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Condo residents take neighbors to court over secondhand smoke

By Ellen Ryan, Published: January 17

If your home is your castle, you should be able to do anything legal you want in it, including lighting up a cigarette, right?

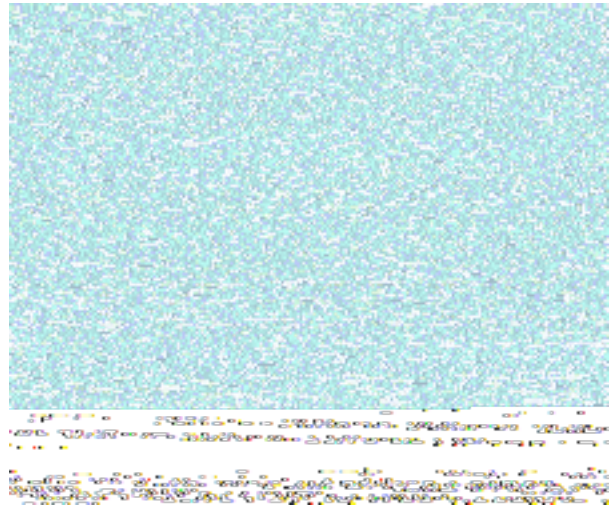
Some residents in the Washington area are challenging that notion, arguing that secondhand smoke seeps through the walls and affects their health. In some recent cases, residents have taken steps to prevent their neighbors from smoking in their own units, following the lead of other condo associations and groups of residents across the country.

The issue pits neighbor against neighbor, has taken over homeowner association agendas and has caused a major legal debate over public health and individual rights of homeowners. Federal incentives have led cities from Austin to Boston to prohibit smoking in public housing. In 2006, a Manhattan judge ruled that secondhand smoke could be a breach of “warranty of habitability” under New York law. And six California cities and counties have banned smoking in all condo units.

Last year at the Promenade Towers in Bethesda, a co-op with more than 1,000 units, neighbors on the first floor complained about a resident chain smoker. The building’s management took steps to contain the smoke by sealing gaps in the walls and issuing a “cease and desist” order to the smoker, who installed a second air filtration system. But the smoke, according to some residents, was still unbearable. “I leave doors and windows open, even as I sleep,” said Ximena Marquez-Dagan, whose young daughter has asthma. “I’ve moved to sleep in my daughter’s room now because the other side of the apartment is full of smoke.”

For years, smoking in one’s home wasn’t much of a dilemma. In 1965, 42 percent of Americans smoked, according to the Centers for Disease Control and Prevention, and those who didn’t were used to secondhand smoke in offices, stores and other people’s homes. Several decades ago, smoking was even advertised as healthful.

But starting with the U.S. Surgeon General’s report in 1964, Americans have slowly turned against “the evil weed”; barely 20 percent smoke today, fewer around Washington. “There is no risk-free



level of exposure to secondhand smoke,” the Surgeon General’s Web site emphasizes. Smoking has been banned in most workplaces for decades. More jurisdictions, including many in the Washington area, now ban smoking in restaurants, and some extend that to parks and play areas.

“If you’re a homeowner, you should retain the right to smoke. It’s your property, and it’s a legal product,” said Jolyn Tenn, spokesperson for Forces International, a libertarian nonprofit founded to fight non-smoking laws.

Although public opinion and habits might be changing, the law isn’t always very clear.

When indoor smokers Darko and Svetlana Popovic moved into a Greenbelt townhouse next door to non-smoker David S. Schuman in 1996, they shared smoke as well as an attic.

Schuman complained about the smoke seeping into his unit to the building’s management company, Greenbelt Homes Inc. The company caulked around baseboards, plumbing and electrical outlets in both homes to try and eliminate the issue. The problem lessened, though Schuman said that this was because his neighbors, the Popovics, started smoking only outside — not because the caulking had worked.

Schuman eventually sued Greenbelt Homes Inc. in Prince George’s County Circuit Court on the grounds that secondhand smoke violated the “nuisance clause” of his mutual ownership contract. Darko Popovic acknowledged that cigarette smoke had migrated into his neighbors’ units, but he also told the court that walking 75 feet to an outdoor common area to smoke was too much of an imposition and that “the whole thing is overblown.” Citing his wife’s illness, he declined to comment for this article.

In November 2011, the court ruled in favor of Greenbelt Homes Inc.

“It is a decision, in my view, that’s going to have to be made by the legislature. . . . I cannot find that there is an actionable nuisance in this case,” said Judge Albert Northrop, noting that he didn’t want to set a precedent and that there did not appear to be harm to Schuman’s health.

Schuman appealed, but has put his house on the market. “I don’t want to move,” he said, “but my fiancée and I want to have children, and we won’t subject them to secondhand smoke.” He has already spent more than \$70,000 on the case, he said. “I’m pursuing this because we’ve come so far and because this will affect a great many people.

“Perhaps Judge Northrop was saying that he doesn’t want to get out ahead of any pending legislation,” Schuman added.

Maryland Del. Ben Kramer, who represents east-central Montgomery County, plans to introduce a bill this session to modify the “nuisance statute” so that it clearly includes secondhand smoke.

Noting that “Utah’s done something similar,” he said Marylanders would “be welcome to smoke in their own home unless there’s a legitimate complaint. This would put the burden of mitigating such a complaint on the creator of the nuisance, not on those adversely affected.”

Among Kramer's constituents is Harriet Hershman, of Silver Spring, who said she asked a neighbor to smoke outdoors because secondhand smoke had seeped into her unit, caused her eyes to burn, led her to develop a cough and forced her to spend nights with friends and relatives, and even in her own car, to avoid the fumes. "He said he has a right to smoke in his own home," she said. The Wintergate at Longmead Condo Association issued a cease-and-desist order, which the smoker appears to be obeying, according to Hershman's lawyer, J.P. Szymkowicz.

"I might be able to move," she said before hearing of the smoker's decision, "but where can I go that I won't end up in the same situation?"

Hershman approached Kramer about nuisance legislation because, she said, "Maybe I can help make a change."

Legal experts say the local courts have ruled on either side of the issue.

Some state courts have held that substantial amounts of smoke transferring between units is a nuisance. But others have determined that the cigarette smoke is like an odor intrusion — a condition of living in a community environment that residents have to put up with, according to the Public Health Law Center at Minnesota's William Mitchell College of Law.

Despite the fact that four-fifths of Americans don't smoke, someone circulating a petition or even openly complaining about secondhand condo smoke risks others' wrath. At the Promenade Towers and elsewhere, several smokers' neighbors were nervous about a backlash if their comments went public.

When Promenade Towers' owners took the smoking ban up for a vote last July, the measure did not pass.

"Instead of trying to solve their problem with the individual neighbor, they tried to get the whole building involved," said resident Keith Feldman, of the petitioners. A smoker, he voted against the ban. "If people are thinking of moving into a building, they should ask if smoking is allowed. If you're allergic, maybe you shouldn't move in."

The Promenade Towers' group of residents who pushed for a smoking ban then asked the board to enact a house rule instead, but the board unanimously refused. "The bylaws give authority to make rules on use on parking or use of the common areas, but restrictions on uses of the unit are more specific" and therefore legally harder to make "a mere rule" on, said attorney Jason Fisher, speaking for the co-op .

Although smoking ban efforts failed at The Promenade, Marquez-Dugan she said she believes a more health-conscious public will eventually prevail. "Change won't happen any time soon, but when it comes to health, eventually it does get there."

Ellen Ryan is a freelance writer.

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