

1 are the actions of the District through its Ordinance and
2 Notice." [Dept. Memorandum at 6:22-23]. KCHD ignores the
3 ordinance and focus on the Act [Ch. 70.160]. The ordinance
4 clearly states:
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6 *This ordinance* is not intended to restrict smoking in
7 private facilities that are occasionally open to the
8 public except upon the occasions when the facility is
9 open to the public.

10 Ex. 1, Sec. 4. It was created "to comply with the enforcement
11 and rebuttal requirements outlined in Chapter 70.160 RCW, as
12 that statute was amended and revised by Initiative 901." Ex. 1;
13 KCHD Motion at 2:11-12. As such, any claims of uncertainty or
14 conflict based on I-901 are invalid. KCHD Memo at 5-6.
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16 Regarding the Act, the defendants ask this Court to ignore
17 the "literal letter of the law" which is entitled "Smoking in
18 Public Places" [Ch. 70.160 RCW] and the express language
19 exempting "private facilities" from "this chapter" and "private
20 workplace, within a public place." RCW 70.160.020(2); RCW
21 70.160.060; DOH Memo at 8:16-19; KCHD Memo at 5:18. They ask
22 the court to ignore the fact that this unambiguous language was
23 specifically and clearly repeated, *without change*, in the text
24 of Initiative 901. [Ex. 8, sec. 2, page 2 lines 28-31].
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29 Consequently, an average informed voter reading the entire

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1 ballot measure for I-901 could assume that private clubs with
2 employees remained exempt from "this chapter." [See Ex. 19
3 Deditius Dec. at para. 11].
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5 The defendants argue that the I-901 was intended to
6 prohibit smoking "to protect all workers in their places of
7 employment" and that "smoking may be allowed in a private
8 establishment when the public, including employees, are not
9 present." KCHD Memo at 7:17-18; DOH Memo at 10:1-2. However,
10 the letter of the ordinance and the Act only exempts private
11 residences or home-based businesses from the definition of
12 "place of employment." Ex. 1, sec. 4; RCW 70.160.020(3). The
13 defendants interpret the law to infer additional exemptions from
14 "this ordinance" and "this chapter" for break rooms, hotel rooms
15 and tribal establishments. DOH Memo at 9; KCHD Memo at 8:12-13.
16 Contrary to their claims, these are not "express and
17 presumptively valid exemptions." DOH Memo at 13:17-19. For
18 example, "break rooms" are specifically defined as a "place of
19 employment." Ex. 1, sec. 4; RCW 70.160.020(3). Nevertheless,
20 they argue that their arbitrary and capricious interpretation of
21 the law is constitutional *so long as you ignore the letter of*
22 *the law.* See KCHD Memo at 21-23.
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1 However, the court need not ignore the letter of the law.
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3 The court can reconcile the laws' express language and the
4 defendants' interpretation of the laws by making the exemptions
5 identified in the definition of "public places" (private
6 facilities and 25% hotel/motel rooms) applicable to the
7 definition of "place of employment."

9 **II. Fundamental Rights & Strict Scrutiny:** **The defendants'**
10 **interpretation of the law to prohibit smoking in a private club**
11 **by member-employees who smoke themselves, impinges upon liberty,**
12 **privacy and property interests. Because fundamental rights are**
13 **involved, strict scrutiny applies.**

14 The constitutional issue is not whether there is a
15 "fundamental right to smoke" but whether the defendants'
16 selective interpretation of the law to ban smoking in a private
17 club with member-employees *who themselves smoke* impinges on
18 liberty, privacy, property, association, business, equal
19 protection, privileges and immunities. [See Ex. 7: Kucenski Dec.
20 at 14]. It is undisputed that strict scrutiny applies to laws
21 "that impinge upon fundamental rights and liberty interests."
22 KCHD Memo at 10:15-16. However, unlike the cases relied upon by
23 the defendants, our State Supreme Court has broadly defined
24 fundamental rights to include:

25 [T]he right to remove to and carry on business
26 therein; the right, by usual modes, to acquire and

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1 hold property, and to protect and defend the same in
2 the law; the rights to the usual remedies to collect
3 debts, and to enforce other personal rights; and the
4 right to be exempt, in property or persons, from taxes
5 or burdens which the property or persons of citizens
6 of some other state are exempt from.

