

EDWARD L. SWEDA, JR.

Attorney at Law

RECEIVED BY
OFFICE OF CITY CLERK

JUN 10 3 28 PM '82
178 BOSTON STREET
DORCHESTER, MA. 02125
CAMBRIDGE, MASS. TELEPHONE (617) 282-4347

The Honorable Members of the Cambridge City Council
City Hall
Cambridge, MA

Dear Councillors:

June 11, 1982

This communication is in response to the letter of June 7, 1982 and the legal brief submitted by John J. Campbell, Esq., representing the Tobacco Institute, alleging that the proposed ordinance to prohibit the public distribution of free tobacco products for commercial purposes is unconstitutional.

The Tobacco Institute, through Mr. Campbell, alleges that there is an absence of a "rational basis for distinguishing between distribution of free samples of tobacco products and other types of products". Such products listed by the Tobacco Institute are "soap, cosmetics, toothpaste, coffee and other food products". Of course, the normal use of these products do not kill people. On the contrary, the United States Surgeon General, along with countless medical studies, have concluded that cigarette smoking is the Number One preventable cause of disease and death in America.

That is the rational basis upon which the ordinance is based. Therefore, the various Equal Protection cases cited by the Tobacco Institute do not invalidate the ordinance.

The ordinance includes the words "in order to avoid obstruction and congestion of public ways and places, to control and reduce litter, and to protect pedestrians from annoyance and invasion of privacy" to defuse the allegation of another Tobacco Institute lawyer, John J. McGlynn, Jr., who, at a public hearing before the Cambridge City Council in November 1981, claimed that such an anti-sampling ordinance would violate the preemption clause of the Public Health Cigarette Labelling Act of 1969 (15 U.S.C. § 1334 (b)). That argument was dealt with thoroughly in the legal brief by Action on Smoking and Health in Washington, D.C., which Group Against Smoking Pollution (GASP) of Massachusetts has submitted to the City of Cambridge Law Department.

Neither Mr. McGlynn before him, nor Mr. Campbell, has explained why, if such anti-sampling laws are unconstitutional, the Tobacco Institute has not challenged such laws in Minneapolis (passed in March 1979), St. Paul (passed in November 1979) and Newton (passed in March 1982). A copy of the Newton anti-cigarette sampling ordinance is attached. Such inaction by a multi-billion dollar industry speaks far louder than words.

Finally, the Tobacco Institute, through Mr. Campbell, argues that cigarette sampling is protected by the "commercial free speech" doctrine. The fundamental fallacy with this argument is the fact that the practice of cigarette sampling involves far more than just speech. The samplers don't give out pieces of paper which say "Try brand X of cigarettes"; rather, they give out cigarettes. They give out free nicotine (a powerful, addictive drug), free tar, free carbon monoxide, free benzopyrene: in short, FREE POISON. If a city council cannot even regulate or prohibit the distribution of poison on its streets, then it is a powerless body.

In fact, though, health and safety are within the police power of the states to protect. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). Local government also has police power to protect the health and safety of its citizens. This proposed ordinance is an example of that tradition.

Therefore, GASP of Massachusetts, which stands by its offer to provide free legal services to the City of Cambridge to defend this ordinance in court if necessary, respectfully urges the members of the Cambridge City Council to reconsider its June 7, 1982 vote on this matter and to enact this proposed ordinance into law.

Sincerely,

Edward L. Sweda, Jr., Esq.

Edward L. Sweda, Jr., Esq.

CITY OF NEWTONIN BOARD OF ALDERMEN

ORDINANCE NO. R-224

March 1, 1982

WHEREAS: the distribution of free cigarettes and other tobacco products to anyone facilitates the availability of such products to minors in contravention of the laws and public policy of Massachusetts;

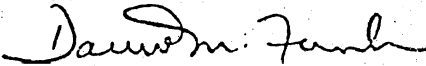
NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF NEWTON, AS FOLLOWS:

That the Revised Ordinances of the City of Newton, Mass., 1979, as amended, be and are hereby further amended by adding to Chapter 20 a new Section 20-18 as follows:

No person in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes, or any agent or employee of any such person, shall in the course of such business, distribute any cigarettes or other tobacco or smoking products free to any person on any public street or sidewalk, or in any public park or playground, or any other public ground, or in any public building.

Any person who violates the provisions of Section 20-18 shall be punished by a fine of not less than twenty (20) nor more than fifty (50) dollars for each violation. Every hour or part thereof in which a person engages in the conduct prohibited by Section 20-18 shall constitute a single and separate violation.

Approved as to legal form and character:

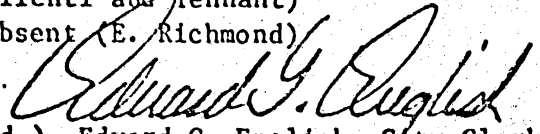

DANIEL M. FUNK
City Solicitor

Under Suspension of Rules
Readings Waived & Adopted
20 Yeas 4 Absent (Ald. Creem,
DePasquale, Shea, Shick)

February 17, 1982
Motion for Reconsideration
by Ald. Vance

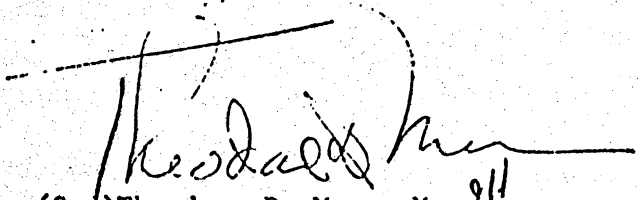
March 1, 1982, Reconsideration
carries 15 yeas 8 nays (Barker,
Bauckman, Daley, Levinsky, M. Richmond
Sheehan, Sofman, Jefferson) 1 absent
(E. Richmond)

Under Suspension of Rules
Readings Waived & Adopted
19 Yeas, 4 Nays (Bauckman, DePasquale,
Taglienti and Tennant)
1 Absent (E. Richmond)


(Sgd.) Edward G. English, City Clerk

EXECUTIVE DEPARTMENT

Approved March 3, 1982


(Sgd.) Theodore D. Mann, Mayor

Comm. from Paul E. Healy, City Clerk, transmitting comm. from Edward L. Sweda, Esq. Re: prohibition of public distribution of free smoking & tobacco products.

