



FIRST PUBLICATION NO. 2134.

City of Cambridge

In the Year One Thousand, Nine Hundred Eighty-One.

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 Thirteen entitled "Offenses" is hereby amended as follows:

1. By inserting in section 13-4 entitled "Smoking Prohibited," as appearing in Ordinance Number 849 of September 15, 1975, after sub-section (e), the following subsection:

(e^{1/2}) No person shall smoke in the areas of any restaurant used for food preparation, or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons, except that the management of any such restaurant may designate properly ventilated waiting lounge, and eating areas as smoking areas, provided that no more than 75 percent of the area available for each such purpose, and no more than 75 percent of the total seating capacity, may be so designated as smoking areas, and further provided that any area so designated be conspicuously labeled as such.

2. By inserting after said section 13-4 the following section:

Section 13-4A. Free distribution of smoking of tobacco products prohibited.

No person shall, except at full market price, in or upon any part of the streets, parks, public grounds, public buildings, or other public places within the City of Cambridge, distribute or allow to be distributed any smoking or tobacco product for any commercial purpose.

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 December 7, 1981 and on or after December 21, 1981 the question comes on passing to be ordained.

ATTEST: — Paul E. Healy, City Clerk.
Dec. 10

CHAPTER 36. CIGARETTE LABELING AND ADVERTISING

Section

- 1331. Declaration of policy
- 1332. Definitions
- 1333. Labeling
- 1334. Preemption
- 1335. Unlawful advertisements on electronic media
- 1336. Authority of Federal Trade Commission
- 1337. Reports to Congress
- 1338. Criminal penalty
- 1339. Injunction proceedings
- 1340. Cigarettes for export

§ 1331. Declaration of policy

It is the policy of the Congress, and the purpose of this Act [15 USCS §§ 1331 et seq.], to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

(July 27, 1965, P. L. 89-92, § 2, 79 Stat. 282; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 87.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1970. Act Apr. 1, 1970 (see 1970 effective date note to this section).
Sec. 2 reenacted this section without change.

Effective date of Act:

Section 11 of Act July 27, 1965, provided: "This Act [15 USCS §§ 1331-1340] shall take effect on January 1, 1966."

Effective date of 1970 amendments:

Section 3 of Act Apr. 1, 1970, provided: "Section 5 of the amendment made by this Act [15 USCS § 1334] shall take effect as of July 1, 1969. Section 4 of the amendment made by this Act [15 USCS § 1333] shall take effect on the first day of the seventh calendar month which begins

after the date of the enactment of this Act [enacted Apr. 1, 1970]. All other provisions of the amendment made by this Act except where otherwise specified shall take effect on January 1, 1970."

Short titles:

Section 1 of Act July 27, 1965, P. L. 89-92, 79 Stat. 282, provided: "This Act may be cited as the 'Federal Cigarette Labeling and Advertising Act.'" For full classification of this Act, consult USCS Tables volumes.

Section 1 of Act Apr. 1, 1970, P. L. 91-222, 84 Stat. 87, provided: "This Act may be cited as the 'Public Health Cigarette Smoking Act of 1969.'" For full classification of this Act, consult USCS Tables volumes.

Section 1 of Act Sept. 21, 1973, P. L. 93-109, 87 Stat. 352 provided that "this Act may be cited as the 'Little Cigar Act of 1973.'" For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Separability. Section 12 of Act July 27, 1965, as amended by § 2 of Act Apr. 1, 1970, provided: "If any provision of this Act [15 USCS §§ 1331 et seq.] or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby."

CROSS REFERENCES

Preemption of state law, 15 USCS § 1334.

Fair Packaging and Labeling Act, 15 USCS §§ 1451 et seq.

Labeling requirements under Consumer Product Safety Act, 15 USCS § 2063.

RESEARCH GUIDE

Am Jur:

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts, p. 345.

§ 1332. Definitions

As used in this Act [15 USCS §§ 1331 et seq.]—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or

purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Island, Kingman Reef, or Johnston Island.

(3) The term "United States," when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term "State" includes any political division of any State.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

(7) The term "little cigar" means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (1)) and as to which one thousand units weigh not more than three pounds.

(July 27, 1965, P. L. 89-92, § 3, 79 Stat. 282; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 88; Sept. 21, 1973, P. L. 93-109, § 2, 87 Stat. 352.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1970. Act Apr. 1, 1970 (effective 1/1/70, as provided by § 3 of Act). Sec. 2 added the second sentence of paragraph (3).

1973. Act Sept. 21, 1973 (effective "thirty days after" 9/21/73, as provided by § 4 of Act). Sec. 2 added paragraph (7).

RESEARCH GUIDE

Am Jur:

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

§ 1333. Labeling

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

(July 27, 1965, P. L. 89-92, § 4, 79 Stat. 283; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 88.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1970. Act Apr. 1, 1970 (effective "on the first day of the seventh calendar month which begins after" 4/1/70, as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 substituted "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health" for "Caution: Cigarette Smoking May Be Hazardous to Your Health."

CROSS REFERENCES

- Definitions, 15 USCS § 1332.
- Preemption of other labeling requirements, 15 USCS § 1334.
- Annual reports to Congress concerning effectiveness of cigarette labeling, 15 USCS § 1337(b).
- Criminal penalties, 15 USCS § 1338.
- Injunctions against violation of Act, 15 USCS § 1339.
- Exemption of packages of cigarettes to be exported, 15 USCS § 1340.
- This section is referred to in 15 USCS § 1334.

RESEARCH GUIDE

Am Jur: 55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts: Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

§ 1334. Preemption

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act [15 USCS § 1333], shall be required on any cigarette package.

CIGARETTE

(b) No requ imposed unc any cigarett provisions o (July 27, 19 § 2, 84 Stat.

Amendr 1970. A § 3 of A 2 added "(b) No the adv conform "(c) Ex in this affect, t unfair c to affir the autl stateme "(d)(1) a repor effective current such re "(2) Th Congre Act, an rette lab ing and may de

Definition:

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(b) 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 [15 USCS §§ 1331 et seq.].

(July 27, 1965, P. L. 89-92, § 5, 79 Stat. 283; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 88.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1970. Act Apr. 1, 1970 (effective "as of July 1, 1969", as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 added subsec. (b) and deleted former subsecs. (b)-(d) which read:

"(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

"(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

"(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

"(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate."

CROSS REFERENCES

Definitions, 15 USCS § 1332.

RESEARCH GUIDE

Am Jur:

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

INTERPRETIVE NOTES AND DECISIONS

Since preemptive provisions of 15 USCS § 1334(b) apply to "advertising or promotion," such legislation does not preclude price differential or requirement that prices be posted, and such legislation thus did not invalidate New York City tax regulations whereby (1) tax on sale of cigarettes was based on tar and nicotine content and (2) difference in retail price of cigarettes was required to be at least equivalent to amount of tax attributable to their tar and nicotine content. *People v Cook* (1974) 34 NY2d 100, 356 NYS2d 259, 312 NE2d 452.

Provisions of 15 USCS § 1334(b) do not completely preempt state legislation in field, state has right to require cigarette prices to reflect taxes based on levels of tar nicotine, and to require that price difference be clearly marked on all price lists, bills, advertisements, catalogs or publications pertaining to sale of cigarettes. *Long Island Tobacco Co v Lindsay* (1973) 74 Misc 2d 455, 343 NYS2d 759, affd 42 App Div 2d 1056, 348 NYS2d 122, affd 34 NY2d 748, 357 NYS2d 504, 313 NE2d 794.

§ 1335. Unlawful advertisements on electronic media

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

(July 27, 1965, P. L. 89-92, § 6, 79 Stat. 283; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 89; Sept. 21, 1973, P. L. 93-109, § 3, 87 Stat. 352.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

1970. Act Apr. 1, 1970 (effective Jan. 1, 1970, as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 substituted this section for former section, which was reenacted without change as 15 USCS § 1338.

1973. Act Sept. 21, 1973 (effective "thirty days after" 9/21/73, as provided by § 4 of Act). Sec. 3 inserted "and little cigars".

CROSS REFERENCES

Definitions, 15 USCS § 1332.

Preemption of other advertising requirements, 15 USCS § 1334(b).

Regulation of cigarette advertising by Federal Trade Commission, 15 USCS § 1336.

Criminal penalties, 15 USCS § 1338.

Injunctions against violation of Act, 15 USCS § 1339.

RESEARCH GUIDE

Am Jur:

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

INTERPRETIVE NOTES AND DECISIONS

In 15 USCS § 1335, Congress prohibited advertising of cigarettes on radio or television, but did not prohibit cigarettes or their use per se.

United States v East (1974) 161 App DC 312, 495 F2d 138.

Prohibition against radio and television ciga-

rette advertising is tising is less vig forms of speech; television advertisi types of advertisi

§ 1336. Aut

(a) The Feder 1971, with re to cigarette ad Trade Commi such pending of the determi regulation rule trade regulati months after t rule, in order t

(b) Except as §§ 1331 et seq affect the aut unfair or dece

(c) Nothing in affirm or den authority to i statement in a (July 27, 1965, § 2, 84 Stat. 89

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Amendmen 1970. Act out as 197 this section 15 USCS §

Unlawful ciga

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CIGARETTES

15 USCS § 1336

rette advertising is constitutional, product advertising is less vigorously protected than other forms of speech; distinction between radio and television advertising, on one hand, and other types of advertising, on other, has reasonable

basis and does not violate due process. *Capital Broadcasting Co. v Mitchell* (1971, DC Dist Col) 333 F Supp 582, affd without op 405 US 1000, 31 L Ed 2d 472, 92 S Ct 1289, 1290.

§ 1336. Authority of Federal Trade Commission

(a) The Federal Trade Commission shall not take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising. If at any time on or after July 1, 1971, the Federal Trade Commission determines it is necessary to take action with respect to such pending trade regulation rule proceeding, it shall notify the Congress of the determination. Such notification shall include the text of the trade regulation rule and a full statement of the basis for such determination. No trade regulation rule adopted in such proceeding may take effect until six months after the Commission has notified the Congress of the text of such rule, in order that the Congress may act if it so desires.

(b) Except as provided in subsection (a), nothing in this Act [15 USCS §§ 1331 et seq.] shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

(c) Nothing in this Act [15 USCS §§ 1331 et seq.] shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(July 27, 1965, P. L. 89-92, § 7, 79 Stat. 283; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 89.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1970. Act Apr. 1, 1970 (effective 1/1/70, as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 substituted this section for former section which was reenacted without change as 15 USCS § 1339.

