

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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7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8)	
9	American Legion Post #149,)	
10	Plaintiff,)	Case No.: 06-2-01384-8
11	vs.)	Plaintiff's Combined
12	Washington State Department of)	Reply to Defendants' Responses
13	Health and the Kitsap County)	to its Motion for Partial
14	Health District,)	Summary Judgment
15	Defendants)	
16	_____)	

17 **I. Standing:**

18 Defendants reassert their claim that the Post lacks
19 standing to represent its members. However, the decision they
20 rely on held that the organization had standing. In NYC CLASH
21 v. City of New York, 315 F.Supp.2d 461 (S.D.N.Y. 2004) the court
22 held "that participation of individual CLASH members is not
23 required." *Id.*, at 469 [Ex. 22]. The court cited NAACP v.
24 Button, 371 U.S. 415 (1963) for the proposition that "There is,
25 however, no absolute requirement that individual members be
26 identified in order to confer organizational standing."
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30		1	Shawn Timothy Newman
31	Plaintiff's Combined		Attorney for Plaintiff
32	Reply to		Attorney at Law, Inc., P.S.
	Defendants' Responses		WSBA 14193
	to it Motion for		2507 Crestline Dr., N.W. for
	Partial Summary Judgment		Olympia, WA 98502
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1 The Post "is a nonprofit, private corporation wholly owned
2 by its membership" which "is limited to those individuals who
3 have served in the United States Military or Merchant Marine
4 during specific time periods designated by Congress. They must
5 have received an honorable discharge or be still on active
6 duty." Ex. 7: Kucenski Dec. at 2 (paragraphs 3-4). The Post
7 does not exist without qualified members who are the "owners."
8 See RCW 70.160.050. The interests the Post seeks to protect are
9 germane to the organization's purpose, traditions and
10 expectations. Ex. 7: Kucenski Dec. at 3 (paragraph 9); Ex. 20:
11 Jackson Dec.

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16 **II. Statutory Interpretation:**

17 The defendants ask the court to endorse their
18 *interpretation* of the law and find that *interpretation*
19 constitutional, *not the letter or plain meaning of the law*. A
20 construction of a statute by the agency charged with enforcing
21 it *is not binding* on the courts. Walthev v. Dept. of Revenue,
22 103 Wn.2d 183, 691 P.2d 559(1984).
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25 Unless the Legislature defines a statutory term or a
26 contrary intent appears in the statute, a term is to be given
27 its plain and ordinary meaning. American Legion Post 32 v. Walla
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1 Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). It is a well
2 established rule of statutory construction that an unambiguous
3 statute is not subject to judicial construction. See, e.g. GESA
4 Fed. Credit Union v. Mutual Life Ins. Co., 105 Wn.2d 248, 252,
5 713 P.2d 728 (1986) ["We are obliged to apply the language as
6 the Legislature wrote it, rather than amend it by judicial
7 construction."].

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11 KCHD argues that state law does not preempt the Ordinance
12 which unambiguously states: "*This ordinance is not intended to*
13 *restrict smoking in private facilities that are occasionally*
14 *open to the public except upon the occasions when the facility*
15 *is open to the public.*" Assuming that is true, the Ordinance
16 stands alone. As such, it is important to point out that the
17 Ordinance was specifically adopted to implement RCW 70.160 "as
18 amended by Initiative 901 and providing a process for rebutting
19 the presumptively reasonable distance." See Ex. 1. The
20 Ordinance could have, *but did not*, amend the exemption for
21 private facilities by adding to the language "except upon the
22 occasions when the facility is open to the public" the words "or
23 *when it is a place of employment.*"

1 While Initiative 901 added several terms to the definition
2 of "public place" (e.g. bar, tavern, casino and no less than 75%
3 of hotel/motel rooms), it did not change the exemption from
4 "this chapter" for "private facilities." RCW 70.160.020(2). It
5 is undisputed that the Post is a private employer operating a
6 private facility. Contrary to the defendants' arguments, the
7 Post Home is not a public bar or tavern but a "private facility"
8 under the law.
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12 Additionally, DOH argues that:

13 There is no authority for the court to consider the
14 Post's argument that an earlier initiative (Initiative
15 890) should be considered as relevant authority, for
16 example as some form of "legislative history," when
17 interpreting Initiative 901.

