Center Keeps Pace with Smokefree Multi-unit Housing Trends

Across the country, demand for smokefree multi-unit housing is on the rise; supply is slowly starting to respond to that demand. Likewise, the Center for Tobacco Regulation has experienced an increase in requests for assistance related to smokefree multi-unit housing. Those requests come from tenants and condominium owners suffering from smoke drift and from management companies and condominium boards seeking to resolve complaints about smoke drift or to adopt smokefree policies for apartment and condominium buildings. Local health departments have also inquired about actions they may take to assure the availability of smokefree multi-unit housing. To meet the demand for assistance, the Center launched an educational website, www.mdsmokefreeapartments.org, and has established a framework for responding to requests. Deputy Director Rita Turner has served as the principal point of contact for those requesting assistance and continues to manage and update the website.

Smokefree multi-unit housing is in demand because residents, owners, and property managers are concerned about the health risks, clean-up costs, fire hazards, and other liabilities associated with indoor smoking. As it becomes apparent that the risks and harms of indoor smoking outweigh the benefits, smokefree housing has become a key topic not only in tobacco control and public health but also in real estate development and property management. The trend is not only evident in the requests for service to the Center and hits on the website but in the fact that in recent years at least three management companies and two condominium boards in Maryland have implemented smokefree policies. And Maryland is simply part of the wider trend nationwide.

What has brought housing to the forefront of smokefree policy development? The most significant impetus behind smokefree policies in multi-unit housing is the concern about the negative health effects of exposure to secondhand smoke. Secondhand smoke is a well-known health hazard, classified by the EPA as a Class A human carcinogen. There is no safe level of exposure to secondhand smoke. Although adults certainly suffer health consequences of exposure to secondhand smoke, especially those with respiratory or heart problems, children suffer even more acutely. Children exposed to secondhand smoke are at an increased risk of asthma, bronchitis, inner ear infections,
A recent study from the University of Rochester reveals that even among children living with non-smokers, those in multi-unit housing show a 45% increase in secondhand smoke exposure as compared to those living in detached housing. The study indicates that children are more likely to suffer from secondhand smoke exposure if they live in a multi-unit building. In addition to health concerns, the risk of accidental fire from improperly discarded smoking materials persuades residents and owners that smokefree policies make sense. For management companies, smokefree policies make dollars and cents as clean-up costs associated with a unit in which smoking was frequent are much higher than for non-smoking units. Finally, as is evident from the requests for technical legal assistance, the legal issues raised by secondhand smoke drift in multi-unit housing provide impetus for management companies and condominium boards to adopt smokefree policies.

Tobacco smoke is nearly impossible to contain in any multi-unit residence. Vents, ducts, doors, windows, and plumbing are just a few of the conduits that allow secondhand smoke from one unit to fill another. Despite the known health risks, clean-up costs, and fire hazards of indoor smoking, some apartment owners and condominium boards hesitate to prohibit indoor smoking because of the common misconception that such a restriction would infringe on the rights of residents who smoke. However, landlords and condominium boards should feel confident that there is no right to smoke and that smokefree policies are not discriminatory. Neither state nor federal law prohibits landlords from restricting smoking on their property. In fact, case law from around the country indicates that smoking should be treated like other legal activities that have been traditionally regulated by landlords, such as keeping a pet or playing loud music.

When a resident is exposed to secondhand smoke in his own home, he has a number of potential legal claims. Secondhand smoke drift may constitute a nuisance, an interference with the right to enjoy property. A nuisance claim may be pursued against the smoking neighbor and against a landlord or condominium board that refuses to take action to prevent the smoke drift. Lease-based contract claims may also be raised against the landlord. Such claims may arise from the implied warranty of habitability (a promise that the property is fit for human habitation) or of quiet enjoyment (the right to enjoy the property free from annoyance or interference from others within the control of the landlord). Many leases contain specific nuisance provisions that could...
also provide a breach of lease action against the landlord. In the condominium setting, a nuisance claim against the smoking neighbor may be available in addition to claims against the neighbor or condominium board based on the condominium by-laws.

