

*Summer 2013*

## *Community Association LawLetter*

### **MARYLAND APPEALS COURT RULES SECOND-HAND TOBACCO SMOKE IS NOT A PRESUMED NUISANCE**

The Maryland Court of Special Appeals has rejected the claim of a housing co-op member that any amount of tobacco smoke which passes from a neighbor's property should be presumed to constitute an unlawful nuisance. However, the appeals court left open the possibility that, where there is evidence that second-hand tobacco smoke causes injury to a person or to property, smoke which passes from one property to another could support a legal claim for damages and an injunction to prohibit the smoke.

In *Schuman v. Greenbelt Homes, Inc.*, a co-op member sued a Prince George's County housing co-operative for not taking action against a neighbor who smoked on his patio. He contended that the co-op had breached the covenant of quiet enjoyment implied in the co-op dwelling lease and was negligent in not taking action to stop the neighbor from smoking. He also sued his neighbor alleging damages due to the second hand smoke.

The court initially noted that, if the only contention was that smoking violated the co-op governing documents, the decision by the co-op board of directors that smoking was a permitted use is a "business judgment" not subject to court review. However, the suit also

alleged that the second-hand smoke constitutes a common law nuisance and trespass.

The Court of Special Appeals--the intermediate state appeals court--concluded that smoking should not be regarded as a presumed nuisance because smoking in one's dwelling unit or patio is unlikely to be substantially and unreasonably offensive to all persons at all times. The court considered the evidence and testimony presented at trial and concluded that the trial court properly found that it was not sufficient to establish that the second-hand smoke in this instance was an unreasonable and substantial interference with the use of the complaining co-op member's home.

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**"The court emphasized that it was not declaring that tobacco smoke could never be a substantial and unreasonable interference with another's use and enjoyment of their property."**

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Additionally, the court concluded that there was not sufficient evidence to establish that the second-hand smoke was a trespass because there was no showing the smoke caused any physical damage or interfered with possession of the property.

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**Second Hand Tobacco Smoke  
(Cont'd from Page 1)**

Although the court found that the evidence in this case did not support legal liability by the housing co-op or the neighbor who smoked on his patio, it noted that "cigarette smoke and its harmful effects is an extremely serious issue". The court emphasized that it was not declaring that tobacco smoke could never be a substantial and unreasonable interference with another's use and enjoyment of their property. The appeals court also observed that this court opinion would not likely "be the final word on liability for second-hand smoke in multi-unit residential housing".

**HOMEOWNERS ASSOCIATION DENIAL  
OF ARCHITECTURAL CHANGE  
REQUEST UPHELD BY MARYLAND  
APPEALS COURT BASED ON BUSINESS  
JUDGMENT RULE**

A homeowners association's refusal to allow a homeowner to install an asphalt shingle roof was recently upheld by the Maryland Court of Special Appeals. Applying the "business judgment rule", the court concluded that the trial court had properly dismissed an owner's suit contesting the decision of a Montgomery County homeowner's association to deny the owner's request to change the roof material from cedar shake shingles to asphalt shingles.



In *Reiner v. Ehrlich*, the appeals court followed prior Maryland court rulings that decisions of homeowners association boards are

not subject to judicial review under the business judgment rule, unless the decision is tainted by bad faith or fraud. Because there was no allegation of bad faith or fraud, the court deferred to the action of the board to follow a covenant which allowed asphalt roofs in some parts of the community, but not in other parts of the community where only cedar shake and slate roofs were allowed.

The court also concluded it was improper to include homeowner association officers, directors and members as defendants in a suit challenging action of the homeowners association. Maryland statutes grant corporate officers and directors immunity from personal liability where they act within the scope of their corporate duties, act in good faith, and do not act in a reckless, wanton, or grossly negligent manner. No such allegations were made in this case.

**NEW MARYLAND LAWS IMPACT  
ASSOCIATION LIENS AND CONDO  
MEETINGS**

During its 2013 legislative session, the Maryland General Assembly considered bills regarding licensing of community association managers, liability for injuries caused by dogs, developer liability for construction defects, collection of association assessments and fines, closed condominium meetings and other issues affecting Maryland community associations. Most of these bills did not pass.

Various proposals for licensing management companies and individual managers have been considered over the past several years. The legislature again failed to enact a licensing bill this year.

