

## Note

### Smokers: Nuisances in Belmont City, California—In Their Homes, But Not on Public Sidewalks

*Georges Tippens\**

“I think this is an uncommonly silly law.”<sup>1</sup>

#### INTRODUCTION

On October 9, 2007, the City of Belmont, California Council approved a smoking ordinance prohibiting smoking in all workplaces, outdoor public places, indoor and outdoor multi-unit residence common areas, and owner or renter units that share common floors and/or ceilings with another unit in multi-unit residences.<sup>2</sup> While other cities have similarly restrictive bans regarding outdoor smoking,<sup>3</sup> the City of Belmont ordinance is likely the first to prohibit smoking within multifamily residential units.<sup>4</sup> Multifamily unit dwellers wishing to smoke may do so at designated smoking areas located at least twenty feet from a window or door of the multifamily complex.<sup>5</sup> In addition, the ordinance permits smoking on sidewalks and streets, unless the area is an outdoor workplace or there is a city-sponsored event occurring.<sup>6</sup>

The effort to prevent smoking in public places has gained traction over the past forty years based on studies detailing the adverse effects of environmental tobacco smoke (“ETS”),

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1. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

2. BELMONT CITY, CAL., MUN. CODE § 20.5 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10411&sid=5>.

3. See, e.g., CALABASAS, CAL., MUN. CODE §§ 8.12.010–.080 (2008), available at <http://www.bpcnet.com/codes/calabasas>.

4. Steve Rubenstein, *Divided Council Approves Strict New Smoking Law*, S.F. CHRON., Oct. 11, 2007, at B-1.

5. § 20.5-3(a)(3)(i).

6. § 20.5-3(b)(8).

commonly known as secondhand smoke.<sup>7</sup> Beginning with laws prohibiting smoking on airplanes<sup>8</sup> and workplaces,<sup>9</sup> spots in which avoidance of ETS is difficult, many cities and states began passing laws banning smoking in restaurants, bars, and other public areas.<sup>10</sup> California cities generally have tested the limits of anti-smoking legislation, with Belmont City being the first city in the nation to prohibit smoking inside residential units. While ETS is an important health concern and regulation of ETS is a valid exercise of police power, prohibiting smoking in residential units before banning it on public sidewalks is “uncommonly silly.”

This note analyzes the Belmont City ordinance, concentrating on the ordinance’s legal and non-legal impacts. Part I reviews the history of smoking bans in the United States and discusses secondhand smoke’s impact on public health. In addition, Part I examines the Belmont City ordinance and related California and federal laws. Part II argues the ordinance’s legality under the U.S. and California Constitutions and discusses other legal options. Part III studies the rationality of such an ordinance and recommends possible modifications other municipalities should follow.

## I. HISTORY OF SMOKING BANS

### A. CAN I BUM A CIGARETTE?: SMOKING CULTURE IN THE UNITED STATES

Native Americans cultivated and smoked tobacco for medicinal and ceremonial purposes before Columbus reached the New World.<sup>11</sup> Not until the mid-sixteenth century did tobacco use become popular in Europe.<sup>12</sup> Tobacco became a

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7. American Heart Ass’n, Environmental Tobacco Smoke, <http://www.americanheart.org/presenter.jhtml?identifier=4521> (last visited Oct. 16, 2008) (defining “environmental tobacco smoke” as “secondhand smoke”).

8. Glenn Kramon, *Smoking Ban Near on Flights in the U.S.*, N.Y. TIMES, Apr. 17, 1988, § 1, at 24.

9. CAL. LAB. CODE § 6404.5 (West 2003).

10. See, e.g., WASH. REV. CODE § 70.160.030 (2008); MINNEAPOLIS, MINN., MUN. CODE ch. 234.20(1) (1991).

11. RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 8–9 (1996).

12. *Id.* at 9. The Spanish, Portuguese, and Italians were the first to bring

commercial crop in Virginia during the seventeenth century;<sup>13</sup> however, cigarettes did not become popular in the United States until the 1880s, with the introduction of the Bonsack machine.<sup>14</sup> The Bonsack machine produced an amazing 12,000 cigarettes per hour,<sup>15</sup> greatly increasing the manufacturing capacity for ready-made cigarettes, which, prior to the introduction of the machine, were hand-rolled by girls.<sup>16</sup> The inexpensiveness of cigarettes<sup>17</sup> coupled with Americans' preference for cigarettes over other tobacco products,<sup>18</sup> steadfastly increased sales of cigarettes. At the turn of the nineteenth century, annual cigarette sales were 3.5 billion units.<sup>19</sup> Annual cigarette consumption increased to 80 billion units during the 1920s,<sup>20</sup> thanks to the women's liberation movement, during which, in a ten year span, per capita cigarette consumption doubled.<sup>21</sup> By 1990, annual cigarette sales reached 525 billion units.<sup>22</sup>

At the same time, anti-smoking culture was also taking hold. In 1910, an organization formed in New York City to prevent smoking in public places where "non-smokers are apt to be," such as theaters and restaurants.<sup>23</sup> Another

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tobacco from the New World. The leaf soon spread east to Persia, Turkey, India, China, and Japan. *Id.*

13. *Id.* at 11.

14. Gene Borio, Tobacco Timeline, [http://www.tobacco.org/resources/history/Tobacco\\_Historynotes.html](http://www.tobacco.org/resources/history/Tobacco_Historynotes.html) (last visited Nov. 20, 2007) (noting that the Bonsack machine led to the widespread use of cigarettes in America).

15. KLUGER, *supra* note 11, at 22.

16. *Id.* at 19–20 (noting that a Bonsack machine, at a production rate of 200 cigarettes per minute, produced cigarettes at the rate of fifty workers).

17. *Id.* at 22–23 (noting that Duke of Durham cigarettes cost five cents for a pack of ten in the late nineteenth century).

18. *Id.* at 19. Kluger writes:

Chewing tobacco was no longer merely messy but socially disagreeable in more crowded urban America, and its inevitable by-product, spitting, was now identified as a spreader of tuberculosis and other contagions and thus an official health menace. The leisurely pipe all at once seemed a remnant of a slower-tempo age, and cigar fumes were newly offensive amid thronged city life. The cigarette, by contrast, could be quickly consumed and easily snuffed out on the job as well as to and from work. *Id.*

19. *Id.* at 37.

20. GIDEON DORON, *THE SMOKING PARADOX: PUBLIC REGULATION IN THE CIGARETTE INDUSTRY* 7 (1979).

21. KLUGER, *supra* note 11, at 64–66.

22. Editorial, *The Cigarette Numbers*, N.Y. SUN, Mar. 14, 2006.

23. *Form Non-Smokers' League.: New Organization Hopes to Do Much to*

organization, the American Anti-Cigarette League, lobbied successfully for statutes limiting the manufacture, sale, or use of tobacco.<sup>24</sup> As early as 1900, the public believed cigarettes to be more injurious than other forms of tobacco,<sup>25</sup> even though the scientific consensus was that cigarettes did not have “any demonstrable harmful effect on human tissue,” despite increases in lung cancer rates.<sup>26</sup> In addition, widely known figures, such as Thomas Edison, Henry Ford, Booker T. Washington, and Ty Cobb, actively discouraged cigarette smoking.<sup>27</sup> However, cigarette popularity grew because “the smaller, quicker smoke was proving a good deal less objectionable to an increasingly urbanized society.”<sup>28</sup> The popularity of smoking cigarettes continued to increase and by 1950, fifty percent of the adult population smoked;<sup>29</sup> by 1955 over two-thirds of American men smoked tobacco on a regular basis.<sup>30</sup> It was not until 1964 that the United States recognized that smoking cigarettes has harmful effects on health.<sup>31</sup>

#### B. CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH: GOVERNMENT REGULATIONS

##### 1. Can't Prevent People from Smoking? Let's Tax Them

The federal government enacted the first federal cigarette tax in 1864 to help fund the Civil War.<sup>32</sup> In 2007, the federal tax stood at \$0.39 per pack.<sup>33</sup> Starting in 1930, states began

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*Prevent the Use of Tobacco*, N.Y. TIMES, May 10, 1910, at 18.