Additionally, if a tenant has a disability that is caused or exacerbated by secondhand smoke, the landlord has a legal obligation under the Fair Housing Act to make “reasonable accommodations” for that tenant. Many landlords or property managers have made efforts to change ventilation or set up filtration systems to mitigate the nuisance caused by secondhand smoke. Unfortunately, while these measures may help with the smell, there is no evidence that they eliminate health risks associated with secondhand smoke.

The Center is able to assist tenants, landlords, condominium boards, and others involved in a dispute over secondhand smoke by educating the parties about their rights and obligations. In other jurisdictions, however, the parties have used litigation to resolve such disputes. For example, recently two D.C. residents brought suit against their neighbors and condominium boards in an effort to protect themselves from secondhand smoke. In one case, the condominium board found the secondhand smoke to be a nuisance under existing condominium rules and regulations. In the other case, the condominium board amended its nuisance clause to include secondhand smoke after the trial judge issued a court order prohibiting the offending neighbor from smoking indoors. Currently, a Maryland lawsuit involving a housing cooperative is pending (Schumann v. Greenbelt Homes, et.al., CL-10-6047).

Management companies and condominium boards, aware of the potential for litigation and liability associated with secondhand smoke drift, are implementing smoke-free policies to prevent such litigation and liability. In June, another D.C. building management company, Equity Residential, announced its smokefree policy. In Bethesda, the owner of the Alaire apartment building is marketing its smokefree policy to potential tenants. In April of this year, the Washington Post’s real estate section published a guide to help renters secure smoke-free housing for themselves and their families.

Whether because of concerns for residents’ health and safety or their own liability and bottom line, apartment owners and condominium boards are moving toward comprehensive indoor smoking bans. As long as supply voluntarily rises to meet demand for smokefree multi-unit housing, legislators and policymakers need not impose mandatory provisions. The Center will continue to provide support to tenants, owners, management companies, and condominium boards interested in providing or securing smokefree housing. The Center website will continue to serve as an essential resource to the Center’s work and will evolve as the trend of smokefree multi-unit housing evolves.

References


One year after President Obama signed the Family Smoking Prevention and Tobacco Control Act giving the Food and Drug Administration (FDA) regulatory power over tobacco products, important agency regulations went into effect across the country. In addition, provisions of the Act set to go into effect 12 months after signage will be enforced by the FDA. For tobacco retailers, the regulations impose the following requirements and restrictions with respect to the sale of cigarettes and smokeless tobacco:

- Sales to individuals under age 18 are prohibited;
- Identification must be request on all tobacco sales; if the consumer is over age 26, identification check is not required;
- Product placement restrictions require a face-to-face exchange, prohibiting self-service displays and vending machines (with some exception for facilities that allow only adults to enter);
- Cigarettes may be sold only in minimum packs of 20; smokeless tobacco may be sold only in original packaging from the manufacturer;
- Free cigarette samples are prohibited except in adult-only facilities (unless state or local law prohibits all free samples) and additional restrictions apply to free smokeless tobacco samples; and
- All packages offered for sale and in-store advertising must comply with the relevant regulations imposed on tobacco product manufacturers.

Retailers who violate any of these provisions may be subject to civil money penalties, warning letters, seizures, injunctions, or criminal prosecution. With respect to certain violations, the retailer could also be subject to state or local enforcement and penalties.

In addition to the sales and distribution regulations, effective June 22, 2010, cigarette manufacturers may no longer market cigarettes using the descriptors light, mild, low tar, or similar terms, meaning packages and advertising may not bear these terms. Although products using the descriptors that were manufactured and introduced into commerce before June 22 may continue to be sold, retailers may be subject to sanctions such as seizure of the product and criminal and civil penalties for selling products that violate the prohibition. Likewise, manufacturers are required to include new, rotating warnings on smokeless tobacco product packaging and advertising; retailers may also be held liable for selling products in violation of the new requirements.

The FDA continues to implement a comprehensive plan to insure that the federal legislation designed to curtail youth access to and use of tobacco products and to decrease smoking in all segments of the population achieves those goals. To learn more about the agency’s work, go to www.fda.gov/tobaccoproducts.

Center staff have provided information about the new laws to state and local tobacco control personnel and have participated in retailer education programs to inform tobacco sellers about the new provisions. As new provisions go into effect, the Center will continue to keep state and local officials updated.

