IN THE COURT OF SPECIAL APPEALS OF MARYLAND

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No. 2020
SEPTEMBER TERM, 2011

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**DAVID S. SCHUMAN,**

**Appellant**

**v.**

**GREENBELT HOMES, INC., et al.**

**Appellees**

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**On Appeal from the Circuit Court of Prince George's County**

**Albert W. Northrop, Associate Judge**

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# Brief of *Amici Curiae* the Tobacco Control Legal Consortium, et al. in Support of Appellant

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## STATEMENT OF THE CASE

*Amici* adopt Appellant's Statement of the Case.

## STATEMENT OF THE QUESTIONS PRESENTED

I. Did the Circuit Court err in denying Appellant's request for permanent injunctive relief based on a finding that Appellant had only demonstrated that the secondhand smoke, a known carcinogen, was an "offensive odor" and therefore not a nuisance?

II. Did the Circuit Court err in requiring evidence demonstrating a specific medical condition or diminished property value before determining the secondhand smoke to be a nuisance warranting the granting of an injunction?

III. Did the Circuit Court err in applying the deferential "business judgment rule" in the context of a residential common interest community as opposed to the "reasonableness" standard?

## STATEMENT OF MATERIAL FACTS

*Amici* adopt Appellant's Statement of Facts Material to a Determination of the Questions Presented.

## ARGUMENT

### I. SECONDHAND SMOKE IS A NUISANCE BECAUSE IT IS A SERIOUS, IMMEDIATE, AND PERVASIVE HEALTH THREAT AND NOT MERELY AN OFFENSIVE ODOR.

#### A. Exposure to secondhand smoke is a severe and immediate health risk.

"The science is clear: secondhand smoke is not a mere annoyance, but a serious health hazard that causes premature death and disease in children and nonsmoking

adults."[1] With this quote, U.S. Surgeon General Richard Carmona introduced the 2006 report, The Health Consequences of Involuntary Exposure to Secondhand Smoke.[2] Among the major conclusions of the report:

- "Secondhand smoke causes premature death and disease in children and in adults who do not smoke."
- "Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer."
- "The scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke."
- "More than 50 carcinogens have been identified in sidestream and secondhand smoke."[3]

This report clarified that the debate concerning the harmfulness of secondhand smoke was over and led many communities to adopt policies and enact laws that protect people from the dangers of secondhand smoke exposure. Despite the strong evidence presented in the 2006 report, the Surgeon General found it necessary yet again to emphasize just how dangerous tobacco products and secondhand smoke really are.

In December 2010, the Surgeon General issued a report, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking Attributable Disease: A Report of the Surgeon General.[4] This new report reiterated some of the same findings as

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[1] Richard H. Carmona, U.S. Department of Health and Human Services, Remarks at Press Conference to Launch Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General, SurgeonGeneral.gov (June 27, 2006), http://www.surgeongeneral.gov/news/speeches.06272006a.html.

[2] U.S. Department of Health & Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General – Executive Summary (2006), available at Reps. & Publications, SurgeonGeneral.gov (June 27, 2006), http://www.surgeongeneral.gov/library/secondhandsmoke/

[3] Id. at 11-12.

[4] U.S. Department of Health & Human Services, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking Attributable Disease: A Report of the Surgeon General (2010), available at Reps. & Publications, SurgeonGeneral.gov (Dec. 9, 2010), http://www.surgeongeneral.gov/library/tobaccosmoke/index.html

the 2006 report, along with providing new information on the low amount of exposure to tobacco smoke that can result in serious and long-term physical harm. Included in this report's major conclusions:

- "The evidence on the mechanisms by which smoking causes disease indicates that there is no risk-free level of exposure to tobacco smoke."[5]
- Exposure to tobacco smoke causes adverse health outcomes, particularly cancer and cardiovascular and pulmonary diseases, through mechanisms that include DNA damage and mutation, inflammation, and oxidative stress.[6]
- Low levels of exposure to secondhand tobacco smoke "lead to a rapid and sharp increase in endothelial dysfunction and inflammation, which are implicated in acute cardiovascular events and thrombosis."[7]
- Risk of harm does not increase in a linear fashion with exposure to secondhand smoke. Low levels of exposure to secondhand smoke substantially increase the risk of cardiac events.[8]

Thus, while the science was clear in 2006 that any exposure to secondhand smoke was harmful, the 2010 report clarified that any exposure to secondhand smoke causes immediate health effects, including genetic mutation, inflammation of tissues, and the triggering of a heart attack or stroke.[9] Neither the 2006 nor the 2010 report limit its findings to exposure due to smoking indoors.