In City Council,

June 14, 1982

6/14/82
Referred to Calendar
Item #16

Calendar #16
City of Cambridge

MASSACHUSETTS

In City Council

10 PM

June 14, 1982

*Councilman David Sullivan motion to
Pass to Ordination*

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton		✓		
Mr. Thomas W. Danehy		✓		
Mr. Francis H. Duehay	✓			
Ms. Sandra Graham	✓			
Mr. Leonard J. Russell		✓		
Mr. David E. Sullivan	✓			
Mr. Walter J. Sullivan		✓		
Mr. Wylie	✓			
Mayor Vellucci	✓			

5 4 0

1015
Pass to be Ordained

16 Calendar
City of Cambridge

MASSACHUSETTS

In City Council June 14 1982

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton			✓	
Mr. Thomas W. Danehy	✓			
Mr. Francis H. Duehay	✓			
Ms. Sandra Graham	✓			
Mr. Leonard J. Russell				✓
Mr. David E. Sullivan	✓			
Mr. Walter J. Sullivan	✓			
Mr. Wylie	✓			
Mayor Vellucci	✓			

7 0 1 1

*Vote to defer action until all commissioners present
& in any event to take action prior to
adjournment.*

Ordinance #16
City of Cambridge

#1

MASSACHUSETTS

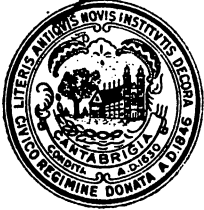
In City Council June 14 1982

C. D. Sullivan motion to suspend rules

*It passed to Ordinance #16
PROHIBITION vs. DISTRIBUTION OF CIGARETTES*

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton			✓	
Mr. Thomas W. Danehy		✓		
Mr. Francis H. Duehay	✓			
Ms. Sandra Graham	✓			
Mr. Leonard J. Russell		✓		
Mr. David E. Sullivan	✓			
Mr. Walter J. Sullivan		✓		
Mr. Wylie	✓			
Mayor Vellucci	✓			
	5	3	1	

Motion failed



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

AN ORDINANCE

In amendment to an ordinance formerly entitled "The General Ordinances of the City of Cambridge" as revised in 1972 and now designated as "The Code of the City of Cambridge".

Be it ordained by the City Council of the City of Cambridge as follows:

That Chapter Seventeen entitled "Public Works" is hereby amended by inserting after section 17-41 the following new section:

Section 17-41A. FREE COMMERCIAL DISTRIBUTION OF SMOKING OR TOBACCO PRODUCTS PROHIBITED IN PUBLIC PLACES.

In order to avoid obstruction and congestion of public ways and places, to control and reduce litter, and to protect pedestrians from annoyance and invasion of privacy, no person in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes, shall in the course of such business, distribute any cigarettes or other tobacco or smoking products free to any person on any public street or sidewalk, or in any public park or playground, or any other public ground, or in any public building.

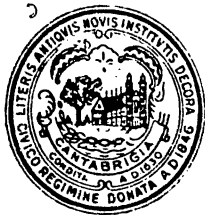
Any person who violates this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

In City Council June 14, 1982.

Passed to be ordained by a yea and nay vote:- Yeas 5; Nays 4; Absent 0.

Robert W. Healy, City Manager.

ATTEST:- Paul E. Healy, City Clerk.



City of Cambridge

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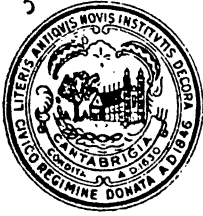
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In City Council June 14, 1982.

Passed to be ordained by a ye and nay vote:- Yeas 5; Nays 4; Absent 0.

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Any person who violates this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

In City Council June 14, 1982.

Passed to be ordained by a yea and nay vote:- Yeas 5; Nays 4; Absent 0.

Robert W. Healy, City Manager.

ATTEST:- Paul E. Healy, City Clerk.

City of Cambridge

MASSACHUSETTS

In City Council

JUNE 7,

1982

Ordinance #6

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton		✓		
Mr. Thomas W. Danehy				✓
Mr. Francis H. Duehay	✓			
Ms. Saundra Graham	✓			
Mr. Leonard J. Russell		✓		
Mr. David E. Sullivan	✓			
Mr. Walter J. Sullivan		✓		
Mr. Wylie			✓	
Mayor Vellucci	✓			

4 3 1 6
C. D. Sullivan motion to Pass to
Be Ordained - Failed of
Ordination -

COUNCILOR D SULLIVAN NOTIFIED CITY CLERK OF
HIS INTENTION TO MOVE RECONSIDERATION

16

6/7/02

SPRING

ONLINE

FRONT OF BELMONT

RECOMMENDATION
MADE BY ED FOLLMAN



City of Cambridge

UNFINISHED BUSINESS
ITEM NUMBER SIX

In the Year One Thousand, Nine Hundred Eighty-Two

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In City Council June 7, 1982.