**Revised Smokeless Tobacco Warnings:**

- This product is addictive.
- This product can cause mouth cancer.
- This product can cause gum disease.
- This product is not a safe alternative to cigarettes.
On behalf of the Society for Research on Nicotine and Tobacco (SRNT) and the Association for the Treatment of Tobacco Use and Dependence (ATTUD), Center Director Kathleen Dachille filed a Citizen’s Petition to the FDA requesting that the agency make changes to the approval process and regulation of nicotine replacement therapy (NRT), such as the patch, gum and lozenge. The petition was accompanied and supported by a review paper, entitled “Barriers to Use of FDA-Approved Smoking Cessation Medications: Implications for Policy Action”, which was funded by the Robert Wood Johnson Foundation. Broadly, the Petition asks the federal agency to take a more flexible approach to regulating NRT to expand access and allow for use that will maximize effectiveness of the products. More specifically, the Petition requests the following:

- **Comparison With Risks from Continued Smoking**: The FDA must recognize that tobacco dependence is a chronic disease that causes grave illness and death in smokers. Labeling of NRT products should reflect the health risks associated with use of NRT compared to continued smoking.

- **Combined Use**: Package labeling should allow for some combined use of NRT products meaning permitting the occasional use of nicotine gum to fight a strong urge while using the patch. Current labeling strongly warns against the combined use of NRT products yet sound research shows that combined use is safe, highly effective and considered the standard of care.

- **Length of Treatment**: NRT users should not be discouraged from using the product beyond the currently recommended 8-12 weeks. Research shows that use well beyond 12 weeks is safe and may help some smokers who would otherwise relapse to smoking permanently quit.

- **Package Size**: FDA should permit the sale of NRT in one-day packages that can be priced affordably. Currently the FDA prohibits such packaging. The high price of NRT in one-week size or larger packaging, compared to the much lower price of a package of cigarettes, serves as a major hurdle for many smokers interested in quitting.

- **Continued Smoking and NRT**: Current package labeling strongly warns against continued smoking and use of NRT. Labeling should be changed so consumers know they can safely use NRT to treat nicotine withdrawal symptoms during times when they can’t smoke (i.e., in hospitals and on airplanes), even though they may not be planning to quit completely at that moment, or to assist in reducing the number of cigarettes smoked before making a quit attempt.

- **Availability of NRT at Retail Stores**: NRT should be widely available. The FDA should remove restrictions that discourage the sale of NRT at non-pharmacy retail locations.

- **NRT Use by Smokers with Certain Health Conditions**: Current warnings discourage individuals with certain health conditions from using NRT. The FDA should modify these warnings to encourage use of NRT to reduce the amount of smoking or to quit altogether by individuals suffering from heart disease and other smoking-related chronic conditions.

The Petition can be found at www.regulations.gov/search/Regs/home.html#docketDetail?R=FDA-2010-P-0089. Comments in support of the Petition are encouraged and can be filed at the preceding link.
From a tobacco control perspective, the 2010 session of the Maryland General Assembly was relatively uneventful, benign. With the state budget crisis continuing and an election looming in the Fall, legislators and advocates gave little attention to tobacco-related legislation. As a result, only one tobacco control bill passed; many died in Committee.

The sole tobacco bill passed in 2010 was House Bill 88, which requires retailers of non-cigarette, or other tobacco products (OTP), to acquire a license to sell OTP; OTP manufacturers, wholesalers and storage warehouse operators must also acquire a license. A particular license is also required for a tobacco agent. The bill also provides for a regulatory scheme for the issuance, renewal, suspension, and revocation of licenses; mandates certain reporting by licensees; and grants the Comptroller plenary power to oversee implementation of the law. Much of HB 88 mirrors current provisions that apply to cigarette manufacturers, retailers, storage warehouse operators, and wholesalers. Providing time for the OTP industry, local clerks of court who process applications and the Comptroller to prepare for implementation, the law does not go into effect until May 2011.