24. Rivka Widerman, *Tobacco Is a Dirty Weed. Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation*, 38 LOY. L. REV. 387, 399 (1992).

25. See *Austin v. Tennessee*, 179 U.S. 343, 348 (1900) (noting current public opinion).

26. KLUGER, *supra* note 11, at 70–71.

27. *Id.* at 66–67.

28. *Id.* at 62 (comparing cigarette smoke with pipe and cigar smoke).

29. PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP 1* (1996).

30. PUB. HEALTH SERV., U.S. DEPT OF HEALTH, EDUC. & SERVS., *SMOKING AND HEALTH* 26 (1964) (evaluating whether smoking could be harmful to smokers).

31. *Id.* at 33.

32. The Tax Foundation, *The Cigarette Tax*, <http://www.taxfoundation.org/blog/topic/103.html> (last visited Oct. 16, 2008).

33. Curtis S. Dubay & Gerald Prante, *State Tobacco Tax Rates Have Skyrocketed Since Last Federal Tax Increase*, TAX FOUND., July 13, 2007,

enacting statutes licensing cigarette sales.<sup>34</sup> As of 2005, state taxes of cigarette packs ranged from only \$0.07 in South Carolina to almost \$2.50 in Rhode Island.<sup>35</sup> In 2007, on average, a pack of cigarettes had \$1.42 of total excises.<sup>36</sup> Revenues obtained from cigarette taxes are important to state budgets. For example, in 2002 New York received over \$1.1 billion in cigarette excise and sales taxes.<sup>37</sup> Higher taxes and anti-smoking campaigning have arguably led to a decrease in cigarette consumption from 525 billion units in 1990 to 379 billion units in 2005.<sup>38</sup>

## 2. State and Local Regulations

The number of states with smoking regulations has changed drastically over the years. At the turn of the twentieth century, fourteen states had passed laws prohibiting smoking.<sup>39</sup> However, by 1930, most of the states had repealed the laws,<sup>40</sup> due in part to the previously mentioned popularity of cigarettes during the 1920s.<sup>41</sup> Not until 1973, did a state enact the first modern anti-smoking legislation.<sup>42</sup> This first law was in Arizona and banned smoking in elevators, libraries, theaters, museums, concert halls, and buses.<sup>43</sup> Just two years later, Minnesota adopted a much more expansive anti-smoking law as part of its Clean Indoor Air Act.<sup>44</sup> The Act made it illegal to smoke in most confined public spaces, unless expressly permitted to do so, and included mandatory non-smoking sections in restaurants, meeting rooms, and workplaces.<sup>45</sup> Only a handful of other states<sup>46</sup> followed

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<http://www.taxfoundation.org/news/show/22477.html>.

34. Widerman, *supra* note 24, at 389.

35. See Tax Foundation, *supra* note 32.

36. See Dubay & Prante, *supra* note 33.

37. Justin C. Levin, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 200 (2004).

38. *The Cigarette Numbers*, *supra* note 22.

39. David B. Ezra, "Get Your Ashes out of My Living Room!": *Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 143 (2001).

40. *Id.*

41. See *supra* text accompanying note 20.

42. KLUGER, *supra* note 11, at 374. Arizona was the first state to enact serious anti-smoking rules. *Id.*

43. ARIZ. REV. STAT. ANN. § 36-601.01 (1973); see also KLUGER, *supra* note 11, at 374.

44. MINN. STAT. § 144.414 (1975); see also KLUGER, *supra* note 11, at 374.

45. § 144.414; KLUGER, *supra* note 11, at 374.

Minnesota's example; however, their clean air acts were less restrictive.<sup>47</sup> Lack of hard scientific evidence on harmful effects of ETS during the 1970s may explain why the tobacco-control movement failed to gain momentum. A member of the American Cancer Society in 1975 even stated that there is "no shred of evidence" that ETS could cause cancer in nonsmokers.<sup>48</sup> In addition, the tobacco industry targeted state legislators, which led anti-smoking activists to turn their attention to local governments.<sup>49</sup>

At the beginning of the 1980s, fewer than 100 localities had smoking bans; however, by the end of the decade the number more than quintupled.<sup>50</sup> Between 1990 and 2001, the nationwide trend was for strong smoking control at the local level.<sup>51</sup> However, starting in about 2002,<sup>52</sup> many states once again began passing anti-smoking legislation. As of today, twenty-nine states and the District of Columbia have anti-smoking laws covering workplaces or restaurants, encompassing over 10,000 municipalities<sup>53</sup> and 42% of the U.S. population.<sup>54</sup> Generally, anti-smoking ordinances first target elevators and public transportation and then increase to cover workplaces, restaurants or bars, and finally outdoor public

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46. Utah, Nebraska, and Montana also passed clean-air laws after Minnesota. KLUGER, *supra* note 11, at 375.

47. *Id.*

48. *Id.*

49. Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11, 20–21 (Robert L. Rabin & Stephen D. Sugarman eds., 2001); *see also* Jordan Raphael, Note, *The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation*, 80 S. CAL. L. REV. 393, 400 (2007).

50. Kagan & Nelson, *supra* note 49, at 21.

51. Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO (Robert L. Rabin & Stephen D. Sugarman eds. 2001) 207, 216.

52. California passed the first comprehensive anti-smoking legislation affecting workplaces in 1994. CAL. LAB. CODE § 6404.5 (West 2003);

53. American Nonsmokers' Rights Foundation, Municipalities with 100% Local Smokefree Laws, <http://www.no-smoke.org/pdf/100ordlisttabs.pdf> (last visited Oct. 16, 2008). Minnesota covers 2670 municipalities. In addition, four other states have passed anti-smoking laws, which will go in effect in 2009. *Id.*

54. Press Release, Americans for Nonsmokers' Rights, Americans for Nonsmokers' Rights Celebrates 30 Years of Advocacy (Mar. 1, 2006), *available at* <http://www.no-smoke.org/document.php?id=486>.

places, such as stadiums.<sup>55</sup> One city, Calabasas, California, enacted a general prohibition on outdoor smoking in 2006, among the most prohibitive outdoor smoking ordinances in the country.<sup>56</sup>

ETS regulation has gained acceptance by incrementally regulating smoking, instead of prohibiting smoking as some localities did during the beginning of the twentieth century.<sup>57</sup> The American public generally accepts smoking regulation because it views smoking as “worthy of moral condemnation.”<sup>58</sup> Furthermore, public perception has drastically changed as the public moved from romanticizing smoking to shunning those who smoke.<sup>59</sup> To be sure, the shift in public perception, and respective declines in smoking, occurred concurrently with scientific discoveries;<sup>60</sup> however, the introduction of smoking bans also aided in reducing smoking rates.<sup>61</sup> Between 1988, the year California voters passed an initiative that established the state’s anti-smoking program, and 2004, smoking rates in California decreased by 33%.<sup>62</sup> In 1988, almost 23% of adults in California smoked; in 2004, only about 15% of adults in California smoked.<sup>63</sup>

### 3. Federal Regulations

Federal government regulation of tobacco companies began in the 1960s due to scientific reports causally linking cigarettes to lung cancer.<sup>64</sup> The 1964 Surgeon General’s report helped create regulation when it unquestionably asserted that

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55. Raphael, *supra* note 49, at 401.

