

1 **EXPEDITE**
2 **X HEARING SET: Friday, January 26, 2007**
3 **TIME: 9:00 am**
4 **JUDGE/CALENDAR: JUDGE TABOR, DEPT. 6**

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8 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY
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10)	
11	American Legion Post #149,)	
12	Plaintiff,)	Case: 06-2-01384-8
13	vs.)	
14	Washington State Department of)	Plaintiff's Motion for &
15	Health and the Kitsap County)	Memorandum in Support of
16	Health District,)	Partial Summary Judgment
17	Defendants)	

18
19 **I. SUMMARY**

20 This is a challenge to the validity, construction and/or
21 application of a local ordinance and state law which bans
22 smoking in a private facility, specifically the American Legion
23 Post #149 home. Those laws are: Kitsap County Board of Health's
24 [KCBH] *Clean Indoor Air Ordinance 2006-02* and Washington State's
25 *Smoking in Public Places* [Ch. 70.160 RCW].
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31	Plaintiff's Motion for	- 1 -	Shawn Timothy Newman
32	& Memorandum in Support		Attorney for Plaintiff
	of Partial Summary Judgment		Attorney at Law, Inc., P.S.
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1 **II. RELIEF REQUESTED**

2 The Post asks the Court to enter partial summary judgment:

3
4 A. Enjoining defendants from enforcing the laws in the
5 Post's private home facility "except upon the occasions when the
6 facility is open to the public" per the definitions of "public
7 place" found in both the ordinance and state law.
8

9 B. Declaring that the law as applied is unconstitutional,
10 preempted and/or void.
11

12 C. Awarding costs and attorney fees.

13 **III. STATEMENT OF FACTS**

14
15 A. The Post is a nonprofit private fraternal organization
16 which owns and operates a private facility (referred to as the
17 *Post Home*) at 4922 Kitsap Way, Bremerton, Washington.
18

19 B. The Defendant, Washington State Department of Health,
20 is an executive agency of state government formed and organized
21 under Chapter 43.70 RCW.
22

23 C. On April 4, 2006, the KCBH adopted the *Clean Indoor*
24 *Air Ordinance 2006-02* which implemented Chapter 70.160 RCW
25 *Smoking in Public Places*. [Ex. 1].
26

27 D. The Defendant, Kitsap County Health District, is
28 responsible for enforcing KCBH *Clean Indoor Air Ordinance 2006-*
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1 02 and Washington State's *Smoking in Public Places* [Ch. 70.160
2 RCW] regarding the duties of owners or other persons in charge
3 of a "place regulated under this chapter." RCW 70.160.070(1);
4
5 RCW 70.160.050.

6 E. The definition of "public place" found in both the
7
8 KCBH Ordinance and Chapter 70.160 RCW states that they are
9
10 [N]ot intended to restrict smoking in private
11 facilities which are occasionally open to the public
12 except upon the occasions when the facility is open to
13 the public.

14 KCBH Ordinance 2006-02 (section 4) and RCW 70.160.020(2).

15 F. The Post allows smoking in private areas of the Post
16 Home where there are employees.

17 G. On May 18, 2006, the County Food Program Manager
18 issued a "Notice and Order to Correct Violation". [Ex. 2]. The
19 Post responded on May 31. [Ex. 3]. The County's Food Program
20 Manager replied on that same day. [Ex. 4].

21 H. The Post's counsel sent an email on June 16
22
23 challenging applicability of the law to the Post. [Ex. 5]. The
24 Kitsap County Prosecuting Attorney responded on June 28 stating
25 that the law applied to the Post. [Ex. 6].
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1 **IV. ISSUES**

2 A. Does application of the smoking ban to the Post Home,
3 a private facility, violate the plain meaning of the law?
4

5 B. Does the smoking ban, as written and as applied to the
6 Post Home, violate due process?
7

8 C. Does the smoking ban, as written and as applied to the
9 Post Home, violate equal protection and/or privileges and
10 immunities?
11

12 E. Does the smoking ban, as written and as applied to the
13 Post Home, interfere with constitutionally protected private
14 affairs, individual rights and liberties?
15

16 **V. EVIDENCE RELIED UPON**

17 A. Declaration of Shawn Newman regarding exhibits.

18 B. Declaration from Bob Kucenski, Adjutant, American
19 Legion Albert C. Kean, Post 149 and attachments. [Ex. 7]
20

21 **VI. LEGAL STANDARDS AND STANDING**

22 **A. Motions for Summary Judgment**

23 Pursuant to CR 56(c), a summary judgment is available only
24 where "there is no genuine issue as to any material fact and the
25 moving party is entitled to a judgment as a matter of law."
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1 or burdens which the property or persons of citizens
2 of some other state are exempt from.

