SECONDHAND CANNABIS SMOKE IN MULTIFAMILY RESIDENTIAL HOUSING

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Decades of litigation and housing policy have established the rights of renters and condo owners to obtain relief from secondhand tobacco smoke exposure from a neighboring unit in a multifamily dwelling, such as an apartment building or a condominium. While the legalization of adult-use cannabis is a relatively recent development in Maryland, exposure to secondhand cannabis smoke and vapor in multifamily residential buildings is a matter of significant health concern, implicating the same health risks of tobacco smoke and vapor.

Secondhand cannabis smoke contains many of the same known and suspected cancer-causing chemicals as tobacco smoke, such as ammonia, hydrogen cyanide, nitric oxide, aromatic amines, and polycyclic aromatic hydrocarbons, and some of those chemicals appear in higher concentrations in cannabis smoke than tobacco smoke.[1] In addition to containing carcinogenic chemicals, cannabis smoke exposure likely causes the same harm to heart and lung health as tobacco smoke.[2]

Similarly, vape products have been linked to severe lung injuries, including both cannabis-derived THC vapes and nicotine vapes.[3] Because harmful chemicals emitted by vapes can also be inhaled secondhand, exposure to vaporized cannabis aerosol is also a health risk.[4]

The American Society for Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE), which is the country's leading authority on ventilation and indoor air quality, has issued a position paper stating that the only effective means of eliminating indoor smoke exposure is to ban smoking in and around buildings.[5] The risks of cannabis smoke and aerosol exposure may require apartment and condominium residents to assert legal protections to avoid further exposure. Below is an overview of the legal protections that an apartment tenant or condo owner can use to enforce their right to a smoke-free home.

LEASE RIGHTS

For a rental tenant, the lease agreement is the primary source of housing rights and responsibilities and may provide protection from exposure to secondhand cannabis smoke and aerosol. Many residential buildings have specific lease provisions preventing indoor smoking or vaping, but even if they do not, the following legal protections apply as a matter of Maryland law.

Maryland holds landlords responsible for ensuring that residential properties are fit for human occupancy.[6] Should secondhand cannabis from a neighboring unit be so severe that a tenant cannot remain in the unit, or even be present in particular rooms at particular times, the landlord may have breached their obligation to keep the residence fit for habitation. The terms of the lease will spell out how a tenant should report a concern to the landlord to obtain relief.

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A landlord who has been informed that a tenant is exposing their neighbors to secondhand smoke or aerosol should contact the tenant and work with them to abate the harm, escalating the matter if the tenant repeatedly fails to cease the harmful cannabis use.

In extreme circumstances, a tenant may need to leave the apartment under a claim of constructive eviction.[7] A constructive eviction occurs when the action or inaction of a landlord cause serious interference with the tenant's use of the property, resulting in the tenant vacating the premises. Typically, constructive eviction may not be claimed until the premises have been vacated and requires evidence that the landlord failed to take required action despite notice from the tenant of the issue.[8] A tenant who has been constructively evicted from their home is relieved from the terms of the lease, and may be able to recover from the landlord compensation for expenses associated with an unexpected move. While not required, evidence from a health care professional about adverse health effects of secondhand smoke would support a claim of constructive eviction.

All lease-based claims arise from the same principle: that the lease agreement requires the landlord to provide a habitable residence, and that secondhand smoke has made the unit unfit for habitation. To support a breach of lease claim resulting from secondhand cannabis, a tenant should document their communications with the landlord requesting relief from the smoke or vapor, any attempts by the landlord to resolve the problem, and any medical conditions either arising from or aggravated by the cannabis exposure.[9]

THE MARYLAND CONDOMINIUM ACT AND BYLAWS-BASED ACTIONS

Owners of condominium units may also have the right to enforce smoking policies based on their condo's bylaws. Under Maryland law, condo unit owners are authorized to delegate authority to a board of directors, which has broad powers to create and enforce condo rules.[10] Boards are bound by law to exercise reasonable and ordinary care to keep common areas of the premises safe and prevent harm to guests. Common areas are all areas of the property outside of the units, including stairs, shared entryways, and outdoor areas. Boards can be subject to negligence lawsuits from unit owners should they fail to take appropriate actions to fix problems that harm the health or safety of owners or guests.[11]

The Maryland Office of the Attorney General has concluded that a condominium board may regulate smoking in individual units as long as the bylaws do not specifically deny the board that authority.[12] If a neighbor's secondhand cannabis is rendering other units or shared spaces inhospitable to residents and guests, the board has the authority and a duty to address the issue by enforcing smoking regulations.

