



Legal Memorandum for the Adoption of Smoke-Free Housing Policies in Jefferson County and the Commonwealth of Kentucky

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May 29, 2013

Smoke-Free Residential Housing Communities: A Legal Analysis¹

The following memorandum examines the legal and policy issues presented by smoke-free residential housing initiatives in Jefferson County and the Commonwealth of Kentucky. An analysis and synthesis of existing research and work product, relevant state and federal law, and ongoing national policy trends indicates that:

- 1.) Public and private rental housing providers in Metro Louisville and throughout Jefferson County may legally mandate under either terms of a residential lease or house rules that tenants refrain from smoking tobacco on the premises;
- 2.) Neither federal nor Kentucky law impose any bar on a landlord's right to create house rules or lease provisions mandating that tenants refrain from smoking on rented residential premises;
- 3.) The implementation of smoke-free policies in affordable housing communities is permissible – and indeed recommended – pursuant to guidelines issued by federal agencies such as the Department of Housing and Urban Development (HUD) and local government entities;
- 4.) Requirements as to drafting, implementation, notice, enforcement, and “grandfathering” of tenants under proposed smoke-free policies are informed by both administrative guidelines and local law including the Uniform Residential Landlord Tenant Act (URLTA).

1. Tobacco Use, Secondhand Smoke, and Smoke-Free Policy in Kentucky

The relationship between the tobacco industry, the Commonwealth, and Kentuckians is, to say the very least, storied and complex. Indeed, as expressed by an NBC Nightly News editorial following the passage of Louisville's smoke-free public building ordinance in 2005, the Commonwealth is virtually "defined by the aroma of smoke."² The City of Louisville proper is certainly no exception; at one time, 1 out of every 6 cigarettes was produced in Louisville, Kentucky.³ Louisville has historically played host to the largest cigarette companies in the world, and has acted as a metropolitan stage for a number of the tobacco industry's most pivotal events.⁴

Today, despite a regional shift in policy towards tobacco control, tobacco use in the Commonwealth remains relatively widespread. Although the majority of Kentuckians are nonsmokers, the percentage of adults who smoke cigarettes – 29% of adults and 24.1% of youths – places Kentucky near the very top of the list of tobacco-using states, with the percentage of smokers in the Commonwealth exceeding that of adults nationwide by ten percent.⁵ While one-fourth of adult Kentuckians smoke cigarettes, almost three-quarters of adults in Kentucky are additionally subjected to the harmful effects of tobacco through exposure to secondhand smoke.⁶

Secondhand smoke – the smoke released from burning tobacco products or exhaled by smokers – poses significant health risks to nonsmokers; secondhand smoke is a toxic air contaminant, and is ranked as the third leading cause of preventable death in the US,⁷ with exposure contributing to myriad physical harms ranging from lung cancer to heart disease.⁸ Smoke released into the air as a result of the burning and exhalation of tobacco is also ambient, or mobile, traveling from space to space within closed structures and leading to damage to physical property from exposure to particulate matter.⁹ Such damage can be costly over time, and repairs of smoke-damaged materials – as well as items burned by physical contact with burning tobacco products – can represent a significant expense to both employers and property owners.¹⁰ In addition, the risk of fire resulting from tobacco use is significant: cigarettes are cited as the single greatest contributor to fire-related deaths.¹¹

Prompted largely by research into the effects of tobacco use and increasing public awareness, a national trend towards embracing laws and ordinances prohibiting tobacco use in public areas is underway as a component of larger local efforts to improve community health and wellness.¹² Although Kentucky does not have a state-wide smoke-free policy, local communities are free to enact laws restricting tobacco use, which are not preempted by superior state law.¹³ As of 2009, roughly 30% of Kentuckians were covered by smoke-free workplace laws,¹⁴ and over 30 communities were covered by smoke-free ordinances of varying degree.¹⁵ For example, local government in Louisville – which represents a major metropolitan community in both the Commonwealth and the United States – has since enforced a comprehensive smoke-free ordinance, barring smoking in many public buildings.¹⁶

The nation-wide trend towards adopting smoke-free policies is increasingly represented within the housing industry; as of 2011, over 160 housing authorities across the country have implemented smoke-free policies in some or all of their buildings.¹⁷ As illustrated by the National Multi-Unit Housing Council (NMHC), the smoke-free trend is actually more common in public housing than in privately owned housing.¹⁸