The 2006 and 2010 Surgeon General reports make it clear that any exposure to secondhand smoke is harmful, causes long-lasting physical damage, and can result in injury or death. Furthermore, the immediate effects of exposure to secondhand tobacco

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[5] Id. at 9 (emphasis added).

[6] Id. at 9-10.

[7] Id. at 9.

[8] Id. at 10.

[9] See Campaign for Tobacco-Free Kids, Smoking's Immediate Effect on the Body, (Sept. 17, 2009), http://www.tobaccofreekids.org/research/factsheets/pdf/0264.pdf

smoke may not always be apparent to the person exposed, but can result in the development of cancers years in the future.

> The development of cancer is a long process that usually starts with genetic changes in the cells, and continues in the growth of these cells over time. The time from genetic change to development of cancer is called the latency period. The latency period can be as long as 30 years or more. This means that some cancers diagnosed today may be due to genetic changes that occurred in the cells a long time ago.[10]

The Circuit Court's reference to secondhand smoke exposure as an "offensive odor," goes against the increasingly large body of scientific evidence that secondhand smoke poses a severe health threat even at very low levels of exposure. The court also stated that, despite the wealth of information provided by Appellant on the immediate health dangers posed by exposure, it did not find any direct or specific link between secondhand smoke exposure and any medical problem experienced by Appellant.[11] Despite taking judicial notice of the Surgeon General's reports, the Circuit Court viewed secondhand smoke merely as an annoyance until the point Appellant suffers a heart attack or develops lung cancer.

By virtue of the way that secondhand smoke is absorbed into and affects the body, the instant damage may not be apparent to the casual observer for years. Appellant's current exposure to secondhand smoke infiltrating from his neighbor's yard is not only

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[10] Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, Cancer Fact Sheet, Community Matters http://www.atsdr.cdc.gov/COM/cancer-fs.html (last updated Aug. 30, 2002); see also CDC, Trends in Lung Cancer Incidence – United States, 1973-1986, Morbidity & Mortality Wkly Report, July 28, 1989, at 505, available at MMWR Weekly: Past Volume (1989), Morbidity & Mortality Weekly Report, http://www.cdc.gov/mmwr/preview/mmwrhtml/00001706.htm (last updated Aug. 5, 1998) ("The burden of lung cancer and other smoking-related chronic diseases will be substantially higher for eversmokers [sic] for many decades because of the long latency periods between exposure to tobacco and onset of these diseases.")

[11] Extract 1428.

dangerous to his health during the time of exposure but also may result in the future onset of cancer or heart disease. Based on the overwhelming evidence of the dangers of exposure to secondhand smoke, injunctive relief is warranted. Not only does the record contain evidence of the immediate genetic, cardiovascular, and respiratory damage caused by exposure to secondhand smoke, but also to withhold relief – in the form of freedom from exposure to toxic substances in one's own home – until that damage manifests itself into serious illness or death would cause irreparable harm to Appellant.

### B. Secondhand smoke travels throughout buildings regardless of ventilation systems.

The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) is an international organization with "more than 50,000 members worldwide" and a mission "[t]o advance the arts and sciences of heating, ventilating, air conditioning and refrigerating to serve humanity and promote a sustainable world."[12] In 2005, ASHRAE issued a position document concluding that "the only means of eliminating health risks associated with indoor exposure is to ban all smoking activity."[13] In 2008, ASHRAE reiterated its conclusion in an updated position document.[14] While this conclusion refers to indoor spaces, another conclusion included in the position document recognized the risks posed by smoking outdoors near buildings: "The existence of outdoor smoking near the building and their potential impacts on entryway exposure and outdoor air intake locations should be discussed with the developer, building owner, and/or building operator."[15]

The U.S. Surgeon General also commented on the utility of ventilation systems in

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[12] American Society of Heating, Refrigerating and Air-Conditioning Engineers, About ASHRAE, http://www.ashrae.org/about-ashrae/ (last visited Apr. 13, 2012).

[13] American Society of Heating, Refrigerating and Air-Conditioning Engineers, Environmental Tobacco Smoke: Position Document 6 (2005).

[14] American Society of Heating, Refrigerating and Air-Conditioning Engineers, ASHRAE Position Document on Environmental Tobacco Smoke 5 (2008).