Failed of ordination on a yea and nay vote:-

Yeas 4; Nays 3; Absent 1; Present 1.

RECONSIDERATION FILED BY COUNCILLOR DAVID SULLIVAN AND COUNCILLOR DUEHAY



City of Cambridge

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ITEM NUMBER SIX

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Failed of ordination on a yea and nay vote:-

Yeas 4; Nays 3; Absent 1; Present 1.

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Yeas 4; Nays 3; Absent 1; Present 1.

RECONSIDERATION FILED BY COUNCILLOR DAVID SULLIVAN AND COUNCILLOR DUEHAY



GASP of Massachusetts
A chapter of Group Against Smoking Pollution

P.O. Box 242, Brookline, Ma. 02146

(617) 734-0841

June 7, 1982

OFFICERS

Rita Addison
President
Alan Goldstein
Treasurer
Edward Sweda
Legislative Secretary

Councillor David Sullivan
Cambridge City Hall
Cambridge, MA

BOARD OF DIRECTORS

David Gordon Wilson
Chairperson
Alvan Brody, Esq.
Betty Brody, Esq.
Mary Ann Cromer, M.D.
Lou Gross
Arnold Reif, D.Sc.
Joseph Pess, Esq.
Edward Sweda, Esq.
Richard Wilson, Ph.D.

Dear Councillor Sullivan,

I, Edward L. Sweda, Esq., am authorized to and do hereby guarantee that Group Against Smoking Pollution (GASP) of Massachusetts shall provide to the City of Cambridge, free of charge, legal services for the purpose of defending in court Section 17-41A of the Code of the City of Cambridge. That proposed ordinance would prohibit the commercial distribution of free cigarettes or other tobacco or smoking products in or upon any public street or sidewalk or in any public park or playground, or any other public ground or in any public building in Cambridge.

GASP, an organization with four lawyers (including Alvan Brody, a Suffolk University Law School professor and author of The Legal Rights of Nonsmokers) on the Board of Directors, is willing to provide legal services to defend this ordinance because we are confident that the ordinance is constitutional in its entirety. Indeed, a Utah law (76-10-102) which bans tobacco ads on billboards and bus placards and ordinances in Minneapolis, MN (passed in March 1979), St. Paul, MN (passed in November 1979) and Newton, MA (passed in March 1982) which ban the public distribution of free cigarette samples have never been invalidated by any Federal law or court decision. In fact, the Minneapolis City Council passed its ordinance by a 12 to 0 vote while the vote in the St. Paul City Council was 7 to 0 as compared to 19 to 4 in the Newton Board of Aldermen. In the intervening 39 months since the first anti-cigarette sampling ordinance was passed, no court challenge against any of the ordinances has been filed.

For the foregoing reasons, GASP is confident of the validity of the ordinance and thus offers legal services to uphold it.

Sincerely,

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Legislative Secretary



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GASP, an organization with four lawyers (including Alvan Brody, a Suffolk University Law School professor and author of The Legal Rights of Nonsmokers) on the Board of Directors, is willing to provide legal services to defend this ordinance because we are confident that the ordinance is constitutional in its entirety. Indeed, a Utah law (76-10-102) which bans tobacco ads on billboards and bus placards and ordinances in Minneapolis, MN (passed in March 1979), St. Paul, MN (passed in November 1979) and Newton, MA (passed in March 1982) which ban the public distribution of free cigarette samples have never been invalidated by any Federal law or court decision. In fact, the Minneapolis City Council passed its ordinance by a 12 to 0 vote while the vote in the St. Paul City Council was 7 to 0 as compared to 19 to 4 in the Newton Board of Aldermen. In the intervening 39 months since the first anti-cigarette sampling ordinance was passed, no court challenge against any of the ordinances has been filed.

For the foregoing reasons, GASP is confident of the validity of the ordinance and thus offers legal services to uphold it.

Sincerely,

Edward L. Sweda, Esq.

Edward L. Sweda, Esq.

Legislative Secretary



GASP of Massachusetts
A chapter of Group Against Smoking Pollution

P.O. Box 242, Brookline, Ma. 02146

(617) 734-0841

June 7, 1982

OFFICERS

Rita Addison
President
Alan Goldstein
Treasurer
Edward Sweda
Legislative Secretary

Councillor David Sullivan
Cambridge City Hall
Cambridge, MA

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Serry Brody, Esq.
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Legislative Secretary



GASP of Massachusetts
A chapter of Group Against Smoking Pollution

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(617) 734-0841

June 7, 1982

RECEIVED BY
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CAMBRIDGE, MASS.

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President
Alan Goldstein
Treasurer
Edward Sweda
Legislative Secretary

Councillor David Sullivan
Cambridge City Hall
Cambridge, MA

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Legislative Secretary

Comm. from Councillor David Sullivan, transmitting comm. from Edward L. Sweda, Leg. Sec., GASP, Re: providing legal services to defend Section 17-41A of the City Code, regarding the prohibition of the distribution of smoking/tobacco materials in public places.

6/7/82
See Calendar
Item which passed
OF ORDINANCE -

In City Council,

June 7, 1982

6/7/82 Copy -
Referred to the
PETITION - ORIGINAL
Placed on File

John J. Campbell
Counsellor at Law

One Center Plaza, Boston, Mass. 02108
617-542-8800

June 7, 1982

The Honorable the Members of the City Council
City Hall
Cambridge, Massachusetts

Dear Councillors:

Please be advised that I represent The Tobacco Institute in opposition to the proposed ordinance to prohibit the free distribution of sample tobacco products.