CROSS REFERENCE

Unlawful cigarette advertising, 15 USCS § 1335.

RESEARCH GUIDE

Am Jur:

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

§ 1337. Reports to Congress

(a) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) current information in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate.

(b) The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

(July 27, 1965, P. L. 89-92, § 8, 79 Stat. 283; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 89.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Amendments (with effective dates):**

1970. Act Apr. 1, 1970 (effective 1/1/70, as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 substituted this section for former section, which was reenacted without change as 15 USCS § 1340.

RESEARCH GUIDE**Am Jur:**

55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 883.

Am Jur Proof of Facts:

Tobacco Hazards and Legal Liability, 12 Am Jur Proof of Facts 345.

Law Review Article:

Gellhorn, Adverse Publicity by Administrative Agencies. 86 Harv L Rev 1380.

§ 1338. Criminal penalty

Any person who violates the provisions of this Act [15 USCS §§ 1331 et seq.] shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

(July 27, 1965, P. L. 89-92, § 9, 79 Stat. 284; Apr. 1, 1970, P. L. 91-222, § 2, 84 Stat. 89.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

1970. Act Apr. 1, 1970 (effective 1/1/70, as provided by § 3 of Act, set out as 1970 effective date note to 15 USCS § 1331). Sec. 2 reenacted, without change, this section which formerly appeared as § 6 of Act July 27, 1965, 15 USCS § 1335, and substituted this section for former

David Gordon Wilson
15 Kennedy Road
Cambridge, Massachusetts 02138
(617) 876-6326
November 13, 1981

A

COMMITTEE ON ORDINANCES, Cambridge City Council
Councillor David A. Wylie, Chairman

This note accompanies some materials which might be helpful in preparation for the hearing on November 17 on an amendment to the general ordinance on "Smoking in public places". They are a public-opinion survey of people leaving restaurants in this general area, in which 85% favored smoking restrictions of some sort, with most wanting separate areas; and a letter of support from the Rev. Edwin A. Lane and one from Alderman Edward L. Richmond of Newton. Alderman Richmond points out that the Newton ordinance providing for nonsmoking sections in restaurants has been very successful, and that the costs have been negligible to the city or to the restaurant owners.

The following people will, if time allows, testify briefly on Tuesday.

Dr. Dwight Emary Harken, world-famous thoracic surgeon, one of the discoverers of the connection between heart and lung disease and smoking, one of the founders of the national Action on Smoking and Health and the local chapter; he will discuss the proposed amendments in relation to health.

Dr. Peter R. Maggs, thoracic surgeon, Deaconess Hospital, who has played a leading part in bringing about nonsmoking areas in several health-care facilities. (There is some doubt about his being able to come, however).

Mr. Carleton P. Merrill, Administrative Director, Board of License Commissioners, Newton, who has been responsible for administering the Newton ordinances on smoking restrictions, will testify on the success, low costs, and lack of policing required in Newton.

Mr. Mark Berkowitz, manager of Legal Seafoods, Chestnut Hill, where the nonsmoking section has just been increased to over 60% of the total seating capacity by public demand. This nonsmoking section resulted from an agreement made with us in Cambridge City Hall during the hearings on the original ordinance in 1975.

Ms. Sue Kuelzer, Grendel's Den, another restaurant with a non-smoking area, will testify to the low-cost and low-hassle procedure in setting up such an area. (We do not expect these or other restaurant operators to be in favor of the ordinance itself).

Edward Sweda, Esq., attorney, will discuss the other places around the country which have requirements for nonsmoking areas in restaurants and have bans on cigarette giveaways.

I will act as coordinator for those in favor.

Thank you for reading!

David Wilson
Chairman, Cambridge, GASP.



BOARD OF ALDERMEN

NEWTON, MASSACHUSETTS 02159

552-7033

November 9, 1981

Matthew Jefferson, *President*
Susan D. Schur, *Vice President*

David Gordon Wilson, *Chairman*
GROUP AGAINST SMOKING POLLUTION
15 Kennedy Road
Cambridge, MA 02138

Wendell R. Bauckman
President Emeritus

Re: No smoking sections in restaurants

Aldermen at Large

Dear Mr. Wilson:

Ward

- 1 Robert Gaynor
- 1 Bruce B. Carmichael
- 2 Terry Morris
- 2 Edward L. Richmond
- 3 Matthew Jefferson
- 3 Robert L. Tennant
- 4 Donald M. Budge
- 4 Richard J. McGrath
- 5 Paul E. Coletti
- 5 James W. Miller
- 6 Rodney M. Barker
- 6 Ethel W. Sheehan
- 7 Dominic J. Taglienti
- 7 Mark A. White
- 8 Wendell R. Bauckman
- 8 Cynthia S. Creem

The City of Newton instituted a voluntary, experimental program of non-smoking sections in restaurants approximately a year and a half ago. This experiment was extremely successful, with excellent voluntary compliance.

After a year's trial, the Newton Board of Aldermen passed an ordinance requiring non-smoking sections in restaurants. The ordinance has also been very successful. Restaurants have increased the size of their non-smoking sections voluntarily at minimal cost (usually just the cost of small signs). The only other change brought about by this ordinance has been that the host or hostess should ask if the patrons prefer smoking or non-smoking sections. There has been no increase in government costs whatsoever.

Ward Aldermen

As you know, the Newton ordinance is applicable to restaurants seating 50 or more persons and requires 15% of the total seats to be non-smoking.

Ward

- 1 Joseph DePasquale
- 2 Elaine M. Gentile
- 3 Paul K. Daley
- 4 Carol Ann Shea
- 5 Susan D. Schur
- 6 Ernest F. Dietz
- 7 R. Lisle Baker
- 8 Robert B. Katz

The policy of non-smoking sections has been well received by the public, and has not caused inconvenience to either restaurants or patrons. Our hope is that after one or more years of experience with our ordinance we will increase the percentage of non-smoking seats to perhaps 25% or more if there is a greater demand.

City Clerk: Clerk of the Board
Edward G. English

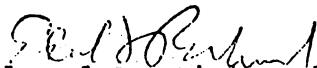
I wish to emphasize that there was no construction or alteration cost to the restaurant owner, who merely must designate the non-smoking area by a small sign.

Asst. Clerk of the Board
Grace M. Lennon

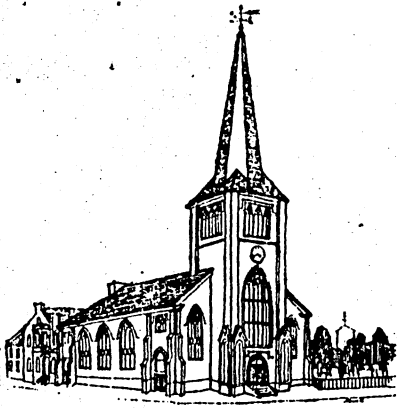
Good luck on your proposed Cambridge ordinance. If I can give you any more information, I will be glad to help in any way I can.

1980 - 1981

Sincerely, -


Edward L. Richmond
Alderman-at-Large, Ward 2

ELR:ja



THE FIRST PARISH IN CAMBRIDGE
THE FIRST CHURCH (UNITARIAN UNIVERSALIST)
3 CHURCH STREET, HARVARD SQUARE
CAMBRIDGE, MASSACHUSETTS 02138
(617) 876-7772

November 7, 1981

Members of the City Council
Cambridge, Massachusetts

Dear Council Member:

Due to a prior commitment I am unable to be present at the November 17 hearing on the smoking ordinance. I am therefore requesting that this letter be read in my absence.

1. I am opposed to giveaway samples of cigarettes. These are products which, beyond any question, are damaging to human health. While I would not deny the right to buy them, it is a different matter to push free samples at people on the streets. I have frequently seen the free samples in the hands of kids, either handed out to them (how much age checking is done?) or passed on to them by adults.
2. I am in support of the law that would require restaurants seating more than 50 people to provide a non-smoking section. This allows freedom for both, and, in the event that seats in the preferred section were filled, would give the option of waiting for a seat in the preferred section, sitting in the non-preferred section, or going elsewhere to dine.

It has been argued that non-smoking sections interfere with the freedom of the smoker, as though the right to smoke or not to smoke were equal freedoms. This is spurious argument. The non-smoker is doing nothing to the smoker. The smoker is polluting the air with a substance that is both irritating and damaging to the health of the non-smoker. Equating a damaging action to another, with a non-damaging non-action, and thereby considering them the same under the law and entitled to the same freedom makes no sense.

Someone once said, "Your freedom to swing your fist ends at the point where my nose begins." By the same token I say, "Your freedom to blow smoke into the air ends where my nose begins."

I urge that the proposed smoking ordinance be passed.

Sincerely,

Edwin A. Lane
Minister

RICHARD IACOBUCCI, B.S., M.S., J.D.

ATTORNEY AT LAW

22 WENDELL STREET CAMBRIDGE, MASS. 02138 EL 4-4444

November 11, 1981

Editor
Cambridge Chronicle
678 Massachusetts Avenue
Cambridge, MA

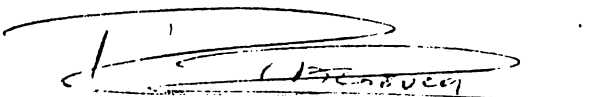
Anyone going to eat at a Cambridge restaurant would be outraged to have his food served on dirty dishes. Yet, despite the fact that the real enjoyment of food is in the savoring of the delicate aromas, many restaurant owners serve these aromas obscured by the poisonous fumes of cigarette and cigar smoke! I support the proposed Cambridge city ordinance requiring a modest No Smoking area in restaurants, and urge all those who enjoy the restaurants of Cambridge to do so as well.

A restaurant patron pays not only for the food on his plate, but for an atmosphere conducive to the enjoyment of that food. Restaurant owners generally recognize the need to provide comfortable seating and a pleasing decor. They should be equally aware that it is essential to the enjoyment of good food to appreciate its aromas as well. For "tasting" food is really not a matter of the taste buds on the tongue, as much as it is the aromas of the food being detected by the infinitely more sensitive olfactory system.

May I also suggest that for those restaurant owners who cannot provide separate seating, that they provide electronic air purifiers which can remove not only cigarette particula, but also dust and other odors. This has an added benefit to the restaurant owner in keeping all of the windows, walls and other fixtures in the restaurant clean.