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

9 Moreover, DOH relies upon Grusendorf v. Oklahoma City, 816
10 F.2d 539, 541 (CA 10 Okla 1987) to argue that there are no
11 fundamental rights at issue. DOH Memo at 12:14-22. However,
12 the Court in that case expressly stated:
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14 It can hardly be disputed that the Oklahoma City Fire
15 Department's non-smoking regulation infringes upon the
16 liberty and privacy of the firefighter trainees.

17 See Ex. 17 and discussion in Plaintiff's Motion at 22-25.

18 **III. APA Review: Judicial review under the APA is applicable**
19 **because KCHD's Food Program Manager relied upon advice from DOH**
20 **in implementing and enforcing the law.**

21 In Entertainment Industry Coalition v. Tacoma-Pierce County
22 Health Dept., 153 Wn.2d 657, 105 P.3d 985 (2005) the Court found
23 that the County Board of Health's smoking ban conflicted with
24 Ch. 70.160 RCW. The plaintiff [EIC] sought attorney fees under
25 the Equal Access to Justice Act [EAJA] which allows an award of
26 attorney fees only for a qualified party who prevails in a
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1 judicial review of "agency action." Id., at 667 [RCW
2 4.84.350(1)]. The Court stated:

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4 Like the EAJA, the APA definition of "agency" is also
5 limited to a "state board, commission, department,
6 institution of higher education, or officer" and an
7 "agency action" is the "licensing, the implementation
8 or enforcement of a statute, the adoption or
9 application of an agency rule or order, the imposition
of sanctions, or the granting or withholding of
benefits" by such an "agency." RCW 34.05.010(2),(3).

10 Although the Court denied EIC attorney fees because the Health
11 Board was not an "agency" under the EAJA, DOH was not a party.

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13 Here, DOH is a party because it is undisputed that KCHD's
14 Food Program Manager relied upon advice from DOH in implementing
15 and enforcing the law to the Post home facility. Ex. 4 ["It is
16 the Washington State Department of Health position that if an
17 organization has paid employees it is a 'place of employment'
18 and the law applies."]. Hence, there was agency action by DOH
19 subject to judicial review.

22 **IV. Standing and Exhaustion: The Post has standing to represent**
23 **the interest of its members and need not name them.** Exhaustion
24 of administrative remedies is not required by the law at issue
25 and would be "patently inadequate" or futile.

26 KCHD argues that the Post lacks standing to bring the suit
27 on behalf of its members. KCHD Motion at 4:17-18. There is no
28 absolute requirement that individual members be identified in
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1 order to confer organizational standing. See, e.g., NAACP v.
2 Button, 371 U.S. 415, 428 (1963) [finding that the NAACP had
3 standing both in its own right, and to assert the rights of its
4 members although none was named as plaintiff]. Numerous courts
5 have held that a person's interest in smoking can be injured
6 and, therefore, smokers have standing to challenge certain
7 actions. See, e.g. Grusendorf v. City of Oklahoma City, 816
8 F.2d 539, 541 (10th Cir. 1987). Here, the Post's historical
9 interest in determining whether or not to allow smoking in its
10 Home facility by its member-employees has been threatened with
11 injury by the local health department enforcing local and state
12 law. See Ex. 7 [Kucenski Dec.]; Ex. 20 [Jackson Dec.]

13 Exhaustion of administrative remedies is not required by
14 the law at issue [Ch. 70.160 RCW and KCBH Ordinance 2006-02 (Ex.
15 1)] and would be "patently inadequate" or futile given the
16 undisputed facts. RCW 34.05.534(3); see also See, Presbytery of
17 Seattle v. King Cy., 114 Wn.2d 320, 333, 787 P.2d 907, *cert.*
18 *denied*, 498 U.S. 911 (1990).

