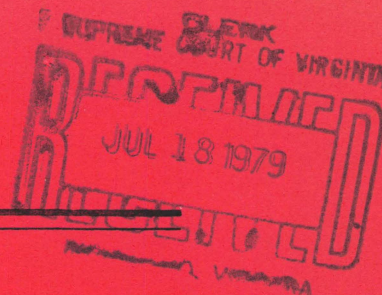


220 VA 584



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 790322

---

PHYLLIS L. ALFORD

Appellant

v.

CITY OF NEWPORT NEWS

Appellee

---

JOINT APPENDIX

---

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Edward Ashworth, Esq.  
Frank J. Albetta, Jr., Esq.  
CHARLES MORGAN, JR. AND  
ASSOCIATES, CHARTERED  
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Newport News, Va. 23607

Counsel for Appellee

---



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CITY OF NEWPORT NEWS, VIRGINIA

Date 6/21/78

vs. Phyllis L. Alford You are hereby summoned to appear in the Municipal Court of the City of Newport News, 2501 Huntington Avenue, Newport News, Virginia at 9:00 o'clock A. M. on

June 29 1978, to answer for the following violation of law, to wit: Failure to comply with No Smoking Ordinance. Ordinance No. 2446-78, Chapter 33, Article IV, Section 33-23 + Section 33-24 of City Code of Newport News, VA.

I hereby promise to appear at the time and place specified above.

Failure to comply with this summons constitutes a separate offense.

Defendant's Signature

(Signing this summons is not an admission of guilt)

Sanitarian

NEWPORT NEWS HEALTH DEPT.

THE COMMERCIAL PRINTER-NEWPORT NEWS



I, John R. Payne, a Justice of the Peace for the Clerk of the General District Court in and for the City aforesaid, do certify that Phyllis L. Alford, defendant and own appearance and

as his surety have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two Hundred Dollars (\$ 200.00 ), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the City of Newport News to be registered, yet upon this condition: That the said defendant shall appear before the CIRCUIT COURT of Newport News on July 12, 1978, at 10:00 o'clock A.M., at 2501 Huntington Avenue, Newport News, Virginia and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this process, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of and upon further condition that the said defendant shall keep the peace and be of good behavior until the within charge is finally disposed of. Non appearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 29th day of June, 19 78

200

Judge

Clerk

4703-78

6-29-78

# DOCKET NUMBER

COMMONWEALTH OF VIRGINIA  
CITY OF NEWPORT NEWS  
SUMMONS FOR TRIAL

vs. { in  
GENERAL DISTRICT COURT  
Failure to comply  
with no smoking  
Ordinance

Phyllis L. Alford

Defendant

For Court Use Only

Address

Executed \_\_\_\_\_, 19 \_\_\_\_

By: \_\_\_\_\_  
Officer Serving Warrant Title

Complainant notified of trial date \_\_\_\_\_, 19 \_\_\_\_

By: \_\_\_\_\_  
Officer Serving Notice Title

Upon examination of the within charge on a plea of Guilty the court finds the defendant, GUILTY AS CHARGED and fixes as the penalty a fine of \$10.00

JUN 29 1978

Judge

OK Appeal Noted

JUN 29 1978

For Court Use Only

Fine \_\_\_\_\_ \$10.00

Cost \_\_\_\_\_ 16.00

Total \_\_\_\_\_ \$26.00

Attorney \_\_\_\_\_

## WAIVER OF COUNSEL

I have this day been advised of my right to be represented by counsel upon trial of the within charge and that if I cannot afford counsel, one will be appointed to represent me. Understanding my right to be represented by counsel either of my own choosing or by court appointment, I wish to, and do hereby, waive my right to be represented by counsel, voluntarily and of my own free will and ask the court to try my case without benefit of counsel.

Date \_\_\_\_\_ Defendant \_\_\_\_\_

## CERTIFICATE OF REFUSAL

I, the undersigned Judge of the General District Court of Newport News, do hereby certify that today I advised the defendant that he had the right to be represented by counsel; that if because of indigency he cannot afford to hire an attorney one would be appointed by the Court; and that his refusal to sign a waiver of counsel, having refused to request or name counsel, constitutes a waiver of the right to counsel. I further certify that I proceeded to enquire into the defendant's financial ability and found that he is able to retain counsel at his own expense and so advised him of this finding; that he again refused to sign the waiver or to request counsel, whereupon the Court deemed said refusal to constitute a waiver of the right to counsel, so advised the defendant, and proceeded to hear and determine the case.

Date \_\_\_\_\_ Judge \_\_\_\_\_

44, 370

VIRGINIA: In the Circuit Court for the City of Newport News, Monday, the 10th day of July, 1978.

PRESENT: The Honorable HENRY D. GARNETT, Judge.

CITY OF NEWPORT NEWS : Upon An Appeal Warrant

VS.

PHYLLIS L. ALFORD : Failure to Comply with No Smoking  
Ordinance  
(June 29, 1978)

On joint motion of the Attorney for the City of Newport News  
and the Attorney for the Defendant, it is ordered that this cause be continued  
generally.

*Ex. 1*  
*Henry D. Garnett, Jr.*

111

MOTION FOR JUDGMENT OF ACQUITTAL

The defendant, Mrs. Phyllis L. Alford, moves the Court to enter a judgment of acquittal pursuant to Virginia Supreme Court Rule 3A:22(c) because:

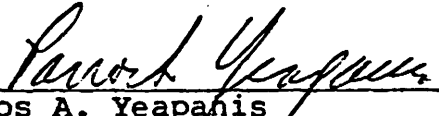
- (1) the ordinance under which defendant is charged is unconstitutional;
- (2) the ordinance under which defendant is charged is unconstitutional in that it infringes upon defendant's right of private property and violates the fourteenth amendment to the Constitution of the United States and article 1, section 11 of the Constitution of the Commonwealth of Virginia, which provide that no person shall be deprived of "life, liberty, or property without due process of law";
- (3) the ordinance under which the defendant is charged is unconstitutional in that it infringes upon the freedom of association guaranteed by the first amendment to the Constitution of the United States;
- (4) there is a less drastic means to achieve the end sought by the City without infringing upon constitutionally guaranteed individual liberties and the rights of property by requiring the posting of notice to all who enter that smoking is permitted;
- (5) Newport News has selectively enforced the ordinance



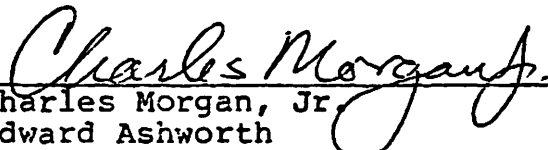
against Mrs. Alford, thereby violating her rights to  
due process of law and to the equal protection of the  
law.

- WHEREFORE, PREMISES CONSIDERED, defendant prays that the  
Court will grant the relief requested and such further relief  
as may be appropriate.