[15] Id.

the 2006 report. In the chapter on Building Design and Operations, the report states:

> Although ventilation systems are widely used for general ventilation, their potential use as a control strategy for secondhand smoke requires a detailed understanding of the constituents to be controlled, the air distribution patterns within structures, the air cleaning or extraction techniques, and the requirements for ongoing operation and maintenance.[16]

This section of the report came to two conclusions:

1. Current heating, ventilating, and air conditioning systems alone cannot control exposure to secondhand smoke.

2. The operation of a heating, ventilating, and air conditioning system can distribute secondhand smoke throughout a building.[17]

Despite the findings regarding the futility of ventilation to eliminate secondhand smoke exposure presented in the complaint and at trial, the Circuit Court faulted Appellant for not making efforts to abate the intrusion of secondhand smoke from Mr. Popovic's residence. The court stated that, based on personal experience, prevailing winds would blow the smoke away from Appellant's unit and that the use of an exhaust fan may abate the problem.[18] The conclusions of eminently reputable authorities such as ASHRAE and the Surgeon General demonstrate that these suggestions for ameliorating the intrusion would not eliminate the potential for exposure to secondhand smoke, which is harmful in any amount.

### C. Exposure to secondhand smoke originating in outdoor locations poses health risks similar to exposure in indoor locations.

Studies of exposure to secondhand smoke in outdoor settings conclude that levels of exposure can be comparable to levels in indoor settings under certain circumstances.

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[16] Health Consequences, supra note 2, at 86.

[17] Id. at 92.

[18] Extract 1429.

> A limited number of controlled experiments and field studies of OTS [outdoor tobacco smoke] have been conducted in California, Europe, Maryland and the Caribbean. These studies show that OTS levels outdoors are often as high as SHS levels indoors, although there are differences in the persistence of OTS levels once smoking ceases.[19]

"[A] California Air Resources Board study (CARB, 2003), measured 1 and 8 hour time-weighted average nicotine concentrations outside an airport, college, government center, office complex, and amusement park, found that at these typical outdoor locations, Californians may be exposed to SHS levels previously associated only with indoor SHS concentrations."[20] An article in the *Journal of Air & Waste Management Association* contained the following observations:

- Outdoor particle concentrations measured close to a cigar or cigarette exhibit multiple concentration spikes or "microplumes", which are similar to those that have been observed close to indoor particle sources.
- Average OTS [outdoor tobacco smoke] particle levels near active sources over the course of 1 or more cigarettes can be comparable to average well-mixed indoor SHS particle levels observed to occur in living rooms or bedrooms during active smoking.[21]

In other words, in outdoor locations where one may expect to be free from exposure to secondhand smoke, studies have demonstrated that exposure may be the same as being in a room with a smoker. Because any level of exposure is dangerous, as discussed above, the threat caused by exposure to secondhand smoke is not eliminated by virtue of the smoke passing through an outdoor area.

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[19] James L. Repace, Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles, 34 Wm. Mitchell L. Rev. 4, 1621, 1623 (2008).

[20] James Repace, Measurements of Outdoor Air Pollution from Secondhand Smoke on the UMBC Campus (June 1, 2005), available at Reports by James L. Repace, Repace Associates, http://www.repace.com/pdf/outdoorair.pdf (last visited Apr. 17, 2012).

[21] Neil E. Klepeis et al., Real-Time Measurements of Outdoor Tobacco Smoke Particles, J. Air & Waste Mgmt. Ass'n 522 (2007).

As more scientific data is available on the health risks posed by exposure to secondhand smoke in outdoor settings, local units of government are acting to protect their citizens. "The City Council of Calabasas, California passed an ordinance that took effect January 1, 2007, 'prohibit[ing] smoking in all public places, indoor or outdoor, where anyone might be exposed to secondhand smoke.'"[22] Over 200 municipalities have adopted smoke-free policies for their outdoor public transit waiting areas, including cities and counties in Maryland, such as Kensington, Montgomery County, Rockville, and Takoma Park.[23] Over 475 municipalities have enacted smoke-free park laws.[24] At the November 8, 2010 meeting of the Greenbelt, Maryland City Council, the council accepted a recommendation of the Park and Recreation Board and prohibited smoking in portions of city parks and recreation areas, declaring that "smoking will be prohibited at all indoor recreation and park facilities and within 25 feet of any such facility."[25]

In addition to governmental action to protect citizens, numerous businesses are establishing campus-wide smoke-free policies to protect employees and customers. Below is a partial listing of corporations or organizations that have adopted smoke-free outdoor policies:

- Calgon – policy covers outdoor property
- Eli Lilly and Company – policy includes outdoor property
- General Mills – policy includes within 50' of buildings, in parking garages, and in company vehicles

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[22] Repace, supra note 16, at 1622.

