A guide for tobacco control advocates and policymakers

Making a New Smokefree Housing Law Work

There is a growing awareness that tenants of apartment buildings are often exposed to drifting secondhand smoke. To address this problem, communities are beginning to consider laws to restrict smoking in common areas and individual units of multi-unit housing. As these communities craft such laws, they face an important question: How will the new law be enforced?

Changelab Solutions has created a comprehensive *Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences*, which gives a number of different groups – local government, landlords, tenants, and members of the public – the power to enforce the smoking restrictions.

To show how the different enforcement options would play out in a community, this booklet looks at a common problem: a nonsmoking tenant living in an apartment where tobacco smoke is drifting in from a neighboring unit.

This booklet illustrates how different enforcement options could be used, highlighting the advantages and disadvantages of each.

NOTE: The enforcement options in this booklet only apply to communities that have passed a law similar to Changelab Solutions' sample ordinance that prohibits smoking in multi-unit housing. If your community has not, these options merely demonstrate some of the benefits to be gained should your local government enact such a law. If you are a tenant affected by drifting smoke and your community has not passed a smokefree housing law, please see Changelab Solutions' other fact sheets on smokefree housing at www.changelabsolutions.org/tobacco-control.

Introduction

Our story takes place in the City of Progress, where the forward-thinking city council has adopted a law that restricts smoking in multi-unit housing. The law requires that indoor and outdoor common areas be smokefree and allows landlords to designate an outdoor smoking area. The new law also requires that the landlord designate a certain percentage of individual units as nonsmoking, including their balconies and patios. Smoking is still allowed in a small portion of units. It is against the law to smoke in nonsmoking units and common areas.

The City of Progress has included the full range of enforcement options suggested in Changelab Solutions' sample ordinance. Local government, landlords, tenants, and members of the public are all empowered to enforce the new smokefree housing law.

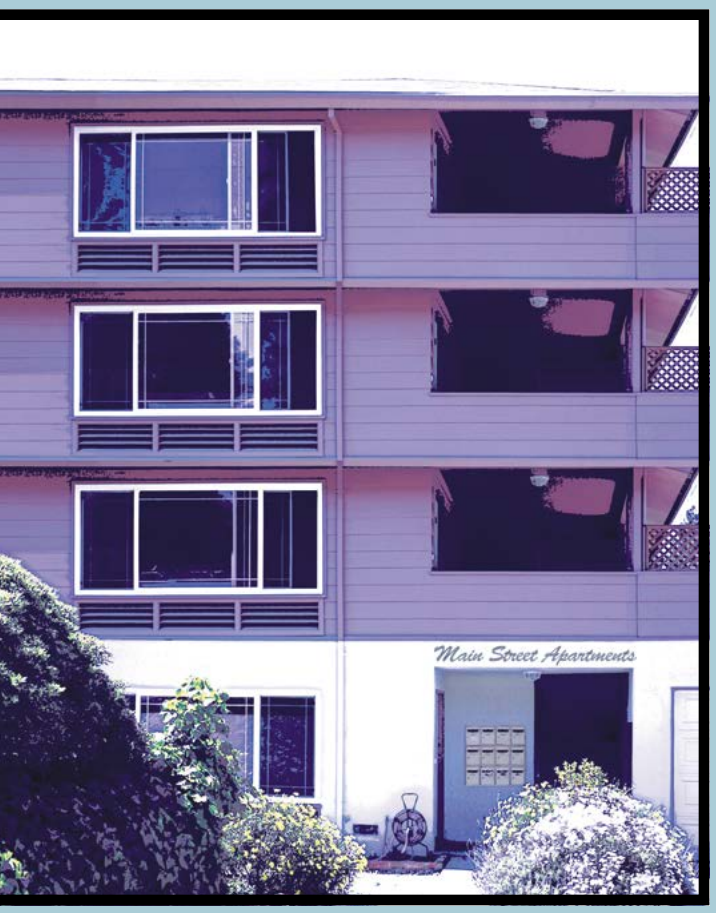
Enforcement Options for Landlords

Larry Landlord owns Main Street Apartments in the City of Progress. He has complied with the smokefree housing law by designating his units as either nonsmoking or smoking. He has posted No Smoking signs in the hallways and near the pool. And he has designated a small portion of the parking lot as the smoking area.

