

- EXPEDITE
- No Hearing Set
- Hearing is Set

Date: January 26, 2007
Time: 9:00 a.m.

The Honorable JUDGE GARY R. TABOR

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

AMERICAN LEGION POST #149,

Plaintiff/Petitioner,

v.

WASHINGTON STATE DEPARTMENT
OF HEALTH and the KITSAP COUNTY
HEALTH DISTRICT,

Defendants/Respondents.

NO. 06-2-01384-8

DEPARTMENT OF HEALTH'S
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

COMES NOW Defendant/Respondent Washington State Department of Health (Department) and submits the following memorandum in support of its motion for summary judgment.

I. BACKGROUND

The Complaint/Petition of Plaintiff/Petitioner, American Legion Post # 149 (Post), asserts that, as a matter of statutory interpretation, the prohibition against smoking in "places of employment" codified in RCW 70.160, as implemented by the Defendant/Respondent Kitsap County Health District's (District) "Clean Indoor Air Ordinance," should be declared inapplicable to the Post. In addition to its statutory argument, the Post asserts that the "place of employment" smoking prohibition is invalid as applied to the Post on several state and federal constitutional grounds. The Post seeks injunctive relief from enforcement of the

1 smoking prohibition except when the Post is open to the public. Finally, the Post seeks
2 damages and attorney fees under its assertion that the application of the law(s) “amounts to a
3 regulatory taking.”

4 It is undisputed that the Post employs workers while members are smoking on the
5 premises. Consistent with the enabling police power authority, RCW 70.160, the District’s
6 Ordinance unambiguously prohibits smoking in a place of employment. The applicable
7 statutory provisions and the District’s Ordinance, as applied to the Post, are entitled to a
8 presumption of constitutionality. If the court grants the Department’s motion for summary
9 judgment, the Post’s case should be dismissed with prejudice in its entirety as the sole
10 undisputed material facts relate to the Post’s regulatory takings damages claim.

11 **II. STATEMENT OF FACTS**

12 A. The Plaintiff, Bremerton American Legion Post #149 (Post), is a nonprofit
13 private fraternal organization which owns and operates its Post facility at 4922 Kitsap Way,
14 Bremerton, Washington.

15 B. The Defendant, Washington State Department of Health, is an executive agency
16 of state government formed and organized under RCW 43.70. The Department’s Tobacco
17 Prevention Program, a part of the Division of Community and Family Health, Office of
18 Community Wellness and Prevention, provides education and prevention programs related to
19 RCW 70.160.

20 C. The Defendant, Kitsap County Health District, is the County entity that enforces
21 or implements the policies and regulations created by the Kitsap County Board of Health.

22 D. On April 4, 2006, the Kitsap County Board of Health adopted Ordinance
23 2006-2, the “Clean Indoor Air Ordinance” (Ordinance) [Ex. 1] which adopted and
24 implemented RCW 70.160 as amended by Initiative 901.

1 E. On May 18, 2006, the Defendant District's Food Program Manager issued a
2 "Notice and Order to Correct Violation" (Notice) directing the Post to immediately comply
3 with the Ordinance in relation to two identified types of violations of the Ordinance.
4 [Ex. 2]

5 F. The Post responded via email on May 31 asking for additional time noting that
6 their board of directors was scheduled to meet on June 5. [Ex. 3]

7 G. The County's Food Program Manager replied on May 31 [Ex. 4] stating
8 that she would wait for the board meeting.

9 H. The Post's counsel responded, challenging the applicability of the law to the
10 post, on June 16 [Ex. 5]:

11 I. The Kitsap County Prosecuting Attorney responded on June 28 arguing that the
12 Clean Air Act applies to Post #149. [Ex. 6]

13 J. The Post permits private members and guests to smoke tobacco products in its
14 facility when the Post is not open to the public.

15 K. The parties agree that the Ordinance and RCW 70.160 prohibit smoking in a
16 private facility, such as the Post, when the facility is open to the public.

17 L. Prior to the issuance of the Notice, the Post employed several staff assigned to
18 work in areas of the Post facility where members and guests were allowed to smoke when the
19 facility was not open to the public.

20 M. The Post disagrees with the Defendants that the Ordinance and RCW 70.160 is
21 properly interpreted, as a matter of law, to prohibit smoking by members and guests when the
22 Post is not open to the public but there are Post employees present in their work assignments in
23 such areas.

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