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FAIR HOUSING ACT

The federal Fair Housing Act (FHA) prohibits discrimination in private housing against several protected classes of individuals, including those with a disability. The FHA prohibits anyone from refusing to make reasonable accommodations in housing rules, practices, or services that are necessary for a disabled person to use the housing on an equal basis with nondisabled persons.[13]

Based on that requirement, a landlord or condo board is required to make a reasonable accommodation, such as enforcement of a no-smoking policy, if such an accommodation is required for a person with a respiratory disability, such as asthma, to be able to breathe in the unit.

An FHA disability claim can be asserted by an individual with a physical or mental impairment that substantially limits one or more major life activities. In the context of secondhand cannabis, that would need to be a record of a respiratory condition that makes an individual particularly sensitive to secondhand smoke or vapor. A reasonable accommodation could be the creation of a non-smoking policy or moving either the smoking tenant or the affected tenant to a further unit.

PRIVATE NUISANCE

A tenant who is repeatedly subjected to unwanted secondhand cannabis from a neighboring unit may have grounds to seek an order from the court prohibiting certain smoking behavior and monetary damages through a nuisance lawsuit.

A private nuisance exists when one person unreasonably interferes with another person's interest in a property.[14] For there to be a nuisance, Maryland law requires that there be a continuing or recurring interference. A neighbor smoking in their unit once or twice would not support a nuisance claim, but regular or repeated smoking incidents could constitute a nuisance. A resident who succeeds in proving a claim for nuisance based on secondhand smoke in court would be able to recover damages for illness, discomfort, or depreciation in property value resulting from the smoke exposure. To do so, the tenant would need to have evidence to back up their claim that their property was interfered with. This could take the form of medical records of harm from secondhand smoke, witness testimony from individuals affected by the smoke, an inspection report indicating cannabis odor or smoke damage, or other supporting evidence.

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MARYLAND CLEAN INDOOR AIR ACT

Maryland's Clean Indoor Air Act (CIAA) prohibits smoking and vaping of tobacco, cannabis, and hemp products in indoor areas that are open to the public and indoor places of employment.[15] There is a specific exemption stating that the CIAA does not apply to private residences, but it would apply to many common areas of multifamily housing units, such as lobbies, management offices, and shared recreational facilities.[16]

Repeat violators of the CIAA are subject to fines from the Maryland Department of Health.[17] Complaints may be submitted to a resident's local health department or the Environmental Health Helpline at 1-866-703-3266 or mdh.envhealth@maryland.gov.

FEDERALLY SUBSIDIZED HOUSING

Because cannabis use remains prohibited under federal law, federal housing subsidies are specifically denied to individuals who are current cannabis users. This includes Housing Choice Vouchers and all public low-income housing funded by the U.S. Department of Housing and Urban Development (HUD).[18]

Not only are cannabis smoking and vaping prohibited in these housing units, but any cannabis use disqualifies users from receiving subsidies. If the housing authority administering the subsidy becomes aware of a tenant's cannabis use, they may revoke voucher funding or evict the tenant from a low-income unit. While federal recognition of medical cannabis has shifted significantly in recent months, there has not been clear guidance from HUD regarding if, or how, these changes will impact the legality of cannabis use for the purposes of housing subsidies.

For further information, please reach out to PubHealthCannabis@law.umaryland.edu. More information for tenants, homeowners, and landlords can be found at mdsmokefreeapartments.org. This resource is not legal advice; if any of the situations described in this resource apply to you, you may wish to speak with an attorney about your specific circumstances. Free legal services are available for low-income individuals at Maryland Legal Aid, www.mdlab.org.