Larry has a vacant nonsmoking unit. Larry tells Nancy Nonsmoker, a prospective tenant, that neither she nor her guests can smoke in the unit or on its balcony. Nancy says she understands the restrictions and signs the year lease.

Soon after Nancy moves in, the nonsmoking unit next to hers becomes vacant. Larry shows this unit to Tommy Tobacum and his family, pointing out that smoking is not allowed in the unit or on the balcony. Tommy admits that he smokes occasionally, so Larry shows Tommy the designated smoking area. If Tommy and his family choose to rent the nonsmoking unit, he says, the designated smoking area is where Tommy is allowed to smoke. Tommy says he understands the restrictions and signs the year lease. He, his wife, and their two-year-old son move in.

Tommy knows that secondhand smoke can be bad for children, so he always goes outside to smoke. After moving into the Main Street Apartments, he went out to the designated smoking area a couple of times. But his wife works weekday



evenings, and when Tommy is home taking care of his son, Tommy can't leave him alone to go to the designated smoking area. Instead, Tommy just goes out onto the balcony every hour or so and smokes a cigarette.

The problem is that the smoke drifts into Nancy Nonsmoker's apartment, especially on warm evenings when she keeps her windows open. Nancy has seen Tommy on his balcony smoking, and she knows that his unit is a designated nonsmoking unit. Nancy has asked Tommy several times, unsuccessfully, to stop smoking.

Nancy decides to see if there is something her landlord can do under the new smokefree housing law to keep her neighbor from smoking on the balcony of his unit.

In fact, the City of Progress' smokefree housing law does provide a way for landlords to enforce the smoking restrictions. The law requires that three new lease terms be inserted into all residential rental agreements:

1] Smoking is prohibited in a unit and its balcony or patio, if it is designated as a nonsmoking unit.
2] It is a breach of the lease to smoke in a nonsmoking unit or common area.
3] Occupants of this multi-unit housing complex have limited rights to enforce the above provisions. (This is covered later in this booklet; see "Enforcement Options for Tenants" on page 11.)

These first two provisions allow a landlord to enforce the smoking restriction just like any other condition in the lease, such as a no-pets rule.

Larry Landlord now includes these new lease terms in all his rental agreements, including those for the nonsmoking units he rented to Nancy Nonsmoker and Tommy Tobacum.

Nancy tells Larry of the problem she is having with Tommy and the drifting smoke. She shows Larry a newspaper article describing the smokefree housing law and points out that the newly required no-smoking lease terms give landlords the power to enforce these restrictions – even to evict a tenant when the lease terms are violated.

Larry decides to contact an attorney to find out more about this new law and what his rights and responsibilities are.

Larry's attorney explains that, yes, he can enforce the new no-smoking lease provision against his tenant Tommy Tobacum. First, Larry should notify Tommy that he is violating the terms of the lease by smoking on the balcony of a designated nonsmoking unit. Larry might want to do this informally, through a conversation with Tommy.

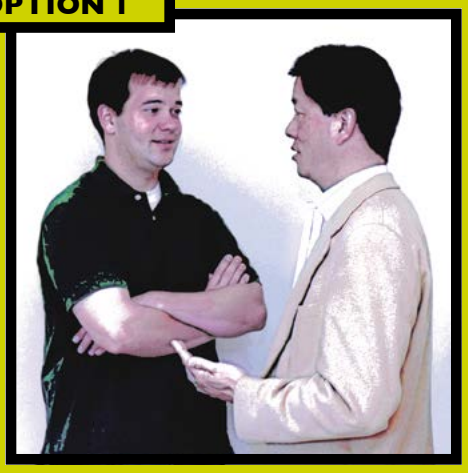
If this doesn't resolve the problem, Larry will want to write a letter or two, sent by certified mail, notifying Tommy of the problem and warning him of the consequences if he continues to smoke in the nonsmoking unit – including the possibility of eviction.