56. CALABASAS, CAL., MUN. CODE §§ 8.12.030-.040 (2008), *available at* <http://www.bpcnet.com/codes/calabasas>; *see* Raphael, *supra* note 49, at 407–12.

57. Raphael, *supra* note 49, at 414–15.

58. *Id.* at 415.

59. *Cf.* KLUGER, *supra* note 11, at 114–15 (noting the romanticization of cigarette use in early Hollywood).

60. *See* Widerman, *supra* note 24, at 390 (noting that the turning point in public opinion regarding smoking occurred contemporaneously with scientific evidence linking lung cancer to smoking).

61. Raphael, *supra* note 49, at 406–07.

62. Press Release, Cal. Dep’t of Health Servs., California Smoking Rates Drop 33 Percent Since State’s Anti-Tobacco Program Began (Apr. 20, 2005), *available at* <http://www.applications.dhs.ca.gov/pressreleases/store/PressReleases/05-16.html>.

63. *Id.*

64. Raphael, *supra* note 49, at 398.

smoking was harmful to human health.<sup>65</sup> Just one year later, Congress required warning labels on all cigarette packages detailing cigarette's harmful effects.<sup>66</sup> However, as part of the Federal Cigarette Labeling and Advertising Act, Congress also prohibited additional labeling requirements at the federal, state, or local levels.<sup>67</sup> Because the Federal Trade Commission is powerless to change warning labels, cigarette-warning labels have rarely changed; Congress has only updated the labels twice since 1964.<sup>68</sup> As a result, compared to many countries, cigarette labels in the United States are weaker, less informative, and less obvious.<sup>69</sup>

The first steps toward regulating ETS began in 1971 when the Surgeon General proposed a federal smoking ban in public places.<sup>70</sup> Not until 1988, however, did the federal government substantially regulate ETS by requiring domestic flights lasting two hours or less to be smoke free.<sup>71</sup> In 1990, Congress amended the law to ban smoking on all domestic flights lasting six hours or less.<sup>72</sup> Another important step occurred in 1997 when President Clinton signed an executive order establishing a smoke-free environment in federal workplaces.<sup>73</sup>

### C. PLEASE PUT OUT THAT CIGARETTE: SECONDHAND SMOKE

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65. Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 69, 82 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

66. *Id.*

67. 15 U.S.C. § 1334 (2000); *see also* U.S. DEPT OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 172 (2000) [hereinafter SURGEON GENERAL REPORT], *available at* [http://www.cdc.gov/tobacco/data\\_statistics/sgr/sgr\\_2000/00\\_pdfs/FullReport.pdf](http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/FullReport.pdf).

68. Congress changed the warning label in 1969 to "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health," from "Caution: Cigarette Smoking May be Hazardous to Your Health." In 1984, as part of the Comprehensive Smoking Education Act, Congress required four specific health warnings on all cigarette packages and advertisements. *See* SURGEON GENERAL REPORT, *supra* note 67, at 163, 165. Although since 1984 more evidence linking cigarettes to adverse health effects has surfaced, Congress has arguably had more pressing matters to legislate on than updating cigarette-warning labels.

69. *See id.* at 169.

70. *Id.* at 198.

71. *Id.*

72. *Id.*

73. *Id.* at 199.



## EFFECTS

In a widely noted 1986 report on the health effects of ETS, the Surgeon General found that “[i]nvolutionary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.”<sup>74</sup> However, in the preface to the report, the Surgeon General wrote:

It is certain that a substantial proportion of the lung cancers that occur in nonsmokers are due to ETS exposure; however, more complete data on the dose and variability of smoke exposure in the nonsmoking U.S. population will be needed before a quantitative estimate of the number of such cancers can be made.<sup>75</sup>

At the time, no one knew the human-absorbed toxicity of ETS;<sup>76</sup> however, recent studies have developed links between ETS and lung cancer, heart disease, strokes, and other diseases.<sup>77</sup> By 1994, studies showed a 30% increase in heart disease risk with exposure to ETS.<sup>78</sup> Around that same time, the EPA released its risk assessment on secondhand smoke five years after it originally began work on the assessment.<sup>79</sup> The report classified ETS as a carcinogen lethal to man and “a serious and substantial” health risk.<sup>80</sup> The report also found that ETS was responsible for the deaths of 52,000 Americans each year and implicated as many as 300,000 cases of pneumonia and bronchitis in infants.<sup>81</sup> With the bevy of scientific support linking ETS and harmful health effects, courts have continuously upheld smoking bans as exercises of state police powers.<sup>82</sup> Because smoking is not a fundamental right,<sup>83</sup> states only need legitimate reasons in enacting anti-

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74. U.S. DEPT OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL vii (1986), available at [http://profiles.nlm.nih.gov/NN/B/C/P/M/\\_/nnbcpm.pdf](http://profiles.nlm.nih.gov/NN/B/C/P/M/_/nnbcpm.pdf).

75. *Id.* at x.

76. KLUGER, *supra* note 11, at 503.

77. Raphael, *supra* note 49, at 403.

78. KLUGER, *supra* note 11, at 698.

79. *Id.* at 737; see generally OFFICE OF HEALTH & ENVTL. ASSESSMENT, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) [hereinafter EPA REPORT], available at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=36793](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=36793).

80. EPA REPORT, *supra* note 79, at 1-1.

81. KLUGER, *supra* note 11, at 737.

82. See, e.g., *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 536–41 (S.D.N.Y. 2005); *Roark & Hardee L.P. v. City of Austin*, 394 F.Supp.2d 911, 922 (W.D. Tex. 2005); *Steffes v. City of Lawrence*, 160 P.3d 843, 852–53 (Kan. 2007); *Amico's Inc. v. Mattos*, 789 A.2d 899, 907–08 (R.I. 2002).

83. See, e.g., *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d.

smoking ordinances to survive courts' rational basis review.<sup>84</sup>

#### D. BELMONT CITY ORDINANCE

Section 1 of the Belmont City ordinance begins with findings detailing the scope of secondhand smoke.<sup>85</sup> The ordinance states that over 440,000 people die each year in the United States from tobacco-related illnesses.<sup>86</sup> In addition, the ordinance finds that secondhand smoke is responsible for 38,000 non-smoker deaths annually in the United States.<sup>87</sup> Next, the Council outlines its intent to:

[P]rovide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-smoking individuals, especially children; by protecting the public from nonconsensual exposure to secondhand smoke where they live, work, and play; by lessening tobacco-related litter; by reducing the potential for children to wrongly associate smoking and tobacco with a healthy lifestyle; and by affirming and promoting the family atmosphere of the City's public places.<sup>88</sup>

The codified ordinance provides generally the definitions and prohibitions of the ordinance and penalties for noncompliance.<sup>89</sup> Like other restrictive California anti-smoking ordinances, Belmont City's ordinance prohibits smoking in public places, places of employment, and common areas of multi-unit residents.<sup>90</sup> However, Belmont City extends its smoking prohibition to include all multifamily homes if a unit shares floor or ceiling space with another unit.<sup>91</sup> The ordinance does not prohibit, however, smoking on public sidewalks like the recently enacted Calabasas, California ordinance.<sup>92</sup> The Belmont City ordinance grants landlords or

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461, 482 (S.D.N.Y. 2004) (noting that smoking bans do not interfere with any "fundamental right"); *see also*, TECHNICAL ASSISTANCE LEGAL CTR., PUB. HEALTH INST., THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE (2004), available at [http://talc.phlaw.org/pdf\\_files/0051.pdf](http://talc.phlaw.org/pdf_files/0051.pdf).

84. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

85. Belmont City, Cal., Ordinance 1032 (Oct. 9, 2007) available at [http://www.belmont.gov/SubContent.asp?CatId=240001398&C\\_ID=240002690](http://www.belmont.gov/SubContent.asp?CatId=240001398&C_ID=240002690).

86. *Id.*

87. *Id.*

88. *Id.*

89. BELMONT CITY, CAL., MUN. CODE §§ 20.5-1,3,9 (2007).

90. §§ 20.5-3(a)(1) - (3); *see also* CALABASAS, CAL., MUN. CODE § 8.12.040 (2008), available at <http://www.bpcnet.com/codes/calabasas>.

91. § 20.5-3(a)(4).

92. CALABASAS, CAL., MUN. CODE §§ 8.12.030-.040.

resident associations the power to designate outdoor smoking areas, if such areas are at least twenty feet away from any indoor area of the multi-unit residence in addition to other restrictive criteria.<sup>93</sup>

The enforcement and liability sections of the ordinances are also of particular interest. A tenant who breaks the law or knowingly allows one to break the law is liable to both the landlord and any third-party residents who were exposed to the secondhand smoke.<sup>94</sup> The landlord; however, is not liable to third-party residents for a tenant's breach.<sup>95</sup> A violator is subject to a fine of \$100.<sup>96</sup> The City has the option to bring a civil action against the violator with penalties ranging from \$250 to \$1000 per violation.<sup>97</sup> Violations of the code are considered nuisances, and appropriate nuisance law applies.<sup>98</sup>

### 1. Preemption

Article XI, § 7, of the California Constitution states, “[a] city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”<sup>99</sup> Under this provision, the California Supreme Court found a city's police power “is as broad as the police power exercisable by the Legislature itself.”<sup>100</sup> Further, California state law specifically grants localities the right to institute further restrictions in anti-smoking statutes. For example, California Health and Safety Code § 104495(h), which regulates smoking in playgrounds, states, “[t]his section shall not preempt the authority of any county, city, or city and county to regulate smoking around playgrounds . . . .”<sup>101</sup> California is one of thirty-four states as well as the District of Columbia that contains no anti-preemption statutory language

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93. § 20.5-3(a).

94. § 20.5-5(d).

95. *Id.*

96. § 20.5-9(b).

97. § 20.5-9(c).

98. § 20.5-9(f).

99. CAL. CONST. art. XI, § 7.

100. *Birkenfeld v. City of Berkeley*, 550 P.3d 1001, 1009 (Cal. 1976).

101. CAL. HEALTH & SAFETY CODE § 104495 (West 2003); *see also* CAL. GOV'T CODE § 7597 (West 2008) (“This section shall not preempt the authority of any county, city . . . to adopt and enforce additional smoking and tobacco control ordinances, regulations, or policies that are more restrictive than the applicable standards required by this chapter.”).

regarding smoke-free indoor air.<sup>102</sup> Certain state courts have found that local authorities have preempted state law, even if the state law did not contain anti-preemptive language.<sup>103</sup> However, in *City of San Jose v. Department of Health Services*, the California Court of Appeals found that a city's adoption of a smoking ordinance is an exercise of its constitutional power.<sup>104</sup>

## 2. Federal Constitutional Grounds

The Supreme Court has found a right to privacy in one's home, including the use of contraceptives,<sup>105</sup> consensual sexual relations,<sup>106</sup> and owning and reading obscene materials.<sup>107</sup> For example, in *Griswold v. Connecticut*, the Court overruled Connecticut laws that prohibited the use of contraceptives.<sup>108</sup> The Court found that the statutes "deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home."<sup>109</sup> In *Stanley v. Georgia*, the Court overturned the defendant's conviction of possessing obscene materials, finding "the right to satisfy his intellectual and emotional needs in the privacy of his own home."<sup>110</sup> However, the *Stanley* Court based its opinion on the First Amendment protected right to "receive information and ideas, regardless of their social worth. . ." <sup>111</sup> and not on substantive

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102. See NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, STATE COMPARISON REPORT, PREEMPTION ON SMOKEFREE INDOOR AIR (2007), [http://apps.nccd.cdc.gov/StateSystem/stateSystem.aspx?selectedTopic=630&selectedMeasure=10010&dir=leg\\_report&ucName=UCLegPreemption&year=2007\\_2&excel=htmlTable](http://apps.nccd.cdc.gov/StateSystem/stateSystem.aspx?selectedTopic=630&selectedMeasure=10010&dir=leg_report&ucName=UCLegPreemption&year=2007_2&excel=htmlTable). For an example of statutory preemptive language, see OR. REV. STAT. ANN. § 433.863 (West 2005) ("A local government may not prohibit smoking in any areas listed in ORS 433.850 (2) unless the local government prohibition was passed before July 1, 2001.").

103. See *JTR Colebrook, Inc. v. Town of Colebrook*, 829 A.2d 1089, 1094 (N.H. 2003) (holding that the state indoor smoking law preempts any additional restrictions placed by municipalities because the law is sufficiently comprehensive and there is no statutory scheme that permits additional municipal regulations).

104. *City of San Jose v. Dep't of Health Servs.*, 77 Cal. Rptr. 2d 609, 613 (Cal. Ct. App. 1998).

105. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

106. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

107. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

108. *Griswold*, 381 U.S. at 485.

109. *Id.* at 495 (Goldberg, J., concurring).

110. *Stanley*, 394 U.S. at 565.

111. *Id.* at 564.

due process grounds.<sup>112</sup>

When determining the constitutionality of local smoking bans, courts use rational basis review.<sup>113</sup> Even if no fundamental right exists, the statute in question must still be rationally related to serve some legitimate state interest.<sup>114</sup> Courts only need to find some “reasonably conceivable state of facts that could provide a rational basis” for a smoking ban’s enactment by the legislature.<sup>115</sup> In *NYC C.L.A.S.H. v. City of New York*, the court found no fundamental right to smoke or a “basis upon which to grant smokers the status of a protected class.”<sup>116</sup> As the Supreme Court ruled in *City of Cleburne v. Cleburne Living Center*,

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.<sup>117</sup>

Legitimate state interests include traditional police powers, such as regulating morals, health, safety, and general welfare of the citizenry.<sup>118</sup> Thus, cities must only provide evidence to support the smoking ordinance, such as the health risks of ETS.<sup>119</sup>

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112. *Id.* at 568 n.11.

113. *See, e.g.*, *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997); *Grusendorf v. Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d. 461, 486 (S.D.N.Y. 2004); *Operation Badlaw, Inc. v. Licking County. Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1064 (S.D. Ohio 1992).

114. *See Washington v. Glucksberg*, 521 U.S. 702, 766 (1997) (Souter, J., concurring) (noting that “[the] enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale.”).

115. *NYC C.L.A.S.H.*, 315 F.Supp.2d. at 486 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)).

116. *Id.* at 492.

117. *Id.* at 440.

118. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 108–09 (1973).

