

**September 2019**  
**Frequently Asked Questions (FAQs)**  
**Proposed Brooks Tower Smoking Ban**  
**Questions were developed by the Rules and Regulations and the Newsletter Committees.**  
**Answers are based on information provided by Denver Department of Public Health during**  
**Information Sessions at Brooks Tower.**

**1. Do I have a constitutional right to smoke?**

- No. The Constitution does not explicitly mention smoking. Therefore, if there were a constitutional right to smoke, it would have to fall under the umbrella of one of the recognized constitutional rights. People who claim a right to smoke usually rely on one of two arguments: (1) that smoking is a personal liberty specially protected by the Due Process Clause, 13 or (2) that the Equal Protection Clause 14 extends special protection to smokers as a group. This section explains that neither of these claims is legally valid. Since smoking is not a specially protected constitutional right, the Constitution does not bar the passage of local state, or federal smoke-free laws and other restrictions on smoking.
- No federal or state law prohibits private property owners and associations from adopting smoke-free policies for all parts of their property, including individual residential units. Smokers are not a protected class under federal law and smoking is not a protected right or activity.

**2. Why aren't we grandfathering in current smokers?**

- Grandfathering is not recommended as the clause in the lease allows current tenants to smoke while prohibiting new tenants from smoking. The grandfather clause can be for a defined period or it can be until the tenant vacates the property. Although it may sound like grandfathering could ease the implementation process, there have been observable negatives:
  - Enforcement difficulties: It is difficult to know who is and who is not violating the policy.
  - Grandfathered "smoking" units: Smokers of the building sometimes congregate in the grandfathered units.
  - Not smoke-free: A grandfather clause does not create a smoke-free building because smoke is still present and can travel from unit to unit.
  - New tenants/owners deceived: New tenants may feel deceived as they believed they were moving into a smoke-free building.

**3. Are we allowed to smoke on balconies?**

- No. Smoke drifts and non-smokers are still exposed to second-hand smoke from other balconies. The Surgeon General Report of 2006 is conclusive in discussing the dangers of second-hand cigarette smoke: "There is no safe amount of secondhand smoke. Breathing even a little can be dangerous, and the longer exposure to secondhand smoke, the more harmful it is."
- Brooks Tower's ventilation system causes negative air flow meaning that smoke or other odors will travel into units from areas such as space under a door or through soffits or air ducts in the building. Thus, secondhand smoke is introduced into the unit.

- Owners or managers of any business not specifically exempted may post signs prohibiting smoking. Such posting will have the effect of including such place in the list of settings where smoking is prohibited.
- Over the years burning cigarettes and butts have fallen onto balconies from above causing a fire hazard, damage to furniture, and potential injury to residents sitting on the balcony.
- Burning cigarettes tossed from balconies have burned holes in the second floor roof and the pool cover, costing the HOA money.
- Brooks Tower has consistently had problems with people throwing cigarettes and other items from balconies even though throwing anything from a balcony is a violation of Denver City Ordinance and HOA rules.

#### **4. Can an HOA make rules about what I do in my unit?**

- Yes. When you purchase a condo, your building provides HOA rules and rights. Is it your right to make noise? Is it your right to cause a nuisance or disturb the quality of life of others? An owner has the right to purchase a product but **NOT** to cause a “nuisance” per Brooks Tower Covenants, Conditions & Restrictions. Section 28, Restrictive Covenants and Obligations, p. 43, states: “No noxious or offensive activity shall be carried on upon any part of the Project, nor shall anything be done or placed on or in any part of the Project which is or may become a nuisance, disturbance or annoyance to others.” Secondhand smoke itself or its odor can be considered a nuisance.  
Cigarette smoke is porous and can travel through walls. Brooks Tower units have shared ventilation.

#### **5. Can smokers sue the HOA about this rule?**

- Yes. They have a right to sue. Court decisions favor HOAs with non-smoking rules. Colorado courts have not identified smoking as a right protected by the Constitution. Colorado has adopted laws designed to protect citizens from adverse health effects of SECONDHAND SMOKE IN INDOOR AREAS.