Respectfully submitted,

  
Panos A. Yeapanis

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(202) 466-7000

Attorneys for Defendant

September 22, 1978

*Filed 9/22/78  
H. J. [unclear]  
Jude.*

Virginia:

In the Circuit Court of the City of Newport News

City of Newport News )

v. )

Phyllis L. Alford )

Criminal Action No. \_\_\_\_\_

MOTION TO DISMISS THE CHARGE

The defendant, Mrs. Phyllis L. Alford, moves the Court to dismiss the charge against her because:

(1) the ordinance under which defendant is charged is unconstitutional;

(2) the ordinance under which defendant is charged is unconstitutional in that it infringes upon defendant's right of private property and violates the fourteenth amendment to the Constitution of the United States and article 1, section 11 of the Constitution of the Commonwealth of Virginia, which provide that no person shall be deprived of "life, liberty, or property without due process of law";

(3) the ordinance under which the defendant is charged is unconstitutional in that it infringes upon the freedom of association guaranteed by the first amendment to the Constitution of the United States;

(4) there is a less drastic means to achieve the end sought by the City without infringing upon constitutionally guaranteed individual liberties and the rights of property by requiring the posting of notice to all who enter that smoking is permitted;

(5) Newport News has selectively enforced the ordinance against Mrs. Alford, thereby violating her rights to

due process of law and to the equal protection of  
the law.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the  
Court will grant the relief requested and such further relief  
as may be appropriate.

Respectfully submitted,

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Attorneys for Defendant

September 22, 1978

*Filed 9/22/78  
per [illegible]  
Jule.*



Virginia:

In the Circuit Court of the City of Newport News

City of Newport News )

v. )

Phyllis L. Alford )

Criminal Action No. \_\_\_\_\_

MOTION TO STRIKE PROSECUTION'S EVIDENCE


The defendant, Mrs. Phyllis L. Alford, moves the Court to strike the prosecution's evidence as being insufficient as a matter of law to support the conviction of defendant. Grounds for the motion are as follows:

- (1) the ordinance under which defendant is charged is unconstitutional;
- (2) the ordinance under which defendant is charged is unconstitutional in that it infringes upon defendant's right of private property and violates the fourteenth amendment to the Constitution of the United States and article 1, section 11 of the Constitution of the Commonwealth of Virginia, which provide that no person shall be deprived of "life, liberty, or property without due process of law";
- (3) the ordinance under which the defendant is charged is unconstitutional in that it infringes upon the freedom of association guaranteed by the first amendment to the Constitution of the United States;
- (4) there is a less drastic means to achieve the end sought by the City without infringing upon constitutionally guaranteed individual liberties and the rights of property by requiring the posting of notice to all who enter that smoking is permitted;

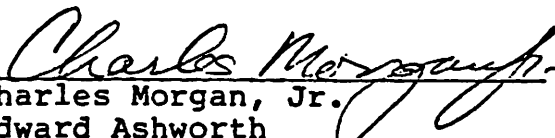
(5) Newport News has selectively enforced the ordinance against Mrs. Alford, thereby violating her rights to due process of law and to the equal protection of the law.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the Court will grant the relief requested and such further relief as may be appropriate.

Respectfully submitted,

  
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Attorneys for Defendant

September 22, 1978

*Filed*  
*9-22-78*  
*Notarius*  
*Jude*

Virginia:

- In the Circuit Court of the City of Newport News

City of Newport News )

v. )

Phyllis L. Alford )

Criminal Action No. \_\_\_\_\_

PLEA OF NOT GUILTY BY REASON OF THE UNCONSTITUTIONALITY  
AND SELECTIVE ENFORCEMENT OF THE ORDINANCE

Comes now the defendant, Mrs. Phyllis L. Alford, and enters a special plea of not guilty on the ground that the ordinance under which defendant is charged is unconstitutional because:

1. It deprives defendant of her right of property protected by the Constitutions of the United States and of the Commonwealth of Virginia;
2. It unnecessarily infringes defendant's freedom of association in violation of the first and fourteenth amendments to the Constitution of the United States;
3. There is a less drastic means to achieve the ends sought by the City without infringing upon constitutionally guaranteed individual liberties and the rights of property by requiring the posting of notice to all who enter that smoking is permitted.

Further, defendant pleads not guilty because Newport News



has selectively enforced the ordinance against her, thereby depriving her of due process and the equal protection of the law.

Respectfully submitted,

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Washington, D.C. 20036  
(202) 466-7000

Attorneys for Defendant

September 22, 1978

*filed 9-22-78  
per [unclear]  
[unclear]*

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT OF  
ACQUITTAL OR, IN THE ALTERNATIVE, TO DISMISS OR, IN THE  
ALTERNATIVE, TO STRIKE THE PROSECUTION'S EVIDENCE

Mrs. Phyllis L. Alford is charged with "failure to comply with no smoking ordinance." Ordinance No. 2446-78, ch. 33, art. IV, of the Code of the City of Newport News. She leases the Warwick Dining Room in the Warwick Hotel, Newport News. The Warwick Dining Room seats seventy-one (71) persons at seventeen (17) tables. Her restaurant is an optional use commercial establishment,<sup>1</sup> i.e., prospective customers can patronize or refuse to patronize her establishment at no cost to themselves for there are scores of competing restaurants in Newport News.

1. Property may be divided into two categories--publicly owned property and private property. Private property may be divided into several categories, three of which are (1) privately owned residences; (2) optional use commercial property; and (3) monopoly use commercial property. The present right of the private homeowner to establish smoking rules even when inviting the public onto his premises is so clear that it need not be discussed.

Optional use and monopoly use commercial property are open to that portion of the public which meets two basic requirements:

1. The desire to purchase the goods and services offered for sale; and
2. the money to pay for them.

Optional use commercial property may be defined as places where goods or services are offered for sale and the consumers retain options due to the existence of like or similar alternative places. In most cities and towns, restaurants, bars, hotels, and motels provide easy examples. Monopoly use commercial property is that property where goods or services are offered for sale but where the consumer has no alternatives. Privately owned one-of-a-kind public transportation facilities, stadia, and hospitals provide examples.

One limitation exists upon the private property rights of Mrs. Alford. She may not discriminate on the basis of race, creed, or color. Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a et seq. Clearly, smokers and non-smokers are not protected classes of people, and their rights, if any, terminate at the restaurant's door. Gasper v. Louisiana Stadium & Exposition District, 47 U.S.L.W. 2112 (5th Cir. Aug. 1, 1978).

On May 15, 1978, by a vote of 4-3, the Council of the City of Newport News passed Ordinance 2446-78, ch. 33, art. IV, of the Code of the City of Newport News.