119. *NYC C.L.A.S.H.*, 315 F. Supp. at 495. The court stated: “What is relevant for the purposes of [rational basis scrutiny] is that Defendants have persuasively demonstrated that there is a plethora of reliable and consistent evidence, upon which they relied in adopting the Smoking Bans, which concludes that ETS poses health risks to non-smokers.” *Id.*

### 3. Other Legal Alternatives

Nonsmokers have two common law actions against ETS entering their home, private nuisance and trespass.<sup>120</sup> Private nuisance consists of using one's property in such a manner as to cause interference to the use and enjoyment of another's property.<sup>121</sup> Trespass, while similar, involves an invasion of the interest in the exclusive possession of the property.<sup>122</sup> To constitute a trespass, compared with a nuisance, there needs to be an interference with the possession of the property.<sup>123</sup> In *Wilson v. Interlake Steel*, the California Supreme Court ruled that intangible intrusions, such as odor are not trespasses, just nuisances.<sup>124</sup> For the hazard to be qualified as a trespass, the hazard must cause physical damage or deposits of particulate matter.<sup>125</sup>

## II. THE COUNCIL APPROVED IT, BUT IS IT LEGAL?

The passage of the Belmont City anti-smoking ordinance has generated mixed reviews. Smokers generally feel the law is too obtrusive, discriminatory,<sup>126</sup> and attacks their free will.<sup>127</sup> However, free will is less important when other rights are at stake. As Belmont City Mayor Feierbach, who cast a favorable vote for the ordinance's passage, maintains, "[i]ndividual rights should be restricted when they threaten the safety of another. That's why society acts when a driver drives drunk or a spouse is battered in the sanctity of the home."<sup>128</sup> On the other hand,

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120. See *Duntley v. Barr*, 805 N.Y.S.2d 503, 504–05 (N.Y. City Ct. 2005) (describing uses of private nuisance and trespass).

121. *Id.*

122. *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 925 (Cal. 1982).

123. *Id.*

124. *Id.* at 924.

125. *Id.*

126. See Joy Alicia, *Anti-smoking Laws Are Becoming Outrageous*, DAILY TITAN, Oct. 22, 2007) at 5 (arguing that with each passing smoking ordinance, discrimination against smokers increases). One could argue that most laws unfairly target a subset of the population. For example, opponents of driving under the influence laws could argue that those laws unfairly discriminate against alcoholic beverage drinkers.

127. Nancy Morgan, *Liberals Send the Truth Up in Smoke*, RIGHT BIAS NEWS, Oct. 8, 2007, <http://www.rightbias.com/Articles/100807smoker.aspx>; Dan Reed, *Smoking Ban: Belmont vs. the 'Pry It from My Cold, Dead Hand' Ward*, S.F. CHRON., Sept. 23, 2007, at E2.

128. Coralin Feierbach, *Health and Safety Come First. There's No "Right to Smoke" If Family, Friends, Neighbors Are Endangered*, USA TODAY, Oct. 9,

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## SMOKERS: NUISANCES

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Council member Lieberman, one of two Council members who voted against the ordinance's passage, believes the ordinance is too restrictive, citing that a tenant may be evicted for smoking inside a unit.<sup>129</sup> Supporters of the ordinance, however, believe the ordinance will significantly improve the health of the community and protects nonsmokers' right to breathe clean air.<sup>130</sup> Smokers wishing to challenge the ordinance will likely argue that the ordinance is too restrictive under California law and is unconstitutional.

## A. SORRY SMOKERS, YOU'RE OUT OF LUCK

Ordinance opponents have no legal ally in hopes of overturning Belmont City's anti-smoking law. California does not have any preemptory language in its state laws regarding anti-smoking ordinances,<sup>131</sup> nor does California case law prevent municipalities from enacting tougher anti-smoking ordinances on the local level.<sup>132</sup> Far from it, many California cities have the some of the toughest anti-smoking ordinances within the country.<sup>133</sup> As mentioned previously, Calabasas City has arguably the toughest outdoor public smoking ban in the nation.<sup>134</sup> In addition, over the past thirty years, secondhand smoke laws have gained support by incrementally increasing regulation.<sup>135</sup> The American public accepts smoking regulations because it views smoking as morally condemnable.<sup>136</sup> The only feasible hope opponents would have is that the Belmont City ordinance over broadly violates constitutional privacy rights.

Smokers have not been granted a heightened class level

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2007.

129. Wendy Koch, *Two Calif. Cities to Vote on Banning Smoking in Apartments*, USA TODAY, Oct. 4, 2007, at 1A.

130. See Will Oremus, *Belmont OKs Strict Smoking Ordinance*, MERCURY NEWS, Oct. 9, 2007.

131. CAL. HEALTH & SAFETY CODE § 104495 (West 2003); CAL. GOV'T CODE § 7597(b) (West 2004).

132. *City of San Jose v. Dep't of Health Servs.*, 77 Cal.Rptr.2d 609, 613 (Cal. Ct. App. 1998).

133. See CALIFORNIA'S CLEAN AIR PROJECT, CALIFORNIA COMMUNITIES PROHIBITING SMOKING/TOBACCO USE IN OUTDOOR DINING, PARKS, BEACHES, AND SPORTING VENUES (2007), <http://ccap.etr.org/base/documents/ListofOTSPoliciesAdopted.doc>.

134. *Supra* text accompanying note 56.

135. Raphael, *supra* note 49, at 414.

136. *Id.* at 415.

under the Equal Protection Clause.<sup>137</sup> Thus, if smokers started a class action suit based on the Fourteenth Amendment's Equal Protection Clause, Belmont City would only need to provide a legitimate state interest to survive the rational basis test. Due to the extensive knowledge of ETS health risks and case history, Belmont City would have little difficulty proving its legitimate interest in regulating cigarette smoke within its boundaries. The Belmont City Council included in its legislative findings the health risks, health costs, and other extrinsic costs associated with cigarette smoking; all of which singularly could be considered a legitimate interest in regulating smoking.<sup>138</sup>

Opponents of the ordinance would likely contend that many of the purported state interests do not warrant banning smoking within multi-unit dwellings. For example, one could likely argue that the city's ordinance will create a greater cigarette butt hazard because the ordinance is in effect forcing smokers to smoke outside rather than inside their homes. Instead of disposing cigarettes within their properties, smokers may throw their discarded butts on public sidewalks and streets. Likewise, the city provides statistics on the number of nationwide deaths associated with secondhand smoke, but no evidence on the pervasiveness of disease related to secondhand smoke inhalation from a nearby apartment unit.<sup>139</sup> Employees in an enclosed smoking environment, such as a bar, receive much more ETS than a nonsmoker would receive from smoke originating in a nearby unit. While ETS in both situations may be unwanted, the potential adverse effect on health is not the same. The listed reasons arguably more directly apply to restricting smoking in public places. However, when using rational basis review, courts do not look too directly at the legislature's reasoning.<sup>140</sup> Rather, courts take the legislature's findings as they are.<sup>141</sup> The overall legislative end to protect

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137. *See supra* Part I.D.2.

138. Belmont City, Cal., Ordinance 1032 (Oct. 9, 2007) *available at* [http://www.belmont.gov/SubContent.asp?CatId=240001398&C\\_ID=240002690](http://www.belmont.gov/SubContent.asp?CatId=240001398&C_ID=240002690)

139. *Id.*

140. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441–42 (1985).

141. Washington v. Glucksberg, 521 U.S. 702, 788–89 (1997) (Souter, J., concurring) (noting that with an un-enumerated right, the Court shows deference to legislative findings). The court discussed the un-enumerated right



public health by banning smoking in multifamily dwellings where smoke may enter another unit rationally relates to that end.

The other legal option available to ordinance opponents wishing to find the law unconstitutional is a claim that the ordinance violates a fundamental substantive right. Previous attempts in California to establish a fundamental right related to smoking have failed;<sup>142</sup> however, no other ordinances have implicated one's home such as Belmont City's ordinance. As mentioned previously, the Supreme Court has found rights occurring in the privacy of one's home as fundamental.<sup>143</sup> Although smoking is inherently different from owning obscene materials, using contraceptives, or having consensual relations in one's home because of smoke's external effects on others, opponents may argue that a heightened level of scrutiny is deserved because the law regulates acts within the privacy of one's home.