[23] American Nonsmokers' Rights Foundation, Municipalities with Smokefree Outdoor Public Transit Waiting Area Laws, No-Smoke.org (Apr. 1, 2012) http://www.no-smoke.org/pdf/SmokefreeTransitStops.pdf.

[24] American Nonsmokers' Rights Foundation, Municipalities with Smokefree Park Laws, No-Smoke.org (Apr. 1, 2012) http://www.no-smoke.org/pdf/SmokefreeParks.pdf.

[25] Diane Oberg, New City Policy Will Ban Smoking in Park Areas, Greenbelt News Rev., Nov. 25, 2010, at 8.

- Johnson & Johnson – transitioning to tobacco free campus policies for worldwide locations
- State Farm Insurance – policy includes all outdoor areas of State Farm-owned property nationwide
- BlueCross Blue Shield of Western New York – headquarters' campus both indoors and outdoors
- Omaha (Nebraska) Public Power District – tobacco-free in outdoor areas[26]

Governmental bodies are enacting ordinances to protect their citizens from exposure and businesses are adopting policies to protect their employees and customers. Private residences, where individuals spend a majority of their time, should not be the last place people are protected, especially when existing law – such as nuisance law – offers a remedy. With the proximity of units at Greenbelt Homes, the secondhand smoke caused by Mr. Popovic smoking in his yard easily drifts into the windows of Appellant's unit and also exposes Appellant to secondhand smoke when he uses his yard adjacent to Mr. Popovic. Ventilation will not eliminate the secondhand smoke once it enters Appellant's home, nor will it have any effect on preventing exposure when Appellant is outside. Appellant should not have to suffer in his home for another's dangerous activity when relief could be granted by the Court under existing nuisance law.

## II. APPELLANT IS NOT REQUIRED TO DEMONSTRATE A MATERIALLY DIMINISHED PROPERTY VALUE OR MEDICAL INJURY IN ORDER TO GET INJUNCTIVE RELIEF FROM A NUISANCE.

The Restatement (Second) of Torts defines private nuisance as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and

[26] Americans for Nonsmokers' Rights, Corporate Smokefree Policies, No-Smoke.org, http://www.no-smoke.org/goingsmokefree.php?id=452 (last visited Apr. 13, 2012).

enjoyment of land."[27] The Restatement also clarifies the nature of the interest invaded in a nuisance:

> It is obvious from the history of the action for private nuisance that the interests originally protected were interests in the use and enjoyment of land, including interests in the use and enjoyment of easements and profits. These interests continue to be interests that are protected by actions for private nuisance. When there is an invasion of these interests, the plaintiff may recover not only for harm arising from acts that affect the land itself and the comfortable enjoyment of it, but also for harm to members of his family and his chattels.[28]

Maryland defines nuisance similarly. "A nuisance in legal parlance is everything that endangers health or life, gives offense to the senses of smell, sight, or sound or otherwise violates the laws of decency or obstructs the reasonable and comfortable use of property."[29] In clarifying what type of nuisance is actionable, the Maryland Tort Law Handbook states that the nuisance must contain two factors: "(1) it must be personally offensive to the plaintiff; and (2) the nuisance must so permeate the plaintiff's property that it interferes with his/her reasonable use and enjoyment of that property."[30]

In this case, however, the Circuit Court added a third prong to the general rule. The court stated that in addition to severely affecting the use and enjoyment of the property, the nuisance must also be found to diminish the value of the property.[31] However, the Maryland Tort Law Handbook states that this standard, requiring both material diminishment in property value and serious interference with the use and

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[27] Restatement (Second) of Torts § 821D cmt. a (1979).

[28] Id.

[29] Richard J. Gilbert, Maryland Tort Law Handbook § 18.0: Definition of Nuisance (3d ed. 2010).

[30] Id.