The cases make it clear that a restaurant owner might legitimately choose to prohibit all smoking on the premises. That is the owner's prerogative. However, if the Council desires to regulate smoking on private property, it must do so, if at all, in a manner which least infringes the rights of private property owners. Additionally, as the first amendment states, there can be "no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Of course, citizens are free to assemble and associate for political purposes. The Supreme Court has expanded the right of expression to cover speech for commercial purposes. See, e.g., Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977). Recently protection has been extended to the non-business related speech of corporations. First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

Analogous to these rights is the freedom of consumer and commercial association which enhances Mrs. Alford's property rights and provides for an altered standard of constitutional



review. The coupling of fifth and fourteenth amendment protected property rights with the first amendment right of free association subjects restrictive legislation to the Supreme Court's most rigorous test of constitutionality--the compelling interest test: Compare Buckley v. Valeo, 424 U.S. 1, 25 (1976):

The Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," [citation omitted] that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." [Citations omitted.] In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." [Citations omitted.]

See, e.g., Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 46 U.S.L.W. 3616 (U.S. April 3, 1978) (Listerine advertisements need not say "Contrary to prior advertising"); Beneficial Corporation v. FTC, 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977) (corporate advertiser may use slogan "instant tax refund"); FTC v. National Commission on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976) (purveyors of cholesterol need not tell of increased risk of heart disease).

The owner of optional use commercial property clearly has a constitutional right to exclude from the premises those who refuse to conform to prescribed codes of conduct, which may include dress (coats, ties) and companionship (couples only)--if the property is otherwise open to the public regardless of race, religion, or national origin.

Mrs. Alford may also exclude classes of persons due to their status or habits. She may establish "No Smoking," "Smoking," and "Separate Sections." As is discussed, infra,

the very hair, dress code, and like cases which limit personal lifestyles and the trespass-after-warning cases which arose from the sit-ins of the early 1960's establish this optional use commercial property right.

By requiring entrance-way notice to those offended by cigarette smoking and thereby preventing, by a process of self-exclusion, any injury which might occur to the few who may be allergic to tobacco smoke, the health hazard, if any, and the need to balance the rights of smokers versus non-smokers is eliminated.

The remedy of the public remains in the democracy of the marketplace, where dimes and dollars are the ballots of commerce, and private premises are precincts.

THE ORDINANCE UNNECESSARILY AND  
UNCONSTITUTIONALLY VIOLATES MRS.  
ALFORD'S AND HER CUSTOMERS' FIRST  
AMENDMENT RIGHT OF ASSOCIATION.

The right of a private property owner to admit at his discretion with or without segregation, smokers or non-smokers, or both (after advance notice), emerges from existing constitutional themes--freedom of association and the rights of private property.

The right to speak freely and to assemble to petition government for a redress of grievances has been expanded far beyond the redress of grievances. "While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." Healy v. James, 408 U.S. 169, 181 (1972); see Baird v. State Bar, 401 U.S. 1, 6 (1971); NAACP v. Button, 371 U.S. 415, 430 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). The right has been recognized in a variety of circumstances. Perhaps the best remembered cases are those involving civil rights. In NAACP v. Alabama ex rel. Patterson, the Court characterized the right as follows:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations omitted.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (emphasis added).

The right of association is the "right . . . to pursue

. . . lawful private interests privately and to associate freely with others." Id. at 466. See also Runyon v. McCrary, 427 U.S. 160 (1976); Booster Lodge No. 405 v. NLRB, 412 U.S. 84 (1973); NLRB v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213 (1972).

The rationale was stated in Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977): "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

This "freedom of belief" is commensurate with the other first amendment freedoms.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). As James Madison stated in defense of religious freedom: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison 186 (Hunt ed. 1901).

The right of association, like its speech counterpart, may not be unreasonably regulated by the state. The state may not restrict the right "simply because it finds the views expressed by any group to be abhorrent," Healy v. James, 408 U.S. at 187-88, nor deny or unnecessarily abridge the associational rights of a group by denying it the opportunity or a forum in

which to present its views. Healy v. James, 408 U.S. at 181; Thornhill v. Alabama, 310 U.S. 88, 103-06 (1940). In the words of Justice Stewart: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

As the Court noted in NAACP v. Alabama ex rel. Patterson, supra, to deny the right of association, the government must show compelling interest. Accord, Buckley v. Valeo, 424 U.S. 1, 25 (1976).<sup>1</sup> See also Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Gilmore v. City of Montgomery, 417 U.S. 556 (1974); NAACP v. Button, 371 U.S. at 438. For a discussion of the compelling governmental interest test and its application in recent cases, see Kant, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 26-38 (1977); Note, The Supreme Court, 1976 Term, 91 Harv. L. Rev. 128-208 (1977).

---

1. In Buckley, which dealt with a constitutional challenge to the Federal Election Campaign Act of 1971, as amended, 88 Stat. 1263, the Court applied the less drastic alternative test:

Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.



THE ORDINANCE UNCONSTITUTIONALLY  
INFRINGES DEFENDANT'S RIGHTS OF  
PRIVATE PROPERTY.

A discussion of property rights must begin with the fifth and fourteenth amendments to the Constitution of the United States and article I, section 11 of the Constitution of Virginia. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The fifth amendment further proscribes the government. It prohibits the taking of "private property . . . for public use, without just compensation."

In his dissent in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), Justice Black sharply criticized the majority for ignoring the rights of private property owners.

I believe that, whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that "[n]o person shall \* \* \* be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

391 U.S. at 330 (Black, J., dissenting).

Justice Black's view was vindicated by Hudgens v. NLRB, 424 U.S. 507 (1976). There the Court held that union pickets had no first amendment right to enter a private shopping center for the purpose of advertising their strike against an employer. The Court relied on Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which upheld the right of a private shopping center owner to

prohibit the distribution of handbills relating to the Vietnam war. In response to the argument that "since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises," the Lloyd Court stated: "Respondents' argument, even if otherwise meritorious, misapprehends the scope of the invitation extended to the public; . . . There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." 407 U.S. at 564-65. The Court went on to note that it

[had] never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

Id. at 568.<sup>1</sup>

The foregoing cases illustrate that, generally speaking, the private owner of property has an inherent right to control its use. When the Council seeks to limit those rights, it must do so within bounds staked out by the Constitution. It must not trespass on the personal or property rights of private owners who may, within limits, establish associational restrictions

---

1. The Lloyd Court applied the less drastic alternative doctrine.

It would be an unwarranted infringement of property rights to require [the owners of the property] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

Id. at 567. The less drastic alternative doctrine is discussed infra.

against the outside world. This theme clearly emerges even from modern fourth amendment,<sup>1</sup> civil rights,<sup>2</sup> and personal appearance cases.<sup>3</sup>

Public conduct on optional use commercial property is no less subject to the private property owner's control.