House Bill 88 was unanimously supported by the Attorney General and tobacco control advocates. Licenses have been required for those who make, distribute or sell cigarettes for several decades; local and state enforcement officials can readily identify locations where cigarettes are sold and conduct appropriate enforcement activities to insure compliance with the laws regarding cigarette sales. Because no such license has been required, the same comprehensive enforcement mechanism has not been in place for those who make, distribute or sell OTP. As these products become more widely available and popular with consumers, requirements or problems with the proposal. Opposition came from the cigar and tobacco industry. Some of the substantive arguments in opposition, heard for the first time at the hearing, revealed issues that could readily be addressed next year to assure some members’ concerns.

Similarly, a hearing before the Senate Judicial Proceedings Committee on Senate Bill 973, legislation that would prohibit the sale of flavored cigars, revealed a variety of changes that could be made to the bill to increase the likelihood of passage in 2011. Lead sponsor Senator Madaleno was joined by Clinic students Julie Siegel and Avery Blank at the hearing; Joan Stine of the Department of Mental Health and Hygiene (DHMH) joined in support as did other public health and tobacco control advocacy groups. Because SB 973 was a first time bill before the Committee, members used the hearing to learn about the reasons behind the bill, the potential impact of the provisions and the deficiencies or problems with the proposal. Opposition came from the cigar and tobacco industry. Some of the substantive arguments in opposition, heard for the first time at the hearing, revealed issues that could be better addressed in 2011 during the drafting of the bill and supporting testimony. The bill was heard quite late in the session and did not get voted on in Committee; hence, the bill failed. Nevertheless, the hearing provided an excellent learning opportunity that advocates can use to improve the campaign for 2011.

Another new proposal that failed was House Bill 720, a bill designed to prohibit the sale of electronic cigarettes in Maryland until such products are subject to the regulatory power of the Food and Drug Administration (FDA) (see insert describing electronic cigarettes on page 7). Lead sponsor Delegate Elizabeth Bobo was inspired to file this bill in response to complaints from high school students in her district who complained that e-cigarette sellers at local shopping malls were aggressive, targeting young people. The FDA attempted to regulate the products, essentially requiring that e-cigarettes be subject to the drug delivery
device approval process before being available for sale to consumers. On challenge, a federal trial court found that the agency lacked authority to impose the restrictions; the FDA has appealed the decision (Smoking Everywhere Inc. v. FDA, 680 F. Supp. 2d 62 (D.D.C. 2010)). While the FDA's regulatory powers are being determined, there are no restrictions on the sale of e-cigarettes in Maryland. E-cigarettes may be sold by any retailer to any consumer, regardless of age, and there are no warnings or instructions required on the product. There is relatively little research on the safety and efficacy of e-cigarettes; some research shows that potentially dangerous chemicals are delivered to the user’s lungs and bloodstream. Hence, Delegate Bobo’s bill was an important public health measure.

At the bill hearing, Center Director Kathleen Dachille and tobacco control advocate and cessation specialist Matt Barry explained to the members of the Health and Government Operations Committee the importance of the bill. Although there was little opposition expressed at the hearing, after the hearing an advocacy group of so-called “Vapers”, consumers who use e-cigarettes, inundated the Committee with letters in opposition to the bill. At the voting session where the bill failed on a 3-19 vote, Delegate Hubbard, Chair of the Public Health Subcommittee, explained that the Subcommittee believed that the FDA would soon regulate e-cigarettes and that the “cessation” community was opposed to a ban.

House Bill 1558, sponsored by Delegate Benson and supported by the Attorney General and the Comptroller, would have allowed the Comptroller to issue a specific penalty for the sale of single cigarettes and would have prohibited retailers from selling consumers unpackaged cigarettes produced through an on-site cigarette rolling machine. Current law requires that cigarettes be sold in a minimum package of 20 yet the Comptroller may only respond to such a violation by suspending or revoking a cigarette retailer’s license; HB 1558 would have allowed the Comptroller to impose a fine of up to $500 for a violation. Current law also allows retailers to sell roll-your-own (RYO) tobacco and allows consumers to use on-site rolling machines to produce relatively cheap cigarettes, avoiding significant taxes. House Bill 1558 would have curtailed that process, insuring that cigarettes be sold only in packages of at least 20 and with a Maryland tax stamp. The bill passed the full House but received an unfavorable report in the Senate Finance Committee, with a 4-7 vote. The Comptroller and the Attorney General are likely to renew this legislation, likely with a Senate cross-file, in 2011. Other tobacco-related bills that failed in 2010 are described briefly below.