2. Smoke-Free Housing & Comprehensive Tobacco Control Strategies

As Susan Schoenmarklin of the Tobacco Control Legal Consortium (TCLC) notes, the trend towards embracing smoke-free housing in communities across the country has prompted the pursuit of legal and policy research regarding the adoption of tobacco-control policies in residential housing (particularly government-assisted housing).¹⁹ In its 2010 cross-national analysis of tobacco control and housing laws, the TCLC concluded that in general, both public housing authorities and private owners of affordable multi-unit housing may legally prohibit smoking in individual units, provided that residents are given legally adequate notice and there exists no conflict with applicable local law.²⁰

Since 2009, the Department of Housing and Urban Development (HUD) has taken a definitive stance on the issue of secondhand smoke and smoke-free housing policies, strongly encouraging housing providers to adopt tobacco control policies.²¹ In 2003, the Chief Counsel in Detroit's HUD office concluded that federal law does not prohibit assisted housing providers from adopting smoke-free policies provided such policies comply with state and local laws.²² This position has been confirmed by HUD field offices and counsel across the country; in separate rulings, HUD has confirmed that a housing provider may restrict or prohibit smoking in HUD properties, further noting that the right to smoke is not protected by the Civil Rights Act and that smokers do not constitute a class of persons entitled to constitutional protection.²³

Indeed, the courts have consistently held that smoking is not a constitutionally protected activity (under either state or federal constitutions).²⁴ Neither the federal Fair Housing Act (FHA) nor the federal Americans with Disabilities Act (ADA) bar the prohibition of smoking in public accommodations; no federal courts have concluded that smoking is a "disability" so as to trigger the protections of the ADA.²⁵ Additionally, smoking bans do not violate individual privacy rights - because the constitutional right to privacy is concerned largely with issues related to marriage, contraception, family relationships, and the rearing of children, it is unlikely that a smoke-free housing policy - which touches upon none of those rights - would violate a tenant's right to privacy.²⁶

Certainly, numerous policies in multi-unit housing and rental condominium property contexts already place limits on resident behaviors.²⁷ The Courts have routinely recognized that even legal activities - such as pet ownership, for example - may be regulated or barred by property managers, noting that constitutional privacy protections do not "encompass all conceivable assertions of individual rights."²⁸ The Court is particularly likely to permit restrictive residential policies when important interests are at stake, such as safety and welfare of residents.²⁹

Notably, like a number of other states, Kentucky *does* provide a degree of statutory protection for adult smokers, as a prophylactic against employment discrimination. KRS § 344.040, a component of Kentucky’s Civil Rights Act, bars employers from discriminating against workers who smoke or use tobacco products outside the workplace.³⁰ Such protection, however, goes no further than shielding smokers against employment discrimination: it is a form of *status* protection, rather than a protection of smoking *per se*.³¹

Further, jurisdictions that have adopted the Uniform Residential Landlord Tenant Act (URLTA), including Jefferson County, KY, are expressly permitted to adopt policies in furtherance of tenants’ safety and welfare.³² Under the URLTA, a landlord may adopt a rule or regulation concerning a tenant’s use and occupancy of a residence if its purpose is to promote the convenience, safety, or welfare of tenants residing on the premises.³³ Housing administrators in URLTA jurisdictions may thus create and implement policies intended to promote resident welfare – such as smoke-free policies – provided any proposed rules are reasonable and applicable to all tenants equally. In such cases, tenants should be given notice of the policy at the time of lease entrance or renewal.³⁴

In fact, the creation and implementation of tobacco-control policies may actually *decrease* a property administrator’s liability for claims brought by non-smoking tenants.³⁵ Such claims may include nuisance (where a defendant’s conduct is unreasonably harmful to another), breach of covenant of quiet enjoyment or warranty of habitability, and disability or housing discrimination.³⁶

Indeed, some courts have found that secondhand smoke resulting from the use of tobacco products may result in harms to non-smoking tenants or, at very least, pose a threat to the quiet enjoyment of a residential property.³⁷ They have concluded, for example, that cigarette smoke may create a nuisance, with the invasion of a person’s home by smoke and odor by smoke potentially resulting in serious harm to resident health and senses.³⁸

Tenants have also initiated claims and raised defenses to evictions based on breach of the covenant of quiet enjoyment and the warranty of habitability.³⁹ These companion doctrines ensure that a residential property “offers a reasonable place to live, but is free of unwanted intrusion by others.”⁴⁰ In some cases, tenants affected by the intrusion of secondhand smoke into a rented dwelling have raised breaches of the covenant of quiet enjoyment or the warranty of habitability as defenses in eviction proceedings⁴¹ or as claims to terminate a lease and recover security deposits.⁴²