The Supreme Court has upheld the right of private property holders to exclude warrantless Department of Labor officials who sought to inspect for violations of the Occupational Safety and Health Act of 1970. Marshall v. Barlow's Inc., 46 U.S.L.W. 4483 (U.S. May 23, 1978). Section 8(a) of the Act, 29 U.S.C. § 657(a), authorized reasonable inspections at reasonable times. The Court held that "it is untenable that the ban on warrantless

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1. See, e.g., Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (U.S. May 23, 1978) (commercial establishment does not have to permit a warrantless inspector from the Occupational Safety and Health Administration to enter its premises).

2. Except for cases which involve racial discrimination, the rule of Washington, Alexandria & Georgetown Railroad v. Brown, 84 U.S. (17 Wall.) 445 (1873) still exists. Trespass laws have been upheld against constitutional attacks based on the first amendment, due process, and interstate commerce clauses of the Constitution. See, e.g., Breard v. Alexandria, 341 U.S. 622 (1951). "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses." 341 U.S. at 642; cf. Martin v. Struthers, 319 U.S. 141 (1943). See also Rosado Maysonet v. Solis, 409 F. Supp. 576 (D. Puerto Rico 1975) (casino may eject patron who acts in unruly manner and fails to comply with regulations); Bonomo v. Louisiana Downs, Inc., 337 So. 2d 553 (La. App. 1976) (race track may bar convicted bookmakers).

3. See, e.g., Brown v. D.C. Transit System, Inc., 523 F.2d 725, 728 (D.C. Cir.), cert. denied, 423 U.S. 862 (1975); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Knott v. Missouri Pacific Railroad, 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

searches was not intended to shield places of business as well as of residence." Id. at 4484.<sup>1</sup>

Civil rights laws.--The Civil Rights Act of 1964 and its subsequent amendments significantly infringe the individual's control over his property. The Fair Housing Act, 42 U.S.C. §§ 3601 et seq., makes it unlawful to discriminate on the basis of race, color, religion, sex, or national origin in the sale or rental of housing. The Act does not prohibit discrimination in the sale or rental of single-family houses if sold or rented without the use of a real estate broker or agent and without "publication, posting or mailing" of any advertisement or notice in violation of the Act. 42 U.S.C. § 3603(b).

Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., prohibits discrimination in public accommodations on the basis of race, color, religion, or national origin. To that extent the statute limits the private property owner's right of association. It does not, however, prevent the owner of a restaurant from excluding persons without shoes, Feldt v. Marriott Corp., 322 A.2d 913 (D.C. Ct. App. 1974), or the owner of a bar from excluding unescorted women, DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968), or the owner of a hotel from excluding women suspected of prostitution, Kelly v. United States, 348 A.2d 884 (D.C. Ct. App. 1975), or the manager of a restaurant from excluding a patron who conducts himself in a proper manner but who is on the owner's list of "undesirables." Drew v. United States, 292 A.2d 164 (D.C. Ct. App.), cert. denied, 409 U.S. 1062 (1972). The Feldt Court set out the

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1. In Barlow's, the Court relied upon See v. City of Seattle, 387 U.S. 541, 543 (1967), which ruled that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

applicable principles:

At common law a restaurant owner had the right to arbitrarily refuse service to any guest. Absent constitutional or statutory rights, the common law still controls in this jurisdiction. This is not a case of racial discrimination or violation of civil rights. We do have a statute making it unlawful for a restaurant to refuse service to "any quiet and orderly person" or to exclude any one on account of race or color; but, as we have said, there was no racial discrimination here and we do not think the requirement to serve any quiet or orderly person prevents a restaurant from having reasonable requirements as to the dress of its customers, such as a requirement that all male customers wear coats and ties or, as here, that all customers wear shoes.

. . .

322 A.2d at 915 (footnote omitted).

The owner of optional use commercial property can exclude those who object to smoking. By requiring notice, the Council avoids the conflict between health based anti-public smoking statutes and the constitutionally protected property and associational rights. A sign is the "less drastic alternative."

Property rights of government owners.—As indicated in Lloyd v. Tanner, supra, even the government may restrict or prohibit the exercise of first amendment and other rights on its property which is not generally open to the public. See Adderley v. Florida, 385 U.S. 39 (1966); United States v. Hymans, 463 F.2d 615 (10th Cir. 1972); McMichael v. United States, 355 F.2d 283 (9th Cir. 1965).

And as trial and appellate lawyers well know, entry into courthouses may be conditioned upon the search of brief cases and packages, Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), smoking may be allowed or not allowed according to the preference of the judge.

THE COUNCIL COULD HAVE ADOPTED  
ENTRANCEWAY NOTICE AS A LESS  
DRASTIC WAY TO REACH ITS DESIRED  
END.

When the government (federal or state) has available a variety of equally effective means by which to achieve a pre-determined end, it must choose the measure which least interferes with individual liberties. This doctrine has been termed variously the "less drastic means,"<sup>1</sup> the "reasonable alternative,"<sup>2</sup> the "less intrusive alternative,"<sup>3</sup> "precision of regulation,"<sup>4</sup> and "necessity."<sup>5</sup>

The doctrine first appeared in Supreme Court adjudication in 1821, in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), in which the Court limited the contempt power of Congress to "the least possible power adequate to the end proposed." Id. at 230-31.

Since its first appearance in Anderson v. Dunn, supra, the doctrine has been woven into judicial fabric. Although out of style, perhaps finally, in the area of economic or "substantive" due process, it adorns (and often determines) the outcome of first amendment, equal protection, and procedural due process cases. Recently, it has been revived in the area of substantive

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1. E.g., United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

2. Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964).

3. Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1082-93 (1968).

4. E.g., NAACP v. Button, 371 U.S. 415 (1963).

5. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

due process and "penumbral" rights. It also is used in state court due process determinations.<sup>1</sup>

Beginning in the late nineteenth century and continuing actively through the 1930's, the Supreme Court held legislation unconstitutional because it infringed upon some notion of "liberty" or "property" protected by the due process clause.

An early case applying the principles of the doctrine to state legislation was Lawton v. Steele, 152 U.S. 133 (1894), which upheld a state statute forbidding net fishing.

To justify the State in thus interposing its authority on behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not . . . impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Id. at 137.

During the New Deal, the Court shed the doctrine, see, e.g., Carolene Products Co. v. United States, 323 U.S. 18 (1944); Olsen v. Nebraska ex rel. Western Reference & Bond Association Inc., 313 U.S. 236 (1941); United States v. Carolene Products Co., 304 U.S. 144 (1938), but it was not until Ferguson v. Skrupa, 372 U.S. 726 (1963), that the Court formally abandoned it by overruling Adams v. Tanner, 244 U.S. 590 (1917).

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1. See, e.g., Schroeder v. Binks, 415 Ill. 192, 113 N.E. 2d 169 (1953); Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281 (1965); Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957); State v. Ballance, 229 N.C. 764, 51 S.E. 2d 731 (1949); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Livesay v. Tennessee Bd. of Exam. in Watchmaking, 204 Tenn. 500, 322 S.W.2d 209 (1959).