[31] See Extract 143 (relying on the case of Adams v. Michael, 38 Md. 123 (1873)); see also Extract 1429-30 (suggesting that the court again relied upon Adams).

enjoyment of the property has only been used "in some instances."[32] Additionally, the Maryland Tort Law Handbook states "the most direct statement" of the test of whether there has been a serious interference with one's property is as follows: "to diminish materially the value of the property *or* seriously interfere with the comfort and enjoyment of it, such as would entitle the party injured to substantial damages."[33] Clearly, the bulk of Maryland decisions do not support the requirement of demonstrating "material" detriment to the property as a third prong to the previously stated two requirements of permeating the property and being offensive to the property owner; rather material diminishment of the property value is an alternative test to establish nuisance.

Appellant has met the test for a nuisance outlined in the Maryland Tort Law Handbook. Appellant has testified that the secondhand smoke resulting from Mr. Popovic's smoking in his own yard continues to infiltrate Appellant's house and yard causing Appellant discomfort and pain, thereby seriously interfering with Appellant's comfort and enjoyment of his property.[34] He testified to the effect on his eyes, nose and throat, and that sometimes his heart would race when the smoke came into his unit.[35] These symptoms are consistent with the effects of exposure described in the 2006 Surgeon General's report,[36] and, as discussed above, are more than just an offense to the senses. Appellant has clearly met the two prongs required to establish nuisance under Maryland tort law.

The Circuit Court opinion also stated that an injunction was not warranted because Appellant had not demonstrated that he has suffered any injury.[37] As discussed above, any level of secondhand smoke exposure is harmful. Appellant's current exposure is

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[32] Gilbert, supra note 29, at § 18.3 Action for Private Nuisance.

[33] Id. (emphasis added).

[34] Extract 419-20.

[35] Extract 401.

[36] Health Consequences, supra note 2, at 562.

[37] Extract 1428, 1432.

causing internal damage that may only become apparent years from now. It seems that the court would require Appellant to be exposed to secondhand smoke until he suffers a catastrophic health event to demonstrate his physical injury. Such an interpretation is inconsistent with Maryland law and common sense.

Other Maryland cases have found a nuisance existed and have upheld relief without evidence of manifestation of physical injury. For example, in Carr's Beach Amusement Co. v. Annapolis Roads Property Owners Ass'n, the Court of Appeals upheld a nuisance finding.[38] There, an amusement park's sound system caused discomfort to owners of nearby property and interfered with their ordinary comfort and enjoyment.[39] In Exxon v. Yarema, the Court of Special Appeals acknowledged that injunctive relief and damages have been granted in cases involving only loud noise:

> In Gorman v. Sabo, 210 Md. 155, 122 A.2d. 475 (1956), the defendants, even after being asked not to do so on numerous occasions, continuously played a radio at an excessive volume, directed at the plaintiff's home, with the sole articulated purpose of forcing the plaintiffs to move from the neighborhood. The Court ruled that these loud and offensive sounds interfered seriously with plaintiff's ordinary comfort and enjoyment of their property and thus constituted a private nuisance, for which those offended may recover actual and punitive damages.[40]

And, in Meadowbrook Swimming Club, Inc. v. Albert, the court held that emanation of loud music from the defendant's resort deprived the plaintiffs of the reasonable use and comfortable enjoyment of their homes, and ordered abatement of that nuisance.[41] In all of these cases, proof of actual physical harm to the plaintiffs was not required by the court prior to granting injunctive relief or damages.

In other situations analogous to exposure to secondhand smoke, Maryland case law does not require evidence of an actual adverse medical condition in order to provide

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[38] 222 Md. 392 (1960).

[39] Id. at 395.

[40] 69 Md. App. 124, 147-48 (1986) (citations omitted).

[41] 173 Md. 641, 647-49 (1938).

the protection of declaring something a nuisance. For example, Maryland considers animals potentially infected with dangerous diseases a public nuisance. In Raynor v. Maryland Department of Health and Mental Hygiene,[42] a minor was bitten by a friend's pet ferret. The ferret was declared a public nuisance so that it could be killed and the brain tested for rabies. The court in that instance did not require proof of the onset of rabies in the Plaintiff before declaring the ferret a nuisance. The court stated that "a biting, wild animal represents a public nuisance due to the mere risk of infection it represents to humans."[43]

Appellant has established with significant evidence the continuing problem with secondhand smoke entering his unit from the Popovic's unit and yard and the extensive nature of the physical discomfort that he experiences from exposure. The Surgeon General's reports clearly and irrefutably establish the dangers of exposure to secondhand tobacco smoke. Appellant should not have to wait until he develops a tobacco-related illness before he is granted an injunction stopping the smoke from Mr. Popovic's residence entering Appellant's house and yard. The immediate health effects and potential longer-term risks of lung cancer and heart disease from exposure to secondhand smoke and not the actual onset of a catastrophic health event should be sufficient to determine that the secondhand smoke entering Appellant's property is a nuisance and needs to be abated.