Courts have also concluded on occasion that certain employees or tenants may qualify for ADA protection when that person’s breathing is significantly impaired by secondhand smoke as a result of a preexisting medical condition.⁴³ The ADA requires that individuals who qualify for its protections be provided “reasonable accommodations” in places of public accommodation.⁴⁴ For non-smokers, the ADA provides such protection if it can be shown that secondhand smoke substantially limits major life activities such as caring for oneself, breathing, or working.⁴⁵ Similar arguments may be

raised under Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act [FHA]), which prohibits housing discrimination based on disability.⁴⁶

Because the protections of the ADA are limited to places of “public accommodation,” the applicability of the ADA to housing cases is somewhat questionable; additionally, if the ADA is found to apply to housing cases, or if the FHA is applied, the question of what constitutes “reasonable accommodations” may pose additional issues.⁴⁷ Regardless, many housing providers have chosen to adopt smoke-free policies as a method of not only improving the safety and welfare of residents, but of avoiding potential liability from disability and/or warranty claims as well.

3. Smoke-Free Policies and Residential Housing

As the TCLC explains, while housing authorities – including those in Kentucky, pursuant to both state and federal law – may indeed adopt smoke-free policies, different types of residential housing (for example, private housing providers, public housing authorities, or Section 8 housing providers) have different basic requirements regarding notice and implementation under both state law and administrative regulations.⁴⁸ For example, some types of federally-funded affordable housing do not permit alteration of a model lease.⁴⁹ Others permit lease changes, provided that such changes are considered “reasonable,” requiring HUD approval for any changes/addendums to the lease.⁵⁰ Private housing providers, on the other hand, may adopt lease changes at any time, with any proposed rules changes being subject only to local law.⁵¹

In *all* cases, changes to residential leases or house rules must comply with state and local law; in Jefferson County both private and federally-funded housing providers are required to comply with the URLTA. The following is a general overview of the requirements for policy implementation in private and HUD-supported housing communities, drawing from TCLC’s 2010 synopsis in an effort to encourage consistency and broad applicability in policy analyses, and incorporating the URLTA.

A. Private Market-Rate Housing Providers

Under Kentucky law, private market-rate housing providers (administrators of privately-owned housing receiving no federal subsidies) may institute a smoke-free policy in all or part of a residential community. Because private market-rate housing properties receive no federal funding, providers are not bound by federal administrative guidelines regarding lease changes and notice; instead, private housing providers in Jefferson County are required to comply only with the applicable provisions of the URLTA (KRS 383, *et. seq.*), which applies to all housing in the County.

Under the URLTA, a landlord may adopt a rule or regulation concerning a tenant’s use and occupancy of a residence if its purpose is to promote the convenience, safety, or welfare of tenants residing on the premises.⁵² Smoke-free policies, for example, may thus be created in furtherance of resident safety and welfare. Tobacco-control policies in private market-rate housing communities must be reasonably

constructed and applied equally to all residents.⁵³ Tenants should be given notice of new smoke-free policies at the time of lease entrance or renewal.⁵⁴

For private market-based housing communities, adoption of a smoke-free policy is permissible through a lease change or provision or an addendum to an existing lease.⁵⁵ Any proposed smoke-free policy must be sufficiently explicit in its prohibition or limitation of a tenant's conduct to fairly inform him/her of what he/she must do or not do to comply with the new policy.⁵⁶

B. Federally-Funded Affordable Housing

TCLC's 2010 policy analysis indicates that none of the HUD-funded housing programs (Public Housing, FHA insured, Section 202/811s, Community Development Block Grant [CDBG], Section 8) prohibit the adoption of smoke-free policies.⁵⁷ However, under HUD guidelines, the manner by which such policies may be adopted varies by the type of affordable housing implementing the policy.⁵⁸

1. Public Housing Authority

Under Kentucky law and HUD administrative rules, housing operated by federally-funded housing authorities may institute a smoke-free policy in all or part of a residential community. Adoption of a smoke-free policy is permissible through either a lease provision or addendum, or change in house rules.⁵⁹ Generally, a change in house rules prohibiting smoking on the premises may be easier for housing authorities to adopt than a change to the lease itself, as changes to house rules do not require HUD approval prior to implementation.⁶⁰ However, any change to house rules prohibiting smoking on a rental property must be explicit, and tenants must be provided with at least 30 days notice of any change, as well as the opportunity to present written comments.⁶¹

Although they may be easier to implement, changes to house rules may be difficult to enforce in the case of non-compliant tenants.⁶² A change or addition to a lease itself that implements a smoke-free policy, on the other hand, is more likely to withstand judicial scrutiny if challenged.⁶³ However, unlike changes to house rules, a change or addendum to a public housing lease requires HUD approval.⁶⁴

Despite the relative inconvenience, lease provisions incorporating smoke-free policies provide new and re-leasing tenants with "clear and conspicuous" notice of any tobacco policy adopted by a rental property.⁶⁵ If a housing authority chooses to implement a lease change, tenants must be provided with at least 90 days notice prior to the end of the term.⁶⁶ Public housing administrators should contact their regional HUD offices to confirm that any proposed lease changes/addendums are appropriate.