I have no objection whatsoever to smokers sucking poisonous fumes into their lungs, there from deriving the "benefits" of lung cancer, heart attacks, etc. That is certainly their business, and I respect their right to make that choice. However, their right to indulge in this self-destructive habit ends where my right to pay for and enjoy a good meal begins.

Sincerely,



Dr. Richard Iacobucci

cc: GASP
ASH

NOV. 13, 1978

TO: Cambridge City Council

FROM: David Gordon Wilson, Chairman, Cambridge GASP
15 Kennedy Rd 02138

We have included here just the summary, leaving off all the tables. We'd be happy to send the full survey if you wish.

The tobacco manufacturers, merchants of disease and death, fighting in every way to preserve their billions of dollars of profits, have as usual sneered at this survey, claiming that the sampling methods were not scientific. In November 1978 the voters in two Cambridge districts supported, in a scientifically accurate, democratic poll, in a two-to-one majority, a Public-Policy Question supporting separate smoking and nonsmoking sections in public places, including restaurants.

David Wilson

REPORT OF FINDINGS:

STUDY OF PUBLIC OPINION WITH REGARD TO RESTRICTIONS

OF PUBLIC SMOKING

Department of Public Health
Division of Preventive Medicine

Sheldon H. Barr, Director
Craig A. Lambert, Ph.D.,
Assistant Director for Research
and Evaluation

I. INTRODUCTION:

The health effects of cigarette smoking have been established as the result of extensive medical experimentation and analysis. Cigarette smoking is a causal factor in a range of chronic diseases and conditions, including cardiovascular disease, a range of cancers, as well as other ailments. The increasing rate of lung cancer among women is attributed to increasing rates of smoking among this group. With approximately two-thirds of annual Massachusetts mortality attributed to heart disease and cancer, cigarette smoking has become a prime public health problem, as well as the single most preventable cause of death.

The evidence continues to mount with regard to the harmful effects of second-hand smoke on those who do not use cigarettes. Involuntary smoking has been linked to higher rates of pulmonary disease, increased pulmonary infections among infants, as well as heightened problems among those suffering from chronic lung problems such as emphysema. The public attention focused on this health problem also continues to increase, as health problems among the spouses of heavy smokers appear to occur with significant intensity.

The Legislature has experienced a steady pressure to strengthen existing smoking restrictions, particularly in public areas such as restaurants, health care facilities, schools and other public establishments. While measures have been adopted to protect non-smokers from the injurious effects of second-hand smoke, organized efforts have yielded a range of more stringent options in regard to restricting public smoking.

The Department of Public Health, through its Division of Preventive Medicine, has adopted a three-part policy in regard to smoking:

- To reduce the numbers of people, particularly young people, who each year choose to adopt the cigarette habit,
- To assist those who seek to reduce or cease their smoking to do so, and
- To protect those who choose not to smoke from the harmful effects of second-hand smoke.

It was within the context of this policy that the study reported herein was undertaken. Through the cooperative efforts of participating colleges, thousands of individuals were interviewed to determine their opinions concerning various measures designed to restrict public smoking. As most legislative initiatives focus on restaurants and health care facilities, the public was questioned specifically on these locations for smoking restrictions. Various approaches to restricting smoking were offered, ranging from no restrictions to an outright ban on public smoking. This was done to provide local and state decision-makers with accurate information with regard to public opinion concerning this important public health issue. As local communities and state government take steps to respond to public demands for protection from the hazards of second-hand smoke, an accurate reading of public opinion in this regard becomes crucial.

The results of this study do not shed new light on this issue as much as they confirm what has long been suspected. That individuals are concerned about their health, and view cigarette smoking as a health hazard has been indicated both in national polls, and in local referenda, as well. For example, in 1978, six Massachusetts communities passed initiatives that would instruct state Representatives to vote for legislation that would restrict public smoking. If the overwhelming results of this latest effort to ascertain public support for such measures assists the Legislature in deliberating the measures proposed this year, it will have served its purpose.

II. METHODOLOGY:

During the Fall of 1980, the Division of Preventive Medicine carried out a survey of attitudes toward smoking regulation in restaurants and health care facilities (hospitals, clinics, community health centers). The Division's Research and Evaluation Unit contacted and gained the cooperation of several faculty members who were teaching courses in research methods at eight different colleges in Eastern Massachusetts.

As a part of ongoing course work, these faculty supervised their students in conducting field interviews at restaurants and health care institutions. Using a schedule of questions prepared by the Division, (see Appendix A) the students interviewed: a) patrons emerging from restaurants, and b) visitors, employees and patients at health care facilities. These interviews took place during October, November and December of 1980. Table 1 lists the participating colleges, together with a summary of the dates, geographical areas and institutions covered.

The interviewers asked people to state their preference among four regulatory alternatives: 1) a total ban on smoking, 2) separate areas for smokers and non-smokers, 3) a requirement for adequate ventilation of the premises, 4) no restrictions on smoking. A total of 3,313 persons responded, 1,973 (60%) of them at restaurants and 1,340 in health facilities. Table 2 summarizes demographic data regarding the population of respondents.

III. FINDINGS:

Overall, 85% of the respondents favored some form of smoking restriction, with only 15% opting for "no restriction." Separate areas was the clearly favored choice, with more than twice the popularity of any other alternative. Table 3 reports the breakdown of policy preferences.

By and large, people were more willing to back stiff restrictions in health facilities than in restaurants. A total ban on smoking received far more support in health facilities than in restaurants. At the other extreme, relatively few people felt that "no restrictions" were appropriate at health facilities; the same was true of ventilation (see Table 4).

Of particular interest is the fact that 75% of the smokers favored some form of smoking restriction. Although smokers were unlikely to favor a total ban, and far more likely than others to suggest "no restrictions," they, nonetheless, heartily endorsed the "separate areas" proposal. Persons who had never smoked

were the group most strongly predisposed towards a total ban. Ex-smokers -- who have been, so to speak, on both sides of the fence -- were the strongest of all three groups in backing "separate areas." (See Table 5).

In health facilities, the respondent's sex did not affect the policy option which he/she preferred. In restaurants, females were slightly more likely to select "separate areas," while males were slightly more inclined towards "no restrictions."

In health facilities, age did not affect policy preference. In restaurants, the oldest age group (44-93 years) had the strongest leaning towards a total ban, while the youngest group (0-22 years) was the likeliest to favor "no restrictions." Those in age groups ages 23-30 and 31-43 were the strongest proponents of separate areas.

In health facilities, a respondent's status there as patient, visitor or employee did not significantly affect her/his choice of option. In restaurants, the number of meals which the diner had eaten "out" in the past week showed no particular relationship to the regulation of choice.

IV. CONCLUSIONS:

Although this study is based upon a "sample of convenience," -- that is, it included the respondents who made themselves available, rather than a group randomly sampled -- three factors argue for the strength of its results. First, the large number of interviews (3,313) gives numerical weight to the analysis. Second, the consistent patterns seen regarding regulatory options generally hold up regardless of age and sex differences, or even one's status as a smoker or non-smoker. Third, respondents were polled on the site of the very institutions in question, and thus, could relate their preferences to recent, direct experience.

The study indicates overwhelming support (85%) for some type of restriction on public smoking, even by a large majority of smokers. Respondents were willing to endorse more stringent restrictions in health facilities than in restaurants. However, for both types of setting, separate smoking areas appeared as the clearly favored solution.

HARVARD MEDICAL SCHOOL

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November 17, 1981

Notes relating to Dr. Harken's testimony before:
COMMITTEE ON ORDINANCES, Cambridge City Council
Councillor David A. Wylie, Chairman

THANK YOU PROFESSOR WILSON. YOU HAVE ESTABLISHED
GOOD REASONS FOR MY PRESENCE HERE, AND IN MY HOME CITY.

I DO NOT COME BEFORE YOU TO BORE YOU ONCE AGAIN WITH
A BLINDING GLIMPSE OF THE OBVIOUS... NAMELY THAT CIGAR-
ETTES ARE HAZARDOUS TO HUMAN HEALTH. THE STATISTICS
ARE OVERWHELMING. FURTHERMORE, AS THE LATE GREAT
SURGEON DR. OWEN WANGANSTEEN SAID " IF YOU HAVE TO
PROVE IT WITH STATISTICS, IT CAN'T BE VERY IMPORTANT".

THE FACTS ARE OBVIOUS, TO ONE AND TO ALL. NOW, WHAT
DO WE AS CITIZENS OF GOOD CONSCIENCE DO FOR THE GREATEST
PREVENTABLE HEALTH HAZARD IN OUR COUNTRY TODAY?

WHAT CAN WE DO TO PREVENT MORE OF OUR YOUNG PEOPLE
FROM FALLING VICTIM TO ONE OF THE WORST ADDICTIONS NOW
WIDESPREAD? I, OF COURSE, USE THE WORD ADDICTION ABSO-
LUTELY ACCURATELY. IT IS AN ADDICTION, BE IT PHARMACO-
LOGIC, PSYCHOLOGIC OR BOTH MATTERS LITTLE IN THIS DISCUS-
SION FOR IT IS HARD TO BREAK AND IT CAN KILL.

POINTING UP THE LATE DANGERS IS USELESS, OR NEARLY SO.
WE MUST CHANGE THE IMAGE OF SMOKING. WE MUST REVERSE

THE MEDIA PHOTO AND PRINT MACHO OR GLAMOROUS FEMALE OR MALE, SEX SYMBOL. WE MUST GIVE SMOKING A REPULSIVE IMAGE.

WHEN ON THE TODAY SHOW I'VE QUOTED THE GLAMOROUS ZAZA GABOR WHO HELPED MAKE MY POINT. SHE IS QUOTED AS "KISSING A MAN WHO SMOKES IS LIKE LICKING A DIRTY ASH TRAY". THE GREAT AUTHORITY ON KISSING SHOULD IMPRESS OUR YOUNG MALES!

HERE IS A MEANS, BY HAVING SMOKING SECTIONS AND NON-SMOKING AREAS IN OUR RESTAURANTS, OF DEMONSTRATING TO ALL WHO WOULD SEE AND LISTEN THAT THE EVER GROWING MAJORITY WANTS ISOLATION FROM SMOKERS.

DON'T BE MISLED BY THE HEAD WAITERS WHO TELL YOU THERE IS NO DEMAND FOR NON - SMOKING SECTIONS.