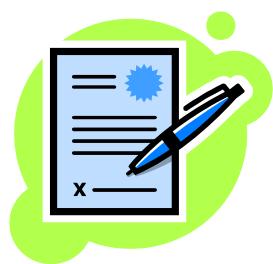
It also came up short on passing legislation to protect property owners from strict liability for injuries caused by dogs. Although there was general agreement

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**New Maryland Laws  
(Cont'd from Page 2)**

that property owners should not be responsible for dog bites unless the property owner knew (or should have known) that a particular animal had vicious tendencies, disagreement over the standard of liability for dog owners doomed the legislation.

The Maryland Contract Lien Act was amended to limit the ability of condo and homeowners association to foreclose on liens which include charges other than assessments, and reasonable costs and attorney's fees "directly related to the filing of the lien and not exceeding the amount of the lien". A lien which includes late fees, interest, collection costs and attorney's fees not directly related to filing the lien, or fines will no longer be subject to foreclosure. However, the new law expressly provides that it does not prevent collection of those charges by other means.



The General Assembly also passed a bill to allow condominium boards to meet in closed session to consider the terms of a business transaction in the negotiation stage, if disclosure would adversely affect the economic interests of the condominium. This amendment to the Maryland Condominium Act extends to condos a similar business transaction exemption which has already been allowed for homeowners associations.

The new lien foreclosure law and closed meetings law take effect October 1.

**MARYLAND APPEALS COURT RULES  
FAIR HOUSING LAW REQUIRES SIDE  
AND BACK DOOR ACCESS**

The Maryland Court of Appeals, in *Maryland Commission on Human Relations v. Cameron Grove Condominium II*, ruled that a Prince George's County condominium violated the state fair housing law by refusing to provide individuals with physical mobility disabilities with a key to the side and back door of the condominium.

When two condominium owners were denied key access to the side and rear doors to facilitate moving groceries from their vehicle to their dwelling unit, they filed complaints with the state fair housing agency alleging that the Condominium had discriminated on the basis of their disability by refusing to provide a reasonable and necessary accommodation in the condominium rules, policies and practices.

An Administrative Law Judge (ALJ) of the Maryland Commission on Human Relations (MCHR) issued a proposed decision which recommended dismissal of the complaints on the basis that the requested accommodation was not necessary to load and unload groceries. The ALJ also concluded that the request for side and back door key access was not reasonable because providing such access would undermine the condominium's legitimate interest in ensuring the safety of residents and would create an undue financial burden on the Condominium. Additionally, because no other residents could gain entry by the side or rear door, the ALJ concluded that the requested access was not necessary to provide an "equal opportunity" to use the condominium facilities.

However, the MCHR Appeal Board disagreed with the legal conclusions of the ALJ and found that the requested accommodation for access to the side and rear doors was reasonable and necessary. The Appeal Board concluded that providing keys was a reasonable

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**Fair Housing  
(Cont'd from Page 3)**

accommodation because it would not constitute an undue financial burden or require a substantial change in the condominium policies and practices. Additionally, according to the Appeal Board, the keys to the side and rear doors were necessary for ingress and egress without limitations, obstructions or additional burdens. It also required the condominium to pay damages totaling \$35,000 and a civil penalty of \$5,000.

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**"The Maryland state appeals court concluded that the Maryland "reasonable accommodation" statute should be applied so that once a resident makes an initial showing of reasonableness, the housing provider then bears the burden to show the requested accommodation is unreasonable."**

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More than 6 years after the fair housing discrimination complaints were first filed, the Court of Appeals affirmed the decision of the Appeal Board. The appeals court determined there was substantial evidence to support the Appeal Board conclusion that providing keys to

the side and rear doors was a reasonable and necessary accommodation for the disabled residents. Therefore, the Condominium had violated the Maryland fair housing laws by refusing to provide a reasonable accommodation in its rules, policies and practices.

The Maryland Court of Appeals – the highest state court -- noted that the Maryland and federal fair housing laws do not state who has burden of proof with regard to whether a requested accommodation is reasonable, and various federal appeals court rulings on this issue are inconsistent.

The federal appeals court for Maryland has ruled that, under the federal fair housing law, the person seeking the accommodation has the burden to show it is reasonable.

However, the Maryland state appeals court concluded that the Maryland "reasonable accommodation" statute should be applied so that once a resident makes an initial showing of reasonableness, the housing provider then bears the burden to show the requested accommodation is unreasonable.

**THOMAS SCHILD LAW GROUP, LLC** represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises community associations on all aspects of association operations including covenant enforcement, assessment collection, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.

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