Larry asks what would happen if the letters don't work. His attorney explains that if Tommy continues to smoke on the balcony, and Larry wants to begin the eviction process, Larry would post a three-day notice to "quit." This notice would demand that Tommy and his family move out of the unit within three days. If Tommy refuses to leave, then Larry would have to file a lawsuit to evict Tommy and force him to move.

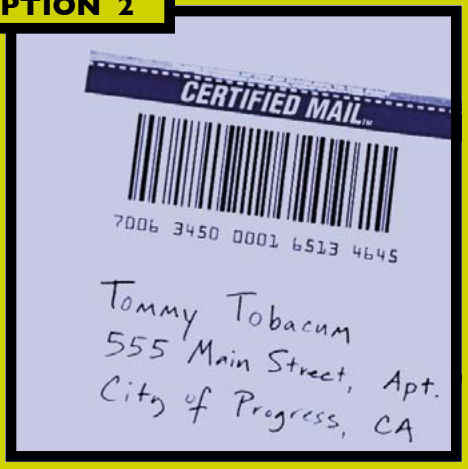
But Larry tells his attorney that he wouldn't want to evict Tommy because he is a good tenant – he pays his rent on time, is quiet, and keeps the apartment in good condition. And he has a wife and a two-year-old son. The attorney reminds Larry that the smokefree housing law doesn't require him to do anything. It is up to him to decide what steps to take, if any. The smokefree housing law only requires that the no-smoking terms be included in leases, giving the landlord the *option* to enforce the new terms.

Larry decides to have a casual conversation with Tommy, letting him know that he has received a few complaints about his smoking on the balcony. Larry reminds Tommy that the apartment is a designated nonsmoking unit, and that he can only smoke in the designated smoking area in the parking lot. Tommy apologizes and says that it has only happened once or twice when he has been home alone watching his son.

OPTION 1



OPTION 2



OPTION 3

This approach seems to have solved the problem – at least for a few weeks. But then Nancy begins to notice the drifting smoke again, and she sees Tommy out on his balcony smoking.

Nancy calls Larry to complain and ask that he do something about the problem. Larry says that he has already talked with Tommy. He's sorry about the problem she is having, but he does not want to make this into a big issue.

Larry knows that he could legally evict Tommy for violating the smokefree housing law. There was a presentation at the Apartment Owners Association last week by a landlord who actually was successful at evicting a tenant for violating the smoking restrictions. But Larry doesn't want to do that, and he doesn't have to.

Maybe Nancy could just close her windows, he suggests.

But Nancy knows that the new smokefree housing law includes other enforcement approaches, so she decides to try another tack.

Enforcement Options for Local Government

Nancy read in the newspaper that the City of Progress has designated the police department as the local government agency to enforce the smokefree housing law. (Cities also could choose the environmental health department, code enforcement, or another government agency to enforce their law.)

Nancy decides to call the police department and report the violation of the new smokefree housing law. She asks them to send someone over to deal with the problem. The first day she calls, no one comes out. She calls again the next time she sees Tommy smoking on the balcony. And again the time after that.

Finally, a police officer shows up, but Tommy is already back inside his apartment. The officer talks with Nancy for a few minutes. She shows the officer her written log where she has recorded all the dates and times she has seen Tommy smoking on his balcony and when she has called the police.

The police officer goes over to Tommy's apartment and tells him that he has received a complaint about Tommy smoking in violation of the smokefree housing law. The officer reminds Tommy that there is no smoking allowed in designated nonsmoking units, including the balcony. Tommy apologizes, explaining that he is home alone watching his two-year-old son and didn't want to leave the apartment to go to the designated smoking area. The officer decides to let Tommy off with a warning... this time.

The officer returns to Nancy's apartment and tells her that he gave Tommy a warning, and he will write up a report of the incident. He tells Nancy that he issued a ticket just last week at another apartment complex where a woman was smoking while sunbathing at the pool. He knows of a few other officers who have issued tickets, but overall most people seem to be complying with the new law. Usually just informing people about the new smoking restrictions is enough to get them to obey the law. He wishes Nancy a good day and leaves.

The visit by the police officer appears to have fixed the problem – at least for a while. A few weeks later, Tommy comes out onto his balcony for another cigarette. A few hours later, he comes out for another one. And then another.