AT THE ST. FRANCIS HOTEL IN SAN FRANCISCO THE OTHER DAY I SAID "DON'T YOU HAVE A NON-SMOKING SECTION?". THE HEAD WAITER ANSWERED "YES" AND SHOWED ME TO A TABLE NEAR THE ENTRANCE TO THE DINING ROOM. I PURSUED MY QUESTION BY "AREN'T THE NON-SMOKING SECTIONS CROWDED, AS OPPOSED TO THE SMOKING SECTIONS?" HE RESPONDED "WE HAVE NO DEMAND FOR A NON-SMOKING SECTION". I WATCHED THE NEXT DOZEN PEOPLE SEATED BY THE HEAD WAITER AND TO NOT ONE DID HE OFFER A CHOICE... NOONE ASKED FOR NON-SMOKING. SO HE WAS RIGHT THEY HAD LITTLE OR NO DEMAND.

3

PEOPLE DON'T ASK FOR SOMETHING THAT THEY DON'T KNOW EXISTS. THIS IS ONE WAY YOU ARE DELIVERED THESE MISLEADING STATISTICS.

JUST AS BY UNITED AIRLINES, OUR EARLY AIRLINE TO HAVE NON-SMOKING SECTIONS, WE WERE TOLD "THERE WILL BE NO DEMAND". HOWEVER, ONCE DESIGNATED THE VAST MAJORITY OF SEATS IN THE PLANES ARE NOW "NON-SMOKING".

LADIES AND GENTLEMEN, GIVE THE PUBLIC A CHOICE AND YOU WILL QUICKLY FIND THAT THEY WANT NON-SMOKING AND IT IS GOOD FOR US AND OUR FUTURE.

THANK YOU FOR YOUR SERVICE TO US ALL.

Dwight Emary Har ken, MD.

g

Received at Meeting Tues Nov 17 at 9:10pm

November 1980

The Proposed Cambridge Ordinance Restricting
Smoking in Restaurants and Prohibiting the
Distribution of Tobacco Products is
Unconstitutional and Ill-Advised

An ordinance has been proposed in the Cambridge City Council, section 1 of which would extend the present ban on smoking in certain public places by prohibiting smoking, except in specific, designated smoking areas, "in the areas of any restaurant used for food preparation, or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons." In addition, section 2 of the ordinance would prohibit the distribution in all public buildings and public places within the city, "except at full market price," of "any smoking or tobacco product for any commercial purpose." Violations of section 1 of the proposed ordinance subject proprietors of such establishments to suspension of city licenses and are punishable by fines of not less than twenty-five nor more than one hundred dollars. Violations of section 2 are punishable by fines of not less than twenty nor more than fifty dollars.

As shown below, the proposed ordinance is misconceived and unnecessary. More importantly, however, each section of the ordinance raises serious legal questions and, if challenged, very likely would be held unconstitutional on several grounds.

*Submitted by John J. Courtney For Study
By City Solicitor to render an opinion to
The Council re validity of ordinance.*

I. SECTION 1 OF THE PROPOSED ORDINANCE
IS UNCONSTITUTIONAL AND ILL-ADVISED

Section 1 of the proposed Cambridge ordinance extends to restaurants the city's already constitutionally infirm restrictions on smoking in certain places open to the public, such as food stores, entertainment facilities and waiting rooms. As noted above, the proposed ordinance would prohibit smoking "in the areas of any restaurant used for food preparation or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons." The management of such establishments "may designate properly ventilated waiting, lounge, and eating areas as smoking areas." However, no more than 75 percent of the available area may be so designated and "any area so designated [must] be conspicuously labeled as such."

Section 1 of the proposed ordinance is subject to constitutional challenge for several reasons. The ordinance creates arbitrary and irrational classifications in violation of the federal and state constitutional guarantees of equal protection, and is vague and ambiguous in violation of the Due Process Clause. In addition, because section 1 imposes restrictions on smoking on private premises, it infringes both the constitutional right of privacy and the right of real property owners to determine the types of activities that will be permitted on their property. Finally, because section 1 applies to private places of work, it is inconsistent with

settled preemption principles derived from the Supremacy Clause of the United States Constitution.

A. Section 1 Creates Arbitrary and Irrational Classifications in Violation of the Constitutional Guarantee of Equal Protection

It is of course well established that the Equal Protection Clause of the Fourteenth Amendment, and the equivalent provision of Article I of the Massachusetts Constitution, prohibits state and local governmental authorities from establishing classifications that are arbitrary and without rational relation to the interest sought to be advanced by the law. As the 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)). 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); Coffee-Rich Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281, 288-89 (1969); Hall-Omar Baking Co. v. Commissioner of Labor & Industries, 344 Mass. 695, 184 N.E.2d 344, 348 (1962). It is equally well settled that the requirements of the Equal Protection Clause must be observed with particular exactitude where, as here, the possible imposition of criminal sanctions

hangs in the balance. See, e.g., United States v. Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974). The regulatory scheme envisioned by section 1 manifestly violates this guarantee of equal protection.

The apparent purpose of section 1 is to protect the health and rights of nonsmokers. In fact, no reliable scientific evidence exists to support the assumption that incidental exposure to ambient tobacco smoke is harmful to the health of nonsmokers, and as to their rights, repeated careful studies have shown that the vast majority of nonsmokers do not find smoking to be a matter of concern. But even if the City Council were to conclude otherwise, 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.

For example, the proposed ordinance would not restrict smoking in the waiting, lounge and eating areas of restaurants that seat less than fifty people, yet the proprietors of establishments having a seating capacity of more than fifty patrons would not be so exempt. Similarly, the ordinance does not purport to restrict smoking in non-restaurant establishments serving liquor, such as bars, yet no such exception is made for the lounge areas of restaurants. Thus, the proprietor of a bar may permit patrons to sit or smoke as they choose, while the proprietor of the restaurant and lounge next door must restrict the activities of customers at the bar. Consider also that proprietors of establishments covered by

the ordinance may have their licenses suspended if they "knowingly permit a violation", thereby requiring such proprietors not only to prohibit patrons from sitting or smoking where they choose but also forcing the owners of covered establishments to enforce the ordinance. Forcing the proprietors of such establishments to incur additional expense and enter into confrontations with their customers will certainly harm, and may irreparably damage, the conduct of their businesses; all for no discernable reason.

Thus, the pattern of restrictions on smoking in restaurants mandated by section 1 is wholly arbitrary. That result is clearly precluded by the Equal Protection Clause. As stated by the court in Alford v. City of Newport News, 220 Va. 584, 260 S.E.2d 241, 243 (1979), which invalidated on equal protection grounds a similar ordinance restricting smoking in restaurants, "no matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal." See, e.g., Greater Rockford Food Service v. Orthoefer, No. 76-2447 (Ill.Cir.Ct. 1976) (invalidating anti-smoking ordinance on equal protection grounds).

B. Section 1 is Impermissibly Vague and Ambiguous in Violation of the Due Process Clause

Since the proposed ordinance proscribes criminal activity and is enforceable by the imposition of fines or license suspensions, it is also vulnerable because it does not adequately

define the conduct being prohibited. The established rule is that a criminal statute cannot be upheld where the standard of conduct required is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application," Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961) (quoting from Connolly v. General Construction Co., 269 U.S. 385, 391 (1926)). Accord, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Giaccio v. Pennsylvania, 382 U.S. 399 (1966). The reason for this is not difficult to divine: the liberty interests protected by the Due Process Clause of the Fourteenth Amendment are of sufficient importance to require legislatures to define with precision the conduct being prohibited.

Section 1 is unquestionably vague and ambiguous in a number of critical respects. For example, the ordinance prohibits smoking "in the areas of any restaurant used for food preparation." This is a classic example of a requirement that can be interpreted in different ways. Does it mean, for instance, that in restaurants where food is prepared at tableside, smoking is prohibited even in designated smoking sections or eating areas? Moreover, who is to determine what constitutes an area "used for food preparation" or "waiting, lounge and eating areas"? The result of this guesswork is to place the proprietors of covered establishments at their peril, with exposure to criminal penalties, whenever anyone complains of an improperly designated smoking area. The opportunities for

selective and inconsistent enforcement in such a situation are obvious.

To take a further example, section 1 requires proprietors to designate as smoking areas "properly ventilated waiting, lounge and eating areas". The ordinance does not define "properly ventilated", however. Is it intended that no ambient smoke may appear in the air in such an area, even though adjacent to a designated smoking area? And again, who is to make such a determination? Similarly, consider the requirement that smoking areas "be conspicuously labeled as such." What standard is to be used to determine whether labeling is conspicuous, and when and by whom is such a standard to be applied?

These examples, which could be multiplied, provide ample evidence of the vague and ambiguous nature of the ordinance's language.^{*/} As a result, the proposed ordinance promises to become a trap for the unwary, to produce conflict and tension between members of the public required to guess at the bill's meaning, and to lead to discriminatory and inconsistent enforcement. While a degree of uncertainty may be tolerable in a civil context, the Due Process Clause does not permit criminal sanctions to be imposed in circumstances like those presented

^{*/} Indeed, as noted above, Ordinance No. 849 would subject proprietors of covered establishments to license suspensions if they "knowingly permit a violation" of said ordinance. The ordinance contains no hint, however, as to the extent to which such individuals must go to enforce this law.

by section 1. As the court recently held in State of Florida v. Burton, No. 80-999CO-A-42 (Fla.Cir.Ct. 1981), in striking down a similar antismoking ordinance on grounds of vagueness:

"Under these conditions the possibility of selective prosecution looms large and the Court will not abandon judicial restraint and redefine the ordinance to give it the precise statutory language required under the due process clause of our state and federal Constitutions. The ordinance is vague and indefinite and will subject persons to prosecution whose conduct was devoid of criminal intent or even culpable negligence."

Slip Op. at 2. See also, Alford v. City of Newport News, 220 Va. 584, 260 S.E. 2d 241 (1979); Greater Rockford Food Service v. Orthoefer, No. 76-2447 (Ill.Cir.Ct. 1976).

C. Section 1 Infringes Both the Constitutional Right of Privacy and Rights Associated With the Ownership of Real Property

As currently drafted, section 1 of the proposed ordinance would restrict smoking in many private establishments. Consequently, section 1 is likely to be struck down as an unconstitutional invasion of privacy and of the right of owners of private property to determine the types of activities that will be permitted on their property.