No court to date has found a fundamental right to smoke, but no court has looked at the issue of the right to smoke in the privacy of one's home. In his dissenting opinion in *Poe*, Justice Harlan noted:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.<sup>144</sup>

Justice Harlan's discussion surrounded the relationship between the home and family life. He did not imply that all acts occurring in one's home are fundamental rights. He reasoned that the protection of the home family life is so fundamental that the Constitution protects its integrity. In addition, ETS affects the health of others, whereas the aforementioned fundamental rights<sup>145</sup> do not. Belmont City's regulation of ETS is rationally related to its legitimate desire in preserving public health and thus will survive a substantive

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to commit suicide. *Id.* at 703.

142. *City of San Jose v. Dep't of Health Servs.*, 77 Cal. Rptr. 2d 609, 613 (Cal. Ct. App. 1998).

143. *See supra* Part D.2.

144. *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) (discussing Connecticut statutes banning contraceptive use within one's home).

145. Owning obscene materials, using contraceptives, and having consensual relations in one's home.

due process challenge even though the ordinance regulates smoking in one's home.

### III. IS THIS NECESSARY?

#### A. CAN'T SMOKERS JUST BE NUISANCES?

In addition to not finding a fundamental right to smoke in one's home, courts have declared secondhand smoke entering neighboring apartments a private nuisance.<sup>146</sup> In *Merrill v. Bosser*,<sup>147</sup> the court found a private nuisance based on secondhand smoke entering into the plaintiff's apartment from a neighboring tenant. The court noted that ETS interfered with the plaintiff's property on "numerous occasions that goes beyond mere inconvenience or customary conduct."<sup>148</sup> Governments have also declared secondhand smoke a nuisance.<sup>149</sup> The Utah legislature declared secondhand smoke as a private nuisance in multi-dwelling residential units if the smoke drifts in more than once in each of two or more consecutive seven-day periods and is "injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."<sup>150</sup> Nonsmokers have a cause of action against the smoker, the renter, or the lessee of the apartment in which the smoke originates, and possibly the landlord.<sup>151</sup> In addition to making it a crime to smoke in multi-unit residential dwellings, the City of Belmont has declared nonconsensual exposure to secondhand smoke a private

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146. See *Duntley v. Barr*, 805 N.Y.S.2d 503, 505 (N.Y. City Ct. 2005) (noting that smoking establishes a cause of action for private nuisance in residential apartment); *Merrill v. Bosser*, No. 05-4239 COCE 53 2005 WL 5680219 (Fla. Broward County Ct. June 29, 2005). For smoke to be a trespass, there needs to be a physical interference with the enjoyment of one's property, such as smoke-related damage. *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 233 (Cal. 1982) ("[A]ctionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion . . .").

147. *Merrill*, No. 05-4239 COCE 53 2005 WL 5680219, at 5.

148. *Id.*

149. UTAH CODE ANN. § 78B-6-1101 (2008); CALABASAS, CAL., MUN. CODE § 8.12.070(b) (2008), available at <http://www.bpcnet.com/codes/calabasas> (declaring that "exposing other persons to second-hand smoke constitutes a public nuisance . . .").

150. § 78B-6-1101.

151. *Id.*

nuisance, following Utah's example.<sup>152</sup>

The inclusion of nuisance language in Belmont City's ordinance adds another enforcement option for nonsmokers against smokers and their unwanted smoke intrusion. While some argue that private nuisance law alone is sufficient to prevent the spread of ETS in multi-unit residences,<sup>153</sup> Belmont City's added enforcement provision is necessary. Private nuisance law creates unneeded litigation and may prevent some nonsmokers from seeking remedies because of court costs and time involvement. Private nuisance law also requires greater and more frequent smoke intrusion to provide the court enough evidence that one was exposed to the "uninvited presence of secondhand smoke."<sup>154</sup> While some landlords commonly make their buildings nonsmoking,<sup>155</sup> tenants may still smoke on balconies or decks, which allows ETS to affect nearby tenants. Only a ban on smoking inside residential units can attain the Council's goal of preventing ETS and its harmful effects to nonsmokers.

#### B. CAN'T THE MARKET REGULATE?

Many apartment building owners and condominium associations restrict smoking in units without government regulation.<sup>156</sup> For example, some may decide to make their buildings fully nonsmoking by refusing to rent or sell to smokers. Landlords may also decide to segregate their units into separate nonsmoking and smoking sections, even creating separate ventilation systems, or charge higher rent to smokers to offset possible damages.<sup>157</sup> While it is true that building owners have the flexibility to place their own restrictions, there is nothing legally that may prevent a city from setting the standard. For example, some restaurants have no-smoking policies in cities with no such restrictions.<sup>158</sup> In addition, the

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152. BELMONT CITY, CAL., MUN. CODE § 20.5-2 (2007), available at [http://www.belmont.gov/SubContent.asp?CatId=240001398&C\\_ID=240002690](http://www.belmont.gov/SubContent.asp?CatId=240001398&C_ID=240002690)

153. See generally Raphael, *supra* note 49, at 415–19.

154. § 20.5-2.

155. Ezra, *supra* note 39, at 138, 153.

156. *Id.* at 177–78.

157. *Id.* at 178.

158. Starbucks is one such place. See Rachael Tiplady, *Can Starbucks Blend into France?*, BUS. WK., Apr. 20, 2006, [http://www.businessweek.com/globalbiz/content/apr2006/gb20060420\\_895395.htm](http://www.businessweek.com/globalbiz/content/apr2006/gb20060420_895395.htm).

legislature gives effect to the will of the people. In California, the majority of apartment owners and managers already favor a law mandating non-smoking units in every building.<sup>159</sup> The Belmont City ordinance aids the 86% of Californians who are non-smokers obtain a smoke-free living environment<sup>160</sup> and lessens the economic impact of smoke-related damage and maintenance costs on landlords.<sup>161</sup>

### C. I CAN SMOKE ON A SIDEWALK, BUT NOT IN MY HOME!?

The Belmont City anti-smoking ordinance bans smoking in multi-unit dwellings that share common floor and/or ceiling space with another unit.<sup>162</sup> It also bans smoking in outdoor workplaces.<sup>163</sup> The ordinance does not proscribe, however, smoking on public sidewalks or streets.<sup>164</sup> As written, a smoker may legally be on a sidewalk sending secondhand smoke into nearby buildings or to nearby people standing at a local bus stop, for example. One may argue that smoke does not have as potent an effect in an outdoor environment as an indoor environment; however, the City bans smoking in places of employment, such as outdoor smoking in restaurant seating areas.<sup>165</sup> Arguably, allowing smoking near a bus stop or other areas where people wait is more likely to produce hazardous effects than at an outdoor restaurant seating area because smoke will blow in a nonsmoker's direction.<sup>166</sup> The ordinance

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159. CTR. FOR TOBACCO POLICY & ORG., AM. LUNG ASS'N OF CAL., STATEWIDE SURVEY OF CALIFORNIA APARTMENT OWNERS AND MANAGERS (2005), <http://www.center4tobaccopolicy.org/polls-ownermanager>.

160. Tobacco Control Section, Cal. Dep't of Health Servs., Adult Smoking Prevalence (Aug. 2006), <http://www.cdph.ca.gov/programs/Tobacco/Documents/CTCPAdultSmoking06.pdf> (noting that on average, 86 percent of California's are non-smokers, and thus would benefit from this ordinance only affecting smokers).

161. See Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 799 (1998).

162. BELMONT CITY, CAL., MUN. CODE § 20.5-3(a)(4) (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10411&sid=5>.

163. See *id.* § 20.5-3(a)(2).

164. See *id.* § 20.5-3(b)(8).

165. See *id.* § 20.5-3(a)(2). The ordinance defines a "place of employment" as "any area under the legal or de facto control of an employer, business or nonprofit entity that an employee or the general public may have cause to enter in the normal course of operations . . . ." *Id.* § 20.5-1(j).