3 Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake, 150
4 Wn.2d 791, 805, 812-813, 820, 83 P.3d 419 (2004).

6 **VII. ARGUMENT AND AUTHORITY:**

7 **A. Statutory Construction: The government's construction**
8 **and application of the law to ban smoking in private facilities**
9 **is contrary to express language of the law, inconsistent with**
10 **the exemptions identified in the law and contrary to general**
11 **rules of statutory interpretation.**

12 **1. Initiative Background:**

13 The Washington Clean Indoor Air Act, Chapter 70.160
14 RCW, was amended by Initiative 901 on November 8, 2005. [Ex. 8].
15 Initiative 901 was preceded by Initiative 890 in 2004. [Ex. 9].
16 Although the I-890 failed to secure enough signatures, both
17 initiative measures are nearly identical with two notable
18 exceptions. First, I-901 added language exempting 25 percent of
19 hotel and motel rooms from the definition of "public place".
20 Second, I-901 failed to include language in its ballot title (or
21 text) that "Tribal establishments are not affected." This Court
22 added that language to the ballot title for I-890. [Ex. 10].

26 **2. The law does not apply to private facilities.**

27 Initiative 901 did not amend specific language found in the
28 definition of "public place" that states:
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1 **3. Permitting smoking in a "private workplace, within a**
2 **public place" but not in private facilities is absurd.**

3 Initiative 901 neither amended nor repealed RCW 70.160.060
4 which provides that:
5

6 *This chapter is not intended to regulate smoking in a*
7 *private workplace, within a public place, even though*
8 *such workplace may be visited by nonsmokers, excepting*
9 *places in which smoking is prohibited by the chief of*
10 *the Washington state patrol, through the director of*
11 *fire protection, or by other law, ordinance or*
12 *regulation.*

13 [emphasis added].

14 "Workplace" means "place of employment." See Microsoft Encarta
15 Dictionary; see also RCW 49.17.060(1). Although the parties
16 agree that the Post Home is not a "public place," the County
17 argues that the Post is not a "private workplace" either so
18 smoking is banned. [See Ex. 6].

19 **4. The State and KCHD arbitrarily insert the "hotel**
20 **exemption" found in the definition of "public place" into the**
21 **definition of "place of employment." The State and KCHD should**
22 **do the same with the "private facilities" exemption since it is**
23 **found in the same place as the "hotel exemption."**

24 Although Initiative 901 added language to the definition of
25 "public place" to exempt up to 25% of hotel rooms, that language
26 is not found in the definition of "place of employment." RCW
27 70.160.020(2 & 3); KCBH Ordinance 2006-02 (4) [Ex. 1]. KCHD and
28 the state maintain that smoking is banned if an entity falls
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1 within either the definition of "public place" or "place of
2 employment." If correct, then smoking would be banned in any
3 "place of employment" except for "private residences" as
4 specifically exempted in both definitions. RCW 70.160.020(2 &
5 3); KCBH Ordinance 2006-02 (4) [Ex. 1]. However, the state has
6 interpreted the law to exempt up to 25% of the sleeping rooms
7 that are rented to guests in hotels and motels. [See Ex. 11: DOH
8 "More Frequently Asked Questions" (December 6, 2005)].

9
10
11
12 It is a well established rule of statutory construction
13 that "No clause, sentence or word shall be construed as
14 superfluous, void or insignificant if the construction can be
15 found which will give force to and preserve all the words of the
16 statute." Sutherland Statutes and Statutory Construction, sec.
17 46:6 (2005) [citing: State ex rel. Peninsula Neighborhood Ass'n
18 v. Washington State Dept. of Transp., 142 Wn.2d 328, 12 P.3d 134
19 (2000)]. Harmony and consistency within the statutory scheme
20 necessitates continuing the exemption from "this chapter" for
21 "private facilities" other than those specifically listed in the
22 definition of "public facilities." RCW 70.160.020(2). It would
23 be inconsistent with the language of the two definitions to
24 limit the preexisting and on-going exemption from "this chapter"

1 for "private facilities" to only 25% of hotel rooms. Both
2 exemptions (25% of hotel rooms and other "private facilities")
3 are found in the definition of "public place" but not "place of
4 employment."