The courts have long recognized that governmental intrusion into private, personal activities can be justified only by substantial and compelling state interests, and that even activities that might be subject to regulation if engaged in publicly cannot be restricted when conducted on private premises. E.g., Stanley v. Georgia, 394 U.S. 557 (1969);

Griswold v. Connecticut, 381 U.S. 479 (1965); City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914); Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911). Thus, the courts in City of Zion and Hershberg struck down antismoking ordinances on the ground that the ordinances unconstitutionally restricted smoking on private premises -- a principle directly applicable to the present bill. See generally 7 McQuillin, Municipal Corporations § 24.239 (3d ed. 1968).

It follows that the ordinance's attempt to regulate activities on commercial premises is illegitimate. The Supreme Court recently has confirmed that private commercial establishments are entitled to constitutional protections equivalent to those granted to individuals, including protection against unwarranted governmental intrusion on their premises. Marshall v. Barlow's, Inc., 426 U.S. 307 (1978) (search warrant required for inspection of private business); see also Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. 530 (1980) (corporate activity protected against state regulation by the First Amendment).

These decisions reflect the fundamental concern expressed in the Bill of Rights for the values of individual privacy and autonomy. This concern has led the courts to examine skeptically attempts by legislatures and administrative agencies to regulate personal, private conduct under the general rubric of "the public welfare." See Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Corn. L.

Rev. 563, 620 (1977) ("[T]o substitute the medical judgment of the state for the personal lifestyle choice [to smoke] is 'paternalism of the strong kind * * * and creates serious risks of governmental tyranny.'").^{*/} One result of this skepticism is that every court that has been presented with the issue has rebuffed efforts by antismoking groups to force governments to restrict smoking in various public and private facilities.

Federal Employees for Non-Smokers' Rights v. United States, 446 F.Supp. 181 (D.D.C. 1978), aff'd, 598 F.2d 310 (D.C. Cir.), cert. denied, 444 U.S. 926 (1979); Gasper v. Louisiana Stadium and Exposition District, 418 F.Supp. 716 (E.D.La. 1976), aff'd, 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1079; GASP v. Mecklenburg County, 42 N.C.App. 225, 256, S.E.2d 477 (1979).

One of the most distressing aspects of the proposed ordinance is that it is premised upon an exclusionary policy that is directed at a class of persons by virtue of their status or customs. Persons who smoke would be permitted to frequent many public and private premises in the state only at the expense of their foregoing an integral aspect of their personal lifestyle. At the same time, the ordinance would deprive real property owners of their right to determine the types of activities that are permitted on their property. The situation presented by the ordinance is thus precisely the reverse of the result of the civil rights cases of the 1960's, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), in that it

^{*/} Quoting from J. Feinberg, Legal Paternalism, in "Today's Moral Problems" 33, 43 (1975).

would place the power of government behind a policy of exclusion. The Constitution has been construed repeatedly as prohibiting such exclusionary policies at the hand of government.

D. Section 1 Would Intrude in an Area Preempted by Federal Law

By restricting smoking in restaurants, the City of Cambridge purports to regulate concerning health in private places of work. Insofar as it does so, it is preempted by federal law. The preemption doctrine, which derives from the Supremacy Clause of the Constitution (Art. VI, § 2), prohibits states and localities from adopting regulations concerning matters as to which Congress has implemented a pervasive regulatory scheme. E.g., Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1963). The Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651 et seq. (Supp. 1971), is expressly intended to operate as a uniform and overriding regulatory scheme concerning safety and health in the workplace. As the court stated in Five Migrant Farmworkers v. Hoffman, 136 N.J. Super. 242, 345 A.2d 378, 381 (1975), in holding that OSHA preempted state authority concerning migrant worker protection:

"This act [OSHA] demonstrated an intention to supersede the authority and obligations of all state laws with respect to the general working conditions where such standards as were adopted by the Secretary [of Labor] were inaugurated."

As the opinion in Hoffman recognizes, OSHA permits state regulation of occupational safety and health matters to

the extent that the appropriate federal agency has not issued standards. See 29 U.S.C. § 667(a). Although the Occupational Safety and Health Administration has not promulgated a standard dealing expressly with "tobacco smoke" in the workplace, "tobacco smoke" is merely a composite of many substances, and the agency has promulgated standards concerning all of those substances. See 29 C.F.R. § 1910.1000 (Tables Z-1 and Z-2) (1977). The existence of such standards thus preempts the state's authority to legislate concerning smoking in the workplace. The failure of the ordinance to take OSHA into account is yet another reason why it should not be approved.

* * *

Section 1 creates an arbitrary and irrational system of regulation concerning smoking in violation of the constitutional guarantee of equal protection. At the same time, the ambiguity of certain of the ordinance's provisions places members of the public and the proprietors of establishments arguably subject to the ordinance in the position of having to guess at its meaning. Efforts to enforce the ordinance thus inevitably will present substantial questions under the Due Process Clause.

Section 1 also attempts to impose restrictions on smoking on private premises, and thereby infringes both the constitutional right to privacy and the right of private property owners to determine the types of activities that will be

permitted on their premises. Finally, the ordinance's attempt to regulate places of work on purported health grounds is preempted by established federal law.

For all of these reasons, it is likely that the ordinance, if approved, would be held unconstitutional.

II. SECTION 2 OF THE PROPOSED ORDINANCE IS UNCONSTITUTIONAL AND ILL-ADVISED

As noted above, section 2 of the proposed ordinance would prohibit the distribution of free samples of cigarettes and other tobacco products in all public buildings and other public places within the city.^{*/} This section is based upon a fundamental misconception of the purpose and effect of cigarette advertising. In addition, this section if passed would violate express provisions of the Public Health Cigarette Smoking Act of 1969.^{**/} Furthermore, the proposed prohibition would impermissibly interfere with the constitutionally protected right to free speech and would arbitrarily discriminate against a lawful product in violation of the constitutions of Massachusetts and the United States.

^{*/} More accurately stated, section 2 prohibits the distribution of tobacco products "except at full market price." The ordinance does not indicate, however, the standard that is to be used to determine what constitutes "full market price", a term with any number of possible meanings. Because of this patent ambiguity, those persons arguably subject to section 2 will have no choice but to act at their peril and risk the imposition of criminal penalties. As discussed above in connection with section 1, such vagueness flies in the face of the Due Process Clause and renders the ordinance legally defective.

^{**/} Pub.L.No. 91-222 (1970), amending 15 U.S.C. §§ 1331-39 (1965).

A. Section 2 Is Based Upon a Fundamental Misconception of the Purpose and Effect of Cigarette Advertising

To the extent that a ban on the distribution of free samples of tobacco products would be intended to deprive tobacco manufacturers of a means of attracting new smokers and to prevent young people from obtaining tobacco products, the proposal is misconceived and unnecessary.

The proposal misapprehends the purpose of distributing free cigarette or other tobacco product samples. Such advertising is conducted primarily to acquaint smokers with a particular brand of tobacco product, i.e., to reinforce existing brand preferences and to create new ones among persons who already smoke. In introducing a new brand, it is common for a manufacturer to advertise that brand and to give free samples to wholesalers, jobbers and retailers. Brand advertising and free samples are not intended to acquaint nonsmokers with cigarettes or other tobacco products.

As far as minors are concerned, the proposed ordinance is unnecessary, both because tobacco manufacturers exercise the utmost care to ensure that samples of their products are not distributed to minors, and because Massachusetts law already makes it a criminal offense to provide tobacco products to a minor under eighteen years of age.^{*/} Comparable provisions have been found sufficient by most other states to protect minors

^{*/} Mass. Ann. Laws ch. 270, § 6.

against the asserted dangers arising from the distribution of free tobacco products. In view of this existing prohibition against furnishing such products to minors, the proposed additional ban on the distribution of samples would serve no legitimate purpose. To the contrary, as described below, such a ban is patently unconstitutional.

B. Section 2 Would Conflict
With Federal Law

In 1970, after an extensive review of the entire smoking-and-health controversy, Congress passed the Public Health Cigarette Smoking Act of 1969 (the "Act"). The Act amended the original 1965 Act.^{*/} The legislative history of the 1969 Act shows that Congress viewed the smoking-and-health controversy as a national problem affecting commerce throughout the country so that, if any regulations were to be imposed, they must be imposed by Congress. The Act reflects the belief of Congress that chaos and confusion could result if each state, and a fortiori each municipality, were free to enact its own special legislation.

Accordingly, the Public Health Cigarette Smoking Act of 1969 expressly preempts states and their municipalities from adopting legislation affecting the advertising or promotion of cigarettes, where such legislation is based on a supposed relationship between smoking and health. To make the intent of

^{*/} 15 U.S.C. §§ 1331-39.

Congress absolutely clear, the 1969 Act includes a provision specifically forbidding states from passing legislation prohibiting or regulating the advertising or promotion of cigarettes.

Section 5(b) of the Act now reads:

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.

Pub.L.No. 91-222 (1970), Section 5(b). (Emphasis added.)

The distribution of free samples of cigarettes and other tobacco products is recognized as a common method of advertising and promoting brands of such products. Section 2 of the proposed ordinance, which would impose a total ban on distribution of tobacco product samples, would follow Ordinance No. 849, a stated purpose of which is to protect the public health. Section 2, therefore, is clearly a law that in the words of the federal statute prohibits tobacco product "advertising or promotion . . . based on smoking and health." Just as clearly, the Act preempts the city, as a subdivision of the state, from enacting such an ordinance.^{*/}

The legislative history of the Act confirms fully that the proposed law is the kind of action that Congress intended

*/ The preemption provision of the Act applies to ordinances adopted by any subdivision of a state, such as a city or municipality, as well as to state-wide enactments. See 15 U.S.C. § 1332(3) (1970); S.Rep. No. 566, 91st Cong., 1st Sess. 12 (1969); H.R. Rep. No. 897, 91st Cong., 2d Sess. 5 (1970) (conference report).

to preempt. The House-Senate Conference Committee emphasized that the preemption provision of the Act is intended to preclude states,

. . . from imposing any requirement or prohibition based on smoking and health on advertising and promotions of cigarettes in packages labeled in accordance with the Act.

Cong., 2nd Sess. 5 (1970). (Emphasis added.)

Similarly, Congressman Staggers, Chairman of the House Committee that held hearings on the bill and a member of the House-Senate Conference Committee, reported to the House that Section 5 preempts any state action in this area,

. . . in recognition of the fact that the labeling, advertising, promotion, and sale of cigarettes insofar as they are related to smoking and health are matters of national concern. The legislation makes clear that in order to make the legislation effective, States and their local divisions are not to interfere with the scheme of regulation provided for in the legislation.