The ordinance is clearly unconstitutional under both the United States and Massachusetts constitutions. The case of *Coffee-Rich Inc. vs. Mass. Commissioner of Public Health* cited in footnote 2 on page 1 of the attached brief along with other cases held that the prohibition of the distribution of free samples of a non-dairy cream substitute violates the equal protection clause of both constitutions.

Advertising by distribution of free product samples has long been recognized as a perfectly legitimate and proper method of promoting many types of consumer products in Cambridge and elsewhere. Sampling is commonly used by manufacturers of many consumer goods other than cigarettes, such as soap, cosmetics, toothpaste, coffee and other food products. None of these manufacturers is prohibited by state or local law from distributing free samples of its products in order to promote their sale. The City Council has been shown on evidence, and obviously there could be none, that the free distribution of tobacco products in public places causes greater traffic congestion, litter, or pedestrian annoyance than is caused by the distribution of any other product in public places. In the absence of such a rational basis for distinguishing between distribution of free samples of tobacco products and other types of products, the proposed ordinance is unfair as well as unconstitutional.

For these reasons and all of the other reasons cited in the attached brief, I ask that you postpone any action on the proposed ordinance until you have the opportunity to consider the importance of this matter.

Yours very truly,

John J. Campbell
JOHN J. CAMPBELL

JJC:mjr
Encl.

I

Prohibiting the Distribution of Sample Tobacco
Products Would Improperly Discriminate Against
a Single Lawful Product

The Fourteenth Amendment to the United States Constitution requires a legislature to treat those similarly situated in a similar manner. As the United States Supreme Court pointed out in Reed v. Reed, 404 U.S. 71, 76 (1971):

"[A] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'" (quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).¹

Part I, Article I of the Constitution of Massachusetts similarly guarantees each person equal protection of the law.² The proposed ordinance would ignore these principles of fundamental fairness.

Advertising by distribution of free product samples has long been recognized as a perfectly legitimate and proper

¹ Accord, e.g., Stanton v. Stanton, 421 U.S. 7, 13-15 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 648-53 (1975); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

² See, e.g., Coffee-Rich Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281, 288-89 (1969) (prohibition of non-dairy cream substitute violates equal protection); Hall-Omar Baking Co. v. Commissioner of Labor and Industries, 344 Mass. 695, 184 N.E.2d 344, 348 (1962) (application of hawkers and peddlers license law to door-to-door bakery product salesmen but not door-to-door dairy product salesmen violates equal protection).

method of promoting many types of consumer products in Cambridge and elsewhere. Sampling is commonly used by manufacturers of many consumer goods other than cigarettes, such as soap, cosmetics, toothpaste, coffee and other food products. None of these manufacturers is prohibited by state or local law from distributing free samples of its products in order to promote their sale. The City Council has been shown no evidence, and obviously there could be none, that the free distribution of tobacco products in public places causes greater traffic congestion, litter, or pedestrian annoyance than is caused by the distribution of any other product in public places.¹ In the absence of such a rational basis for distinguishing between distribution of free samples of tobacco products and other types of products, the proposed ordinance is unfair as well as unconstitutional.

The Proposed Ordinance Would Interfere
With the Exercise of First Amendment Rights

The distribution of sample tobacco products is one method by which tobacco manufacturers convey information to smokers about their products. As a means of disseminating information of interest to the smoking public, such sample

¹ Indeed, as far as litter is concerned, it is highly unlikely that a person who requests and receives a sample of cigarettes for which payment would normally be required would then discard the sample package.

distribution is protected as a form of commercial speech under the First Amendment.

Recent decisions of the United States Supreme Court have made clear that the dissemination of information about commercial products is entitled to constitutional protection.¹ The Supreme Court emphasized that although a state may prohibit the dissemination of false or misleading commercial advertising, it may not interfere with the dissemination of truthful commercial information about a lawful activity such as smoking.

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), the Supreme Court invalidated state action similar in purpose to the present proposal. The Central Hudson case involved an attempt by the State of New York to ban advertising by electrical utilities promoting the use of electricity on the ground that such advertising was contrary to the national policy of conserving energy. The Court held that the governmental interest in conserving energy, while important, could not overcome the utility's right of free speech:

"The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation Commercial expression not only serves the economic interest of the speaker, but also assists

¹ E.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." 447 U.S. at 561-62.

Two members of the Court concurred in the decision in language directly applicable here:

"I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. 447 U.S. at 574-78.¹

As was the case in Central Hudson, the proposed ordinance would reduce the availability of information concerning a lawful commercial product in an apparent effort to reduce the demand for that product. That "highly paternalistic" effort is precisely what the First Amendment prohibits.

* * * * *

In summary, the proposed ordinance -- in addition to resting on a fundamental misconception of the purpose and effect of tobacco product sampling and the manner in which such sampling is conducted -- would violate specific provisions of the Public Health Cigarette Smoking Act of 1969 and, if approved, would represent an ill-advised conflict with express

¹ Accord, e.g., Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (1980).

congressional policy. Moreover, to the extent the proposed ordinance is based solely on concerns of traffic and litter control or pedestrian annoyance, there is no rational basis for singling out tobacco product sampling, and the ordinance therefore would unconstitutionally discriminate against a lawful product in commerce. Finally, as an attempt to suppress the dissemination of information about a lawful product, the ordinance would violate the right of free speech and represents precisely the type of paternalistic regulation that the American public strongly opposes.