#### **6. Are there court cases when an HOA has banned smoking?**

- There was a case in Colorado where the court upheld a no-smoking amendment, finding it “reasonable, made in good faith and not arbitrary or capricious” and forced the resident to comply. (See *Heritage Hills Condos v Christiansen/Sauve*, Sept. 17, 2011.) Colorado has adopted laws designed to protect citizens from the adverse health effects of secondhand smoke in indoor areas. This decision isn’t appealable but fact-specific: Some older buildings are porous, making seepage of smoke difficult to control with shared ventilation or shared soffit space which permits smoke or smoke smell to migrate.
- No federal or state law prohibits private property owners and associations from adopting smoke-free policies for all parts of their property, including individual residential units.

#### **7. How does non-smoking affect property values?**

- Realtor.com reports that smoking in your home can reduce its resale value by up to 29%.
- National and local research consistently shows that demand for smoke-free housing is rising.

- Realtors who assist buyers and sellers agree: *"... 88% of prospective condo owners are less interested in a development if they smell tobacco smoke."*
- Smoke-free housing can preserve resale value. A home with smoking in its past can be a deal breaker when prospective buyers smell smoke in units or hallways, or even elevators.
- A smoke-free unit is also more sustainable. It takes less time and materials to restore a unit that is smoke-free when a tenant moves out or the unit is sold.
- Cigarette fires cause roughly 5 percent of all residential fires in Colorado, 36 percent of all residential fire fatalities, 14 percent of all residential fire injuries and 7 percent of all residential property loss

#### **8. Are common areas affected by the ban?**

- Common indoor areas, e.g., Residents' Room, lobbies, are already restricted from the use of e-products and combustible tobacco products per the Colorado Clean Indoor Air Act.

#### **9. What specifically is banned? Vaping? Marijuana? Tobacco?**

- All e-products, combustible tobacco and marijuana.

#### **10. What about residents who must use marijuana for medical purposes by doctor's prescription?**

- Marijuana must be consumed in forms other than smoking.
  - Inhale it through a device called a vaporizer that turns it into a mist
  - Eat it – for example, in a brownie or lollipop
  - Facts and Brooks Tower
  - Place a few drops of a liquid under the tongue
  - Patients with questions should consult their physician.

#### **11. Summary Information (Denver Public Health and Brooks Tower Smoking survey.)**

- Smoke free policies reduce fire risk for both residents and housing providers. Housing providers can potentially save money through discounts on property, life and fire insurance. Each owner should consult with his or her insurance carrier.
- Non-smokers have the right to sue the HOA. Smoke free policies reduce the likelihood of legal claims from a tenant/owner who develops illness or suffers harm because of exposure to secondhand smoke.
- More than half of Coloradans support smoke free policies including in multiunit housing settings.
- Over 87 percent of Coloradans do not allow smoking inside their home.
- Brooks Tower Smoking Survey had 349 Responses. 2/3 (66.2%) would support making BT completely smoke free. 70% said the smell of smoke has been a nuisance.

#### **12. When would the ban go into effect and be enforced?**

- The non-smoking ban would be phased in with the following steps: A "soft roll out" to the new policy of six (6) months would begin on December 1, 2019 to give residents time to adjust and to be informed if there are violations. There would be no fines or penalties at this time. The formal ban would begin June 1, 2020. All residents will receive ample notification.

- The number of warnings and fine structure would be built into the policy if and when the amendment passes.
- Residents who believe they have been falsely accused of violating the smoking ban may have the option of a fresh air monitor placed in their unit. The monitor would show whether there is smoking in a unit and prove or disprove the accusations.

**13. When will owners have a chance to vote on the proposal?**

- Voting will occur for the annual meeting. Voting on the smoke-free proposal is the same for all items on the Annual Meeting agenda. It will be a new, electronic voting process that the Board adopted at the September 19, 2019 meeting. It is more efficient and saves money.
- Voting will occur electronically. All owners will receive all voting information, an electronic code and a website. The electronic code is different for each owner and is based on his/her ownership percentage. Voting can begin as soon as owners receive the mailer and they may vote by computer or cell phone.
- Voting will close immediately after the Annual Meeting. The Annual Meeting is on Monday, November 4, 2019, 6pm.

**14. What percent of owners must approve the proposal for it to be passed?**

- Sixty-seven (67%) percent of the Brooks Tower ownership must approve the proposal.

**15. Where would smokers be allowed to smoke?**

- Areas may be designated at the discretion of the HOA but must be more than 25' from any entrances.