116 Cong. Rec. 7920 (1970). (Empahsis added.)

There thus can be no doubt that section 2 of the proposed ordinance would directly interfere with the federal legislative scheme. It disregards the provision preempting states and their constituent parts from acting in the area and ignores the intent of Congress to establish a single national policy to be followed throughout the country. It conflicts with the specific intent of Congress that tobacco manufacturers continue to have the right to promote their products in ways not prohibited by federal law.

It bears emphasis that federal preemption is effective even if it does not regulate the subject matter in the way forbidden to the states.^{*/} If Congress has preempted the field, any state or local legislation in the area conflicting with or altering the federal plan is without legal effect.^{**/} If passed, the Cambridge ordinance would be a legal nullity.

Moreover, even if there were not specific statutory provisions preempting the proposed ordinance, its passage at this time would be ill-advised. Under the Act, the Department of Health, Education and Welfare (now the Department of Health and Human Services) and the Federal Trade Commission are specifically required to make annual reports to Congress on the smoking-and-health controversy and to recommend legislation that they deem appropriate. The continued active interest of these agencies and other agencies of the federal government assures that further action will be taken on the federal level if it is necessary.

The Act establishes a reasonable national policy that balances concern for the public health against the desirability of preventing the imposition of any unnecessary burdens on com-

*/ San Diego Building Trades Counsel v. Garmon, 359 U.S. 236 (1959).

**/ U.S. Const., Art. VI, cl. 2; see Northern Natural Gas Co. v. Kansas, 372 U.S. 84, 91 (1963) ("The [state] orders must be declared a nullity in order to assure the effectuation of the comprehensive Federal regulation ordained by Congress."). See also Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

merce. The proposed ordinance would endanger this program adopted for the benefit of the entire country.

C. Section 2 Would Interfere With the Exercise of First Amendment Rights

The proposed ban on the distribution of sample tobacco products would impermissibly interfere with the right of free speech guaranteed by the First Amendment to the United States Constitution. The distribution of sample tobacco products is one of the methods 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 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.^{*/} Just within the past year, 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. 577 (1980), the Supreme Court invalidated state action similar in purpose to section 2

^{*/} 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).

of the proposed ordinance. 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 government 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 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.*

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

As was the case in Central Hudson, section 2 of the proposed ordinance would manipulate 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.

D. Section 2 Improperly Discriminates
Against a Single Lawful Product

Advertising by distributing free product samples has long been recognized as a perfectly legitimate and proper method of promoting many types of consumer products in Massachusetts and elsewhere. Sampling is commonly used by manufacturers of many consumer goods other than tobacco products such as soap, cosmetics, toothpaste, coffee and other food products. None of these manufacturers is prohibited by local law from distributing free samples of its products in order to promote their sale.

Section 2 of the proposed ordinance thus would create a dangerous precedent equally applicable to the promotional practices used in connection with any number of other products. If Cambridge did not extend the ban to other products, the ordinance would be invalid as unfairly discriminating against a single type of lawful product -- cigarettes, cigars and smoking tobacco.

It is of course axiomatic that a legislature must treat persons similarly situated in a similar manner. 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); Reed v. Reed, 404 U.S. 71, 76 (1971).

For example, in Best & Co. v. Maxwell, 311 U.S. 454 (1940), the Supreme Court struck down a North Carolina statute that imposed an annual privilege tax on persons who temporarily displayed sample merchandise for the purpose of obtaining retail orders. The Court held that the statute unconstitutionally discriminated against foreign merchants who sold by samples.^{*/}

Part I, Article I of the Constitution of Massachusetts, like the Fourteenth Amendment, guarantees each person equal protection of the law.^{**/} The proposed ordinance would ignore these principles of fundamental fairness.

* * *

In summary, section 2. -- in addition to resting on a fundamental misconception of the purpose and effect of tobacco product advertising -- would violate specific provisions of the Public Health Cigarette Smoking Act of 1969, and if approved, would represent an ill-advised conflict with express Congressional policy. Moreover, as an attempt to suppress the dissemination of information about a lawful product, the ordinance

^{*/} See also Hartford S.B.I. & Ins. Co. v. Harrison, 301 U.S. 459 (1937).

^{**/} 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 to door-to-door dairy product salesmen violates equal protection).

would violate the constitutional right of free speech and represents precisely the type of paternalistic regulation that the American public strongly opposes. Section 2 also would unconstitutionally discriminate against a lawful product in commerce. For these reasons, it is likely that section 2 of the ordinance, if approved, would be held unconstitutional.

III. CONCLUSION

Wholly aside from the serious practical problems of compliance and enforcement that would be created by the ordinance, and wholly aside from the fact that the ordinance would lead to further governmental regulation and intrusion into people's lives at a time when the public is demanding far less governmental interference, both sections of the proposed ordinance are legally defective in several significant respects. Accordingly, the proposed ordinance should be rejected.

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JOHN J. McGLYNN, JR.
State Director
617/927-3990

November 12, 1981

David Wylie, Esquire
Martin, Morse, Wylie & Kaplan
31 Milk Street
Boston, Massachusetts 02109

Dear Councillor Wylie:

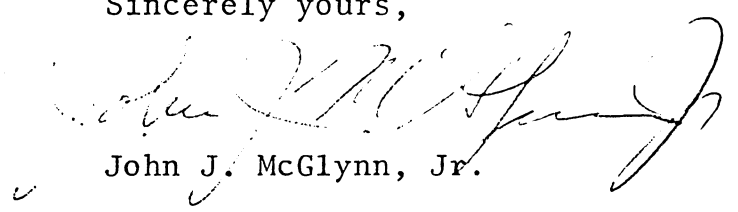
Enclosed please find a brief regarding a proposed anti-tobacco ordinance in the City of Cambridge.

It would be important to us and I think beneficial to the businesses in Cambridge involved that you read this brief before making a decision on the ordinance.

I would hope that sometime on Monday you would have the time to sit and talk with me regarding the proposed ordinance and discuss any questions, legal or otherwise, you might have regarding the ordinance.

Our office will be in touch with your office tomorrow in an attempt to arrange an appointment on Monday at your office. Thank you for your consideration.

Sincerely yours,


John J. McGlynn, Jr.

JJM/njg
Enclosure

November 1981

The Proposed Cambridge Ordinance Restricting
Smoking in Restaurants and Prohibiting the
Distribution of Tobacco Products is
Unconstitutional and Ill-Advised

An ordinance has been proposed in the Cambridge City Council, section 1 of which would extend the present ban on smoking in certain public places by prohibiting smoking, except in specific, designated smoking areas, "in the areas of any restaurant used for food preparation, or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons." In addition, section 2 of the ordinance would prohibit the distribution in all public buildings and public places within the city, "except at full market price," of "any smoking or tobacco product for any commercial purpose." Violations of section 1 of the proposed ordinance subject proprietors of such establishments to suspension of city licenses and are punishable by fines of not less than twenty-five nor more than one hundred dollars. Violations of section 2 are punishable by fines of not less than twenty nor more than fifty dollars.

As shown below, the proposed ordinance is misconceived and unnecessary. More importantly, however, each section of the ordinance raises serious legal questions and, if challenged, very likely would be held unconstitutional on several grounds.

I. SECTION 1 OF THE PROPOSED ORDINANCE
IS UNCONSTITUTIONAL AND ILL-ADVISED

Section 1 of the proposed Cambridge ordinance extends to restaurants the city's already constitutionally infirm restrictions on smoking in certain places open to the public, such as food stores, entertainment facilities and waiting rooms. As noted above, the proposed ordinance would prohibit smoking "in the areas of any restaurant used for food preparation or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons." The management of such establishments "may designate properly ventilated waiting, lounge, and eating areas as smoking areas." However, no more than 75 percent of the available area may be so designated and "any area so designated [must] be conspicuously labeled as such."

Section 1 of the proposed ordinance is subject to constitutional challenge for several reasons. The ordinance creates arbitrary and irrational classifications in violation of the federal and state constitutional guarantees of equal protection, and is vague and ambiguous in violation of the Due Process Clause. In addition, because section 1 imposes restrictions on smoking on private premises, it infringes both the constitutional right of privacy and the right of real property owners to determine the types of activities that will be permitted on their property. Finally, because section 1 applies to private places of work, it is inconsistent with

settled preemption principles derived from the Supremacy Clause of the United States Constitution.

A. Section 1 Creates Arbitrary and Irrational Classifications in Violation of the Constitutional Guarantee of Equal Protection

It is of course well established that the Equal Protection Clause of the Fourteenth Amendment, and the equivalent provision of Article I of the Massachusetts Constitution, prohibits state and local governmental authorities from establishing classifications that are arbitrary and without rational relation to the interest sought to be advanced by the law. As the 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)). 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); Coffee-Rich Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281, 288-89 (1969); Hall-Omar Baking Co. v. Commissioner of Labor & Industries, 344 Mass. 695, 184 N.E.2d 344, 348 (1962). It is equally well settled that the requirements of the Equal Protection Clause must be observed with particular exactitude where, as here, the possible imposition of criminal sanctions

hangs in the balance. See, e.g., United States v. Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974). The regulatory scheme envisioned by section 1 manifestly violates this guarantee of equal protection.

The apparent purpose of section 1 is to protect the health and rights of nonsmokers. In fact, no reliable scientific evidence exists to support the assumption that incidental exposure to ambient tobacco smoke is harmful to the health of nonsmokers, and as to their rights, repeated careful studies have shown that the vast majority of nonsmokers do not find smoking to be a matter of concern. But even if the City Council were to conclude otherwise, 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.

For example, the proposed ordinance would not restrict smoking in the waiting, lounge and eating areas of restaurants that seat less than fifty people, yet the proprietors of establishments having a seating capacity of more than fifty patrons would not be so exempt. Similarly, the ordinance does not purport to restrict smoking in non-restaurant establishments serving liquor, such as bars, yet no such exception is made for the lounge areas of restaurants. Thus, the proprietor of a bar may permit patrons to sit or smoke as they choose, while the proprietor of the restaurant and lounge next door must restrict the activities of customers at the bar. Consider also that proprietors of establishments covered by

the ordinance may have their licenses suspended if they "knowingly permit a violation", thereby requiring such proprietors not only to prohibit patrons from sitting or smoking where they choose but also forcing the owners of covered establishments to enforce the ordinance. Forcing the proprietors of such establishments to incur additional expense and enter into confrontations with their customers will certainly harm, and may irreparably damage, the conduct of their businesses; all for no discernable reason.