166. Neil E. Klepeis et al., *Real-Time Measurement of Outdoor Tobacco Smoke Particles*, 57 J. AIR & WASTE MGMT ASS'N 522, 522 (2007) (noting that exposure to outdoor secondhand smoke may present a hazard under certain

does, however, ban smoking and loitering on sidewalks within twenty feet of a public entrance or opening.<sup>167</sup> Enforcement of such a rule will be difficult due to the exception allowing people passing by such an entrance to smoke.<sup>168</sup> If confronted, a smoker could reasonably argue that he or she was “actively passing on the way to another destination.”<sup>169</sup>

The “reasonable smoking distance” requirement of twenty feet<sup>170</sup> seems arbitrary at best. The ordinance bans smoking within twenty feet of a multi-unit dwelling entrance or opening, and within twenty feet of a public entrance or opening, but completely bans smoking within a multi-unit dwelling.<sup>171</sup> Many apartments and condominiums are so large that one could smoke inside their unit and be twenty feet away from a ventilation point. If twenty feet is the limit that smoke could travel, then people who wish to smoke will likely continue smoking inside their multi-family homes.

Another potential issue with banning smoking in multi-unit residences is that it may unfairly target renters. Belmont City’s ordinance permits single-family dwelling residents to smoke on their properties, but not multi-family dwelling residents.<sup>172</sup> The majority of renters in Belmont City live in multi-family units.<sup>173</sup> The ordinance targets 3,549 renter-occupied multi-family households compared with 740 owner-occupied multi-family households,<sup>174</sup> thus disproportionately restricting renters from smoking within their homes.

The Belmont City Council created limits of twenty feet

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conditions of wind and smoker proximity). While the ordinance bans smoking in service areas, such as a bus stop, it does not ban people from smoking while passing by these areas. § 20.5-(1)(l); § 20.5-3(a)(5); § 20.5-6(b).

167. § 20.5-6(a).

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.* § 20.5-3.

172. § 20.5-3(b)(2).

173. According to 2000 Census data, only 618 of 4,167-renter households in Belmont City live in single-family detached units compared with 5,561 of 6,301-owner households that live in single-family detached units. U.S. CENSUS BUREAU, TENURE BY UNITS IN STRUCTURE, (2000) [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-context=dt&-ds\\_name=DEC\\_2000\\_SF3\\_U&-mt\\_name=DEC\\_2000\\_SF3\\_U\\_H032&-CONTEXT=dt&-tree\\_id=403&-redoLog=true&-all\\_geo\\_types=N&-geo\\_id=16000US0605108&-geo\\_id=N&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=DEC_2000_SF3_U&-mt_name=DEC_2000_SF3_U_H032&-CONTEXT=dt&-tree_id=403&-redoLog=true&-all_geo_types=N&-geo_id=16000US0605108&-geo_id=N&-search_results=01000US&-format=&-_lang=en).

174. *Id.*

away from areas in which smoke might infiltrate<sup>175</sup> to restrict the impact of unwanted ETS traveling indoors. While this reduces the potential of smoke entering multi-family residences from an outdoor source, smoke still can enter single-family residences. Even in high-density residential areas, smokers are still legally allowed in Belmont City to smoke within twenty feet of a nonsmoker's single-family house because single-family homes are not used by the public.<sup>176</sup> In addition, smokers may smoke on their property even if they are within twenty feet of another's indoor ventilation access point.

In *Thomsen v. Greve*, the Court of Appeals of Nebraska declared smoke emanating from a wood burning stove a private nuisance because it infiltrated a neighbor's house.<sup>177</sup> The court stated that

[T]o have the use and enjoyment of one's home interfered with by smoke, odor, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odor or smoke from a neighbor cannot avoid such harm except by moving. One should not be required to close windows to avoid such harm.<sup>178</sup>

If the Council really wished to curb the spread of ETS, it would also have banned smoking within twenty feet of any neighbor's window or door. The City of Belmont did declare nonconsensual exposure to secondhand smoke a nuisance, including the uninvited presence of secondhand smoke on property.<sup>179</sup> However, nuisance law by itself is not adequate to prevent unwanted smoke intrusion.<sup>180</sup> Only in the most severe cases, is nuisance law effective to prevent smoke from entering a residence.

While the inclusion of a designated outdoor smoking area in multi-unit residences allows smokers an environment to smoke away from nonsmokers, it is not a sufficient remedy to prevent unwanted ETS. The ordinance allows landlords to designate an area with certain restrictions, but it is not a requirement.<sup>181</sup> Landlords or condominium associations who actively choose not to use their outdoor space for such purposes

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175. § 20.5-6.

176. *See id.* § 20.5-1(k).

177. *Thomsen v. Greve*, 550 N.W.2d 49, 58 (Neb. App. 1996).

178. *Id.* at 55.

179. § 20.5-2.

180. *See supra* Part 3.A.

181. § 20.5-3(a)(3).

in effect pass the smoke externalities to the public. Smokers living in developments, unable to smoke in their units or in a designated outdoor smoking area on the property, will likely congregate on the sidewalk and smoke where the public passes nearby.

#### D. IS ENFORCEMENT POSSIBLE?

Because Belmont City is the first city in the nation to implement a broad smoking ban in multi-family units, enforcement is a concern. Violators are subject to a \$100 fine and a potential civil action with fines ranging from \$250 to \$1000.<sup>182</sup> While the penalties are steep, citing individuals may be problematic. For example, if a nonsmoking multi-unit resident smells smoke coming from the ventilation system, it could be difficult to pinpoint the origination of the smoke if an officer or landlord responds to the complaint. The above example may also raise Fourth Amendment issues, which prevents unreasonable “search and seizures” in the home.<sup>183</sup> In *Katz v. U.S.*, the Court stated, “[A] man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements, that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”<sup>184</sup>

If a police officer is called in to cite a person smoking in her multi-family unit, a possible Fourth Amendment issue might arise if the smoker was smoking in her apartment behind closed doors. Courts need to decide if smoking in the home and the accompanying smoke constitutes in “plain view” to outsiders. If the smoking origination could not be ascertained, many people would object to officers questioning them about something as harmless, compared with other possible crimes, as smoking a cigarette within their own home, especially if they were innocent. Officers may also be hesitant to approach residents in their homes over smoking a cigarette. Of course, if the smoking was chronic and the nonsmoker had other evidence to support the smoke origination, then officers may have more persuasion to sanction violators. However, as the ordinance is now written, many nonsmokers may be upset if they smell cigarette smoke emanating from a nearby multi-

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182. *See id.* §§ 20.5-9(b)–(c).

183. U.S. CONST. amend. IV.

184. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (discussing the Fourth Amendment).

family unit, call the police, and the police do not enforce the law. On the other hand, if officers vigilantly enforce the ordinance, other residents may be upset because they might feel the police should be attending other matters, such as keeping the streets safe. While the ban itself may be constitutional, possible enforcement options may not be.

Without a complete ban of smoking on public sidewalks, enforcement of smoking within twenty feet of a public entrance will be problematic. If confronted, smokers could state that they were “actively passing on the way to another destination”<sup>185</sup> or that they believed that they were standing a reasonable distance from any public entrance. To enhance compliance, Belmont City should organize and designate enforcement officials. Delayed enforcement may lead to smokers not complying with the anti-smoking ordinance.<sup>186</sup>

Another potential problem could be low prioritization by law enforcement. Police departments generally see their primary objective as preserving the safety of citizens and officials may think that enforcing the smoking ban would be a waste of resources.<sup>187</sup>

On the other hand, formal rules often create enforcement by the public. Americans have been raised to abide the law; something called “practical authority.”<sup>188</sup> Practical authority leads to compliance, even if there is a low probability of enforcement.<sup>189</sup> A person waiting at a red light late at night with no oncoming cars in sight is an example of practical authority.<sup>190</sup> In addition to practical authority, legal rules add a moral authority to civility norms concerning the deference smokers owe to nonsmokers.<sup>191</sup> Moral authority allows a nonsmoker to ask a smoker to stop smoking if the smoker is not following the law.<sup>192</sup>

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185. § 20.5-6(a).