2. Site-Based Section 8 Housing

As with public housing, federally-funded private multi-unit housing projects may adopt smoke-free policies in all or part of a residential community. Project-based Section 8 housing properties are generally required to use HUD-approved leases;⁶⁷ as such, any proposed lease changes must be approved by HUD prior to implementation.⁶⁸ HUD

approval will be granted when changes comply with state and local laws, as well as general practices in a project's market area.⁶⁹

As with public housing communities, HUD has indicated that smoke-free policies may be implemented in project-based Section 8 housing properties through changes in house rules.⁷⁰ If a proposed change or addition meets the normal criteria for house rules, HUD approval is not required for implementation.⁷¹ If the policy is made part of the lease (e.g. a lease provision), however, then a property administrator is required to seek HUD approval to the extent that it is bound to use HUD's model lease.⁷²

3. Voucher-Based (Tenant-Based) Section 8 Housing

The TCLC indicates that voucher-based (or tenant-based) Section 8 housing units may implement tobacco-control policies in all or part of a residential unit through either lease changes/addendums or changes to house rules.⁷³ For voucher-based housing, there are no procedural requirements for giving tenants notice of any proposed changes, other than those required by state and local law.⁷⁴ It should be noted that any lease changes must apply to *all* residents of a voucher-based unit, and not merely to those receiving federal housing assistance.⁷⁵

a. “Grandfathering” Existing Tenants

The recent groundswell of support of smoke-free housing initiatives in various types of affordable housing has necessarily raised the question of “grandfathering” tenants under newly-implemented tobacco control policies – specifically, whether such policies should apply to *all* tenants (current tenants as well as new lessees) or to new tenants only. Notably, neither private nor federally-assisted housing providers are *required* to “grandfather” or exempt tenants; however, they must provide existing tenants with legally adequate notice of any impending change to smoking policies.⁷⁶ Generally, 90 days is sufficient to constitute “legally adequate notice.”

As the TCLC rightly indicates, a plan to implement new smoke-free applicable to all existing tenants makes a certain amount of sense: a transition to a smoke-free community is likely to take more time when existing tenants are exempted, as such housing will not be entirely smoke-free until all exempted tenants either move or pass away.⁷⁷ Conversely, implementing changes that apply to all tenants simultaneously reduces variance in how rules are applied, encouraging consistency in implementation and enforcement as well as tenant understanding.⁷⁸

It must be noted, however, that state and local law must be followed by housing administrators in implementing new policies and applying those policies to current tenants, and in some cases grandfathering may raise more significant questions. In certain jurisdictions in Kentucky, for example – including Jefferson County – the URLTA provides that while landlords are permitted to adopt rule or regulation changes applicable to current tenants, a rule or regulation adopted after a lessee has entered a rental agreement with a landlord that works a “substantial modification of [the tenant’s] bargain,” is not valid unless the tenant agrees to the modification in writing.⁷⁹ As a result

of this provision of URLTA, smoking tenants residing in jurisdictions that have adopted the Act may assert that a generally-applicable change in smoking policy represents a substantial change in the agreement to which they originally contracted, and therefore such a policy would be invalid as applied to current tenants.

Landlords in URLTA jurisdictions that wish to avoid this potential conflict may opt to grant current tenants exemptions from a new policy, applying it to new tenants and lease renewals only; however, the choice remains a matter of individual discretion. It is also quite possible that such an assertion by a tenant may be defeated by the principal language of KRS § 383.610(1), which permits a landlord to adopt a rule in furtherance of tenants' safety and welfare. Notably, organizations such as HUD have indicated that implementing a policy that exempts current tenants may be the easiest course of action - in other words, the route least likely to create legal conflict; in any case, legally adequate notice (at least 90 days) is always required.⁸⁰

b. Enforcement of Smoke-Free Policies

Enforcement of smoke-free policy – up to and including lease termination – generally follows traditional guidelines used to enforce compliance with lease provisions or house rules in affordable housing settings. Such guidelines are informed by both administrative rules for subsidized housing providers governing lease noncompliance & enforcement (ex: HUD rules) and state and local law, such the URLTA.⁸¹

In jurisdictions such as Jefferson County that have adopted the URLTA, if there is a material noncompliance with the terms of the rental agreement or any rule or regulation implemented pursuant to KRS § 383.610, a landlord may deliver a written notice to the tenant specifying the acts or omissions constituting the material breach and informing the tenant that the rental agreement will terminate on a date no less than 14 days from the date of notice.⁸² If the breach is remediable by repairs or the payment of damages *or otherwise* and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate.⁸³ In effect, the URLTA grants tenants a “right to cure” in certain instances of material noncompliance.