19 **V. Regulatory Taking: The law as applied to the Post Home**
20 **amounts to an unconstitutional regulatory taking. The property**
21 **interest invaded is the Post's right to prevent total abdication**
22 **of the private facility's air to the government. The smoking**
23 **ban diminishes property value and interferes with the distinct**
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1 and reasonable investment-backed expectations of the Post and
2 its members. [See Ex. 7: Kucenski Dec.; Ex. 20 Jackson Dec.]

3 1. Constitutional provisions:

4 The Washington State Constitution Declaration of Rights
5 provides that "No person shall be deprived of life, liberty, or
6 property, without due process of law." Wash. Const. Art. I, sec.

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8 3. Section 16 sets forth the state's eminent domain power and
9 provides that: "No private property shall be taken or damaged
10 for public or private use without just compensation having been
11 first made, or paid into court for the owner." Wash. Const. Art.
12 I, sec. 16. That section also provides: "Whenever an attempt is
13 made to take private property for a use alleged to be public,
14 the question whether the contemplated use be really public shall
15 be a judicial question, and determined as such, without regard
16 to any legislative assertion that the use is public."
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21 The 5th Amendment to the U.S. Constitution provides that
22 private property shall not "be taken for public use, without
23 just compensation." The 5th Amendment in applied to the states
24 via the 14th Amendment's due process clause ["No State shall
25 deprive any person of life, liberty, or property, without due
26 process of law."]
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1 **2. Analysis**

2 The Takings Clause "does not prohibit the taking of private
3 property, but instead places a condition on the exercise of that
4 power." See, e.g. Lingle v. Chevron, 544 US 528, 125 S.Ct. 2074,
5 2080 (2005). The issue with a regulatory taking is "whether a
6 taking has occurred in consequence of some government activity."
7
8 Jesse Dukeminier & James E. Krier, Property at 1116. Rather
9 than physically seize land, the government effectively does so
10 through some action. An exaction or required dedication of
11 property albeit for the public interest may constitute a
12 physical taking. See, Nollan v. California Coastal Commission
13 483 U.S. 825 (1987); Dolan v. City of Tigard (1994) 512 U.S.
14 374; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
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19 In this case,

20 That the restrictive antismoking law may 'promote the
21 health, safety, morals or general welfare of the
22 public' does not alter the fact that it interferes
23 with a bar or restaurant owner's use of his privately
24 owned property. Furthermore, to call such a
25 restrictive anti-smoking law a 'health provision that
26 merely regulates conduct' forgets that the law
27 specifically restricts the use of such proprietors'
28 land.
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1 Danella, *Smoked Out: Bars, Restaurants, and Restrictive*
2 *Antismoking Laws as Regulatory Takings*, 81 Notre Dame L. Rev.
3 1095, 1105 (2006).
4

5 **(i) State Takings Analysis**
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7 Our state's regulatory takings analysis is similar to the
8 federal takings analysis (discussed below). When a regulation
9 results in a taking, the remedy is just compensation; and when
10 the regulation violates substantive due process, the remedy is
11 invalidation of the regulation. Presbytery of Seattle v. King
12 Cy., 114 Wn.2d 320, 331-32 (fn 3), 787 P.2d 907, *cert. denied*,
13 498 U.S. 911 (1990). In Robinson v. Seattle, 119 Wn.2d 34, 51-
14 52, 830 P.2d 318 (1992), the court stated:
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19 Once a court determines that a regulation is
20 vulnerable to a taking challenge, it engages in a
21 "taking" inquiry. The court first determines whether
22 the regulation substantially advances legitimate state
23 interests. If the answer to this question is "no",
24 then the regulation is a *per se* taking. Presbytery, at
25 333. If the regulation does substantially advance
26 legitimate state interests, then the court next
27 determines whether the plaintiff's challenge to the
28 regulation is a facial challenge or an "as applied"
29 challenge. If a plaintiff alleges the application of
30 the regulation to any property is a taking, the
31 challenge is a facial one. For facial challenges, no
32 exhaustion of administrative remedies is required.
Presbytery, at 333. However, if a plaintiff challenges
the regulation as it applies to a specific parcel of

1 property, the challenge to the regulation is "as
2 applied". Presbytery, at 333.