Fortunately, Nancy recalls seeing in the news coverage after the law was passed that there are other options, besides calling the police, that could help her resolve this problem.

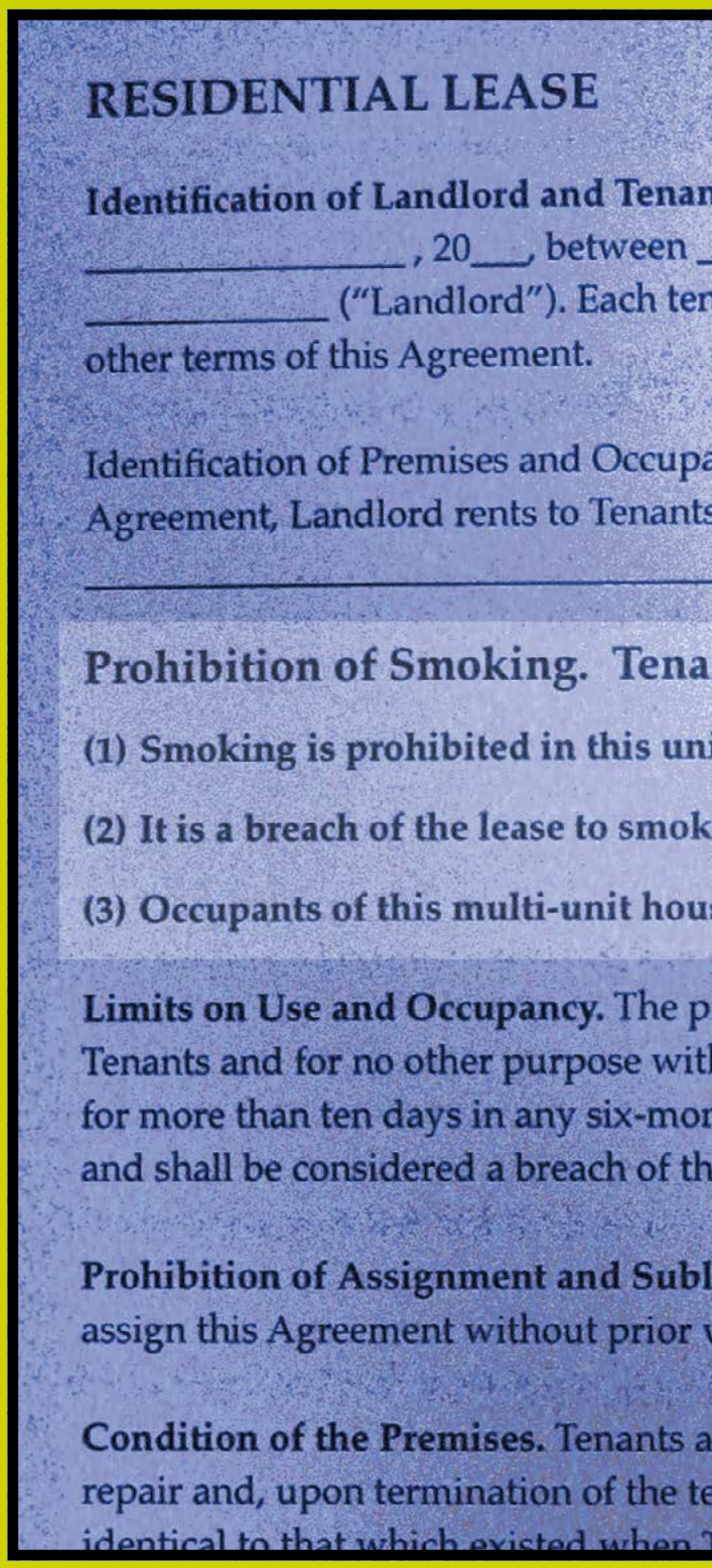
Enforcement Options for Tenants

Nancy decides to see what she can do to enforce the City of Progress' smokefree housing law herself.