6 Initiative 901 specifically added various public facilities
7 to the definition of "public place" (e.g. bars, taverns, bowling
8 alleys, casinos and 75% of private hotel rooms). Initiative 901
9 left in place the general exemption for "private facilities."

11 Given the government's interpretation of the hotel exemption and
12 insertion of that exemption into the definition of "place of
13 employment," this Court should apply the same interpretation and
14 interpolation for the term "private facilities". This would be
15 consistent with how smoking bans in other jurisdictions are
16 applied. For example, California law "declares that regulation
17 of smoking in the workplace is a matter of statewide interest
18 and concern," and exempts 65% "of the guest room accommodations
19 in a hotel, motel or similar transient facility" from the
20 definition of "place of employment." Cal. Lab. Code sec.
21 6404.5(d)(1)-(3). Here, KCHD and the State insert similar
22 language exempting 25% of hotel rooms found in the initiatives'
23 definition of "public place" into the definition of "place of
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1 employment." RCW 70.160.020(2&3); KCBH Ordinance 2006-02 (4)

2 [Ex. 1].

3
4 **B. Due Process:** The statutory exemptions for "private
5 facilities" and "private workplaces within a public place" are
6 vague violating due process. Moreover, banning smoking in
7 private facilities but permitting smoking at "private workplaces
8 within a public place" and other "private facilities" that are
9 "places of employment," is arbitrary.

10 **1. Constitutional provisions**

11 Article 1, section 3 of the State Constitution's
12 Declaration of Rights provides that "No person shall be deprived
13 of life, liberty, or property, without due process of law." The
14 14th Amendment to the U.S. Constitution provides at section 1
15 that "No State shall ... deprive any person of life, liberty, or
16 property, without due process of law."
17

18 **2. Analysis**

19 A vague statute violates due process. Haley v. The Med.
20 Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). A
21 statute is vague if it does not give fair notice of the
22 proscribed conduct or clear standards to prevent arbitrary
23 enforcement. State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270
24 (1993). The police power of a state cannot be arbitrarily
25 exercised. Hadacheck v. Sabastian, 239 U.S. 394, 410 (1915).
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1 In Lexington Fayette County Food & Beverage Ass'n v.
2 Lexington-Fayette Urban County Gov't, 131 S.W. 3d 745, 753-56
3
4 (Ky 2004) [Ex. 12] the Court declared a provision of a no
5 smoking ordinance void for vagueness because it prohibited the
6 presence of "ashtrays and other smoking paraphernalia" from no-
7 smoking areas, without further defining "smoking paraphernalia."

8
9 Here, the statute's definition of "place of employment" is
10 vague as to what "private facilities" are exempt. RCW
11 70.160.020(3). Prior to I-901, the law did not specifically
12 exempt hotel rooms or private clubs from the definition of
13 "public place." Nevertheless, both were exempt as "private
14 facilities." After I-901, 75% of hotel rooms are considered
15 "public places" with 25% still being considered exempt as
16 "private facilities." However, the Post and other private clubs
17 with employees were no longer considered exempt.
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22 The state arbitrarily limits the exemption for "private
23 facilities" to only 25% of "private *hotel* facilities." Such an
24 interpretation excludes, by implication, private clubs which
25 where previously exempt and not among the list of newly defined
26 "public places" (e.g. bars, taverns, bowling alleys, skating
27 rinks, casinos). However, it is a well recognized rule of
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1 statutory construction that the express inclusion of certain
2 matters in a statute precludes the inclusion of other matters by
3 implication. Washington Natural Gas Co. v. PUD 1, 77 Wn.2d 94,
4 98, 459 P.2d 633 (1969). Here, Chapter 70.160 RCW [ironically
5 entitled "Smoking in *Public Places*"] specifically excludes
6 "private facilities".
7