3 ...

4 In an "as applied" challenge (involving the
5 application of the regulation to specific property),
6 the court considers "(1) the economic impact of the
7 regulation on the property; (2) the extent of the
8 regulation's interference with investment-backed
9 expectations; and (3) the character of the government
10 action." (Footnote omitted.) Presbytery, at 335-36.
Once a court determines a taking has occurred, just
11 compensation is mandated. Presbytery, at 337.

12 The smoking ban is "contrary to the traditions and
13 expectations of the Post and its members," "impinge on the
14 membership's rights of privacy and association," diminishes
15 property value and interferes with the distinct and reasonable
16 investment-backed expectations. See Ex. 7: Kucenski Dec.; Ex.
17 20: Jackson Dec.

18 In Robinson, the plaintiffs filed a class action against a
19 city and four city employees alleging that the city violated the
20 plaintiffs' constitutional rights by willfully enforcing
21 successive tenant relocation assistance and housing replacement
22 fee ordinances that were held to be unconstitutional in prior
23 proceedings. The State Supreme Court concluded that:
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1 [T]he ordinance did go beyond preventing a harm, and
2 required landowners to provide a public benefit in
3 requiring property owners to pay a fee or replace
4 rental units lost before removing units or demolishing
5 them. We have on an earlier occasion stated that the
6 burden of providing this public benefit was one best
7 borne by the community rather than by individuals.

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9
10 Robinson v. Seattle, 119 Wn.2d 34, 52, 830 P.2d 318 (1992).

11 Smoking bans cause a regulatory taking of private property
12 by requiring property owners of certain private facilities to
13 provide a public benefit. See Danella, at 1097.

14 The property interest invaded is the right of the
15 owner to prevent total abdication of the air of the
16 establishment to the government.

17 Hagan, *Restaurants, Bars and Workplaces, Lend Me Your Air:*
18 *Smokefree Laws as Private Property Exactions - The Undiscovered*
19 *Country for Nolan and Dolan?* 23 Journal of Contemporary Health
20 Law and Policy 143 (2003-2004) at 160.

21
22 Smokefree laws do not operate as dedications in a
23 literal sense, but they take on the character of
24 exactions because they operate by conditioning
25 permission to operate a bar or restaurant on the
26 exaction of the air of the property for a distinct
27 public use and purpose. If restaurant or bar owners
28 wish to continue in their desired use of the
29 establishments, they must accept this condition or
30 risk breaking the law.

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1 Id., at 169 [citing Kenneth P. Vogel, "Business Owners Declare
2 War on Smoking Ban," Tacoma News Trib., Dec. 27, 2003 ("many
3 [owners] plan to let their customers keep right on puffing ...
4 even though that could bring fines on smokers and businesses.
5 Violators also could lose various licenses needed to stay open
6 for business.")].
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10 The financial impact of smoking bans has been recognized by
11 other jurisdictions which have tried to adopt less restrictive
12 alternatives to our state's near total ban. See, Hagan at 149
13 (fn. 34). For example, New York's antismoking law allows for
14 waiver of the ban if "(a) compliance with a specific provision
15 of this article would cause undue financial hardship; or (b)
16 other factors exist which would render compliance unreasonable."
17 N.Y. Pub. Health Law sec. 1399-u (McKinney 2002 & Supp. 2005).
18
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21 As one legal commentator noted:
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23 The possibility that New York's waiver provision
24 represents the state legislature's attempt to
25 foreclose any regulatory taking challenge would seem
26 to counsel in favor of such a judicial finding. What
27 would a New York court say of an economically damaged
28 bar or restaurant whose waiver application failed?
29 What about states with restrictive antismoking laws
30 that do not allow for such waivers?

