

2010 WL 8654560 (Md.Cir.Ct.) (Trial Order)  
Circuit Court of Maryland.  
Prince George's County

David S. SCHUMAN, Plaintiff  
v.  
GREENBELT HOMES, INC., Et Al, Defendants

No. CAL10-06047.  
September 1, 2010.

**Opinion and Order**

BEFORE THE COURT is a Motion for Preliminary Injunction and For Declaratory Judgment. The matter was heard and testimony taken over two days on August 25 and 26, 2010. The matter was taken under advisement at the conclusion of the hearing.

The key parties are neighbors in Greenbelt, Maryland. They occupy<sup>1</sup> adjoining townhouses and the common wall between them is a "hollow" wall which houses plumbing, electrical and other utility type elements. The Plaintiff is a non-smoker while the individual Defendants are, or at least were, smokers. The corporate Defendant, Greenbelt Homes, Inc. serves, in effect for purposes here, as a condominium association. Plaintiff's complaint is that the individual Defendants' smoking is a nuisance at law and a nuisance pursuant to the Mutual Ownership Contract which governs the residential project through the corporate Defendant.

Looking first to the request for a declaratory judgment, the evidence is clear that the issue was presented to Greenbelt Homes, Inc. Substantial correspondence and opportunity to be heard was undertaken. It is fair to conclude that Greenbelt Homes, Inc., hereinafter GHI, in essence found a nuisance and undertook steps along the way to ameliorate the situation, ultimately leaving it to the parties to take whatever further action they felt necessary to resolve the matter.

Plaintiff would have this court issue a declaratory judgment which would direct that the nuisance complained of is one that is prohibited by the Mutual Ownership Contract<sup>2</sup> and then directing GHI to take steps to require the individual Defendants to stop smoking in or on their property. For authority, Plaintiff points to [Ewen v. Carerina International, LTD, 2009 NY Slip Op 52428U](#); 25 Misc.3d 1235A, 242 N.Y.L.J. 110. As a suggestion that this court has the jurisdiction to hear and rule on the GHI's action in the case at hand, the court accepts that suggestion. GHI, on the other hand, cites [Black v. Fox Hills North Community Association, Inc., 90 Md.App. 75, 599 A.2d 1228 \(1992\)](#) and the "business judgment rule." Simply stated, the "general rule, with only limited exceptions, courts will not interfere in the internal affairs of a corporation."<sup>3</sup> Quoting from *Martin v. United Slate, etc. Ass'n., 196 Md. 428, 441, 77 A.2d 136 (1950)* the *Black* court said:

"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 coming properly before them, except in cases of fraud - which would include action unsupported by facts or otherwise arbitrary."<sup>4</sup>

The Plaintiff having the burden of proof to demonstrate an exception to the general rule has, in this court's opinion and review of the testimony and exhibits, failed to do so. Accordingly the request for declaratory judgment will be denied.

Such does not, however, dispose of the matter. Plaintiff's request for a preliminary injunction against the individual Defendants remains. A consideration of the issue requires a closer examination of the facts.

Our Plaintiff, Mr. David Schuman, and the Defendants, Mr. and Mrs. Popovic, have been neighbors for approximately fourteen years. Early on the Plaintiff complained of the cigarette smoke coming through the common wall from inside the Defendants' residence. Plaintiff also complained of Defendant's cigarette smoke coming through Plaintiffs windows when the Defendants smoked on their patio. Efforts to respond to these complaints were undertaken by GHI and by Mr. and Mrs.

Popovic and the problem diminished. There were few if any complaints from 1997 until late 2008 when Mr. Schuman states the problem worsened considerably. In his words it became “unbearable.” It was at this point that the dispute process through GHI pursuant to the Mutual Ownership Contract was implemented. When that process failed to result in a cessation of the smoking, this action was instituted.

It must be noted that at about the same time that this action was filed, Mrs. Popovic was diagnosed with a tumor. From that point on she no longer smoked. While Plaintiff disputes it, Mr. Popovic states that from his wife’s unfortunate diagnosis on he no longer smokes inside of his residence.

As will be shown, substantial and significant evidence regarding secondhand smoke and its effects was presented. What is also noted is that there was no evidence of direct damage to this Plaintiff other than that of the offensive odor. Mr. Schuman testified, however, that this is not a “smell” problem. It is a “health” problem. Finally, no one questions that Mr. and Mrs. Popovic’s smoking is a lawful activity.