She learns that the city's smokefree housing law grants tenants limited rights to enforce the new smoking restrictions, giving those who are directly affected by drifting smoke the power to do something about it. In addition to the provisions allowing landlords to enforce the smoking restrictions (see "Enforcement Options for Landlords" on page 4), the law requires that all rental agreements contain a "tenant enforcement" provision, the third one below:

1] Smoking is prohibited in a unit and its balcony or patio, if it is designated as a nonsmoking unit.
2] It is a breach of the lease to smoke in a nonsmoking unit or a smokefree common area.
3] Occupants of this multi-unit housing complex have limited rights to enforce the above provisions.

This provision allows tenants to file a lawsuit against their neighbor to enforce the no-smoking lease terms. While tenants cannot evict a neighbor who smokes, they can seek an order from the court requiring the neighbor to stop smoking in nonsmoking areas or pay money to compensate the nonsmoking tenant.


RESIDENTIAL LEASE

Identification of Landlord and Tenan
_____, 20___, between _
_____ ("Landlord"). Each ter
other terms of this Agreement.

Identification of Premises and Occupa
Agreement, Landlord rents to Tenants
_____

Prohibition of Smoking. Tena

(1) Smoking is prohibited in this uni

(2) It is a breach of the lease to smok

(3) Occupants of this multi-unit hou

Limits on Use and Occupancy. The p
Tenants and for no other purpose wit
for more than ten days in any six-mor
and shall be considered a breach of th

Prohibition of Assignment and Subl
assign this Agreement without prior

Condition of the Premises. Tenants a
repair and, upon termination of the te
identical to that which existed when

Nancy Nonsmoker decides to use the new lease language to enforce the no-smoking terms against her neighbor Tommy.

Nancy writes a letter to Tommy notifying him that he is violating both the City of Progress' smokefree housing law and the no-smoking provisions of his lease agreement. She informs him that as a tenant in his apartment complex, she has the ability to enforce the smoking restrictions in his lease. She asks him to stop smoking on his balcony, and she warns him that if he doesn't, she will take him to court. She sends the letter certified mail (keeping a copy for herself) and keeps her fingers crossed.

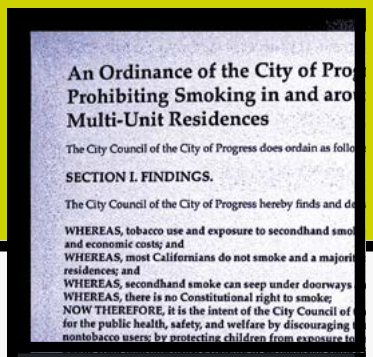
Several days pass, and nothing changes. Tommy does not respond to Nancy's letter, nor does he stop smoking on his balcony. Nancy takes a deep, smoke-filled breath, and begins the process of finding a lawyer to represent her.

Nancy calls the county bar association's lawyer referral service and gets several names of attorneys that handle landlord/tenant disputes and personal injury cases. She calls all of them, but none wants to represent her. They tell her that because only a small amount of money will be recovered, it just wouldn't be worth their time and effort.

She tells the last attorney on her list that she would be willing to pay him; she just wants help to solve this problem. He suggests that she might want to try and bring the complaint against her neighbor in small claims court – that way she wouldn't need to hire a lawyer. There is one problem with small claims court, he warns her: The judge cannot issue an *injunction*, an order to do or stop doing something. A small claims court judge can only issue a *conditional judgment*, which allows the person being sued to choose between taking a certain action or paying a fine. In this case, Nancy could ask the court to order Tommy to stop smoking; if he doesn't, then he will have to pay Nancy a fine.

Nancy decides to file a lawsuit against Tommy Tobacum in small claims court.

On the day of the hearing, Nancy brings several documents to prove her case. She has a copy of the smokefree housing law, a map of the apartment complex showing which units are designated as smoking and nonsmoking, and photographs of Tommy smoking on his balcony. She also brings her written log tracking when Tommy smoked on his balcony, a copy of the report filed by the police officer, and a copy of the letter she sent to Tommy asking him to stop smoking on his balcony. She also has several reports outlining the dangers of secondhand smoke.