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1 Danella at 1100 (2006) [emphasis added]. Our state law, as
2 interpreted by the defendants, does not allow for any waivers or
3 any exceptions for private facilities with member-employees who
4 themselves smoke.
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7 **(ii) Federal Takings Analysis**
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9 The federal takings analysis is similar to the state
10 takings analysis discussed above. The proper inquiry is one
11 into the "challenged regulation's effect on private property ...
12 [and not its] underlying validity." Lingle v. Chevron U.S.A.
13 Inc., 544 US 528, 125 S.Ct. 2074, 2084 (2005). The
14

15 Takings Clause presupposes that the government has
16 acted in pursuit of a valid public purpose ... it does
17 not bar government from interfering with property
18 rights, but rather requires compensation 'in the event
19 of otherwise proper interference amounting to a
20 taking.'

21 Id., at 2084.

22 The first factor focuses on the owner rather than the
23 property alone. The court analyzes an owner's expectations as
24 to the use of his land and the extent to which government
25 regulation has interfered with these plans. The United States
26 Supreme Court has held that "a state statute that substantially
27 furthers important public policies may so frustrate distinct
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1 investment-backed expectations as to amount to a 'taking.'" Penn
2 Central Transportation Co. v. New York City, 438 U.S. 104, 127
3
4 (1978).

5
6 Property owners invest in land and development with
7 certain expectations in mind, and laws affect these
8 expectations. Nevertheless, the court may find a
9 regulatory taking in cases where "distinct investment-
10 backed expectations' are defeated by government
11 regulatory action that sharply reverses a prior
12 governmental stance upon which the aggrieved owner
13 specifically and justifiably relied by investing in
14 the particular advantage that the questioned
15 regulation would remove or destroy."

16 An owner can argue that the government has effectively
17 taken his land when subsequent government regulation
18 goes beyond that in effect when the owner had
19 originally invested in the land. The owner relied
20 upon these laws when investing in the land and
21 planning for its expected uses. Regulation that
22 interferes with these expectations may constitute a
23 regulatory taking.

24 Danella at 1100.

25
26 As detailed in the declaration of Robert Kucenski, Post
27 Adjutant,

28 The smoking ban is contrary to the traditions and
29 expectations of the Post and its members who expect
30 they will be allowed to associate, drink and smoke.
31 This expectation dates from the founding of the Post,
32 construction of the facility (including the bar) and
has been reiterated by the membership.

Ex. 7: Kucenski Dec. at para. 9; See also Ex. 20: Jackson Dec.

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1 The second factor looks at the economic effect that
2 regulation has on property. Stated simply, the court may find a
3 taking if government regulations "deny an owner economically
4 viable use of his land." See, e.g. D.A.B.E., Inc. v. City of
5 Toledo, 292 F. Supp. 2d 968, 971 (N.D. Ohio 2003). Apart from a
6 complete economic taking, a "less intrusive regulation" may
7 allow a property owner "some but not all economic use of his
8 land (sometimes called a partial or non-categorical taking)."
9 Id., at 971. This principle was established in Pennsylvania
10 Coal Co. v. Mahon, 260 U.S. 393 (1922), where the Supreme Court
11 relied on this diminution-in-value test in finding a regulatory
12 taking.
13

14 It is impossible to ignore the financial implications of
15 smoking bans on private clubs, especially ones that were
16 established prior to Initiative 901; ones that have a smoking
17 tradition and; ones whose member-employees want to allow
18 smoking. Ex. 7: Kucenski Dec. at para. 9; See also Ex. 20:
19 Jackson Dec. Unlike Washington, a number of jurisdictions
20 permit smoking in certain facilities or grant waivers based on
21 financial hardship. See Horvick, *Examining the Underlying*
22 *Purposes of Municipal and Statewide Smoking Bans*, 80 Ind. L.J.

1 923, 941 (fn 97) (2005). These jurisdictions include: New York
2 State; Mesa, Arizona; Oshkosh, Wisconsin; and Duluth, Minnesota.

