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Hearing Set: Friday, January 26, 2007  
Time: 9:00 a.m.  
Judge/Calendar: Judge Tabor, Dept. 6

SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON

AMERICAN LEGION POST #149,  
  
Plaintiff,  
  
v.  
  
Washington State Department of Health and the  
Kitsap County Health District,  
  
Defendant.

No. 06-2-01384-8

DEFENDANT KITSAP COUNTY HEALTH  
DISTRICT'S RESPONSE TO PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT.

INCORPORATION OF CROSS-MOTIONS FOR SUMMARY JUDGMENT

Defendant Kitsap County Health District ("District") maintains that its Motion for Summary Judgment, as well as the Department of Health's Motion for Summary Judgment, adequately address all of the arguments raised in Plaintiff's ("Post") Motion for Summary Judgment. Therefore, rather than duplicate those arguments, the District adopts and incorporates those briefs as if fully set forth herein.

ARGUMENT

While the District maintains that its' Motion for Summary Judgment adequately establishes that the Post is not entitled to Summary Judgment, this Response will provide further argument in response to the Post's claim that the Clean Indoor Air Act/Ordinance ("Act") interferes with fundamental rights as well as its argument that the District's Ordinance is preempted by State Law.

1           A.     The Post’s Burden.

2           As the party challenging the Act, the Post bears the burden to prove that the Act is unconstitutional  
3 beyond a reasonable doubt. *Amalgamated Transit Union Local 587 v. Wa.*, 142 Wn.2d 183, 205, 11 P.3d  
4 762 (2000). “This standard is met if argument and research show that there is no reasonable doubt that the  
5 [law] violates the constitution.” *Id.* “Passing treatment of a constitutional issue or lack of reasoned  
6 argument is insufficient to merit judicial consideration.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d  
7 1082 (1992); *Des Moines Marina Ass’n v. Des Moines*, 124 Wn. App. 282, 100 P.3d 310 (2004). Before a  
8 court invalidates a law “it must be clear that the legislation cannot reasonably be construed in a manner that  
9 comports with constitutional imperatives.” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804, 23  
10 P.3d 477 (2001). Here, the Post relies on a myriad of constitutional issues but provides only passing or  
11 cursory treatment of those issues. Therefore, the Post’s Motion for Summary Judgment should be denied.  
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15           A.     Fundamental Rights

16                     There can be no question that the regulation is a valid use of the State’s police  
17 power. There is no more a fundamental right to smoke cigarettes than there is to  
18 shoot-up or snort heroin or cocaine or to run a red light.<sup>1</sup>

19           In its Motion, the Post argues that the Act impinges upon the fundamental rights of Liberty, Privacy  
20 and Association. In making these arguments, the Post relies upon the fundamental rights of its members.  
21 As discussed on page 11 of the District’s Motion for Summary Judgment, the Post lacks standing to rely  
22 upon the rights of its members. *N.Y.C. C.L.A.S.H. v. City of New York*, 315 F.Supp.2d 461, 473 (S.D.N.Y.  
23 2004). Therefore, even if the act impinged upon the fundamental rights of its members, the Post lacks the  
24 standing to rely on those rights. As such, the Court should summarily dismiss the Posts fundamental rights  
25 arguments.  
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<sup>1</sup> *Fagan v. Axelrod*, 146 Misc.2d 286, 297, 550 N.Y.S.2d 552 (1990)