8
9 KCHD also violated due process by attempting to enforce an
10 ordinance with penalties that are preempted by state law. RCW
11 70.160.070(1) states that violators are subject to a fine of up
12 to \$100. However, the penalties set forth in the ordinance at
13 section 6(E) include suspension and revocation of food service
14 establishment permit. KCBH Ordinance 2006-02 [Ex. 1]. Those
15 penalties are preempted by RCW 70.160.070.
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19 The same issue arose in Entertainment Industry Coalition v.
20 Tacoma-Pierce County Health Dept., 153 Wn.2d 657, 105 P.3d 985
21 (2005). In that case, the Court found that the Tacoma-Pierce
22 County Board of Health's smoking ban conflicted with Ch. 70.160
23 RCW. In finding the board's resolution void, the Court stated:
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26 While the statutory delegation under RCW 70.05.060 is
27 broad, such delegation does not include any power to
28 enact regulations that conflict with state
29 legislation. A local regulation conflicts with a
30 statute when it permits what is forbidden by state law
31 or prohibits what state law permits. Where such a

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1 conflict is found to exist, under the principle of
2 conflict preemption, the local regulation is invalid.

3 Id., at 663

4 **C. Equal Protection and Privileges and Immunities:**
5 **Banning smoking in private workplace facilities but permitting**
6 **smoking in "private workplaces within a public place" and other**
7 **"private facilities" that are "places of employment," violates**
8 **equal protection and privileges and immunities under the State**
9 **and/or Federal Constitutions.**

10 **1. Constitutional provisions**

11 Article 1, section 12 of the State Constitution's
12 Declaration of Rights prohibits "Special Privileges and
13 Immunities" and provides that "No law shall be passed granting
14 to any citizen, class of citizens, or corporation other than
15 municipal, privileges or immunities which upon the same terms
16 shall not equally belong to all citizens, or corporations."

17 The 14th Amendment to the U.S. Constitution provides at
18 section 1 that "No State shall make or enforce any law which
19 shall abridge the privileges or immunities of citizens of the
20 United States; nor shall any state . . . deny to any person
21 within its jurisdiction the equal protection of the laws."

22 Comparing the words chosen, it is clear that the state
23 clause seeks to prohibit the favoritism of an
24 individual or small class of citizens over the
25 majority while the federal clause is aimed at unfair
26 discrimination.

1 Thompson, *The Washington Constitution's Prohibition on Special*
2 *Privileges and Immunities: Real Bite for "Equal Protection"*
3 *Review of Regulator Legislation?*, 69 Temp. L. Rev. 1247, 1251
4 (1996).
5

6 The privileges and immunities clause of the Washington
7 State Constitution provides greater protection and requires an
8 independent constitutional analysis from the equal protection
9 clause of the United States Constitution. Grant Co. Fire
10 Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791,
11 805, 811, 83 P.3d 419 (2004). For a violation of article I,
12 section 12 to occur, the law, or its application, must confer a
13 privilege to a class of citizens. *Id.*, at 812; See State v.
14 Robinson Co., 84 Wash. 246, 249-50, 146 P. 628 (1915)
15 (invalidating statute that exempted cereal and flouring mills
16 from act imposing onerous conditions on other similarly situated
17 persons and corporations). The principles of art. 1, section 12
18 of our Declaration of Rights, as well as of the Fourteenth
19 Amendment to the United States Constitution, prohibits unequal
20 application of impartial laws. See Yick Wo v. Hopkins, 118 U.S.
21 356, 373-374 (1886).
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1 **2. Analysis**

