

The Honorable Barry Groveman,
City Council of Calabasas
26135 Mureau Road
Calabasas, CA 91302-3172

**BY OVERNIGHT
DELIVERY**

RE: **Why Calabasas Should Logically Become the World's First Smokefree City, and Why Prohibiting Smoking on City Streets is Both Necessary and Constitutional**

Dear Mayor Groveman:

Action on Smoking and Health (ASH), the nation's oldest and largest antismoking organization, and the one which pioneered the movement to ban smoking outdoors as well as indoors, strongly supports legislation which would make **Calabasas** the world's first smokefree city (just ahead of **Del Mar**) by prohibiting smoking on its sidewalks and in other outdoor public places.

In addition to suggesting many strong arguments in favor of such a proposal, we write to assure you that such a regulation would be entirely constitutional and lawful – based upon our extensive research and success in a very similar legal situation, and subsequent court decisions.

Calabasas is a logical choice to reap the publicity of becoming the world's first smokefree city because it lies in the heart of the first state to ban smoking in most indoor public places and work places – thereby preconditioning nonsmokers to expect protection, and smokers to expect restrictions. It comes on the heels of – and draw support from – this week's determination by **California** that tobacco smoke, even outdoors, constitutes a toxic air pollutant.

Recent evidence clearly shows that, even outdoors, concentrations of tobacco smoke can be higher than in some indoor areas, and exceed federal health regulations. People have and are entitled to protection from even momentary exposure to small amounts of substances which can cause cancer. That's the reason why removal of asbestos remnants from buildings requires elaborate precautions to protect people walking by on the sidewalk. Thus pedestrians should be entitled to no less protection from tobacco smoke – a substance which has been recognized by California, the U.S. Government, most major medical organizations, and by the major tobacco companies as a known and proven human carcinogen in the same category as asbestos.

The fact that smoking has been banned in some outdoor areas in over 700 jurisdictions – including overwhelmingly by voters in **Washington State** – clearly indicates the need and propriety of such prohibitions. Even if there were no health hazard, a prohibition on smoking on city streets would be more than justified by other reasons such as annoyance and physical irritation to nonsmokers, to slash the number one cause of litter, to protect small children from burns as well as exposure to people smoking (as we now protect them from people consuming alcohol), and to further California's public policy of reducing health care costs by discouraging smoking.

From a legal point of view, banning smoking on streets creates no more of a problem than banning spitting (which is often part of the use of smokeless tobacco, and satisfies the same nicotine desire), drinking alcoholic beverages, wearing inappropriately revealing attire, playing loud music, etc.; none of which even arguably creates a health hazard like secondhand tobacco smoke.

Courts have repeatedly held that there is no right to smoke even in private homes, much less in public places. In at least 18 states, including California, courts have ruled that smoking can be prohibited in private homes to protect children involved in custody disputes, and 4 states prohibit smoking in private homes when foster children are present.

The issue of the constitutionality of prohibiting smoking on sidewalks was raised once before when **Friendship Heights, Maryland**, adopted such a measure. When it was challenged in court, ASH prepared a major brief and argued to the court that such a restriction was entirely constitutional. Although the ordinance was ultimately held invalid on other grounds not relevant here, the judge did state from the bench that he was convinced on its constitutionality. In his opinion, he strongly suggested that he found the unconstitutionality arguments without merit. [<http://ash.org/fh.pdf>]. Since that time, there have been many decisions which have demolished the argument that there is any constitutional or other legal right to smoke, regardless of location.¹

For your further information, I am enclosing my legal brief (and motion) in the **Friendship Heights** case which discusses many of the rationales for prohibiting smoking on sidewalks, as well as an extensive discussion of the constitutional issues. Also enclosed is a recent document prepared by ASH outlining the many arguments for banning smoking in outdoor areas. You may be particularly interested in paragraphs 1,2,3,6, and 7 which provide more information (and citations) about the dangers of secondhand tobacco smoke.

In summary, many court decisions make it clear that a city may ban virtually any activity on sidewalks or other public places if there is any reasonable basis for the governing body to believe that it will help to protect the public health or welfare. Since smoking is not a “fundamental right”(like voting or procreating) and smokers are not a “protected minority” (like African Americans), a court will not challenge the underlying evidence nor the reasoning of the legislative body, providing only that there was some “rational basis” upon which it acted.

Enforcement should be no more of a problem than a similar ban on smoking on beaches and in parks, or prohibitions against spitting, carrying an open alcohol beverage container, leaving behind dog feces on sidewalks, etc. Such rules set a general standard which is largely self enforcing, backed up by the possibility of complaints where appropriate. Please feel free to contact me if I can be of any further assistance by answering questions, testifying, etc.

Yours truly,

Prof. John F. Banzhaf III
Executive Director & Chief Counsel

¹ See, e.g., RK & Hardee L.P. v. City of Austin, 394 F. Supp. 2d 911 (W.D. TX 2005); Players, Inc. v. City of New York; 371 F. Supp. 2d 522 (S.D. NY 2005); Taverns for Tots, Inc. v. City of Toledo, 341 F. Supp. 2d 844 (N.D. OH 2004); New York City C.L.A.S.H. v. City of New York, (S.D. NY 2004); Batte-Holmgren et al. v. J. Robert Galvin et al., 2004 Conn. Super. LEXIS 3313 (Sup. Ct. CT 2004); Allen v. Cattaraugus County Bd. of Health, 4 Misc. 3d 383 (Sup. Ct. NY 2004). See also decisions cited in enclosed materials.