Thus, the pattern of restrictions on smoking in restaurants mandated by section 1 is wholly arbitrary. That result is clearly precluded by the Equal Protection Clause. As stated by the court in Alford v. City of Newport News, 220 Va. 584, 260 S.E.2d 241, 243 (1979), which invalidated on equal protection grounds a similar ordinance restricting smoking in restaurants, "no matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal." See, e.g., Greater Rockford Food Service v. Orthoefer, No. 76-2447 (Ill.Cir.Ct. 1976) (invalidating anti-smoking ordinance on equal protection grounds).

B. Section 1 is Impermissibly Vague and Ambiguous in Violation of the Due Process Clause

Since the proposed ordinance proscribes criminal activity and is enforceable by the imposition of fines or license suspensions, it is also vulnerable because it does not adequately

define the conduct being prohibited. The established rule is that a criminal statute cannot be upheld where the standard of conduct required is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application," Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961) (quoting from Connolly v. General Construction Co., 269 U.S. 385, 391 (1926)). Accord, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Giaccio v. Pennsylvania, 382 U.S. 399 (1966). The reason for this is not difficult to divine: the liberty interests protected by the Due Process Clause of the Fourteenth Amendment are of sufficient importance to require legislatures to define with precision the conduct being prohibited.

Section 1 is unquestionably vague and ambiguous in a number of critical respects. For example, the ordinance prohibits smoking "in the areas of any restaurant used for food preparation." This is a classic example of a requirement that can be interpreted in different ways. Does it mean, for instance, that in restaurants where food is prepared at tableside, smoking is prohibited even in designated smoking sections or eating areas? Moreover, who is to determine what constitutes an area "used for food preparation" or "waiting, lounge and eating areas"? The result of this guesswork is to place the proprietors of covered establishments at their peril, with exposure to criminal penalties, whenever anyone complains of an improperly designated smoking area. The opportunities for

selective and inconsistent enforcement in such a situation are obvious.

To take a further example, section 1 requires proprietors to designate as smoking areas "properly ventilated waiting, lounge and eating areas". The ordinance does not define "properly ventilated", however. Is it intended that no ambient smoke may appear in the air in such an area, even though adjacent to a designated smoking area? And again, who is to make such a determination? Similarly, consider the requirement that smoking areas "be conspicuously labeled as such." What standard is to be used to determine whether labeling is conspicuous, and when and by whom is such a standard to be applied?

These examples, which could be multiplied, provide ample evidence of the vague and ambiguous nature of the ordinance's language.^{*/} As a result, the proposed ordinance promises to become a trap for the unwary, to produce conflict and tension between members of the public required to guess at the bill's meaning, and to lead to discriminatory and inconsistent enforcement. While a degree of uncertainty may be tolerable in a civil context, the Due Process Clause does not permit criminal sanctions to be imposed in circumstances like those presented

^{*/} Indeed, as noted above, Ordinance No. 849 would subject proprietors of covered establishments to license suspensions if they "knowingly permit a violation" of said ordinance. The ordinance contains no hint, however, as to the extent to which such individuals must go to enforce this law.

by section 1. As the court recently held in State of Florida v. Burton, No. 80-999CO-A-42 (Fla.Cir.Ct. 1981), in striking down a similar antismoking ordinance on grounds of vagueness:

"Under these conditions the possibility of selective prosecution looms large and the Court will not abandon judicial restraint and redefine the ordinance to give it the precise statutory language required under the due process clause of our state and federal Constitutions. The ordinance is vague and indefinite and will subject persons to prosecution whose conduct was devoid of criminal intent or even culpable negligence."

Slip Op. at 2. See also, Alford v. City of Newport News, 220 Va. 584, 260 S.E. 2d 241 (1979); Greater Rockford Food Service v. Orthoefer, No. 76-2447 (Ill.Cir.Ct. 1976).

C. Section 1 Infringes Both the Constitutional Right of Privacy and Rights Associated With the Ownership of Real Property

As currently drafted, section 1 of the proposed ordinance would restrict smoking in many private establishments. Consequently, section 1 is likely to be struck down as an unconstitutional invasion of privacy and of the right of owners of private property to determine the types of activities that will be permitted on their property.

The courts have long recognized that governmental intrusion into private, personal activities can be justified only by substantial and compelling state interests, and that even activities that might be subject to regulation if engaged in publicly cannot be restricted when conducted on private premises. E.g., Stanley v. Georgia, 394 U.S. 557 (1969);

Griswold v. Connecticut, 381 U.S. 479 (1965); City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914); Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911). Thus, the courts in City of Zion and Hershberg struck down antismoking ordinances on the ground that the ordinances unconstitutionally restricted smoking on private premises -- a principle directly applicable to the present bill. See generally 7 McQuillin, Municipal Corporations § 24.239 (3d ed. 1968).

It follows that the ordinance's attempt to regulate activities on commercial premises is illegitimate. The Supreme Court recently has confirmed that private commercial establishments are entitled to constitutional protections equivalent to those granted to individuals, including protection against unwarranted governmental intrusion on their premises. Marshall v. Barlow's, Inc., 426 U.S. 307 (1978) (search warrant required for inspection of private business); see also Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. 530 (1980) (corporate activity protected against state regulation by the First Amendment).

These decisions reflect the fundamental concern expressed in the Bill of Rights for the values of individual privacy and autonomy. This concern has led the courts to examine skeptically attempts by legislatures and administrative agencies to regulate personal, private conduct under the general rubric of "the public welfare." See Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Corn. L.

Rev. 563, 620 (1977) ("[T]o substitute the medical judgment of the state for the personal lifestyle choice [to smoke] is 'paternalism of the strong kind * * * and creates serious risks of governmental tyranny.'").^{*/} One result of this skepticism is that every court that has been presented with the issue has rebuffed efforts by antismoking groups to force governments to restrict smoking in various public and private facilities.

Federal Employees for Non-Smokers' Rights v. United States, 446 F.Supp. 181 (D.D.C. 1978), aff'd, 598 F.2d 310 (D.C. Cir.), cert. denied, 444 U.S. 926 (1979); Gasper v. Louisiana Stadium and Exposition District, 418 F.Supp. 716 (E.D.La. 1976), aff'd, 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1079; GASP v. Mecklenburg County, 42 N.C.App. 225, 256, S.E.2d 477 (1979).

One of the most distressing aspects of the proposed ordinance is that it is premised upon an exclusionary policy that is directed at a class of persons by virtue of their status or customs. Persons who smoke would be permitted to frequent many public and private premises in the state only at the expense of their foregoing an integral aspect of their personal lifestyle. At the same time, the ordinance would deprive real property owners of their right to determine the types of activities that are permitted on their property. The situation presented by the ordinance is thus precisely the reverse of the result of the civil rights cases of the 1960's, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), in that it

^{*/} Quoting from J. Feinberg, Legal Paternalism, in "Today's Moral Problems" 33, 43 (1975).

would place the power of government behind a policy of exclusion. The Constitution has been construed repeatedly as prohibiting such exclusionary policies at the hand of government.

D. Section 1 Would Intrude in an Area Preempted by Federal Law

By restricting smoking in restaurants, the City of Cambridge purports to regulate concerning health in private places of work. Insofar as it does so, it is preempted by federal law. The preemption doctrine, which derives from the Supremacy Clause of the Constitution (Art. VI, § 2), prohibits states and localities from adopting regulations concerning matters as to which Congress has implemented a pervasive regulatory scheme. E.g., Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1963). The Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651 et seq. (Supp. 1971), is expressly intended to operate as a uniform and overriding regulatory scheme concerning safety and health in the workplace. As the court stated in Five Migrant Farmworkers v. Hoffman, 136 N.J. Super. 242, 345 A.2d 378, 381 (1975), in holding that OSHA preempted state authority concerning migrant worker protection:

"This act [OSHA] demonstrated an intention to supersede the authority and obligations of all state laws with respect to the general working conditions where such standards as were adopted by the Secretary [of Labor] were inaugurated."

As the opinion in Hoffman recognizes, OSHA permits state regulation of occupational safety and health matters to

the extent that the appropriate federal agency has not issued standards. See 29 U.S.C. § 667(a). Although the Occupational Safety and Health Administration has not promulgated a standard dealing expressly with "tobacco smoke" in the workplace, "tobacco smoke" is merely a composite of many substances, and the agency has promulgated standards concerning all of those substances. See 29 C.F.R. § 1910.1000 (Tables Z-1 and Z-2) (1977). The existence of such standards thus preempts the state's authority to legislate concerning smoking in the workplace. The failure of the ordinance to take OSHA into account is yet another reason why it should not be approved.

* * *

Section 1 creates an arbitrary and irrational system of regulation concerning smoking in violation of the constitutional guarantee of equal protection. At the same time, the ambiguity of certain of the ordinance's provisions places members of the public and the proprietors of establishments arguably subject to the ordinance in the position of having to guess at its meaning. Efforts to enforce the ordinance thus inevitably will present substantial questions under the Due Process Clause.

Section 1 also attempts to impose restrictions on smoking on private premises, and thereby infringes both the constitutional right to privacy and the right of private property owners to determine the types of activities that will be

permitted on their premises. Finally, the ordinance's attempt to regulate places of work on purported health grounds is preempted by established federal law.

For all of these reasons, it is likely that the ordinance, if approved, would be held unconstitutional.

II. SECTION 2 OF THE PROPOSED ORDINANCE
IS UNCONSTITUTIONAL AND ILL-ADVISED

As noted above, section 2 of the proposed ordinance would prohibit the distribution of free samples of cigarettes and other tobacco products in all public buildings and other public places within the city.^{*/} This section is based upon a fundamental misconception of the purpose and effect of cigarette advertising. In addition, this section if passed would violate express provisions of the Public Health Cigarette Smoking Act of 1969.^{**/} Furthermore, the proposed prohibition would impermissibly interfere with the constitutionally protected right to free speech and would arbitrarily discriminate against a lawful product in violation of the constitutions of Massachusetts and the United States.

^{*/} More accurately stated, section 2 prohibits the distribution of tobacco products "except at full market price." The ordinance does not indicate, however, the standard that is to be used to determine what constitutes "full market price", a term with any number of possible meanings. Because of this patent ambiguity, those persons arguably subject to section 2 will have no choice but to act at their peril and risk the imposition of criminal penalties. As discussed above in connection with section 1, such vagueness flies in the face of the Due Process Clause and renders the ordinance legally defective.

^{**/} Pub.L.No. 91-222 (1970), amending 15 U.S.C. §§ 1331-39 (1965).