- **House Bill 1103**, sponsored by Delegate Rosenberg, would have imposed product placement restrictions on tobacco retailer and allowed for local health departments to enforce the restrictions. Clinic students Serra Schlanger and Rachel Shapiro testified in support of the bill as did representatives from DHMH and tobacco control and public health advocates. Although the bill failed, FDA regulations went into effect June 22, 2010, that impose similar restrictions on all retailers. See Important Federal Tobacco Control Provisions, p. 4.

- **House Bill 1497**, a Departmental bill for DHMH, would have imposed an identification check requirement on all tobacco sales, prohibited the sale of tobacco to minors and allowed for local health department enforcement of these provisions. While local enforcement will remain an issue of local law for now, the identification check provision is included in the FDA regulations that went into effect June 22, 2010.

- **House Bill 957/Senate Bill 703**, cross-filed by Delegate Tarrant and Senator Garagiola, would have imposed the identification check requirement, altered...
Data and anecdotal evidence continue to show the increasing use of cigars—not the fat stogie your grandfather smoked but the hip, small blunts that are cheap and available by the single. The products are particularly popular among minors because they are available in sweet and sassy flavors, masking the harsh tobacco taste to a smoking initiate and enticing young consumers. Sadly, many users vastly underestimate the negative health effects and addictiveness of smoking this type of cigar, which is generally inhaled like a cigarette. Unlike cigarettes, however, cigars may be sold in fruit and candy flavors, or sold by the single and are subject to only a modest tax. The Prince George’s County Council and the Baltimore City Health Commissioner took action in 2009 to reduce the accessibility of these products by imposing a minimum pack size. Per the Prince George’s ordinance and the Baltimore City regulation, cheap cigars may be sold only in a minimum pack of five. As with the 20-pack minimum for cigarettes, the minimum pack size for cigars is designed to reduce the availability of the product to price-sensitive youth and to discourage impulse purchasing of cigars.

Prince George’s County became the first jurisdiction to pass a law imposing a minimum pack size of five for cigars in November 2008; the law was immediately challenged in court. After tweaking the law to cure a potential defect in April 2009, the County vigorously defended the ordinance in court. The cigar industry challenging the local ordinance raised two primary issues, both unique to Maryland. The first argument is that Prince George’s County lacks the power to pass the cigar packaging law—the law is not sufficiently “local” in nature—because the law will have a significant impact outside of the County. The industry also claims that State law preempts the County from regulating tobacco sales. The parties filed cross motions for summary judgment that were argued in the Circuit Court for Prince George’s County on July 16, 2009. In July 2010, the Court ruled in favor of the County, and the cigar industry plaintiffs files and appeal in August.

After gathering and considering data and research on these small, cheap cigars, as well as extensive comments submitted in response to a proposed regulation, then Baltimore City Health Commissioner, Dr. Joshua Sharfstein (now Deputy Commissioner of the Food and Drug Administration), issued a regulation imposing a minimum pack size of five for cigars in February 2009. See “Baltimore City Health Officer Proposes Regulation to Reduce Cigar Consumption,” Tobacco Regulation Review, Vol. 7, Issue 2, September 2008, at p. 1. The City regulation and the Prince George’s County ordinance are quite similar; hence, the industry’s legal challenge to the City regulation raises the local law and preemption issues. The City suit raises the additional issue of whether the Health Commissioner’s nuisance abatement powers allow for the issuance of a cigar packaging regulation. A bill pending before the City Council would impose the same packaging requirements as the health regulation, eliminating the challenge to the Commissioner’s power; however, that bill has not been presented for a vote. A recent decision by the Circuit Court for Baltimore City demonstrates the imperative of the Council’s adoption of the cigar packaging restrictions: In June, the Court found that the Health Commissioner lacked the power to issue the cigar packaging regulation; the Court did not decide the local law or preemption challenges. The City has appealed the trial court’s decision.