Because of these numerous legal infirmities, as well as the practical objections to the proposal, it should be rejected.



CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139 • (617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

EDWARD A. CUNNINGHAM
SEVERLIN B. SINGLETON
DAVID B. O'CONNOR
BIRGE ALBRIGHT
LEGAL COUNSEL

December 9, 1981

Mr. Robert W. Healy
City Manager
City Hall
Cambridge, MA

Re: Proposed Ordinance Regulating Smoking in
Restaurants and Prohibiting Distribution
of Free Tobacco Products in Public Places

Dear Mr. Healy:

By letter of November 23, 1981, Paul E. Healy, City Clerk, informed me that the City Council has requested my opinion regarding the constitutionality of the attached proposed Ordinance and also regarding the question of whether section one thereof would apply to beano games or to dining halls in local universities.

Before preparing this opinion, I received a Memorandum of Law prepared by Professor Richard A. Daynard on behalf of the Ordinance's proponents and a brief submitted by the Tobacco Institute.

My conclusions are as follows:

CONCLUSION

Section 1 of the Ordinance requiring no-smoking areas in restaurants is constitutional. The term "restaurant" does not include beano games or university dining halls.

Section 2 of the Ordinance is constitutional, but it may be barred by §5(b) of the Public Health Cigarette Smoking Act of 1969 (15 U.S.C., §1334(b)).

I. Proposal to Ban Smoking in Restaurants Seating more than 50, except that Restaurant may Establish Smoking Areas Consisting of not more than 75% of Seating Capacity.

A. Beano Games and Dining Halls in Local Universities

Section one of the proposed Ordinance applies only to "restaurants," which are defined as follows in G.L. c. 138, §1:

"Restaurant," space, in a suitable building, leased or rented or owned by a person holding a...license as a common victualler under (G.L. c. 140)...

I am informed by the Cambridge License Commission that neither beano games nor university dining halls are required to obtain common victualler's licenses, and, therefore, I conclude that they are not "restaurants."

B. Equal Protection

The Tobacco Institute correctly points out that a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971); Brief, 3.

The apparent purpose of section 1 is to protect the health and rights of nonsmokers. The Tobacco Institute argues that no reliable, scientific evidence exists to support the assumption that exposure to tobacco smoke is harmful to the health of nonsmokers and that the vast majority of nonsmokers do not find smoking to be a matter of concern. Brief, 4. The Council must, of course, address these questions.

If the Council disagrees with the Tobacco Institute and concludes that smoking does pose a health hazard and that a significant number of nonsmokers are concerned about it, the Institute still argues that "there is simply no rational basis for concluding that achievement of the ordinance's purpose depends upon the nature and size of the establishment involved," Brief, 4, and that the classifications established by the Ordinance - "restaurants" and "restaurants seating more than 50 people" are "wholly arbitrary." Brief 4, 5.

In my opinion, the classifications established by the Ordinance are not wholly arbitrary. The Council might decide that people who go to a restaurant for a meal are less likely to want to smoke than people who go to a bar for a drink. Similarly, it might decide that it makes sense to have a no-smoking area in larger restaurants but not in smaller restaurants. If smoking causes a health problem, the Council is not obliged to solve the entire problem at once. As the Supreme Court stated in Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955):

... The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others....

The Institute cites Alford v. City of Newport News, 220 Va. 584, 260 SE 2d 241 (1979), Brief, 5, but that case is not in point. The facts there were as follows: Defendant Alford, who operated a restaurant was convicted of failing to comply with a no-smoking ordinance. The ordinance prohibited smoking in any restaurant seating 50 or more, except in designated smoking areas, and required the posting of "No Smoking" signs. The city attorney testified that "the way we are attempting to enforce the ordinance (is) by allowing one table" to be designated as a nonsmoking area. 260 SE 2d at 242. The Court struck down the Ordinance, as applied, because the means employed, a no-smoking area of only one table, was not reasonably suited to the achievement of the goal, protecting the nonsmoking public. The proposed Cambridge Ordinance requires that the no-smoking area be at least 25% of the seating capacity.

C. Due Process

The Tobacco Institute next argues that the Ordinance is also defective, "because it does not adequately define the conduct being prohibited." Brief, 5-6. The test is that "...a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Cramp v. Bd. of Public Instruction, 368 U.S. 278, 287 (1961).

On the other hand, "it has been held that a statute is not unconstitutionally vague where it is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.... If the meaning of terms employed in the statute has long been recognized in law and life, they will be considered sufficiently definite." 16A Am. Jur. 2d, Constitutional Law, §818, p. 988, 989 (1979).

Furthermore, "...in view of the strong presumptive validity of a legislative act, statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. The 'void for vagueness' doctrine does not require straining to inject doubt as to the meaning of words in a statute where no doubt would be felt by the normal reader, and the United States Supreme Court will not indulge in such straining. United States v. Powell, 423 U.S. 87, 93 (1975).... all that is necessary is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices; that there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense...." 16A Am. Jur. 2d, Constitutional Law, §818, pp. 991, 992 (1979).

In light of the foregoing principles, I am of the opinion that section 1 is not impermissibly vague in violation of the Due Process Clause.

D. Right of Privacy and Rights Associated with
Ownership of Real Property

Although it may be true that "courts have long recognized that governmental intrusion into private, personal activities can be justified only by substantial and compelling state interests" (Institute Brief, 8); see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (right of marital privacy), I doubt that smoking in a restaurant is such an activity.