A. Section 2 Is Based Upon a Fundamental Misconception of the Purpose and Effect of Cigarette Advertising

To the extent that a ban on the distribution of free samples of tobacco products would be intended to deprive tobacco manufacturers of a means of attracting new smokers and to prevent young people from obtaining tobacco products, the proposal is misconceived and unnecessary.

The proposal misapprehends the purpose of distributing free cigarette or other tobacco product samples. Such advertising is conducted primarily to acquaint smokers with a particular brand of tobacco product, i.e., to reinforce existing brand preferences and to create new ones among persons who already smoke. In introducing a new brand, it is common for a manufacturer to advertise that brand and to give free samples to wholesalers, jobbers and retailers. Brand advertising and free samples are not intended to acquaint nonsmokers with cigarettes or other tobacco products.

As far as minors are concerned, the proposed ordinance is unnecessary, both because tobacco manufacturers exercise the utmost care to ensure that samples of their products are not distributed to minors, and because Massachusetts law already makes it a criminal offense to provide tobacco products to a minor under eighteen years of age.^{*/} Comparable provisions have been found sufficient by most other states to protect minors

^{*/} Mass. Ann. Laws ch. 270, § 6.

against the asserted dangers arising from the distribution of free tobacco products. In view of this existing prohibition against furnishing such products to minors, the proposed additional ban on the distribution of samples would serve no legitimate purpose. To the contrary, as described below, such a ban is patently unconstitutional.

B. Section 2 Would Conflict
With Federal Law

In 1970, after an extensive review of the entire smoking-and-health controversy, Congress passed the Public Health Cigarette Smoking Act of 1969 (the "Act"). The Act amended the original 1965 Act.^{*/} The legislative history of the 1969 Act shows that Congress viewed the smoking-and-health controversy as a national problem affecting commerce throughout the country so that, if any regulations were to be imposed, they must be imposed by Congress. The Act reflects the belief of Congress that chaos and confusion could result if each state, and a fortiori each municipality, were free to enact its own special legislation.

Accordingly, the Public Health Cigarette Smoking Act of 1969 expressly preempts states and their municipalities from adopting legislation affecting the advertising or promotion of cigarettes, where such legislation is based on a supposed relationship between smoking and health. To make the intent of

^{*/} 15 U.S.C. §§ 1331-39.

Congress absolutely clear, the 1969 Act includes a provision specifically forbidding states from passing legislation prohibiting or regulating the advertising or promotion of cigarettes. Section 5(b) of the Act now reads:

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.

Pub.L.No. 91-222 (1970), Section 5(b). (Emphasis added.)

The distribution of free samples of cigarettes and other tobacco products is recognized as a common method of advertising and promoting brands of such products. Section 2 of the proposed ordinance, which would impose a total ban on distribution of tobacco product samples, would follow Ordinance No. 849, a stated purpose of which is to protect the public health. Section 2, therefore, is clearly a law that in the words of the federal statute prohibits tobacco product "advertising or promotion . . . based on smoking and health." Just as clearly, the Act preempts the city, as a subdivision of the state, from enacting such an ordinance. ^{*/}

The legislative history of the Act confirms fully that the proposed law is the kind of action that Congress intended

*/ The preemption provision of the Act applies to ordinances adopted by any subdivision of a state, such as a city or municipality, as well as to state-wide enactments. See 15 U.S.C. § 1332(3) (1970); S.Rep. No. 566, 91st Cong., 1st Sess. 12 (1969); H.R. Rep. No. 897, 91st Cong., 2d Sess. 5 (1970) (conference report).

to preempt. The House-Senate Conference Committee emphasized that the preemption provision of the Act is intended to preclude states,

. . . from imposing any requirement or prohibition based on smoking and health on advertising and promotions of cigarettes in packages labeled in accordance with the Act.

Cong., 2nd Sess. 5 (1970). (Emphasis added.)

Similarly, Congressman Staggers, Chairman of the House Committee that held hearings on the bill and a member of the House-Senate Conference Committee, reported to the House that Section 5 preempts any state action in this area,

. . . in recognition of the fact that the labeling, advertising, promotion, and sale of cigarettes insofar as they are related to smoking and health are matters of national concern. The legislation makes clear that in order to make the legislation effective, States and their local divisions are not to interfere with the scheme of regulation provided for in the legislation.

116 Cong. Rec. 7920 (1970). (Empahsis added.)

There thus can be no doubt that section 2 of the proposed ordinance would directly interfere with the federal legislative scheme. It disregards the provision preempting states and their constituent parts from acting in the area and ignores the intent of Congress to establish a single national policy to be followed throughout the country. It conflicts with the specific intent of Congress that tobacco manufacturers continue to have the right to promote their products in ways not prohibited by federal law.

It bears emphasis that federal preemption is effective even if it does not regulate the subject matter in the way forbidden to the states.^{*/} If Congress has preempted the field, any state or local legislation in the area conflicting with or altering the federal plan is without legal effect.^{**/} If passed, the Cambridge ordinance would be a legal nullity.

Moreover, even if there were not specific statutory provisions preempting the proposed ordinance, its passage at this time would be ill-advised. Under the Act, the Department of Health, Education and Welfare (now the Department of Health and Human Services) and the Federal Trade Commission are specifically required to make annual reports to Congress on the smoking-and-health controversy and to recommend legislation that they deem appropriate. The continued active interest of these agencies and other agencies of the federal government assures that further action will be taken on the federal level if it is necessary.

The Act establishes a reasonable national policy that balances concern for the public health against the desirability of preventing the imposition of any unnecessary burdens on com-

*/ San Diego Building Trades Counsel v. Garmon, 359 U.S. 236 (1959).

**/ U.S. Const., Art. VI, cl. 2; see Northern Natural Gas Co. v. Kansas, 372 U.S. 84, 91 (1963) ("The [state] orders must be declared a nullity in order to assure the effectuation of the comprehensive Federal regulation ordained by Congress."). See also Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

merce. The proposed ordinance would endanger this program adopted for the benefit of the entire country.

C. Section 2 Would Interfere With the Exercise of First Amendment Rights

The proposed ban on the distribution of sample tobacco products would impermissibly interfere with the right of free speech guaranteed by the First Amendment to the United States Constitution. The distribution of sample tobacco products is one of the methods 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 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.^{*/} Just within the past year, 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. 577 (1980), the Supreme Court invalidated state action similar in purpose to section 2

^{*/} 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).

of the proposed ordinance. 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 government 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 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.*

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

As was the case in Central Hudson, section 2 of the proposed ordinance would manipulate 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.

D. Section 2 Improperly Discriminates
Against a Single Lawful Product

Advertising by distributing free product samples has long been recognized as a perfectly legitimate and proper method of promoting many types of consumer products in Massachusetts and elsewhere. Sampling is commonly used by manufacturers of many consumer goods other than tobacco products such as soap, cosmetics, toothpaste, coffee and other food products. None of these manufacturers is prohibited by local law from distributing free samples of its products in order to promote their sale.

Section 2 of the proposed ordinance thus would create a dangerous precedent equally applicable to the promotional practices used in connection with any number of other products. If Cambridge did not extend the ban to other products, the ordinance would be invalid as unfairly discriminating against a single type of lawful product -- cigarettes, cigars and smoking tobacco.

It is of course axiomatic that a legislature must treat persons similarly situated in a similar manner. 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); Reed v. Reed, 404 U.S. 71, 76 (1971).

For example, in Best & Co. v. Maxwell, 311 U.S. 454 (1940), the Supreme Court struck down a North Carolina statute that imposed an annual privilege tax on persons who temporarily displayed sample merchandise for the purpose of obtaining retail orders. The Court held that the statute unconstitutionally discriminated against foreign merchants who sold by samples.^{*/}

Part I, Article I of the Constitution of Massachusetts, like the Fourteenth Amendment, guarantees each person equal protection of the law.^{**/} The proposed ordinance would ignore these principles of fundamental fairness.

* * *

In summary, section 2. -- in addition to resting on a fundamental misconception of the purpose and effect of tobacco product advertising -- would violate specific provisions of the Public Health Cigarette Smoking Act of 1969, and if approved, would represent an ill-advised conflict with express Congressional policy. Moreover, as an attempt to suppress the dissemination of information about a lawful product, the ordinance

^{*/} See also Hartford S.B.I. & Ins. Co. v. Harrison, 301 U.S. 459 (1937).

^{**/} 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 to door-to-door dairy product salesmen violates equal protection).

would violate the constitutional right of free speech and represents precisely the type of paternalistic regulation that the American public strongly opposes. Section 2 also would unconstitutionally discriminate against a lawful product in commerce. For these reasons, it is likely that section 2 of the ordinance, if approved, would be held unconstitutional.

III. CONCLUSION

Wholly aside from the serious practical problems of compliance and enforcement that would be created by the ordinance, and wholly aside from the fact that the ordinance would lead to further governmental regulation and intrusion into people's lives at a time when the public is demanding far less governmental interference, both sections of the proposed ordinance are legally defective in several significant respects. Accordingly, the proposed ordinance should be rejected.



City of Cambridge

UNFINISHED BUSINESS
ITEM NUMBER SIX

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 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



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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

PROPOSED ORDINANCE

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

That Chapter Thirteen entitled "Offenses" is hereby amended as follows:

1. By inserting in section 13-4 entitled "Smoking Prohibited", as appearing in Ordinance No. 849 of September 15, 1975, after subsection (e), the following subsection:

50 (e¹/₂) No person shall smoke in the areas of any restaurant used for food preparation, or in the areas open to the general public in any restaurant which has a seating capacity in excess of fifty (50) patrons, except that the management of any such restaurant may designate properly ventilated waiting, lounge, and eating areas as smoking areas, provided that no more than 75⁵⁰ percent of the area available for each such purpose, and no more than 75 percent of the total seating capacity, may be so designated as smoking areas, and further provided that any area so designated be conspicuously labeled as such.

2. By inserting after said section 13-4 the following section:

Section 13-4A. Free distribution of smoking or tobacco products prohibited.

No person shall, except at full market price, in or upon any part of the streets, parks, public grounds, public buildings, or other public places within the city of Cambridge, distribute or allow to be distributed any smoking or tobacco product for any commercial purpose.

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

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Proposed amendment to the General Ordinances
of the City of Cambridge in Chapter Thirteen
entitled "Offenses" by adding a new subsection
(e₂) relative to smoking in restaurants with
a seating capacity in excess of fifty patrons

12/19/83 Placed on file
pursuant to Ord # 8