3
4 While regulations may not interfere with the whole of an
5 owner's property interests, if the owner can prove that the
6 government has effectively taken one such interest then the
7 owner may make a case for a regulatory taking. See, Ex. 21
8 American Lithuanian Naturalization Club v. Board of Health of
9 Athol, 446 Mass. 310, __ N.E. 2d ____ (2006). In that case,
10 the Supreme Judicial Court of Massachusetts remanded the case to
11 the Superior Court for consideration of the plaintiffs' claim
12 that the town regulation prohibiting smoking in membership
13 associations constituted a deprivation of property without
14 adequate compensation. Here, the total ban on smoking the Post
15 Home if they have members working constitutes a regulatory
16 taking by effectively taking away desired use of the club's
17 property. See Ex. 7 [Kucenski Dec.] and Ex. 20 [Jackson Dec.].
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23 Kentucky Supreme Court Justice John William Graves wrote
24 that an antismoking ordinance was "oppressive because it
25 operates as a regulatory partial taking of private property
26 without just compensation."
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28 Use is an essential attribute of ownership. ... [W]hen a
29 businessman is forced to effect an unwanted smoking

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1 policy on his own property, the government is taking
2 part of his property by regulation.

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4 Ex. 12: Lexington Fayette County Food & Beverage Ass'n v.
5 Lexington-Fayette Urban County Gov't, 131 S.W. 3d 745, 757-58
6 (Ky. 2004) (Graves, J., dissenting).
7

8 As discussed above, the DOH and KCHD interpret the law to
9 allow smoking in some "private facilities" (e.g. break rooms,
10 hotel rooms and tribal establishments) albeit they are "places
11 of employment." RCW 70.160.020 (2)&(3). According to the
12 defendants, if a private club wants to allow members to smoke,
13 it could carve out a break room, go to a tribal establishment or
14 a local hotel *so long as* members do not smoke in their private
15 facility when the public or employees are present, even member-
16 employees who smoke. DOH Memo at 10:1-2; KCHD Memo at 8:11-13.
17 This interpretation of the law suggests that if a private club
18 forfeited the privacy and associational rights of its members
19 and became a "public place" as defined by the law, it would be
20 allowed to have smoking in a "private workplace" as authorized
21 by RCW 70.160.060. See Ex. 6. KCHD claims that the law "allows
22 an employer to have a designated area, such as a break room,
23 where smoking can occur." KCHD Memo at 8:11-13. However, "break
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1 rooms" are specifically defined as a "place of employment" where
2 smoking is prohibited. RCW 70.160.020(3). Thus, KCHD
3
4 interprets the law to deny the express exemption from the
5 ordinance for private facilities yet infers exemptions for
6 breakrooms, hotels and tribal facilities. This arbitrary and
7
8 capricious application of the law denies the Post and its
9 members due process and severely curtails the use or enjoyment
10 of property by owners/members, without adequate compensation.
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12 Moreover, a smoking ban applicable only to private
13 membership club facilities is not the least restrictive
14 alternative available to protect fundamental rights. Assuming
15 the government has a compelling interest to limit exposure to
16 second hand smoke, application of the law to the Post, which
17 operates a distinctly "private facility," is unreasonable given:
18 (a) the express language exempting "private facilities" from the
19 ordinance and Act and (b) the arbitrary interpretation of the
20 law to exempt break rooms, hotels and tribal establishments
21 although they fall within the definition of "places of
22 employment" [RCW 70.160.020(3)].
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27 There are a number of alternatives to protect the public
28 from second hand smoke short of a selective ban on private
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1 facilities with employees. See, Hagan, supra, at 173-175.
2 First, the law could allow private clubs to have a separate
3 smoking area with separate ventilation. Second, the law could
4 provide for positive or negative incentive tax schemes. Third,
5 the law could allow for "smoking licenses." Forth, the State
6 could follow New York's lead and adopt a waiver program based on
7 financial hardship.
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10 VI. Conclusion

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12 This is a challenge to the validity, construction and/or
13 application of a local ordinance and state law which bans
14 smoking in a private facility. Both specifically exempt private
15 facilities. While the effect of I-901 on the existing state law
16 can be debated, the ordinance was adopted to implement I-901.
17 The defendants ask the court to ignore the "letter of the law"
18 exempting private facilities and accept their arbitrary
19 interpretation exempting other "places of employment" (e.g.
20 break rooms, hotel rooms and tribal establishments). To do so
21 would be absurd and contrary to the letter of the law.
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31 Combined Opposition to
32 Defendants Motions
for Summary Judgment

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