The two smoking cases cited by the Institute, (Brief, 9) are not in point. City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914), held that an ordinance making it an offense to use or carry tobacco on any of the streets or in the parks or public buildings of a municipality could not be sustained as a valid police regulation, because the streets were so wide and the parks so large that smoking therein could not offend others. The smoking in question occurred on a street. The Court said:

...we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters,

and like places where large numbers of persons are crowded together in a small place.

104 N.E. at 837.

Hershberg v. City of Barboursville, 142 Ky. 60, 133 S.W. 985 (1911) is another example of an over-inclusive ordinance. There, the ordinance prohibited smoking cigarettes "within the corporate limits of the city...." In holding the ordinance void, the Court stated:

The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city.

133 S.W. at 986

The proposed Cambridge Ordinance is, of course, readily distinguishable from those considered in City of Zion and Hershberg. It is more like the ordinance upheld in State v. Heidenhain, 42 La. Ann. 483, 7 So. 621 (1890), which prohibited smoking in street cars.

It is true that recent cases have held that anti-smoking groups cannot force the government to restrict smoking in public places. See cases cited in Institute Brief, 10. But these holdings do not, of course, mean that the government cannot act if it chooses. See, e.g., Gasper v. Louisiana Stadium & Exposition District, 577 F2d 897, 898 (CA5, 1978):

We assume that the Superdome authorities, if they saw fit, could prohibit smoking in the facility, or the City of New Orleans in the exercise of its police power could prohibit smoking in public stadiums...

See 7 McQuillin, Municipal Corporations, §24.239 (3rd ed. rev., 1981); 62 C.J.S., Municipal Corporations, §302 (1949); Annot., "Constitutionality of anti-cigarette legislation," 20 ALR 926 (1922).

Although it is true that the Supreme Court has recently extended certain constitutional protections to private commercial establishments (Institute Brief, 9), I doubt that these protections would allow a restaurant to resist the enforcement of a reasonable ordinance designed to protect the health of its patrons.

E. Federal Preemption

The institute finally argues that this area has been preempted by the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C., §§651 et seq. I am not convinced by this argument, especially in view of the fact that the proposed Ordinance is apparently designed to protect the health of a restaurant's patrons, not its employees. See 61 Am. Jur. 2d, Plant and Job Safety - OSHA and State Laws, §§3, 25, 128 (1981).

As a matter of fact, 29 U.S.C., §653(b)(4) recognizes concurrent state power to act either legislatively or judicially under the common law with regard to occupational safety. See Shimp v. N. J. Bell Tel. Co., 145 N.J. Super. 516, 368 A2d 408, 411 (1976) (employee entitled to injunction requiring employer to establish no-smoking area).

II. Proposal to Prohibit Distribution of Free Tobacco Products in Public Places.

Section 5(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C., §1334(b), states:

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Does this provision prevent Cambridge from adopting section 2 of the proposed Ordinance?

The question of whether Congress intends to occupy a given field in such a way as to exclude the operation of state and local laws depends on the facts in the particular case. 81A C.J.S., States, §24(b) (1977). But "...the intention of Congress to exclude the states from exercising their reserved powers must be clearly manifested, and the courts will not lightly infer that Congress by mere passage of a federal act has impaired the traditional sovereignty of the states...." Id. at 330. The burden is on the proponent of federal preemption to state a strong case. Druker v. Sullivan, 334 F. Supp. 861, 862 (D. Mass., 1971), aff'd 458 F2d 1272.

I do not know if section 2 is "based on smoking and health." As the Daynard brief points out on p. 2, it could

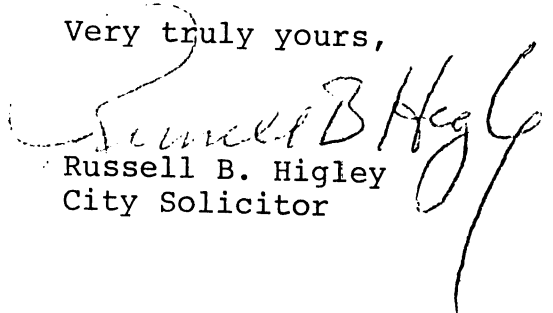
Mr. Robert W. Healy

-7-

December 9, 1981

be based on the avoidance of litter or a number of other reasons. If it is in fact "based on smoking and health," there is a good chance that it is forbidden by S1334(b), because it certainly deals with the "promotion" of cigarettes.

Very truly yours,


Russell B. Higley
City Solicitor

RBH:jl



City of Cambridge

Calendar Item No. 14

IN CITY COUNCIL

May 24, 1982

COUNCILLOR WALTER SULLIVAN

ORDERED:

That the City Manager be and hereby is requested to direct the City Solicitor to render an opinion as to the legality of the proposed ordinance under consideration by this City Council which would restrict the distribution, without consideration, of cigarettes or other tobacco products in the public ways, playgrounds or public buildings in the City of Cambridge.

In City Council May 24, 1982.