2 Here the selective application of the law by the government
3
4 confer privileges on one class of "private facilities" that are
5 "places of employment" (e.g. hotels) but not on other similarly
6 situated and previously exempt private businesses (private club
7 facilities). If the law was intended to further a compelling
8 governmental interest by limiting exposure of employees to
9 second hand smoke, it would ban smoking in all "places of
10 employment", including hotels in their entirety. RCW
11 70.160.020(3). Burdening the property of some "private
12 facilities" with a smoking ban but not others (apparently for
13 economic or political reasons after the failure of I-890),
14 violates equal protection and privileges and immunities.
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19 Private club facilities are exempt from the definition of
20 "public place" and have been exempt from the law because, unlike
21 schools, hospitals, retail stores, etc., citizens can choose
22 whether or not to join and patronize clubs. RCW 70.160.020(2).
23 In Rossie v. State Department of Revenue, 133 Wis. 2d 341, 395
24 NW2d 801 (1986) [Ex. 13] the Court upheld the statute at issue
25 from an equal protection challenge noting that the law did not
26 apply in areas that nonsmokers could easily avoid, such as
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1 privately owned and occupied offices, private halls, small
2 restaurants, and bowling alleys. The Court stated that these
3 distinctions were both substantial and germane to the purpose of
4 regulating smoking. The Court noted that the areas excepted
5 from the ban, for the most part, did not present the same degree
6 of risk to nonsmokers, either because they could be avoided,
7 because nonsmokers were not present, or because the plenary
8 authority of those in charge made state regulation of smoking
9 unnecessary.
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13 In Leonard v. Dutchess County Dept. of Health, 105 F. Supp.
14 2d 258, (S.D. N.Y. 2000) [Ex. 14], the Court invalidated a
15 municipal ordinance that restricted smoking in restaurants. The
16 Court held that, in promulgating the regulation, the department
17 had overstepped the bounds of its authority by considering non
18 health-related factors and by exceeding statutory restrictions
19 on smoking.
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23 In City of Roanoke Rapids v. Peedin, 1124 N.C. App. 578,
24 478 S.E.2d 528 (1996) [Ex. 15] the Court held that even if the
25 county board of health had statutory authority to regulate
26 smoking in public, it exceeded general limitations imposed on
27 rule-making powers by usurping legislative power to make policy-
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1 based distinctions when it adopted smoking control rules that
2 distinguished among small and large restaurants, bars, and
3 public places rented for private functions based on factors
4 other than public health, such as economic hardship and
5 difficulty of enforcement, which resulted in disparate treatment
6 of similarly situated patrons, employees, and commercial
7 establishments.
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10 Here, as the initiative's history and the state's
11 interpretation shows, an accommodation was made to exempt 25% of
12 hotel rooms for economic reasons. The hotel exemption was not
13 found in I-901's predecessor, I-890. If the intent of the law
14 was to protect all workplaces from second hand smoke, exempting
15 25% of private hotel/motel rooms does not protect hotel workers.
16 It is ironic that a hotel would be forced to ban smoking in a
17 private club on its premises but allow smoking in private suites
18 rented by the same private club and serviced by the same hotel
19 employees.
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24 **D. Individual rights, liberties and private affairs:**
25 **Banning smoking in private facilities but permitting smoking at**
26 **"private workplaces within a public place" and other private**
27 **facilities that are "places of employment," impinges on**
28 **individual rights, liberties, and private affairs under the**
29 **State and/or Federal Constitutions.**

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1 provides that "No State shall ... deprive any person of life,
2 liberty, or property, without due process of law."

3
4 **2. Analysis**

5 "When a state's laws impinge on fundamental rights, such as
6 liberty, they are constitutional only if they further compelling
7 state interests, and are narrowly drawn to serve those
8 interests." In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857
9 P.2d 989 (1993). Whether there had been a violation of article
10 I, section 7 depends upon whether there had been an intrusion
11 into private affairs. This question is resolved through a two-
12 step analysis: (1) what interests citizens have historically
13 held, and (2) whether the expectation of privacy is one that
14 citizens should be entitled to hold. State v. McKinney, 148
15 Wn.2d 20, 27-32, 60 P.3d 46 (2002).

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21 **(a) Interests Citizens Have Held:** The smoking ban as
22 applied to private workplace facilities has a coercive impact on
23 the liberty, association and privacy rights causing members to
24 forgo the exercise of those rights. [Ex. 7: Kucenski
25 declaration]. Historically, distinctly private clubs have been
26 protected from government interference in their business
27 affairs. See, e.g. RCW 49.60.040(10). Prior to passage of I-
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1 901, private club facilities (like private hotel rooms) were
2 exempt from the smoking ban as "private facilities." As
3
4 detailed in the attached declaration from Mr. Kucenski, members
5 of private workplace facilities have had the expectation of
6
7 privacy to associate, drink and smoke in their private
8 facilities since those facilities were founded. [See Ex. 7].
9

10 **(b) Expectation of Privacy:** This reasonable expectation
11 of privacy is one that citizens should be entitled to hold given
12 how other jurisdictions have acknowledged that smokers have
13
14 privacy rights.
15

16 In Alford v. City of Newport News, 270 Va. 584, 260 S.E.2d
17 241 (1979) [Ex. 16], the Virginia Supreme Court ruled that a
18
19 municipal ordinance prohibiting smoking was unconstitutional as
20 applied to the owner of a private restaurant. The Court
21
22 invalidated the ordinance only in its impact upon the regulation
23 of the use of private property. In that case, the Court stated:
24

25 But, no matter how legitimate the legislative goal may
26 be, the police power may not be used to regulate
27 property interests unless the means employed are
28 reasonably suited to the achievement of that goal.
29 "The mere power to enact an ordinance ... does not carry
30 with it the right arbitrarily or capriciously to

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1 deprive a person of the legitimate use of his
2 property."