Because smoking on non-smoking premises is likely to be considered a relatively minor breach, it is foreseeable that smoking would be included as a type of noncompliance that tenants would have the opportunity to cure – in other words, to cease smoking on the premises. However, if within six months a tenant engages in substantially the same act or omission which constituted a prior noncompliance regarding which notice was given, the landlord may then terminate the rental agreement upon at least 14 days' written notice specifying the breach and the date upon which the agreement will terminate.⁸⁴

4. Implementing Smoke-Free Policies in Louisville Housing Communities

Adoption of smoke-free policies in housing communities represents a fundamental component of any comprehensive community-wide wellness program. Kentucky-based advocacy groups such as the Tobacco Environmental Strategies

Prevention Enhancement Site (TESPES), as well as federal agencies such as HUD, have consistently recommended a comprehensive approach to addressing tobacco use in local communities, of which housing is a fundamental component.⁸⁵ Certainly, pursuant to both HUD recommendations and ongoing state-wide policy trends, affordable housing providers in Kentucky are administratively encouraged to adopt smoke-free policies for residential communities as a tool for improving the safety and welfare of tenants as well as reducing potential liability flowing from claims of non-smoking residents.

The following is a general summary of considerations that housing administrators in Jefferson County should take into account when creating and implementing a smoke-free policy, and in applying & enforcing that policy amongst new and existing tenants. For practical guidance, administrators are also encouraged to reference the Landlord Smoke-Free Policy Toolkit as a companion to the proceeding summary.

1. Planning & Development

Fundamental to the successful institution of any major housing policy is proper planning and development of both short and long-term objectives, framed by a working recognition of the particular environment in which a new policy is to be implemented.⁸⁶ As David B. Ezra notes, a recognition of the particular personalities and environments involved in each housing community is of immense importance to the success (or failure) of a smoke-free policy initiative; as such, these particularities – of the community and its residents, as well as its administration – should be taken into account when developing and implementing a new smoke-free policy.⁸⁷

The process of instituting a smoke-free policy in a residential property should begin with an assessment of a property provider's goals, such as reduction of maintenance costs, minimizing safety risks, reducing the risk or likelihood of litigation, reducing prevalence of secondhand smoke and the risk of harm to nonsmokers, and/or improving the desirability of the property.⁸⁸ Additionally, a survey of the physical structure should be undertaken, noting the nature of the ventilation system(s), patios or balconies, and the connectedness of buildings' structures.⁸⁹ This is particularly important for administrators who wish to adopt smoke-free policies only for certain parts of a residential property: if, for example, a reduction of tenant exposure to secondhand smoke is an administrator's principal goal, a partial smoke-free policy in a largely physically connected building may prove largely ineffective.⁹⁰

2. Drafting & Implementation

A new smoke-free policy must be noticed to tenants as a written document that comprehensively informs tenants of the terms of the new policy.⁹¹ It may additionally inform tenants of the objectives of the policy, supporting information regarding that objective, and if desired, legal justification(s) for the policy.⁹² For example, the written policy may include reductions in tenant exposure to secondhand smoke and fire prevention as distinct objectives, including facts and statistics regarding smoking-related fires and the harms of secondhand smoke. Further, the policy should be as explicit as possible, including specifics as to the prohibited behavior, the areas in which it is

prohibited, the parties to whom the ban applies, and the procedure(s) by which the policy will be implemented and if necessary, enforced.⁹³ A copy of a lease addendum or rule change may be sufficient, provided it is attached to a general letter of notice.

Precisely defined terms and definitions should be used in the drafting of a smoke-free policy so as to ensure clarity and consistency and to avoid ambiguity.⁹⁴ Thorough descriptions of the behaviors to be controlled and the premises to be covered by the smoking prohibition should be provided, as well as expressions of the rights and responsibilities of tenants and landlords in maintaining and enforcing the policy. Providers are additionally advised to seek guidance of legal counsel when drafting smoking policies to avoid any potential conflicts with applicable law.

For buildings with existing residents, substantial notice is required prior to the implementation of a smoking policy.⁹⁵ Housing providers should provide notice of the new policy to residents at least 90 days prior to its implementation; a 90-day notice period meets the requirements imposed by both state law and administrative guidelines. A notice period of this length also provides tenants who do not wish to comply with the new policy sufficient time to relocate.⁹⁶

As previously noted, a property administrator implementing a smoke-free policy in a residence already housing tenants may choose to either exempt those residents and apply the policy only to new and renewed leases, or to apply the policy to all tenants concurrently. If a provider chooses to not exempt current residents and institutes a generally-applicable policy, he/she should be aware that a resident may challenge the policy based upon the URLTA's bar on post-rental agreement rule changes that substantially alter the original covenant. However, as noted, a provider may be able to defeat such an assertion using the principal language of KRS § 383.610(1).