## III. THE "REASONABLENESS" STANDARD AND NOT THE "BUSINESS JUDGMENT RULE" SHOULD BE APPLIED TO COMMON INTEREST COMMUNITY ASSOCIATION BOARD DECISIONS.

A common interest community is defined by the Restatement (Third) of Property (Servitudes) as follows:

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[42] 110 Md. App. 165 (1996).

[43] Id. at 191-92 (emphasis added).

> A "common interest community" is a real estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.[44]

This section of the Restatement clarifies that "members of cooperatives...are members of common interest communities within the meaning of the Restatement."[45] Greenbelt Homes, Inc. (GHI) is a cooperative[46] and therefore a form of common interest community.

The business-judgment rule is defined as follows:

> The presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. The rule shields directors and officers from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors' or officers' authority.[47]

The definition of the business judgment rule that has been adopted by the Circuit Court in this case is as follows:

> When the tribunals of an organization, incorporated or unincorporated, have power to decide a disputed question their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and...the courts cannot be invoked to review their decisions of questions properly coming before them, except in cases of fraud—which would include action unsupported by facts or otherwise arbitrary.[48]

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[44] Restatement (Third) of Prop.: Servitudes § 1.8 (2007).

[45] Id. at cmt. c.

[46] Extract 1582.

[47] Black's Law Dictionary 192 (7th ed. 1999).

[48] Extract 141.

Appellant argues in his brief that the tort and contract exceptions to the business judgment rule apply in this case, due to his arguments concerning nuisance and the breach of contract caused by GHI's inaction to Mr. Popovic's smoking. This Court might alternatively determine that the business judgment rule is inapplicable and that GHI's failure to protect Appellant was unreasonable. The Restatement (Third) of Property: Servitudes, in section 6.13 Duties of a Common-Interest Community to Its Members, recommends not using the business judgment rule to shield common interest community board decisions: "The business judgment rule is not adopted because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs."[49] The Restatement explains the reasons for this position:

> There are three significant differences between business corporations and other types of nonprofit corporations and common-interest community associations, however, which suggest that there may be greater need for judicial review of common-interest-community decisions than of decisions of other corporations or associations. First, the stakes of association members are generally much higher than those of shareholders in business corporations. The members' investment is the members' home, which is often the largest single asset the member owns, and which has personal and social significance far beyond the monetary value of the asset. Second, the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader than in the typical business corporation. The range of these powers depends, of course, on the extent of the common property and the functions of the association in the common-interest community. Some associations have little impact, while others have extensive power over the members' property values and quality of life. Careless or risky decisions by the association could have devastating impacts on members. The third difference is that association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in closely held corporations where liquidity is absent, an area where courts increasingly

[49] Restatement (Third) of Prop.: Servitudes § 6.13 cmt. b (2000).

> inquire into the substance of business decisions that have an adverse impact on the reasonable expectations of the parties to the enterprise.[50]

The residential nature of common interest community associations sets them apart from other organizations or associations due to the considerable impact on the lives of members of the association. Also, the decisions of a common interest community association board are not all strictly "business" decisions. "More important, the good faith business judgment standard may be of limited utility when the association action at issue involves limitation of unit owners' activities rather than financial decisions, since the former class of actions do not readily lend themselves to evaluation in terms of *business* judgment."[51]

The Circuit Court relied on the business judgment rule to deny Appellant's request for a declaratory judgment that the Popovics' smoking is a nuisance prohibited by the Mutual Ownership Contract, declining to impose its judgment on the decisions of the cooperative board.[52] At the preliminary injunction stage, the court cited the case of Black v. Fox Hills North Community Ass'n.[53] as the source for the "general rule" on deference to the decisions of common interest community association decisions. However, a later

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[50] Id.; See also Randolph C. Gwirtzman, An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions, 14 Cardozo L. Rev. 1021, 1023 (1993) ("The problem with a strict standard of review for the decisions of cooperative and condominium boards is that, unlike decisions made by typical business corporations, cooperative and condominium board decisions have a much more profound and substantial impact on the everyday lives of their shareholders. In such a vulnerable environment, the general objectivity of the board, who themselves are owners or shareholders in these properties, in making un-bargained-for decisions is greatly diminished, making it impossible for board members to be totally disinterested in the decision-making process.").