In deciding whether to grant a request for a preliminary injunction, four factors must be considered: 1) the likelihood that the Plaintiff will succeed on the merits; 2) the “balance of convenience,” determined by whether greater injury would be done to the Defendant by granting the injunction than would result from its refusal; 3) whether Plaintiff will suffer irreparable injury unless the injunction is granted; and 4) the public interest. In nuisance cases, the equity courts will grant an injunction where the injury is irreparable and cannot be adequately compensated in damages, or when full and adequate relief cannot be obtained at law, or when the nuisance goes to the destruction of the property, or when it is necessary to prevent a multiplicity of suits. “Indeed, without such jurisdiction (to issue an injunction), parties would, in many cases, suffer the greatest wrongs, for which actions at law would afford them no adequate redress.”<sup>5</sup>

Nuisances may be public or private and may be nuisances per se or in fact. In the case at bar the nuisance would be private and would be a nuisance in fact. Quoting from the Maryland Tort Law Handbook, Chapter 18.1.2:

Not all nuisances are actionable. The activity alleged to constitute the nuisance must be deemed to be unreasonable. In other words, the utility of the Defendant’s conduct is weighted against the adverse impact it has upon others so as to determine its reasonableness *vel non*. When making the analysis, courts will not consider the hypersensitivity of the Plaintiff. The injury the court poses is whether a reasonable person would be unreasonably affected by the activity at issue.”<sup>6</sup>

Quoting further from Chapter 18.0:

There has been a myriad of nuisance cases in Maryland based on allegations of various types of pollution growing out of the defendant’s activities, e.g., noise, odor, dust, smoke, vapors, water, gas, or other particulate matter, vibration, and the like. In most of those cases the plaintiff was a homeowner, and the nature of the complaint was concerned with the pollution that invaded the plaintiff’s property. To be actionable, 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. The two factors are conjunctive, not disjunctive; both must coexist. Neither one standing alone will support a cause of action grounded on nuisance.

Notwithstanding the broad language used by the Court in defining a nuisance as “everything that gives offense to the senses,” no Maryland case thus far has sanctioned a private right or action for either damages or injunctive relief without some showing that the nuisance did more than simply offend the senses.”<sup>7</sup>

Further quoting from [38 Md. 123 at 126](#):

To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented, a court of chancery does not interfere. It must appear to be a case of real injury and here a court of law would award substantial damages. Where, however, such is shown to be the case, the power of the court is clear, and it will interpose by injunction. (emphasis added).

As previously noted, Plaintiff provided substantial evidence regarding secondhand smoke. This came primarily from Mr. James R. Repace. It can reasonably be suggested that Mr. Repace is one of the foremost experts on the subject. He was cited numerous times, for example, in the Surgeon General’s 2006 Report on Second Hand Smoke. He was consulted for this case and presented as it’s Exhibit 4 a Risk Assessment of Secondhand Smoke Infiltration In a Greenbelt, MD Town Home: Located at 11 Ridge Road. 0. In his testimony, Mr. Repace also relied on parts of that same 2006 Surgeon General’s report.

Mr. Repace's report followed the use of a Hammon Passive Nicotine Diffusion Monitor placed in Plaintiff's home for thirty-five (35) days. Nicotine was detected indicating the presence of secondhand smoke at significant levels. He concluded, "to within a reasonable degree of scientific certainty, that Mr. Schuman is exposed to unhealthy levels of secondhand smoke from a cigarette smoker in his neighboring townhouse, that poses both acute and chronic hazards, and that is irritating and malodorous as well." (p. 15). He further concluded that "this unhealthy SHS (secondhand smoke) infiltration condition can only be remedied by elimination of smoking in the interior of the neighboring townhome." (emphasis added) (p. 16).

In his testimony Mr. Repace gave an approximate *distance* figure of twenty-five (25) feet as the distance at which secondhand smoke dissipates when exposed to it in an outside environment so as not *to* permeate into a dwelling or building.

This last note may have added significance due to the testimony of at least two of three additional witnesses, all neighbors, who testified on behalf of Mr. Schuman. Two of them testified that they would smell the smoke from the Defendants through the neighbor's open window. They estimate their window, however, to be some forty (40) to sixty (60) feet from the Defendant's patio. This is notably inconsistent with the testimony provided by the Plaintiff's expert.