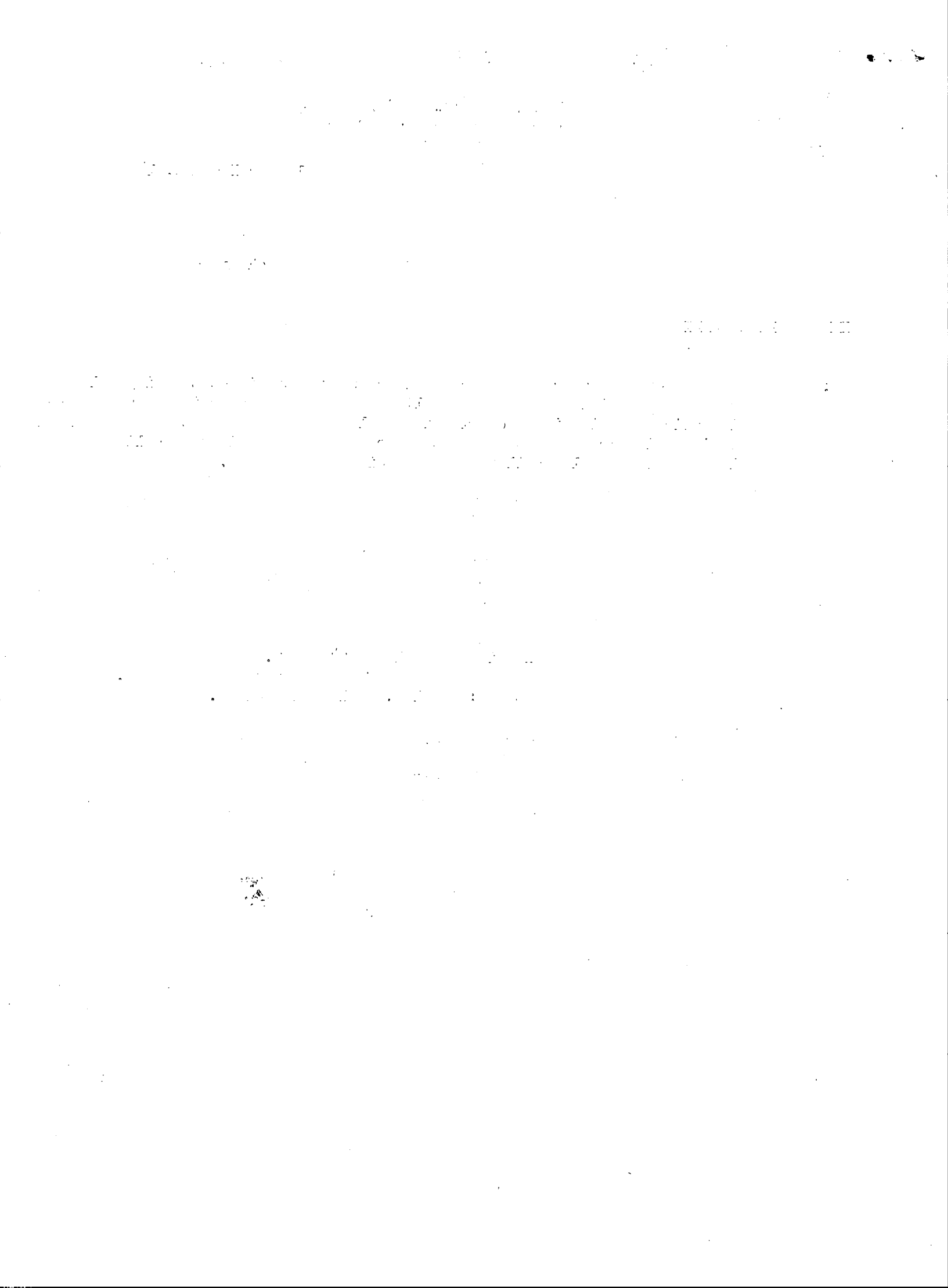
Adopted by the affirmative vote of 8 members.

Attest:- Paul E. Healy, City Clerk.

A true copy;

ATTEST:-

A handwritten signature in cursive script, reading "Paul E. Healy".





City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

AN ORDINANCE

In amendment to an ordinance formerly entitled "The General Ordinances of the City of Cambridge" as revised in 1972 and now designated as "The Code of the City of Cambridge".

Be it ordained by the City Council of the City of Cambridge as follows:

That Chapter Seventeen entitled "Public Works" is hereby amended by inserting after section 17-41 the following new section:

Section 17-41A. FREE COMMERCIAL DISTRIBUTION OF SMOKING OR TOBACCO PRODUCTS PROHIBITED IN PUBLIC PLACES.

In order to avoid obstruction and congestion of public ways and places, to control and reduce litter, and to protect pedestrians from annoyance and invasion of privacy, no person in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes, shall in the course of such business, distribute any cigarettes or other tobacco or smoking products free to any person on any public street or sidewalk, or in any public park or playground, or any other public ground, or in any public building.

Any person who violates this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

Passed to a second reading at the City Council Meeting of May 17, 1982 and on or after June 7, 1982 the question comes on passing to be ordained.

ATTEST:- Paul E. Healy, City Clerk.



City of Cambridge

Calendar Item No. 14

IN CITY COUNCIL

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In order to avoid obstruction and congestion of public ways and places, to control and reduce litter, and to protect pedestrians from annoyance and invasion of privacy, no person in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes, shall in the course of such business, distribute any cigarettes or other tobacco or smoking products free to any person on any public street or sidewalk, or in any public park or playground, or any other public ground, or in any public building.

Any person who violates this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

Passed to a second reading at the City Council Meeting of May 17, 1982 and on or after June 7, 1982 the question comes on passing to be ordained.

ATTEST:- Paul E. Healy, City Clerk.