[51] Harvard Law Review Ass'n, Note: Judicial Review of Condominium Rulemaking, 94 Harv. L. Rev. 647, 665 (1993) (emphasis in original).

[52] Extract 141.

[53] Black v. Fox Hills N. Cmty. Ass'n, 90 Md. App. 75, 81-82 (1992) (citing Martin v. United Slate, 196 Md. 428, 441 (1950)).

case from this Court, Ridgely Condominium Ass'n. v. Smyrnioudis,[54] applied a more intrusive standard to the decisions of a condominium association board; this Court reviewed the board decision for "reasonableness."

The Court explained its adoption of the "reasonableness" standard of review in Ridgely for board actions that do not involve a majority of the membership by stating:

> [W]e hold that the appropriate standard of review for evaluating a condominium bylaw amendment containing a use restriction is reasonableness. While we recognize that a more deferential standard may be employed when considering provisions contained in original condominium documentation, we emphasize that later adopted provisions that are passed by less than unanimous approval of all unit owners have the potential to discriminate against certain classes of owners. Thus, one factor that should weigh heavily in applying the reasonableness test is uniformity.[55]

In this case, the Board decision to discontinue efforts to stop the secondhand smoke exposure was a decision made only by the Board and not by a unanimous or majority decision of the entire membership of the cooperative.

The reasonableness standard of review should be used by the court to review the GHI Board actions in the current case because a decision by the board will have considerable impact on the quality of Appellant's life. The GHI Board acknowledged in communications with the Popovics that secondhand smoke is a nuisance,[56] and yet the Board declined to take further action stating that the final resolution should be left to Appellant and the Popovics.[57] If Mr. Popovic had been playing music at volumes loud enough to disturb Appellant and other neighbors, the GHI Board would not have stepped aside but would have been required to act based on the terms of the Proprietary Lease and

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[54] 105 Md. App. 404 (1995).

[55] Id. at 422 (emphasis added). See also Dulaney Towers v. O'Brey, 46 Md. App. 464 (1980) (reviewing the enforcement of a house rule pertaining to pets on the basis of reasonableness).

[56] Extract 1636.

[57] Extract 1640.

Mutual Ownership Contract. Surely, exposure to a hazardous substance, where any level of exposure is harmful, should be viewed more seriously than loud music.

The court also faulted Appellant because he had not taken certain steps to try to abate the problem, such as through the use of fans or the purchase of a HEPA filter.[58] As discussed above, ventilation is not sufficient to prevent the intrusion of secondhand smoke. If the problem was excessive noise from Mr. Popovic, the court would not have required neighbors disturbed by the noise to sound proof their units or buy sound-blocking headsets. The reasonable approach is not to put the onus on Appellant for a resolution to a problem he is not causing, particularly since ventilation measures are inadequate. The only way to abate the nuisance is to prohibit the smoking that is affecting Appellant. The burden should be on Mr. Popovics because of his continued smoking and on GHI because the terms of the GHI Cooperative Housing Proprietary Lease and Mutual Ownership Contract prohibit members from engaging in an activity that constitutes a nuisance.[59] Uniformity of response from the GHI Board to similar issues raised by residents is a key reason to support the less deferential standard of reasonableness.

Because of the impact on residents' quality of life, this Court could review the decisions made just by the GHI board under the "reasonableness" standard as an alternative to relying on the business judgment rule exceptions. The individuals on the GHI board are not disinterested or unbiased; a decision to continue to address the secondhand smoke issue may have a financial impact on them through costs incurred by the association. The Court should not allow the GHI board to treat Appellant differently from others who are affected by nuisance activities; the Court should assure reasonable uniformity in response.

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[58] Extract 145, 1428-29.

[59] Extract 1604.