As they did with the statewide bills that would have imposed a minimum pack size on cigars (H.B. 238(2009); H.B. 609(2008)), Center staff provided technical assistance to the Prince George’s County Health Office and Council and the Baltimore City Health Commissioner and Council with their respective bills and regulation. The Center has also provided litigation support to the Prince George’s County Attorney and the Baltimore City Solicitor. Much of this work was performed by law students enrolled in the Tobacco Control Clinic. Center staff have also responded to innumerable requests for consultation on this issue from public health officials, advocates, state and local legislators, and attorneys from across the country. A grant from the Maryland Department of Health and Mental Hygiene will allow the Center to continue working on many issues surrounding cigars, including packaging restrictions. Through the Center website and future issues of Tobacco Regulation Review, the Center will keep readers apprised of the legislative and litigation outcomes.
Congratulations are in order for Program Coordinator Megan McDonald! Megan recently graduated from the University of Maryland Baltimore County with a Master’s Degree in Public Policy, Health Policy track.

We are pleased to announce that Carter Beach, a 2010 graduate of the University of Maryland School of Law and Tobacco Control Clinic student, has accepted a position as Regulatory Counsel with the FDA’s Center for Tobacco Products.

Baltimore Sun Publishes Clinic Students’ Op-Eds

During the 2010 Spring semester, the Baltimore Sun published Commentaries by several Tobacco Control Clinic students in the paper’s Op-Ed section. One piece focused on proposed legislation before the Maryland General Assembly and two others on policy issues ripe for discussion and action. The first Commentary, published March 17, 2010, “Flavored Cigars are Aimed at Kids,” focused on the dynamics of flavored cigar marketing and use, arguing that just as flavored cigarettes are banned as youth-enticing products, so too should flavored cigars—such as cherry Black and Milds and grape Phillies Blunts—be banned. Authors Julie Siegel and Avery Blank urged readers to express support for Senate Bill 973 that would have banned the sale of certain flavored cigars. (See 2010 General Assembly Session Review at p. 6). On April 16, 2010, the Sun published an Op-Ed by Carter Beach entitled, “Time to Spit Out This Baseball Tradition.” The piece explains the prevalence and impact of spit tobacco use among professional and youth baseball players and urging Major League Baseball to prohibit use of spit tobacco during professional games just as such use is prohibited in the minor leagues and the NCAA. Finally, in “A Littering Habit Baltimore Needs to Kick,” published April 28, 2010, Megan Mueller noted the prevalence of cigarette butt trash in Baltimore City, explaining the detrimental impact of this trash and suggesting policy changes that would decrease the blight and environmental degradation of cigarette butt trash.

These student Op-Eds were published within a six-week period. Each of the issues covered in the public Commentaries continues to be the focus of the Center and will be on the list of projects for incoming students in the Fall semester. The published Commentaries are available on the Center’s website (www.law.umaryland.edu/tobacco) under the Publications tab.

SAVE THE DATE!

On October 22, 2010, the Center for Tobacco Regulation will host a workshop to educate Maryland state and local public health officials about policy options related to cigar packaging and flavored cigars and smokeless tobacco. Information on smokefree multi-unit housing will also be available. Details will be available on the Center website and through invitations in early Fall.
the penalty for youth cited for possession of tobacco and included little cigars (“brown cigarettes”) within the definition of cigarette for certain purposes, such as taxation and minimum packaging.

- **House Bill 1354/Senate Bill 346**, cross-field by Delegate Manno and Senator Garagiola, would have authorized the Attorney General and Comptroller to require the use of electronic cigarette stamps that allow for better tracking and accounting of cigarettes and to decrease the use of counterfeit tax stamps.

- **House Bill 1509**, promoted by Altria/Philip Morris, would have limited to $200 million the amount of an appeal bond that could be imposed on a cigarette manufacturer that signed the Master Settlement Agreement in certain civil cases.

The lack of passage of important tobacco control measures during the 2010 General Assembly session should not be discouraging to tobacco control advocates. Election year sessions with extremely tight budget constraints generally do not yield significant public health legislation. As the economy begins to improve slowly and as the 2010 election will have ended, the 2011 session promises more opportunity for tobacco control and other public health legislation.