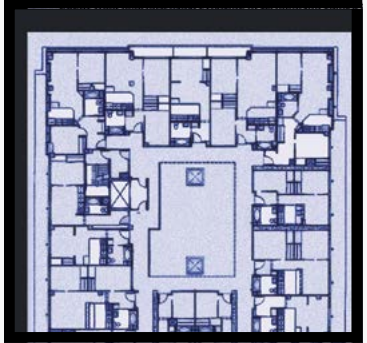

An Ordinance of the City of Pro
Prohibiting Smoking in and aro
Multi-Unit Residences

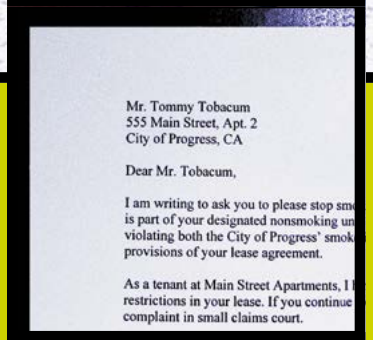
The City Council of the City of Progress does ordain as follo

SECTION I. FINDINGS.

The City Council of the City of Progress hereby finds and d

WHEREAS, tobacco use and exposure to secondhand smo
and economic costs; and
WHEREAS, most Californians do not smoke and a majorit
residences; and
WHEREAS, secondhand smoke can seep under doorways
WHEREAS, there is no Constitutional right to smoke;
NOW THEREFORE, it is the intent of the City Council of
for the public health, safety, and welfare by discouraging
nontobacco users; by protecting children from exposure to




Mr. Tommy Tobacum
555 Main Street, Apt. 2
City of Progress, CA

Dear Mr. Tobacum,

I am writing to ask you to please stop sm
is part of your designated nonsmoking un
violating both the City of Progress' smok
provisions of your lease agreement.

As a tenant at Main Street Apartments, I
restrictions in your lease. If you continue
complaint in small claims court.

After presenting her case, the judge asks Tommy to respond. Tommy says that he has a right to smoke in his own home and that he can't be made to smoke somewhere else. And besides, barely any smoke went into Nancy's apartment; certainly not enough to hurt her.

The judge asks Tommy if the landlord told him the apartment was a nonsmoking unit. Tommy says yes, but…

That is all the judge needs to hear.

The judge issues her ruling: Because Tommy's lease says the unit is nonsmoking, he is violating the lease. Tommy must stop smoking in his apartment, including the balcony, or pay Nancy $500. And the judge tells Tommy that he has no constitutional right to smoke. Tommy's mouth drops open in shock.

Nancy is relieved: She won her case.

Enforcement Options for Members of the Public

After winning her case in small claims court, Nancy reads in her local paper that the city's tobacco control coalition is interested in learning how the new law is working. She calls to find out how to attend a meeting of the coalition to share her experience.

At the meeting, Bonnie Bronchial, the executive director of the Pulmonary Protection Association, tells Nancy that the Association recently brought a lawsuit against one of the largest apartment owners in the city, Humongous Housers, for failing to comply with the new smokefree housing law.

Nancy is intrigued. She asks Bonnie to explain how the new law made that possible.

Bonnie tells Nancy that the smokefree housing law includes something called a *private enforcement* option that allows someone other than the local government to enforce the law. Normally, only the local government can prosecute a violation of the law, but the private enforcement option gives private citizens the power to file a lawsuit against a violator and uphold the law.

Nancy asks why the private enforcement option is necessary. Bonnie explains that sometimes a smokefree housing law may not require the no-smoking lease terms – or, if these lease terms are required, tenants may not be given the power to enforce them. But if the law includes a private enforcement option, tenants can bring a lawsuit to enforce the law itself.

PRIVATE ENFORCEMENT

Notwithstanding any legal or equit
an action to enforce this law solel
general public, nothing about such an action shall act to preclud
based upon the same facts but seeking relief on his, her or its o

Bonnie explains that although it might seem confusing, the important thing to remember is that both enforcement options – enforcing the lease and enforcing the law – allow individuals who are most affected by drifting smoke to take action to solve the problem themselves. In the City of Progress, affected tenants are able to either enforce the lease terms (as Nancy did) or use this private enforcement option to enforce the law.

The other way the private enforcement option can be used, Bonnie explains, is when a member of the public or a public interest organization brings a lawsuit on behalf of the community against a person or business that is disobeying the law. That is how the Pulmonary Association brought its lawsuit.