The neighbor immediately to the other side of Defendants' residence from Mr. Schuman testified that she too smells smoke from the Defendants. She also testified that when she smells the smoke from outside she closes the windows and runs a fan which clears the smoke.

Of particular note in the case at hand are the conclusions drawn by Mr. Repace and cited earlier. In both instances, the findings and conclusions dealt with secondhand smoke and with nicotine levels permeating from inside. The measurements taken were prior to the time when Mrs. Popovic stopped smoking. The conclusion calls for the Defendants to cease smoking in their residence.

In a similar vein, the 2006 Surgeon General's Report dealt with secondhand smoke within a building.

This is of great significance in this case. The testimony is, and the court accepts, that neither Mr. nor Mrs. Popovic smoke inside their home anymore and Mrs. Popovic does not smoke at all. In fact Mr. Popovic consents to a preliminary injunction which would prevent him from smoking inside his residence.

Plaintiff cites a number of cases to support his request. [Hart v. Wagner](#), 184 Md 40; 40 A.2d 47 (1944) merely establishes the right to bring the action. The appeal in *Hart* reversed the chancellor who sustained a demurrer. The nuisance involved, the burning of leaves and trash, had similar issues as those in the case at bar and the principles of law involved have effectively been included in this opinion.

While the nuisance complained of was of a different character, [Five Oaks Corporation v. Gathmann](#), 190 Md. 348, 58 A.2d 656 (1947) further solidified the court's authority to control the behavior of a neighbor when that behavior rose to the level of becoming a nuisance. The court further instructed, however, that:

It is true that there are certain inconveniences and discomforts incident to living in a city or in a thickly-settled suburban community. These discomforts must be endured as part of the privilege (or at least of the fulfillment of the desire) of living in close proximity to other people. But these discomforts must not be more than those ordinarily to be expected in the community, and incident to the lawful use of the offending property or business. If they exceed what might be reasonably expected and cause unnecessary damage, or annoyance, then the court in an appropriate case, will act.<sup>8</sup>

Excessive noise was the nuisance complained of in Plaintiff's cited case of [Anne Arundel County Fish & Game Conservation Association, Inc., v. Carlucci](#), 83 Md.App. 121, 573 A.2d 847 (1959). There the appellate court affirmed the trial court's injunctive relief which included a noise abatement system. Plaintiff in the case at hand has taken an all or nothing approach, seeking a cessation of smoking by the Defendants. There is no suggestion of any possible "abatement system" by Plaintiff. In fairness, the testimony shows that there have been prior efforts at sealing parts of the porosity of the common wall.

More to the point of the case at bar is the cited case of *Ewen*, supra. That case involved secondhand smoke from a neighboring apartment. The offending unit owners moved to dismiss the complaint claiming, among other things, that the suit was precluded by the by-law of the condominium association and that the action could not proceed in the absence of the condominium association as a party. The slip opinion denied defendants' motion to dismiss.

[Burke v. Oakwood Worldwide](#), 169 Cal.App.4th 1540, 87 Cal.Rptr.3d 602 (2009) is another secondhand smoke case alleging a nuisance arising out of the landlord's failure to limit secondhand tobacco smoke in the outdoor common areas of an

apartment complex. Here the appellate court reversed the sustaining of a demurrer without leave to amend.

While instructive to the issue at hand, the above cited cases establish a cause of action. They do not individually nor collectively establish that secondhand smoke per se is a nuisance in and of itself.

Finally, Plaintiff cites the trial court opinion in *Merrill v. Bosser*, Case No. 05-4239 CODE 53 In the County Court of the 17th Judicial Circuit, In and For Broward County, Florida. In that case the court did find that the secondhand smoke complained of was a nuisance and awarded money damages. For our purposes it is of particular significance that the plaintiff in *Merrill* presented evidence of actual compensable damages.

Appended to Plaintiff's Post-Day One Hearing Brief is a study of hazardous levels of tobacco smoke dated August 25, 2010. This study was neither offered nor admitted into evidence and therefore has not been reviewed by the court for this opinion.

A few notes should be made of certain of the arguments made by the Defendants. Among them are the suggestion by GHI that perhaps the renovations done by Mr. Schuman to his unit caused or contributed to the smoke seepage. Another suggestion was that Mr. Schuman could take it upon himself to temporarily leave his home when the Popovics are smoking. And finally, there was a suggestion that the Plaintiff could pack up and move. The court finds that all of these suggestions are ludicrous if not outright offensive under the circumstances.