If a provider wishes to avoid any potential conflict with this provision of the URLTA, he/she may apply the new smoking policy only to new or renewed leases, exempting current tenants from the policy. In the case of new buildings housing no residents, it is relatively simple to institute a new policy for all new leases.

3. Enforcement & Advertising

As noted, a clear enunciation of the enforcement procedure for violation of the smoking policy should be included in the written policy. A property owner in Jefferson County must clearly indicate in the policy that failure to comply with its terms constitutes grounds for termination or non-renewal of the lease, citing the URLTA's procedures for termination.⁹⁷ Pursuant to KRS § 383.660(1), the language should expressly indicate that a tenant's failure to comply with the policy – a material breach of the terms of the lease – will result in a 14-day notice to cure, and that failure to cure the material breach will result in the immediate termination of the lease agreement and the commencement of eviction proceedings. Additionally, it should note that if a tenant who has cured such a material breach engages in substantially the same conduct that constituted the material noncompliance within a period of six months, the landlord may terminate the rental

agreement upon no less than 14 days' written notice specifying the breach and the date the agreement is to terminate.⁹⁸

The written policy should also include clear language regarding security deposits and the forfeiture thereof, indicating that smoke and burn damage are included as potential sources of forfeiture of all or part of a tenant's security deposit.

Once a policy is implemented, it should be enforced as consistently as possible.⁹⁹ Consistent enforcement will aid in communicating the seriousness of the policy, and may help avoid future conflict between tenants or between the landlord and residents. Additionally, consistent and professional enforcement may prevent a non-smoking tenant from raising a defense to an action for non-payment of rent based upon a landlord's breach of warranty of habitability or covenant of quiet enjoyment.

Additionally, any new smoke-free policy should be advertised to both new tenants and to the general public.¹⁰⁰ Consistent, visible advertising of the policy will aid in reducing the potential for later conflicts with smoking tenants, and increase visibility of the smoke-free policy as a valuable feature of a housing property.¹⁰¹

5. Jefferson County Smoke-Free Policy Toolkit

The Legal Aid Society has compiled resources from various public organizations to create a Smoke-Free Policy Toolkit, intended to be used as an aid for housing providers in Metro Louisville and throughout Jefferson County in drafting and adopting smoke-free policies in residential properties.¹⁰² The Toolkit may be used as a companion to this synopsis to address questions and concerns frequently posed by landlords, or as a basic guide for property providers in creating and implementing tobacco-control policies.

Although the Toolkit is intended as an aid, it is advisable for property providers in all cases to seek the advice of legal counsel when drafting smoking policies to ensure that any such policies comply with applicable state and local laws.

¹ Compiled by the Legal Aid Society of Metro Louisville in collaboration with the Metropolitan Housing Corporation (MHC). Note that this memorandum is provided for training and educational purposes only and is not to be construed as a substitute for obtaining individualized legal advice. Practitioners should consult legal counsel for advice in adopting a smoke-free policy in a residential housing community.

² Roger O’Neil, A Smoking Ban in Louisville, NBC Nightly News (Aug. 12, 2005, 7:32 PM), <http://www.nbcnews.com/id/8930794/ns/nbcnightlynews/t/smoking-ban-louisville/>.

³ Id.

⁴ *See, e.g.*, The Insider (Touchstone Pictures 1999).

⁵ Kentucky Cabinet for Health and Family Services, *Secondhand Smoke and Smoke-Free Policy* (2009) [hereinafter “Secondhand Smoke”]; Tobacco Environmental Strategies Prevention Enhancement Site, *A Review of the Commonwealth of Kentucky Tobacco Control Laws* (2004) [hereinafter “TESPES”].

⁶ *See* Secondhand Smoke, *supra* note 5.

⁷ Id.

⁸ *See, e.g.*, Pub. Health Serv., U.S. Dept. of Health & Human Servs., *The Health Consequences of Involuntary Smoking*. A Report of the Surgeon General 125-37 (1986).

⁹ *See* David B. Ezra, Get Your Ashes Out of My Living Room!: Controlling Tobacco Smoke in Multi-Unit Residential Housing, 53 Rutgers L. Re.v 135, 152 (2001) [hereinafter “Ashes”].

¹⁰ Id.