CITY OF CAMBRIDGE
INTEROFFICE CORRESPONDENCE

To Russell B. Higley, City Solicitor

Date May 26, 1982

From Paul E. Healy, City Clerk

Reference

Subject proposed amendment to the General Ordinances
regarding the prohibition of the free distribution
of smoking or tobacco products

Dear Mr. Higley:

Enclosed herewith you will find a copy of a proposed amendment to the General Ordinances in Chapter Seventeen entitled "Public Works" which would insert after section 17-41 a section 17-41A entitled "Free distribution of smoking or tobacco products prohibited in public places". Said proposed amendment was submitted to the Council for its consideration by Councillor David Sullivan on May 17, 1982. At that time it was passed to a second reading and reconsideration was filed by Councillor Walter Sullivan. It subsequently appeared on the City Council calendar for May 24, 1982, at which time reconsideration failed and the action taken on May 17, 1982 stands.

I believe that the Council has in the past requested your legal opinion in connection with a similar amendment. Would you kindly submit your opinion in this matter, or re-submit a copy of the opinion you have already rendered relating to the free distribution of smoking or tobacco products.

Your kind cooperation in this regard will be greatly appreciated by this office and the City Council.

PEH/mh

Enclosure



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

AN ORDINANCE

In amendment to an ordinance formerly entitled "The General Ordinances of the City of Cambridge" as revised in 1972 and now designated as "The Code of the City of Cambridge".

Be it ordained by the City Council of the City of Cambridge as follows:

That Chapter Seventeen entitled "Public Works" is hereby amended by inserting after section 17-41 the following new section:

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Passed to a second reading at the City Council Meeting of May 17, 1982 and on or after June 7, 1982 the question comes on passing to be ordained.

ATTEST:- Paul E. Healy, City Clerk.

Ind Reading -

City of Cambridge

MASSACHUSETTS

In City Council

May 17,

1982

2

Passed & Ind Reading -

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton	✓			
Mr. Thomas W. Danehy		✓		
Mr. Francis H. Duehay	✓			
Ms. Sandra Graham	✓			
Mr. Leonard J. Russell			✓	
Mr. David E. Sullivan	✓			
Mr. Walter J. Sullivan		✓		
Mr. Wylie	✓			
Mayor Vellucci		✓		

5 2 1

City of Cambridge

MASSACHUSETTS

In City Council

May 17 1982

1/
CWJS
D

Refer to Ord. 1100
Friday

	YEA	NAY	ABSENT	PRESENT
Mr. Daniel J. Clinton	✓			
Mr. Thomas W. Danehy	✓			
Mr. Francis H. Duehay		✓		
Ms. Sandra Graham		✓		
Mr. Leonard J. Russell			✓	
Mr. David E. Sullivan		✓		
Mr. Walter J. Sullivan	✓			
Mr. Wylie		✓		
Mayor Vellucci	✓			

4 *4* *1*



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

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Passed to a second reading at the City Council Meeting of May 17, 1982 and on or after June 7, 1982 the question comes on passing to be ordained.

ATTEST:- Paul E. Healy, City Clerk.



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

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ATTEST:- Paul E. Healy, City Clerk.



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

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ATTEST:- Paul E. Healy, City Clerk.



City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-Two

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Any person who violates this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

Passed to a second reading at the City Council Meeting of May 17, 1982 and on or after June 7, 1982 the question comes on passing to be ordained.

ATTEST:- Paul E. Healy, City Clerk.

Ord. #1

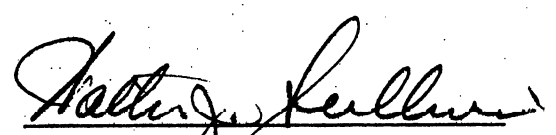
MOTION FOR RECONSIDERATION SUBMITTED BY COUNCILLOR

WALTER J. SULLIVAN

May 17, 1982

Date

Councillor Walter Sullivan has notified the City Clerk of his intention to move Reconsideration of the vote of the City Council on May 17, 1982 passing to a second reading a proposed amendment to the General Ordinances in Chapter Seventeen entitled "Public Works" by inserting after section 17-41 a section 17-41A entitled "Free commercial distribution of smoking or tobacco products prohibited in public places".


Signature

PROPOSED ORDINANCE

Be it ordained by the City Council of the City of Cambridge as follows:

That Chapter Seventeen entitled "Public Works" is hereby amended by inserting after section 17-41 the following section:

Section 17-41A. Free commercial distribution of smoking or tobacco products prohibited in public places.

In order to avoid obstruction and congestion of public ways and places, to control and reduce litter, and to protect pedestrians from annoyance and invasion of privacy, no person in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes, shall in the course of such business, distribute any cigarettes or other tobacco or smoking products free to any person on any public street or sidewalk, or in any public park or playground, or any other public ground, or in any public building.

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PASSED TO A SECOND READING. RECONSIDERATION FILED BY COUNCILLOR WALTER SULLIVAN



City of Cambridge

COUNCILLOR D. SULLIVAN

1.
IN CITY COUNCIL
May 17, 1982

ORDERED:

That the attached proposed ordinance be passed to a second reading.

Order # 1

14
0-18

C.D. Sullivan order re: Proposed amendment to the General Ordinances in Chapter 17 entitled "Public Works" by inserting after section 17-41 a section 17-41A entitled "FREE COMMERCIAL DISTRIBUTION OF SMOKING OR TOBACCO PRODUCTS PROHIBITED IN PUBLIC PLACES".

6/14/82 reconsideration prevailed

*Passed to be ordained
5-4-0*

*6/17/82 published
Chronicle*

In City Council,

May 17, 1982

5-17-82

LPS
Passed to 2nd Reading
on Roll Call
5-3-1