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January 18, 2007

Betty J. Gould
Clerk
Thurston County Superior Court
2000 Lakeridge Drive SW, Bldg. 2
Olympia, WA 98502

RE: *American Legion Post #149 v. Washington State Department of Health, and the
Kitsap County Health District*
Thurston County Superior Court No. 06-2-01384-8

Dear Ms. Gould:

Enclosed for filing is the original *Department of Health's Reply to Plaintiffs' Response to Defendants' Motions For Summary Judgment* in the above-referenced matter. A copy for Judge Tabor has been provided as well.

Thank you for your attention in this matter.

Sincerely,

Linda Humphrey
Legal Assistant to
Mark H. Calkins and Pamela H. Anderson
Assistant Attorneys General

Enclosure

cc: Shawn T. Newman
Philip A. Bacus

- 1 EXPEDITE
2 No Hearing Set
3 Hearing is Set

4 Date: January 26, 2007

5 Time: 9:00 a.m.

6 The Honorable Judge Gary R. Tabor

7
8 **STATE OF WASHINGTON**
THURSTON COUNTY SUPERIOR COURT

9 AMERICAN LEGION POST #149,

NO. 06-2-01384-8

10 Plaintiff/Petitioner,

DEPARTMENT OF HEALTH'S
REPLY TO PLAINTIFF'S
RESPONSE TO DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT

11 v.

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

14 Defendants/Respondents.

15 COMES NOW Defendant Washington State Department of Health (Department) in
16 reply to the Plaintiff American Legion Post #149's (Post) response to the Department's motion
17 and memorandum in support of motion for summary judgment. The Post's response, titled
18 "Plaintiff's Combined Opposition to Defendants Motions for Summary Judgment," does not
19 differentiate between the Department's summary judgment motion/memorandum and the
20 summary judgment motion/memorandum filed by Defendant Kitsap County Health District
21 (District). The following argument addresses the Post's response to the Department's
22 arguments.

23 This reply will follow the five argument sections used in the Post's response. To avoid
24 repetition, the court is referred to sections of the Department's previously filed pleadings when
25 relevant.

1 **I. ARGUMENT**

2 A. "Statutory Construction" [Post's Response, Sec. I]

3 In its response, the Post continues to ignore or misapply core principles of statutory
4 interpretation. See "Department of Health's Memorandum in Support of Motion for Summary
5 Judgment," at part IV.C. (pp.7-11) supporting the conclusion that the District Ordinance
6 properly implements RCW 70.160 by prohibiting smoking in the Post facility as a "place of
7 employment" even when the facility is not open to the public.

8 Further support for the Department's analysis is found in the June 8, 2006 informal
9 opinion letter addressing the Initiative 901 amendments to RCW 70.160 sent to several state
10 legislators by the Attorney General's Office. A copy of that letter is attached as Exhibit A to
11 the "Washington State Department of Health's Response to Plaintiff's Reply and Motion for
12 Temporary Restraining Order" dated July 4, 2006 and filed herein. Items 1,2,3,5,6, and 7 of
13 the above-referenced opinion address the definitions and exception sections of RCW 70.160
14 raised in the Post's response.

15 B. "Fundamental Rights and Strict Scrutiny" [Post's Response Sec. II]

16 See "Department of Health's Memorandum in Support of Motion for Summary
17 Judgment" at Part IV.D (pp.11-15) and to the "Defendant State Department of Health's
18 Response to Plaintiff's Motion for Summary Judgment" at Part II.B (pp.3-8) for an analysis of
19 why the place of employment smoking prohibition does not affect any of the Post's
20 fundamental rights and why the District's Ordinance, implementing RCW 70.160, is a
21 presumptively valid exercise of state and local governmental police power.

22 The Post's reply clearly fails to approach the "beyond a reasonable" doubt standard as
23 articulated in *Island County v. State*, 135 Wn.2d 141, 147 (1998). Indeed it fails to cite any
24 authority that actually supports its position. The Post's quotation from *Grant County Fire*
25 *Protection District No.5 v. City of Moses Lake*, 150 Wn.2d 791, at 820 is from the concurring
26