18 DOH Response at 6:8-11. However, legislative intent can be
19 determined by examining the sequence of events preceding passage
20 of the legislation, the history of parallel legislation, and the
21 history of any amendments to the legislation. Port of Edmonds
22 v. PERC, 103 Wn.2d 331 (1985). When interpreting statutory
23 language which (*let us assume*) does not clearly convey the
24 Legislature's intent, a court may consider the history,
25 including sequential drafts, of the legislation. Bellevue Fire
26 Fighters Local 1604 v. City of Bellevue, 100 Wn.2d 748, 754
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1 (1984), *cert. denied* 471 U.S. 1015 (1985); Hama Hama Co. v.
2 Shorelines Hearings Bd., 85 Wn.2d 441, 450, 536 P.2d 157 (1975)
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4 ["It is presumed that members of the Legislature were aware of
5 prior drafts of the bill..."]

6 The out-of-state cases relied upon by the defendants
7 *unambiguously exempt* some establishments and not others. KCHB
8 Response at 3 and 5 citing Players, inc. v. City of New York,
9 371 F.Supp. 2d 522 (S.D.N.Y. 2005). In the Players case, the
10 Court held that statutory and municipal smoking bans did not
11 violate the equal protection rights of private social clubs,
12 even though it exempted establishments that derived more than
13 ten percent of their revenue from tobacco-related sales. The
14 Court found that the *express exemption* was reasonable given
15 unique economic harm the ban would impose on entities that
16 depended on tobacco sale revenues to survive. No such exemption
17 exists under the Ordinance or Ch. 70.160 [Smoking in Public
18 Places]. However both defendants argue that hotels are entitled
19 to a partial exemption albeit they are clearly public places and
20 places of employment where employees would be exposed to second
21 hand smoke.
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1 KCHD further argues that "the Act simply prohibits smoking
2 in certain designated areas where non-smokers will be subjected
3 to second hand smoke." KCHD Response at 3:15-16. The Act and
4 the Ordinance *unambiguously exempt* "private facilities that are
5 occasionally open to the public except upon the occasions when
6 the facility is open to the public." Contrary to the state's
7 argument by implication, the initiative did not add to the
8 statutory language exempting private facilities "except upon the
9 occasions when they facility is open to the public" the words
10 "and also if they have any employees." DOH Response at 2.
11 Further, the initiative did not exempt any hotel rooms from the
12 definition of "place of employment."

13 While the DOH acknowledges that I-901 made many changes to
14 the definition of "public place" and added "place of
15 employment," *they ignore the fact that I-901 repeated, without*
16 *change, the language exempting public facilities "except upon*
17 *the occasions when they facility is open to the public." See Ex.*
18 *8. The drafters could have easily amended that language to add*
19 *"or when employees are present." Moreover, the defendants*
20 *ignore the fact that the Post member-employees smoke or have no*
21 *objection to smoking. Ex. 7: Kucenski Dec. at 5 (paragraph 14).*

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1 **III. Fundamental Rights in the Post Home:**

2 DOH argues that "The authorities cited in support of the
3 Post's assertions are cases interpreting smoking regulations
4 from other states and are not binding on this court." DOH
5 Response at 7:17-18. Ironically, it is the defendants who rely
6 on out of state cases to argue that no fundamental rights are
7 impinged by the smoking ban "in public places." KCHD Response at
8 5-6 [citing Players, inc. v. City of New York, 371 F.Supp. 2d
9 522 (S.D.N.Y. 2005)].

10 They ignore the Washington State Constitution and state
11 caselaw which broadly and uniquely defines fundamental rights.
12 See Post's Motion at 5-6, 18-20. [citing Grant Co. Fire
13 Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791,
14 805, 812-813, 820, 83 P.3d 419 (2004)].