The doctrine's obituary was premature. Only two years after Ferguson, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court revitalized it in a "penumbral" area.

The New Deal Court left room for the operation of the doctrine (and for the rise of the compelling governmental interest test) when individual liberties were at issue. In United States v. Carolene Products Co., supra, Chief Justice Stone distinguished infringements upon the Bill of Rights:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

Id. at 152 n.4.

In Griswold, Mr. Justice Douglas, writing for the plurality, established a right of privacy by merging guarantees drawn from the Bill of Rights. Avoiding Lochner v. New York, 198 U.S. 45 (1905), and its interpretation of "liberty" (which included liberty of contracts and less drastic alternative standards when attacking economic legislation), Douglas wrote:

[F]oregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.

. . . .  
We have had many controversies over these penumbral rights of "privacy and repose." . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

381 U.S. 484-85 (citations omitted). Thus, theory became law and the constitutionally guaranteed right of privacy was established. To breathe life into it, Douglas wrote of overbreadth:



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[A] law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Id. at 485.

The abortion decisions, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), made it clear that the right of privacy derives substantive (and substantial) protection from the fourteenth amendment's "liberty" clause. Today, even corporate first amendment rights are encompassed within the fourteenth amendment's protection of liberty. See First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

Thus, while the less drastic alternative test is no longer used when "purely" economic rights are examined (but see Vlandis v. Kline, 412 U.S. 441, 460-61 (1973) (Burger, J., dissenting)), when the Court passes on "fundamental" rights such as those associated with private property and free association, the doctrine plays a significant role.

The doctrine of the less drastic alternative has been continually viable in procedural due process cases since Lawton v. Steele, supra.

Mr. Justice Frankfurter, concurring in Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951), provided a classic statement of the concerns which must be considered when determining how much "process" is due:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the

considerations that must enter into the judicial judgment.

Id. at 163 (emphasis added).

Recent procedural due process cases have employed the less drastic alternative test to strike down conclusive presumptions. See, e.g., Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Bell v. Burson, 402 U.S. 535 (1971).

The owners and lessees of optional use commercial property and the smokers (and non-smokers who do not object) who desire to purchase their goods and services have fundamental interests which may not be infringed by the Council without a compelling interest. -Any attempt to statutorily restrict or prohibit entirely smoking on optional use commercial property infringes property owners' and smokers' associational rights...

"Property interests" transcend economics. Historically, the interests of property owners have been deemed basic in a free society. See Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); J. Adams, A Defense of the United States of America, in F. Coker, Democracy, Liberty and Property, 121-32 (1942); 1 W. Blackstone, Commentaries \*138-40; J. Cribbet, Principles of the Law of Property 6-7 (1962); J. Locke, Of Civil Government 82-85 (1924). The focus must be on the rights of the owner of real property and those who desire to assemble there. The presumption against courts and legislatures which attempt to classify citizens who seek to assemble is heavy.

If the challenging party is an owner of private property who has provided notice to the world of who is or is not welcome to assemble within his commercial establishment, then the words of Mr. Justice Stewart, in a plurality opinion, apply.

To him, "the dichotomy between personal liberties and property rights is a false one." Lynch v. Household Finance Corp., supra, 405 U.S. at 552.

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

405 U.S. at 552.

As Mr. Justice Stewart reiterated in a second plurality opinion: "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. at 81.<sup>1</sup>

When the Council moved into this area of fundamental associational freedom it should have employed the less drastic alternative. Notice was such an alternative for it provides the knowledge necessary for the customer (not the government) to make an independent informed choice of whether or not to enter.

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1. Fuentes, although of recent vintage, has had an up-and-down history. Justice Stewart, who authored the plurality opinion in Fuentes, reported its demise in his dissent in Mitchell v. W.T. Grant Co., 416 U.S. 600, 629-36 (1974) (Stewart, J., dissenting); only to see it resurrected in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975) (Stewart, J., concurring). The Court in Di-Chem cited Fuentes for the following proposition: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 419 U.S. at 608.

AN EXAMPLE OF THE LESS DRASTIC ALTERNATIVE  
IS THE NOTICE PROVIDED TO INDIVIDUALS WHO  
ENTER THE WARWICK DINING ROOM.

Persons who choose to enter a restaurant after receiving clear written notice of the management's policies waive their rights, if any, which are based upon an expectation of no smoke. Even constitutional rights may be waived if the waiver is made knowingly, intelligently, and voluntarily. Johnson v. Zerbst, 304 U.S. 458 (1938).

Mrs. Alford has established the requirement of voluntariness. There are at least ten other restaurants of a similar size in a ten-block radius of her Dining Room. Prospective customers who desire a smoke-free environment may eat elsewhere. Knowledge is provided by the large signs, and the intelligence of the decision to enter the Dining Room must be measured only by whether or not the individual realizes the consequence of his act.

In Virginia, as elsewhere, a restaurant patron is an "invitee."<sup>1</sup> Under Virginia law, the owner or occupier of real property does have a duty to warn an invitee of certain conditions on the premises which are unknown to the invitee.

[T]he owner must give notice or warning of an unsafe condition which is known to him and unknown to the invitee, [but] such notice is not required where the dangerous condition is open and obvious, and is patent to a reasonable person exercising ordinary care for his own safety.<sup>2</sup>

The Restatement (Second) of Torts § 43A, Comment d (1965),

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1. See, e.g., Thalhimer Bros., Inc. v. Buckner, 194 Va. 1101, 76 S.E.2d 215 (1953) (tearoom); Holmes v. Ginter Restaurant Co., 54 F.2d 876 (1st Cir. 1932) (restaurant).

2. Knight v. Moore, 179 Va. 139, 145-46, 18 S.E.2d 266, 269 (1942) (emphasis added; citation omitted); see Note, Invitee Status in Virginia, 44 Va. L. Rev. 804, 804 n.1 (1958).

frames the rule in language that parallels the rule of constitutional waiver. An invitee is entitled to know

the actual conditions, and the activities carried on, and the dangers involved in either, [so that] he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering and remaining on the land. [Emphasis added.]

A restaurateur does have a duty to give warning,<sup>1</sup> but is not an insurer of an invitee's safety.<sup>2</sup>

A warning gives an invitee the freedom to decide for himself whether to enter another's premises, and whether to associate with those inside.<sup>3</sup> It gives the invitee the freedom to choose, but it also obliges him to care for himself. "The timorous may stay at home," said Cardozo.<sup>4</sup> The person who objects to tobacco smoke may wish to stay at home, or he can pass by Mrs. Alford's restaurant in favor of another establishment.

The thrust of Warren Court criminal case decisions was notice--once the criminal defendant has notice of his rights, his confession is valid. See, e.g., Miranda v. Arizona, 384

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1. Holmes v. Ginter Restaurant Co., 54 F.2d 876, 878 (1st Cir. 1932).