The work of the Legal Resource Center for Public Health Policy (LRC) is funded in part by the Maryland Department of Health. The LRC provides information and technical assistance on public health issues related to cannabis, injury prevention, problem gambling, and tobacco. The legal information and assistance provided in this document does not constitute legal advice or legal representation.

For legal advice, please consult specific legal counsel.

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[1] David Moir et al., *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Cigarette Smoke Produced Under Two Machine Smoking Conditions*, 21 CHEM. RSCH. TOXICOLOGY 494 (2008), https://pubs.acs.org/doi/10.1021/tx700275p.

[2] *Cannabis and Secondhand Smoke*, CDC (Feb. 15, 2024), https://www.cdc.gov/cannabis/health-effects/secondhand-smoke.html.

[3] Vikram P. Krishnasamy et al., *Update: Characteristics of a Nationwide Outbreak of E-cigarette, or Vaping, Product Use-Associated Lung Injury – United States, August 2019 – January 2020*, CDC (Jan. 24, 2020).

[4] *Secondhand Electronic-Cigarette Aerosol and Indoor Air Quality*, EPA (last updated June 6, 2024), https://www.epa.gov/indoor-air-quality-iaq/secondhand-electronic-cigarette-aerosol-and-indoor-air-quality#:~:text=Research%20indicates%20that%20e%2Dcigarettes,those%20in%20secondhand%20tobacco%20smoke.

[5] Am. Soc'y of Heating, Refrigerating & Air-Conditioning Eng'rs, ASHRAE Position Document on Environmental Tobacco Smoke (2023), *https://www.ashrae.org/file%20library/about/position%20documents/pd_environmental-tobacco-smoke-2023-06-28.pdf*.

[6] Md. Code Ann., Real Prop. § 8-211 (available at *https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=grp&section=8-211&enactments=false*).

[7] *Quiet Enjoyment and Constructive Eviction*, THE PEOPLE'S LAW LIBRARY (last updated Jan. 18, 2022), https://www.peoples-law.org/quiet-enjoyment-and-constructive-eviction.

[8] Bocchini v. Gorn Management Co., 69 Md. App. 1, 4-5 (Md. App. Ct. 1986).

[9] *See, e.g.*,Poyck v. Bryant, 13 Misc. 3d 699, 706 (N.Y. Civ. Ct. 2006).

[10] REAL PROP. § 11-109 (available at https://mgaleg.maryland.gov/mgawebsite/laws/StatuteText?article=grp&section=11-109&enactments=false).

[11] Macias v. Summit Management, Inc., 243 Md. App. 294, 327-28 (Md. App. Ct. 2019) (citing Bramble v. Thompson, 287 A.2d 265, 267 (Md. 1972)).

[12] Letter from Kathryn M. Rowe, Assistant Att'y Gen. of Md., to Del. Samuel I. Rosenberg (Feb. 15, 2008), https://mdsmokefreeapartments.org/wp-content/uploads/2023/05/Rosenberg-02-15-08.pdf.

[13] 42 U.S.C. § 3604(f) (available at https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter45&edition=prelim).

[14] *Common Law Nuisance*, MD. SMOKE FREE LIVING (last accessed Aug. 16, 2024), https://mdsmokefreeapartments.org/landlords/legal-rights/common-law-nuisance/#:~:text=%E2%80%9CCommon%20law%20nuisance%E2%80%9D%20%E2%86%92%20To,)%20of%20Torts%2C%20%C2%A7821D.

[15] HEALTH-GEN. § 24-504 (available at https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=ghg&section=24-504&enactments=false).

[16] *Id.* § 24-505 (available at https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=ghg&section=24-505&enactments=False&archived=False).

[17] *Id.* § 24-508 *(available at* https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=ghg&section=24-508&enactments=false*).*

[18] 24 C.F.R. § 5.854 (available at https://www.law.cornell.edu/cfr/text/24/5.854).

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