Bonnie says that the Association had received numerous complaints about Humongous Housers because it had not designated its units as either smoking or nonsmoking, even though this was now required by the smokefree housing law. The Pulmonary Association decided to use the private enforcement provision to file a lawsuit, because ensuring that people have smokefree air to breathe is a top priority for the organization.

Humongous Housers has many tenants who would benefit if the firm complied with the law, Bonnie explains, and a win against such a high-profile company could provide extra incentive to smaller landlords and property managers to follow the smokefree housing law.

As it turned out, a week before the hearing, the attorneys for both the Pulmonary Association and Humongous Housers were able to resolve the case without going to trial. Humongous Housers realized that if it lost the case, the court could order it not only to implement the smokefree housing law but also to pay a huge fine. The Pulmonary Association was willing to settle as long as Humongous Housers adhered to the smokefree housing law immediately and the Association was able to publicize its success in enforcing the law.

Nancy is impressed by the many possible ways to enforce the smokefree housing law, and says she will definitely keep the private enforcement provision in mind if she hears of other violations.

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le or bar the Private Enforcer from bringing a subsequent action
own behalf.

Conclusion

As communities begin to adopt local laws to address the problem of drifting smoke in multi-unit housing, it is important to consider the pros and cons of the various enforcement options available *before* the law is passed. Learning how different groups can be empowered to enforce a smokefree housing law – from local government officials to landlords and tenants to members of the public – will help advocates and policymakers evaluate which combination of enforcement options will work best in their community and, as a result, create the most effective law possible.

As your community considers a smokefree housing law, Changelab Solutions is available to answer questions about enforcement options and to help adapt its *Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences* to meet your needs. Please visit Changelab Solutions at www.changelabsolutions.org/publications/model-ord-smokefree-housing.

Changelab Solutions extends much appreciation to Carmen Castro-Rojas, Lisa Feldstein, Adam Grauer, Kelvin Quan, and James Zellers, who donated their time and talent to make this booklet possible, and to Sylvia Darr, for allowing the use of her home as the "scene of the crime." Changelab Solutions' Advisory Board members also provided valuable input on this project throughout its development. Thanks also to Randy Kline and Karen Parry for their creative vision, and to Changelab Solutions' suitemates at 180 Grand Avenue for their assistance.

This material was made possible by funds received from the California Department of Health Services under contract #04-35336.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Resources

Changelab Solutions

www.changelabsolutions.org/tobacco-control

Changelab Solutions' *Smokefree Housing Ordinance: A Model California Ordinance Regulating Smoking in Multi-Unit Residences* is designed as a comprehensive approach to regulate smoking in multi-unit housing and provides a variety of options for limiting exposure to secondhand smoke, from restricting smoking in common areas to prohibiting smoking in individual units. For a checklist and copy of Changelab Solutions' sample ordinance, visit www.changelabsolutions.org/publications/model-ord-smokefree-housing.

Changelab Solutions also has several fact sheets providing information and resources to address drifting secondhand smoke in multifamily housing. You can download these from Changelab Solutions' website at www.changelabsolutions.org/tobacco-control. (See the Smokefree Housing category of resources.

Americans for Nonsmokers' Rights (ANR)

www.no-smoke.org

ANR provides advocacy information on such topics as clean indoor air ordinances, smokefree apartments, and tobacco industry activity. The "Going Smokefree" section of ANR's website contains resources on smokefree housing.

California's Clean Air Project (CCAP)

www.ccap.etr.org

CCAP provides technical assistance, training, and educational materials statewide on secondhand smoke issues. The Secondhand Smoke Resources section has a category devoted to smokefree multifamily housing.

The Center for Tobacco Policy and Organizing

www.center4tobaccopolicy.org

The Center, a project of the American Lung Association of California, provides assistance with community organizing strategies and serves as a tobacco policy resource. Its website contains a variety of resources on smokefree housing.

Smokefree Apartment House Registry

www.smokefreeapartments.org

The Registry provides guidance on how to implement smokefree housing policies and maintains a database of vacant units in apartment complexes where at least half of all adjacent units are nonsmoking.

ChangeLab Solutions

Law & policy innovation for the common good.

www.changelabsolutions.org/tobacco-control