2. Thalhimer Bros., Inc. v. Buckner, 194 Va. 1101, 76 S.E.2d 215 (1953).

3. An insufficient warning has the same legal consequences as no warning at all. See Kalopodes v. Federal Reserve Bank, 367 F.2d 47 (4th Cir. 1966). But the signs prominently displayed in Mrs. Alford's dining room, which read "SMOKING PERMITTED ALL WHO SMOKE OR DO NOT OBJECT TO THE PRESENCE OF TOBACCO SMOKE ARE WELCOME!", provide clear and sufficient warning. See also Sadler v. Lynch, 192 Va. 344, 64 S.E.2d 664 (1951) (sufficiency of warning to servant).

4. Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, \_\_\_, 166 N.E. 173, 174 (1929).

U.S. 436 (1966). The Burger Court also emphasizes notice. See, e.g., Faretta v. California, 422 U.S. 806 (1975), which held that the sixth amendment right to counsel included the right of self-representation. "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." 422 U.S. 833-34. The Court, of course, recognized that, in almost every trial, the defendant would be better represented by an attorney, but rejected the argument that an attorney should be forced upon an unwilling defendant. "Personal liberties are not rooted in the law of averages. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" 422 U.S. at 834, quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). Blackmun, dissenting, characterized the majority opinion as bestowing a "constitutional right on one to make a fool of himself." 422 U.S. at 852. This is precisely the virtue extolled by Justice Black dissenting in Bell v. Maryland, 378 U.S. 226, 332 (1964). "'The preservation of a free and pluralistic society would seem to require substantial freedom for private choice. . . . Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind.'"

It was this right of free choice which motivated Justice Black to write, "[T]he property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will." 378 U.S. at 331 (emphasis added).

If balancing is required, accomodation between the property

owner's rights and the rights of non-smokers "must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); accord, Hudgens v. NLRB, 424 U.S. 507 (1976). As labor cases illustrate, "a trespass is far more likely to be unprotected than protected." Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 46 U.S.L.W. 4446, 4453 (U.S. May 15, 1978). The scale may tip in favor of union organizational activity when carried on by an employee already rightly on the employer's property. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). When carried on by non-employees who have no general right to be present, the employer's property interest may overcome the interests of the organizers. See Hudgens v. NLRB, supra at 521-22 & n.10. This difference is "one of substance." NLRB v. Babcock & Wilcox, supra at 113.

As NLRB v. Babcock & Wilcox indicated, the property owner's interest may have to give way when there are no other alternatives.<sup>1</sup> See also Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). However, most commercial property is optional use; alternatives exist because there are available like enterprises. Except in very limited circumstances, there are other grocery stores, other taxicabs, other employers, even other doctors. If these other places and services exist, the balance should tip in favor of the property owner's associational right to determine to whom he will offer his services.

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1. In NLRB v. Babcock & Wilcox, supra, alternative channels existed for communication between employees and union organizers and, therefore, the intrusion on the property owner's rights ordered by the National Labor Relations Board was unwarranted.

Recognition of the right of free choice requires that the individual take steps to avoid situations which may produce unwanted unpleasantness. As Erzoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975), recognized,

. . . the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Or nose.



SELECTIVE ENFORCEMENT OF THE ORDINANCE  
HAS DEPRIVED DEFENDANT OF THE EQUAL  
PROTECTION OF THE LAW.

An otherwise valid ordinance may not single out for first enforcement a particular restaurant. As Frank M. Johnson, Jr. wrote in a dissenting opinion later upheld by the Supreme Court, "it is not tolerable for this Court to allow these officials to make their first foray in the enforcement direction against a small, new, and almost surely impecunious group . . . ." Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala. 1968), rev'd, 394 U.S. 358 (1969).

By selectively enforcing the anti-public smoking ordinance against Mrs. Alford, the City has violated the constitutional guarantee of equal protection provided by the fourteenth amendment. Equal protection under the law means that in the administration of criminal justice, no person shall be subject to any greater or different punishment than another in similar circumstances. Pace v. Alabama, 106 U.S. 583 (1883); Cavalier Vending Corp. v. State Board of Pharmacy, 195 Va. 626, 79 S.E. 2d 636, appeal dismissed, 347 U.S. 995 (1954). The limits of prosecutorial discretion are set out in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the hallmark of equal protection cases:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

118 U.S. at 373-74.

The violation of equal protection in this case is clear. The ordinance enacted by the City requires that signs of a specific size with specific words in letters of specific height

be posted in various public places including restaurants, hospitals, elevators, and doctors' offices. In fact, numerous types of commercial establishments were excluded, including all restaurants which seat fewer than fifty (50) persons. Many locations which are included within the coverage of the ordinance have not posted the required signs. Others have posted signs which do not include the language required by the ordinance. Even the signs in the restaurant and elevators located in City Hall do not comply. Thus, the ordinance has been enforced with the "unequal hand" condemned in Yick Wo.

CONCLUSION

Based on the foregoing, the Court should find the ordinance unconstitutional and dismiss the charge against Mrs. Alford. This result not only is constitutionally appropriate; it also furthers individual rights which are the foundation of our society.

Respectfully submitted,

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Attorneys for Defendant

September 22, 1978

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

-----+  
CITY OF NEWPORT NEWS, +  
Plaintiff +

vs. +

PHYLLIS L. ALFORD, +  
Defendant +  
-----+

PROCEEDINGS

Before Honorable J. Warren Stephens, Judge

September 22, 1978

Newport News, Virginia

Appearances:

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CHARLES MORGAN, JR., ESQ.,  
EDWARD ASHWORTH, ESQ.,  
Counsel for the Defendant

## I N D E X

## WITNESSES:

Direct Cross Redirect RecrossFor the City:

Thomas C. Kanoy, Jr.

11

19

35

For the Defendant:

James H. Livengood, Jr.

53

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134

143

Ray T. Allmond

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Phyllis L. Alford

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## EXHIBITS:

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 (Copy of Ordinance)

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\* \* \*

(The court reporter was sworn.)

THE COURT: Ms. Alford, the warrant charges, ma'am, that -- it's an unusual looking warrant. Warrant says: "You are hereby summoned to appear in the Municipal Court of the City of Newport News, 2501 Huntington Avenue, Newport News, Virginia at 9:00 o'clock A. M. on June 29, 1978, to answer for the following violation of law, to wit: Failure to comply with no smoking ordinance. Ordinance No. 2446-78, Chapter 33, Article IV, Section 33-23 and Section 33-24 of the City Code of Newport News, Virginia," and the summons is signed by you, agreeing to appear.

You have a right to a trial by jury if you desire a trial by jury, ma'am.

THE DEFENDANT: No, sir.

THE COURT: The verdict of the jury would have to be unanimous in all respects. You have a right to be tried by the Court without a jury. Do you desire to be tried by the jury or Court without a



1 jury?