3 Id., at 586.

4
5 In Grusendorf v. Oklahoma City, 816 F.2d 539 (CA 10 Okla
6 1987) [Ex. 17], the U.S. Court of Appeals sustained the
7 enforcement of a fire department rule forbidding first-year
8 firefighter trainees from smoking cigarettes either on or off
9 duty. The plaintiff contended that although there is no
10 specific constitutional right to smoke, such a right is included
11 within the right of liberty or privacy in the conduct of one's
12 private life, a right to be let alone that is implicit in the
13 14th Amendment. Although the Court upheld the rule, it assumed
14 that the plaintiff had a liberty interest in one's right to
15 smoke cigarettes off duty. The Court stated:
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21 It can hardly be disputed that the Okalahoma City Fire
22 Department's non-smoking regulation infringes upon the
23 liberty and privacy of the firefighter trainees. The
24 regulation reaches well beyond the work place and well
25 beyond the hours for which they receive pay. It
26 burdens them after their shift has ended, restricts
27 them on weekend and vacations, in their automobiles
28 and backyards and even with the doors closed and the
29 shades drawn in the private sanctuary of their own
30 homes. Furthermore, while it is true that the Court
31 has thus far recognized a right of liberty or privacy
32 in only a handful of circumstances, it is also true

1 that "the outer limits of this aspect of privacy have
2 not yet been marked by the court"

3 Id., at 541 (emphasis added).
4

5 In Fagan v. Axelrod, 550 N.Y.S.2d 552, 558 (1990) [Ex. 18],
6 the petitioners challenged the constitutionality of New York's
7 Clean Indoor Air Act arguing that it "impermissibly intrudes
8 upon the right of citizens to be 'let alone' in the conduct of
9 his private affairs." Although the Court rejected that argument,
10 it drew an important distinction between smoking bans in public
11 and private areas as follows:
12
13
14

15 Chapter 244 pertains only to activity of a public
16 dimension. It does not apply to significantly private
17 areas such as ... hotel or motel rooms or to private
18 events, such as private social functions ... If
19 petitioners in fact have a general "right to privacy"
20 to smoke, this legislation merely requires them to
21 exercise it outdoors or in private. ... Under Chapter
22 244 no person loses any recognizable right or liberty
23 by virtue of being a smoker. It is not a blanket
24 prohibition against smoking, merely a limitation of
25 smoking in public areas where other persons will
26 involuntarily be exposed to secondhand smoke.

27 Id., at 559-561.
28

29 It can hardly be disputed that the law as interpreted by
30 the KCHD and the State banning smoking in private facilities
31 infringes upon the liberty and privacy of club owners and
32

31 Plaintiff's Motion for
32 & Memorandum in Support
of Partial Summary Judgment

- 23 -

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1 members. Unlike Grusendorf, the total ban on smoking in private
2 facilities at issue here reaches beyond "public places" and
3
4 public servants to impinge upon fundamental privacy and
5 association rights of the Post and its members.

6 **VIII. CONCLUSION:**

7
8 Under the government's interpretation and application of
9 the smoking ban, some "private facilities" continue to be exempt
10 while others (private fraternal clubs) do not - even though they
11 both fall within the broad definition of "place of employment."
12 RCW 70.160.020(2). This inconsistent interpretation and
13 application of the law can be remedied by this Court by
14 continuing to exempt those "private facilities" not otherwise
15 listed in the definition of "public place." Otherwise, the law
16 as written and as applied to the Post Home is unconstitutional
17 because it violates due process, equal protection, and
18 privileges and immunities by impermissibly impinging on
19 fundamental rights.
20
21
22
23
24

25 Dated: 12.20.06

26 Shawn Timothy Newman
27 Attorney for Plaintiff