¹¹ Id., citing Nat’l Safety Council, Accident Facts 96 (1989).

¹² Id. at 148-150.

¹³ *See* Lexington Fayette County Food and Beverage Ass’n v. Lexington-Fayette Urban County Government, 131 S.W.3d 745, 749-752 (Ky. 2004).

¹⁴ *See* Secondhand Smoke, *supra* note 5.

¹⁵ Id.

¹⁶ *See* Metro Ordinance § 90, *et. seq.*

¹⁷ Daniel R. Lange and Michelle H. Wildgrubem Smoke- Free Environments Law Project, *Housing Authorities/Commissions which have adopted smoke-free policies* (Jan. 2011), available at <http://www.tcsg.org/sfelp/SFHousingAuthorities.pdf> [hereinafter “Memorandum”].

¹⁸ *See* Susan Schoenmarklin, *Secondhand Smoke Seepage into Multi-Unit Affordable Housing*, Tobacco Control Legal Consortium 1 (Apr. 2010) [hereinafter “Seepage”], citing National Multi-Unit Housing Council, Property Mgmt., Update: No Smoking Policies in Apartments (Feb. 2008) at 1, available at http://www.tcsg.org/sfelp/S-F_NMHC.pdf.

¹⁹ Id.

²⁰ Id.; *see also* Susan Schoenmarklin, Smoke-Free Environments Law Project, *Analysis of the authority of Housing Authorities and Section 8 multiunit housing owners to adopt smoke-free policies in their residential units* (2005) at 1 [hereinafter “Authority”].

²¹ Id. at 2; *see* U.S. Dep’t. of Housing & Urban Dev., Non-Smoking Policies in Public Housing, Notice: PIH-2009-21 (HA) (July 17, 2009), available at <http://www.hud.gov/offices/pih/publications/notices/09/pih2009-21.pdf>; U.S. Dep’t. of Housing & Urban Dev., Optional Smoke-Free Housing Policy Implementation, Notice: H 2010-21 (Sept. 15, 2010), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=12-22hsgn.pdf>.

²² July 18, 2003 letter from Sheila Walker, Chief Counsel, HUD, Detroit Field Office (concluding that a ban on smoking in multi-unit Section 8 residential housing in Michigan was permissible) [hereinafter “Letter”].

²³ *See* In Re: Kearney, Nebraska Public Housing Authority Tenant/Unit Assignment According to Smoking Preference Compatibility with Tenant Selection/Assignment Regulations, HUD Opinion (June 27, 1996); In Re: City of Fort Pierce, Florida Housing Authority, HUD Opinion (July 9, 1996); 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).

²⁴ *See* Axelrod v. Fagan, N.Y.S.2d 552 (1990); Brashear v. Simms, 138 F.Supp.2d 693 (D. Md. 2001); *see also* Samantha Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke*, 2005 [hereinafter “No Right”]; Seepage, *supra* note 18, at 6.

²⁵ Id.; *see* Stevens v. Inland Waters, Inc., 559 N.W.2d 61 (Mich. Ct. App. 1996) (holding that smoking addiction does not qualify as a handicap under state disability laws mirroring the ADA).

²⁶ *See* No Right, *supra*.

²⁷ See Ashes, *supra* note 9, at 183-84.

²⁸ See Nahrstedt v. Lakeside Village Condominium Ass’n, Inc., 878 P.2d 1275, 1291-92 (Cal. 1994).

²⁹ See Ashes, *supra* note 9, at 184, citing City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995).

³⁰ KRS § 344.040(1), (2).

³¹ See Ashes, *supra* note 9, at 179; *see also* No Right, *supra* note 24, at 5.

³² See KRS § 383.610(1).

³³ Id.

³⁴ See KRS § 383.610(1)(f); KRS § 383.610(1)(c).

³⁵ See Ashes, *supra* note 9, at 155-177.

³⁶ Id.

³⁷ Id.

³⁸ Id., citing Thomsen v. Greve, 550 N.W.2d 49 (Neb. Ct. App. 1996).

³⁹ Id.

⁴⁰ Id.; *see also* Robert L. Kline, *Smoke Knows No Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions into the Home Within Multi-Unit Residential Dwellings*, TC Online, Tobacco Control (Feb. 9, 2000), available at <http://tc.bmjournals.com/cgi/content/full/9/2/201>.

⁴¹ Id., citing 50-58 Gainsborough Street Realty Trust v. Haile, No. 98-02279 (Mass. Hsg., Boston Div. Jube 8, 1998).

⁴² Id., citing Dworkin v. Paley, 638 N.E.2d 636, 637 (Ohio Ct. App. 1994).

