100% Smoke Free

Chelsea's Read Blog

100% smoke-free environment

The demand for smoke-free environments is rising, and Parkside is listening.

Parkside Commons will be a **100% smoke-free environment**, making it one of Massachusetts' premier smoke-free rental communities, inside and out. Smoking is banned in all common areas, on the grounds, and in the apartments themselves. Why 100%? Cigarette smoking is hazardous to your health and it's the number one preventable cause of death. Second-hand smoke can be just as deadly. Cigarette smoke and its very noticeable odor travels farther than most of us realize, permeating rooms and getting into walls, ceilings, carpeting, drapes and clothing. At Parkside, you have a right to fresh and pure air.

Parkside welcomes residents who care about themselves. Our non-smoking policy is simply another way to support our commitment to creating a **clean, healthy, active community for all.**