## CONCLUSION

The proof is irrefutable. In two reports, the U.S. Surgeon General has documented that exposure to secondhand smoke is a serious health risk and results in the deaths of thousands of non-smokers every year. In recognition of the threat posed to individuals, over 20 states have enacted comprehensive smoke-free laws that prohibit smoking in all indoor places of employment and public places, including bars and restaurants.[60] Maryland is one of the states with a comprehensive law.[61] Over 225 public housing authorities have adopted smoke-free policies for some or all of their buildings.[62] Numerous cities and counties have enacted ordinances that restrict or entirely prohibit smoking in multi-unit residences, including apartments and common interest communities.[63] Many of these ordinances restrict the ability to smoke in outdoor common areas and on private patios and balconies. Utah's statutes clarify that a certain level of intrusion by secondhand smoke into a private residence is a nuisance.[64]

No legislative action is required here, however. The evidence presented in the briefs and the proceedings shows that Appellant satisfied Maryland's two-pronged test for an actionable nuisance. The Circuit Court erred by characterizing the exposure to secondhand smoke that Appellant experienced as just an "offensive odor" and therefore

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[60] American Nonsmokers' Rights Foundation, U.S. 100% Smokefree Laws in Non-Hospitality Workplaces and Restaurants and Bars, No-Smoke.org (Apr. 1, 2012), http://www.no-smoke.org/pdf/WRBLawsMap.pdf.

[61] Md. Code, Health-Gen. §§ 24-501 to -511 (2011).

[62] Smokefree Environments Law Project, Environmental Tobacco Smoke in Apartments, http://www.tcsg.org/sfelp/home.htm (last visited Apr. 18, 2012).

[63] Center for Tobacco Policy and Organizing, Matrix of Local Smokefree Housing Policies: November 2011, http://www.center4tobaccopolicy.org/localpolicies-smokefreehousing (last visited Apr. 12, 2012).

[64] Utah Code Ann. § 78-38-1 (2011) ("A nuisance under this section includes tobacco smoke that drifts into any residential unit a person rents, leases or owns, from another residential unit or commercial unit and this smoke: (a) drifts in more than once in each of two or more consecutive seven-day periods . . . .").

not worthy of designation as a nuisance or the protection of an injunction. The court also erroneously required that Appellant prove a material diminishment to the value of his property before the court would consider the secondhand smoke intrusion a nuisance even though that is not required under Maryland law. The court also improperly applied the "business judgment rule" to a cooperative association board decision, even though the Restatement (Third) of Property does not recommend that and Maryland law has not consistently used that standard. And last, and most egregiously, the court required Appellant to have actually suffered a medical condition as a result of exposure to secondhand smoke before it would provide him the protection of injunctive relief.

Regardless of the rhetoric, individuals do not have a constitutional right to smoke.[65] Smoking is still permitted in many locations, but it is not a protected activity. Because of the long history of smoking in this country,[66] however, the treatment of smoking is unjustifiably given more leeway than is granted to other activities that are as, or less, dangerous.

For these reasons, *amici* respectfully request that this Court reverse the Circuit Court and order the court to grant Appellant's request for a declaratory judgment that the smoke coming onto his property from the adjacent property is a nuisance and should be considered such under the terms of the Greenbelt Homes Inc. Cooperative Housing Proprietary Lease and Mutual Ownership Contract. *Amici* also request that the Circuit Court be ordered to grant Appellant's request for an injunction to prohibit Mr. Popovic from smoking in his yard adjacent to Appellant's property.

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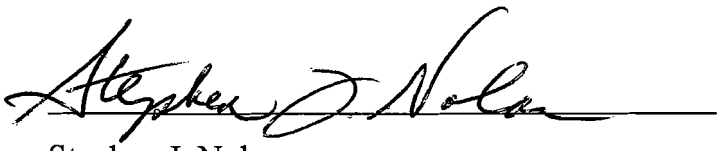
[65] Samantha K. Graff, Tobacco Control Legal Consortium, There is No Constitutional Right to Smoke: 2008 (2d ed.).

[66] Allan M. Brandt, The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America (2007).

Respectfully Submitted,



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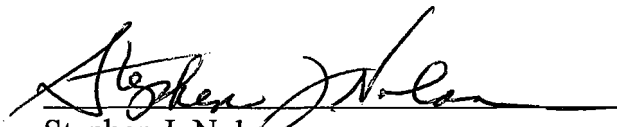
## CERTIFICATION OF BRIEF FORMAT

I hereby certify, pursuant to Maryland Rule 8-504 (a)(8), that the foregoing brief *amici curiae* was prepared using 13 point Times New Roman typeface.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2012, two copies of the foregoing Brief of *Amici Curiae* Tobacco Control Legal Consortium, et al. in Support of Appellant were sent via U.S. Mail, postage prepaid to:

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