186. See Damon K. Nagami, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 159, 167 (2001) (comparing compliance and enforcement efforts in San Clemente and Los Angeles, California).

187. *Id.* at 168.

188. Kagan & Skolnick, *supra* note 65, at 86.

189. *Id.*

190. *Id.*

191. *Id.* at 87.

192. Tyler, *supra* note 161, at 810.



## E. YOUR HOME IS YOUR CASTLE

Americans traditionally have valued their home in high regard. The Founders included two Amendments specifically related to the home in the Bill of Rights.<sup>193</sup> Any law directed at one's home will create angst among the public, and rightfully so.<sup>194</sup> The home does not guarantee a fundamental right to do what one pleases inside its walls.<sup>195</sup> Unlike the liberty protected in the Constitution, the potential invasion of home privacy created by the Belmont City ordinance does not include physical intrusion.<sup>196</sup> That does not mean, however, that the home should not receive some deference by local authorities. While legally entitled to use their inherent police power to regulate smoking in multi-unit residences, the City of Belmont should have first considered restricting smoking in areas where it may have a more harmful effect before instituting a ban on smoking in multi-family residences.

The City of Calabasas has the most restrictive citywide ban on outdoor smoking in the nation, banning smoking virtually anywhere in public.<sup>197</sup> While some may call the Calabasas ordinance "draconian,"<sup>198</sup> it is a necessary step Belmont City should have followed before proscribing smoking in multi-family residences. The Calabasas ordinance restricted smoking in outdoor places where people may breathe the unwanted fumes.<sup>199</sup> The ordinance as originally written, however, did not

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193. The Third Amendment states, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

194. See, e.g., Alicia, *supra* note 126, at 5.

195. See *supra* text accompanying notes 145–47.

196. Poe v. Ullman, 367 U.S. 497, 549 (1961).

197. Raphael, *supra* note 49, at 393.

198. Karyn Chenoweth, *Trailblazing Anti-smoking City of Calabasas Steps up War, M & C* (Oct. 4, 2007), [http://news.monstersandcritics.com/usa/news/article\\_1362456.php/Trailblazing\\_anti-smoking\\_city\\_of\\_Calabasas\\_steps\\_up\\_war](http://news.monstersandcritics.com/usa/news/article_1362456.php/Trailblazing_anti-smoking_city_of_Calabasas_steps_up_war) (last visited Oct. 22, 2007).

199. See CALABASAS, CAL., MUN. CODE §§ 8.12.010-.080 (2008), available at <http://www.bpcnet.com/codes/calabasas>. Calabasas amended its ordinance after Belmont City passed its ordinance regulating smoking within multifamily homes. See Betsy Feigin Betfus, *Up in Smoke: Multifamily*

encroach upon a person's home.<sup>200</sup> There are many concerns with choosing to outlaw smoking in multi-unit residences, including enforcement issues, passing ETS externalities to other areas, and possible privacy concerns. Forcing smokers to smoke in public areas outside is a major concern.

The Belmont City Council, if wishing to prevent unwanted inhalation of ETS, should ban smoking within a reasonable distance of all buildings and public gathering spots, including all homes, bus stops, movie lines, and street corners. Potential inhalation of smoke by nonsmokers at these locations may be more prolific than breathing smoke that has traveled through a filtered ventilation system in a multi-unit complex. If the prevalence of cigarette butts, with their associated hazards, were a real concern of the Belmont City Council,<sup>201</sup> only a complete ban on smoking on public ways would mitigate this problem. Forcing smokers to smoke outside will likely lead to increased littering of cigarette butts and other trash on public sidewalks.<sup>202</sup>

While protecting renters' interests is commendable, the Council should not institute a smoking ban in condominium or co-op facilities. Multi-family owned buildings decide their communal rules as a collective or with a representative board. These bodies can decide if they wish to make their building smoke-free. If unwanted smoke inhalation becomes a problem, then those buildings may justifiably choose to ban smoking within their units. A strict citywide ban on smoking may lead condominium members to request that their building become smoke free, as unit owners realize the benefits of living in clean air. On the other hand, allowing owner-occupied smoker-friendly multi-family buildings will please the smoker

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*Properties Institute Smoking Bans*, MULTIFAM. EXECUTIVE MAG., May 1, 2008, <http://www.multifamilyexecutive.com/industry-news.asp?sectionID=543&articleID=707191> (noting that the Calabasas ordinance went into effect in February 2008). By January 1, 2012, landlords must designate 80 percent of multifamily units within their buildings as nonsmoking. *Id.* at § 8.12.055.

200. *Id.*

201. Belmont City, Cal., Ordinance 1032 (Oct. 9, 2007) available at [http://www.belmont.gov/SubContent.asp?CatId=240001398&C\\_ID=240002690](http://www.belmont.gov/SubContent.asp?CatId=240001398&C_ID=240002690)

202. Joni Ogle, *Why Smoking Bans Are a Butt to Texas: The Impact of Smoking Bans on Private Property Rights and Individual Freedom*, 39 TEX. TECH. L. REV. 345, 355 (2007) (discussing how smoking ban in Austin led to increased littering).

community by giving them a comfortable place to smoke. If ETS traveling between units becomes an issue, the buildings may become totally smoke-free or the offended tenant may resort to nuisance law.

Perception regarding smoking has changed over recent years.<sup>203</sup> While per capita smoking has decreased concomitantly with increased local smoking regulations, scientific discoveries and moral condemnation also have contributed to the decrease. For example, the public can create some smoking bans through the initiative process rather than the legislative process.<sup>204</sup> The Belmont City ban on smoking in multi-family units may lead to further decreases in smoking rates, however as discussed above, the ban may also upset current smokers who believe that they are being unfairly discriminated against.<sup>205</sup>

### CONCLUSION

As the first ordinance in the nation to restrict smoking in individual multifamily units, the Belmont City smoking ban has drastically changed the landscape of anti-smoking legislation. While constitutionally legal (courts have never found smoking a fundamental right) the ordinance prematurely bans smoking in multi-family units. The ordinance arbitrarily targets multi-family unit renters and owners, while not restricting smoking near or around single-family unit ventilation points. Secondhand smoke is unquestionably a public health hazard, and the regulation of it is a valid exercise of states' police power. However, instead of focusing on being the first city to ban smoking in multi-family units, the Belmont City Council should focus on restricting ETS near areas where it has the most potential harmful health effect to nonsmokers, such as street corners. If the Council wishes to prevent the spread of ETS, it should create a prohibitive outdoor ban on smoking, like Calabasas, California, ban smoking within a

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203. See *supra* note 59 and accompanying text.

204. See, e.g., CAL. PROPOSITION 99 (1988) (increasing excise tax on cigarette packs), available at <http://www.cdph.ca.gov/programs/tobacco/Documents/CTCPProp99Initiative.pdf>; WASH. INITIATIVE 901 (2005) (prohibiting smoking in public places and places of employment), available at <http://www.secstate.wa.gov/elections/initiatives/text/i901.pdf>; see also KLUGER, *supra* note 11, at 703 (calling California's excise increase the largest contemplated by any U.S. governmental agency at the time).

205. See *supra* note 126 and accompanying text.

reasonable distance of single-family homes, *and* ban smoking in multi-family units. For the Council to first ban smoking in multi-family homes without placing other restrictions is “uncommonly silly.”