2 THE DEFENDANT: Court without a  
3 jury.

4 THE COURT: You consulted with  
5 your lawyer about that?

6 THE DEFENDANT: I did it myself.

7 THE COURT: Well, you're supposed  
8 to consult with your lawyer prior to making  
9 a determination as to whether or not you  
10 would try the case with a jury or without  
11 a jury.

12 THE DEFENDANT: Yes.

13 THE COURT: So you have consulted  
14 with him in that respect?

15 THE DEFENDANT: Yes.

16 THE COURT: All right, ma'am.  
17 And your plea to this charge against you,  
18 ma'am, is what?

19 MR. YEAPANIS: Not guilty.

20 THE COURT: All right.

21 MR. YEAPANIS: I have two motions  
22 I would like to file at this time. I have  
23 given Mr. Mercer copies. One is "Plea of Not  
24 Guilty by Reason of the Unconstitutionality  
25

1 and Selective Enforcement of the Ordinance."

2 The other is "Motion to Dismiss the Charge."

3 THE COURT: The City has copies of  
4 these?

5 MR. MERCER: I have just received  
6 them, Your Honor. I haven't had a chance to  
7 look at them.

8 THE COURT: All right, sir. I'll  
9 give you an opportunity to look at them.

10 MR. MERCER: Thank you, Your  
11 Honor. Did you want to take a five minute  
12 recess?

13 THE COURT: Yes, sir. I think  
14 that would be in order. I will mark the  
15 "Plea of Not Guilty by Reason of the  
16 Unconstitutionality and Selective Enforce-  
17 ment of the Ordinance" filed this day, and  
18 I will mark the "Motion to Dismiss the Charge"  
19 filed, also, this day. We will recess until  
20 about twenty-five minutes to 12:00.

21  
22 (Brief recess)

23  
24 MR. MERCER: Your Honor, the City  
25

1 has had a chance to review the Defendant's  
2 "Plea of Not Guilty" and the "Motion to  
3 Dismiss." Of course, I would point out to  
4 Your Honor in preparing for a case like  
5 this, there are many possible arguments  
6 which the City could be confronted with and,  
7 Your Honor, I have not had time to prepare  
8 individually or specifically for each charge  
9 of the Defendant with respect to constitu-  
10 tionality. Additionally, Your Honor, I  
11 would submit the maxim of law in Virginia is  
12 that if the Court can dispose of a case  
13 without reaching the constitutional issue,  
14 it should do so, and, therefore, the Court  
15 should, of course, first hear this case on a  
16 factual basis before even giving considera-  
17 tion to the constitutional issues which the  
18 Defendant has raised.

19 THE COURT: All right, sir.

20 Yes, sir. Mr. Morgan?

21 MR. MORGAN: Yes, sir, Judge, we  
22 agree and we don't want to have anything  
23 done unawares. The law rises out of the  
24 facts, as we all know, and I don't think  
25

1 there will be a lot of disputes of the  
2 facts. We intend to present two witnesses  
3 and, as I understand it, the prosecution  
4 has two witnesses and if they could be  
5 sworn, we could proceed with the case.

6 THE COURT: All right, sir.

7 MR. MORGAN: We only would have  
8 one other motion to file. I think it will  
9 be at the conclusion of the prosecution's  
10 evidence. We also have a brief on the  
11 subject, not too lengthy, but about 25 pages.  
12 We have not served that, either. We can  
13 serve it now or later. We understand full  
14 well the prosecuting attorney or the Court  
15 both might like to have time to read and  
16 file an answer to the brief. If so, we  
17 would like to have opportunity to respond  
18 to his brief.

19 THE COURT: Yes, sir. If it's as  
20 extensive as you say, I don't see how I  
21 could be expected to rule today. The City  
22 will have an opportunity to respond and I'll  
23 give you an opportunity to rebut whatever  
24 they respond. I do have a policy of trying  
25

1 to expedite things. One of the joys of  
2 being on the Bench after twenty-five years  
3 as a lawyer is that I have no pending cases;  
4 therefore, I do like to move things along.  
5 So in setting the time for briefs, I usually  
6 set them right closely.

7 MR. MORGAN: Fine.

8 THE COURT: Under the circum-  
9 stances, why don't we just proceed with the  
10 evidence and withhold making any determina-  
11 tion on a motion to dismiss at this time.

12 MR. MORGAN: If the prosecutor  
13 desires to make an opening statement, we  
14 might make a brief oral statement to you  
15 so at least you would know what the  
16 constitutional questions are.

17 THE COURT: Would you like to be --

18 MR. MERCER: I have no opening  
19 statement. We're only going to present the  
20 evidence for the Court's consideration, and  
21 upon completion of that, if the Court feels  
22 it should hear the constitutional issues,  
23 I will address the issues individually as  
24 they are raised, Your Honor.  
25

1 THE COURT: Mr. Morgan, would  
2 you like to make an opening statement?

3 MR. MORGAN: Yes, sir. We expect  
4 the evidence to show that the City passed  
5 an ordinance requiring the posting of a sign  
6 in private enterprise or optional use  
7 property. By optional use property, we mean  
8 that there are other facilities available  
9 such as many restaurants, other places that  
10 consumers may go to purchase the goods or  
11 services they're offering. We contend that  
12 the ordinance is unconstitutional under the  
13 facts of this case in that the City must  
14 adopt the least drastic alternative with  
15 respect to the desire that it has to regulate  
16 smoking. In this instance, Mrs. Alford will  
17 show, from the evidence, that she is the  
18 lessee of the Warwick Hotel Dining Room;  
19 that she, therefore, has a property right  
20 in that dining room. We will contend and  
21 have briefed the question of whether or  
22 not there is a right to commercial association  
23 under the first amendment of the Constitution.  
24 It is the right of property under the due  
25

1 process clause, the right of commercial  
2 association under the first amendment,  
3 and freedom of association generally for  
4 the shopkeeper or store owner that we will  
5 contend raises constitutional questions  
6 which bring into play the strictest  
7 scrutiny of a city ordinance. And under that  
8 set of circumstances, the City should have  
9 adopted the least drastic alternative, which  
10 is simply providing notice to whoever comes  
11 to the place as to what the policy is,  
12 whether no smoking, separate section, or  
13 smoking allowed. That way, the need for the  
14 City to act was completely obviated and the  
15 democracy of the marketplace takes over and  
16 in the marketplace, of course, people go  
17 with their dimes and dollars and cash  
18 registers are --

19 THE COURT: Thank you, sir. Do  
20 you have anything you would like to say in  
21 response?

22 MR. MERCER: Yes, sir. I would  
23 point out under United States law and  
24 Virginia law, there is a presumption of  
25

1 constitutional validity of this statute.

2 Additionally, courts have held the defendant  
3 has to make a strong and clear showing by  
4 the evidence the statute is invalid.

5 Therefore, the defendant does have that  
6 burden when attacking the statute.

7 Additionally, with respect to the defendant's  
8 argument concerning freedom of association,  
9 I merely raise the question of the defendant's  
10 standing to make that argument, Your Honor.