⁴³ Id., *see also* Mark A. Gottlieb, et al., Second-Hand Smoke and the ADA: Ensuring Access for Persons with Breathing and Heart Disorders, 13 St. Louis U. Pub. L. Rev. 635 (1994).

⁴⁴ PGA Tour, Inc. v. Martin, 532 U.S. 661, 697 (2001) (Scalia, J., dissenting); *see generally* 42 U.S.C. §§ 12101-02, 12189 (1994).

⁴⁵ Karpel v. Inova Health Sys. Servs., 1997 WL 38137, at *6 (E.D. Va. Jan. 24, 1997), *aff’d*, 134 F.3d 1222 (4th Cir. 1998).

⁴⁶ See Smoke-Free Environments Law Project, *The Federal Fair Housing Act and the Protection of Persons Who Are Disabled By Secondhand Smoke in Most Private and Public Housing* (2002) at 1; *see generally* 42 U.S.C. 3601, *et. seq.*

⁴⁷ See Ashes, *supra* note 9, at 167.

⁴⁸ See Seepage, *supra* note 18, at 7.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.; *see also* Warren Ortland, Public Health Law Center, *Comparison of Smoke-Free Policy Factors: Private Market Rate versus Publicly Subsidized Multi-Unit Housing*, William Mitchell College of Law (2009), available at <http://changelabsolutions.org/system/files/Chart%20from%20Warren%20Ortland.pdf> [hereinafter “Comparison”].

⁵² See KRS § 383.610(1).

⁵³ See KRS § 383.610(1)(b), (c).

⁵⁴ See KRS § 383.610(1)(f).

⁵⁵ See Comparison, *supra* note 50; Memorandum, *supra* note 17, at 8.

⁵⁶ Id.; *see* Ashes, *supra* note 9, at 187; *see also* KRS § 383.610(1)(f).

⁵⁷ See Memorandum, *supra* note 17, at 9.

⁵⁸ See Seepage, *supra* note 18, at 7.

⁵⁹ Id. at 8.

⁶⁰ Id.

⁶¹ Id., citing Office of Public and Indian Housing, U.S. Dep’t. of Housing & Urban Dev., *Public Housing Occupancy Guidebook, Part 5-Chapter 17 General Public Housing Lease Requirements*, at 190 (2003), available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.

⁶² Id.; *see also* Authority, *supra* note 20, at 6-7.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id., citing U.S. Dep’t. of Housing & Urban Dev., *HUD Occupancy Handbook*, p. 6-26 (2007), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/43503c6HSGH.pdf>.

⁶⁷ Id.

⁶⁸ Id.
⁶⁹ Id.
⁷⁰ Id.; *see* Letter, *supra* note 22.
⁷¹ Id.
⁷² Id.
⁷³ *See* Seepage, *supra* note 18, at 9.
⁷⁴ Id.
⁷⁵ Id.
⁷⁶ Id., citing Letter from Stephen Gronewold, Chief Counsel, U.S. Dep’t. of Housing & Urban Dev., Minneapolis Field Office to Warren Ortland, Staff Attorney, Public Health Law Center, William Mitchell College of Law, at 1 (July 18, 2003), *available at* http://www.alamn.org/smokefreehousing/Minneapolis_HUD_Letter1.pdf.
⁷⁷ *See* Seepage, *supra* note 18, at 10; Authority, *supra* note 18, at 8.
⁷⁸ Id.
⁷⁹ *See* KRS § 383.610(1)-(2).
⁸⁰ *See* Authority, *supra* note 20, at 7.
⁸¹ *See* Comparison, *supra* note 50.
⁸² KRS § 383.660(1).
⁸³ Id. (emphasis added).
⁸⁴ Id.
⁸⁵ *See* TESPEs, *supra* note 5, at 1.
⁸⁶ *See* Ashes, *supra* note 9, at 186-7.
⁸⁷ Id.
⁸⁸ Id.
⁸⁹ Id.
⁹⁰ Id.
⁹¹ Id. at 187-88.
⁹² Id.
⁹³ Id.
⁹⁴ Id. at 188.
⁹⁵ Id.
⁹⁶ Id.
⁹⁷ *See* KRS § 383.660(1).
⁹⁸ Id.
⁹⁹ *See* Ashes, *supra* note 9, at 188.
¹⁰⁰ Id.
¹⁰¹ Id.
¹⁰² Toolkit includes materials adapted from the U.S. Department of Housing & Urban Development and the Center for Energy and Environment and Association for Nonsmokers – Minnesota. Note that this toolkit is provided for training and educational purposes only and is not to be construed as a substitute for obtaining individualized legal advice. Practitioners should consult legal counsel for advice in adopting a smoke-free policy in a residential housing community.