Perhaps more persuasive is the evidence that Mr. Schuman has not taken action to abate the problem through the use of fans or of a HIPPA filter. While Mr. Repace testified that such efforts would not suffice, the neighbor on the other side of Mr. and Mrs. Popovic reported some success through the use of fans. Various efforts at what the court will call spot sealing over the years have been only marginally effective at best. Left unaddressed is the possibility of removing the existing plaster or sheetrock wall, installing a complete plastic sheet barrier, and reinstalling the sheetrock. Given the consent of Mr. and Mrs. Popovic not to smoke *inside* their home, such an effort now becomes moot.

While recognizing the dangers of secondhand smoke and the elevated risk to one's health, the court has not received evidence in this case demonstrating actual damage to the Plaintiff other than the offensive odor. There is no medical evidence demonstrating an unfavorable health condition that has actually been suffered by Mr. Schuman. No evidence of "materially" diminished property value in Mr. Schuman's home due to the secondhand smoke by Defendants was presented. The injuries suggested were speculative in nature at this juncture, no "real injury" having been demonstrated. At this point "substantial damages" would not be awarded on such speculation for no way to calculate them has been shown. Though questions remain over the efficacy of such an effort, no evidence of the estimated cost of a complete impermeable barrier covering the hollow wall was offered. While the burden of proof falls upon Mr. Schuman to present some evidence that the nuisance did more than offend the senses, that burden was not met. Trial in this matter may offer something different but for purposes of the preliminary injunction, aside from Mr. and Mrs. Popovic's consent, the request must fail. Given the testimony presented, under the facts before the court, the court does not find that irreparable harm will result unless a preliminary injunction is granted.

Accordingly, it is this 1st day of September, 2010 by the Circuit Court for Prince Georges County, Maryland

ORDERED, that Plaintiff's request for a declaratory judgment be, and the same is, hereby denied; and it is further

ORDERED, that, by consent, the Defendants Darko Popovic and Svetlana Popovic be, and the same are, hereby enjoined until further Order of this court, from smoking tobacco products inside their residence at Unit R, 11 Ridge Road, Greenbelt, Maryland; and it is further

ORDERED, that the request for a temporary injunction enjoining Mr. and Mrs. Popovic from smoking outside of their residence be, and the same is, hereby denied.

<<Signature>>

ALBERT W. NORTHROP, Judge

Footnotes

1	The ownership of residences in the Greenbelt Homes development is unique. While not directly in evidence the court understands the arrangement to be one where you purchase a perpetual use contract which itself can be re-sold. While you own the contract, it is as if you own the residence and can make (approved) alterations and renovations. A purchase money loan can be used to make the purchase in much the same fashion as through a mortgage.
2	Section 3.d. of the Greenbelt Homes, Inc. Cooperative Housing Proprietary Lease and Mutual Ownership Contract states in part: Use of the Premises or any part of the Premises for any purpose contrary to the interests of GHI or its members as determined by GHI or contrary to law is not authorized. It shall be the duty of Member to respect the comfort and peace of mind of neighbors as well as of all members and tenants of GHI, not to engage in conduct that is objectionable conduct, and to ensure that all persons occupying or visiting in the Premises so act. Member agrees not to do or allow to be done, or keep or allow to be kept upon the Premises, anything that will increase the rate of insurance on the Premises or do or allow to be done any act or thing that shall or may be a nuisance, annoyance, inconvenience, or damage to GHI or its members or tenants, or to the occupants of adjoining dwellings or of the neighborhood.
3	<a href="#">90 Md.App.75 at 81.</a>
4	<a href="#">90Md.App.75at81.</a>
5	<a href="#">Adams v. Michael</a> , 38 Md. 123, at 125.
6	See also: <a href="#">Stottlemeyer v. Crampton</a> , 235 Md. 138, 200 A.2d 644 (1963) and <a href="#">Rosenblatt v. Exxon</a> , 335 Md. 58, 642 A.2d 180 (1994).
7	See also: <a href="#">Hart v. Wagner</a> , 184 Md. 40, 40 A.2d 50 (1944) and <a href="#">Exxon Corp. v. Yarema</a> , 69 Md.App. 124, 516 A.2d 990 (1987)
8	<a href="#">190 Md. 348 at 355.</a>