15 DOH blithely states:

16 The Post's interests in maintaining a facility for
17 members or guests has not been impaired. If the Post
18 decided not to have employees the Post would not be
19 prohibited from allowing its members or guests to
20 smoke when it is not open to the public. Under those
21 circumstances, the Post and its members would be
22 allowed to assume the risk of the effects of second-
23 had smoke and the State and District would not need to
24 protect the interests of employees.

1 DOH Response at 5:7-8. DOH ignores the declarations of the Post
2 Adjutant, Robert Kucenski (Ex. 7) and Finance Officer, Steven C.
3 Jackson (Ex. 20) which explains how the defendants'
4 interpretation of the law impairs the interests, traditions and
5 expectations of the Post, its member-employees and its members.
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7 The defendants also ignore the declaration of Richard Deditius,
8 co-manager of the Fleet Reserve Association Club 170 in Everett
9 which illustrates how a "person of ordinary intelligence" would
10 understand the law.
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13 Based on our reading of the law, we believed we were
14 exempt because the law specifically exempts private
15 facilities. As set for in the attached petition, the
16 law states, "this chapter is not intended to restrict
17 smoking in private facilities ...". That sounds pretty
18 clear to us, regardless of whether we have employees
19 or not, and especially since no language was added to
20 cover private, nonprofit fraternal clubs such as Club
21 170.

22 Ex. 19 at paragraph 12; DOH Response at 7:10-14.

23 The defendants also ignore the fact that the Post member-
24 employees do not need protections since thy smoke or have no
25 objection to smoking. Ex. 7: Kucenski Dec. at paragraph 14.

26 **IV. Preemption:**

27 An ordinance may prohibit or punish the same act which
28 constitutes an offense under state law *provided* that
29 ordinance does not conflict with state law or that

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1 state law on its face does not show it was intended to
2 be exclusive.

3 State v. Inglis, 32 Wn.App. 700, 649 P.2d 163 (1982).

4 Here, RCW 70.160.070(2)&(3) clearly limit the remedies a
5 local health department may take against property owners:
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7 (2) When violations of RCW 70.160.050 occur, a
8 warning shall first be given to the owner or other
9 person in charge. Any subsequent violation is subject
10 to a civil fine of up to one hundred dollars. Each
11 day upon which a violation occurs or is permitted to
continue constitutes a separate violation.

12 (3) Local health department shall enforce RCW
13 70.160.050 regarding the duties of owners or person in
14 control of public places and places of employment by
either of the following actions:

15 (a) Serving notice requiring the correction of any
violation; or

16 (b) Calling upon the city or town attorney or county
17 prosecutor or local health department attorney to
18 maintain an action for an injunction to enforce RCW
19 70.160.050, to correct a violation, and to assess and
recover a civil penalty for the violation.

20 The defendants believe they can remove food service licenses
21 "sort of" using the new law to "prove" a health problem. But
22 Ch. 70.160 does not provide any such authority and the court
23 should not rewrite the law to insert an extra penalty.
24

25 KCHD claims the only other reported state case challenging
26 a "no-smoking ordinance" enacted pursuant to RCW 70.160 is
27 "inapplicable." KCHD Response at 6:27 [Entertainment Industry
28 Coalition v. Tacoma-Pierce County Health Department, 153 Wn.2d
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1 657, 105 P.3d 985 (2005).] The defendants argue that KCHD's
2 "authority to suspend a permit to operate a food establishment
3 exists independently of the Act..." Id., at 7:23-24; DOH Response
4 at 6:12-23.
5

6 But the Ordinance was specifically adopted to implement RCW
7 70.160 as amended by initiative 901 "and providing a process for
8 rebutting the presumptively reasonable distance." See Ex. 1.
9 The law, as amended by I-901, specifically limits the remedy
10 available to local health departments to
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14 (a) Serving notice requiring the correction of any
15 violation; or

16 (b) Calling upon the city or town attorney or county
17 prosecutor or local health department attorney to
18 maintain an action for an injunction to enforce RCW
19 70.160.050, to correct a violation, and to assess and
20 recover a civil penalty for the violation.

21 RCW 70.160.070(3). Nothing more. Neither Ch. 70.160 nor I-901
22 authorizes suspension or revocation of any food permits.
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24 Dated: 1.16.07
25 Olympia, WA

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