11 I seriously doubt whether the defendant's  
12 freedom of association has in any way been  
13 impaired by this statute. Additionally, with  
14 respect to where a consumer can go in relation  
15 to choosing restaurants, etc., with respect  
16 to the legislature's or the city council's  
17 ability to pass an ordinance such as this,  
18 I believe that the law in the United States  
19 and in Virginia clearly says that legislatures  
20 have broad discretion in their police power,  
21 Your Honor, which is what is at issue here,  
22 and that as such, the ordinance as passed is  
23 constitutional.

24  
25 THE COURT: Do we stipulate the



1 existence of the ordinance, gentlemen, for  
2 whatever purpose, so we don't have to go  
3 through proving the ordinance is in  
4 existence?

5 MR. MORGAN: We will so stipulate.

6 THE COURT: We start off by  
7 stipulating the ordinance is in existence.  
8 Mr. Mercer, are you prepared to go forward?

9 MR. MERCER: Yes, Your Honor. The  
10 City would call city inspector Thomas Kanoy  
11 to the stand.

12  
13 (All witnesses were sworn.)

14  
15 EVIDENCE ADDUCED IN BEHALF OF THE CITY  
16

17 THOMAS C. KANOY, JR., after being  
18 first duly sworn, testified in behalf of the City, as  
19 follows:  
20

21 DIRECT EXAMINATION

22 BY MR. MERCER:

23 Q Please state your name and occupa-  
24 tion.

25 A My name is Thomas Kanoy, Jr.; I'm

1 a sanitarian, City of Newport News.

2 Q Could you please explain what a  
3 sanitarian is?

4 A Sanitarian is one that deals in  
5 health matters, etc., inspections, food inspections,  
6 environmental conditions, swimming pools.

7 Q Then it would be fair to assume  
8 you are an inspector for the City Health Department?

9 A Yes, sir, primarily.

10 Q How long have you been so occupied?

11 A Four and a half years.

12 Q On May 21, 1978, did you have  
13 occasion to issue Mrs. Phyllis L. Alford a summons for  
14 violation of City Ordinance No. 2446 --

15 A On what date, sir? I'm sorry.

16 Q June 21. Pardon me.

17 A June 21, yes, sir, I did.

18 Q For violation of City Ordinance  
19 No. 2446-78, Chapter 33, Article IV, Section 33-23  
20 and Section 33-24 of the City Code, that is, for  
21 violation of the City's no smoking ordinance?

22 A Correct.

23 Q Please tell the Court the circum-  
24 stances which gave rise to the issuance of that  
25

1 summons.

2 A All right, sir. I first contacted  
3 Mrs. Alford concerning the no smoking ordinance on  
4 May 25 of this year and I explained to her that she  
5 was supposed to designate an area as a no smoking  
6 area and have it so posted with a sign, and at the  
7 time, she told me that she wasn't going to do it,  
8 because she just didn't feel like it was right.  
9 The next time I was in her establishment on official  
10 business was on June 20th of this year, when I did a  
11 regular inspection, and at that time, I noticed that  
12 she still wasn't complying with the no smoking  
13 ordinance. I discussed this with her and she again  
14 stated that she did not intend to comply, and so I  
15 noted this on her inspection sheet. I also told her  
16 that if she didn't comply, she left me, in all  
17 probability, no choice but to issue her a summons  
18 and she said she understood this. Well, that afternoon  
19 when I got back to the office, I discussed this with  
20 one of my supervisors, Mr. Henry Bowen, and I told him  
21 what had happened. The next morning, next day, which  
22 was the 21st of June, that morning he went by and  
23 saw Mrs. Alford and discussed the matter with her,  
24 also, and she also told him that she did --  
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THE COURT: Don't tell me what she told him. That's the rankest kind of hearsay.

THE WITNESS: Okay. I beg your pardon. I'm sorry.

THE COURT: That's all right.

A (Continuing) Anyway, later that day Mr. Bowen and Mr. Ray Allmond, other supervisor, we got together and discussed the matter and they advised me to issue her a summons. So on the 21st of June, I did issue her a summons for violating the no smoking ordinance.

BY MR. MERCER:

Q I take it you are reasonably familiar with the layout of Mrs. Alford's restaurant?

A Yes, sir.

Q Are you familiar with the capacity, seating capacity of the restaurant?

A Yes, sir. As of my last inspection, in her main dining room, her seating capacity was 70. She also has a banquet room which she now uses just for banquets, etc. Originally, she was also using this for everyday trade.

1 Q Is this banquet room attached to  
2 the main area of the restaurant?

3 A Yes. There's a door.

4 Q Did you have occasion to advise  
5 Mrs. Alford as to what you would regard as being in  
6 compliance with the requirements of the ordinance;  
7 in other words, did you tell her what would satisfy  
8 the requirements of the ordinance?

9 A Yes, sir.

10 Q Would you please tell the Court  
11 what you advised her of?

12 A I advised her that she was  
13 required to designate an area in her dining area as a  
14 no smoking area and that this had to be posted, stating  
15 that it was a no smoking area.

16 Q How large an area did you tell her?

17 A I did not specify any as far as  
18 size, as far as square feet or what-have-you.

19 Q You are an inspector for the City  
20 of Newport News. Do you have a specific area in  
21 which you inspect?

22 A Yes, I do.

23 Q Do you have occasion to inspect  
24 other restaurants which are similarly organized in  
25

1 terms of layout as Mrs. Alford's, for instance, a  
2 one room layout?

3 A You mean that of the banquet room,  
4 you mean?

5 Q That simply have one room.

6 A Yes. Sure.

7 Q And have you had occasion to  
8 advise them of what is required for compliance with  
9 the statute?

10 A Yes, sir.

11 Q And how have you so advised them?

12 A The same way I advised Mrs. Alford.

13 Q Please explain to the Court how  
14 that is.

15 A I advised them they were supposed  
16 to designate an area as a no smoking area, this being  
17 in their dining area, and this area had to be posted  
18 with a no smoking sign.

19 Q Is this, then, the policy of the  
20 Health Department with respect to restaurants,  
21 essentially, which have one room, in other words,  
22 which have no more than one room?

23 A That's right.

24 Q Is this the City's policy?  
25

1                   A           This was as was explained to me  
2                   and as I was instructed to do by my supervisors.  
3                   This is what I was instructed to tell them.

4                   Q           Have you had occasion to visit  
5                   Mrs. Alford's restaurant since the issuance of the  
6                   summons?

7                   A           Yes, sir. I have.

8                   Q           Would you please explain to the  
9                   Court when you have been to her restaurant, what was  
10                  the basis of your visits?

11                  A           All right. I have been there on  
12                  official business on the 31st of July of this year  
13                  and on September 14th of this year and they were on  
14                  regular routine inspections.

15                  Q           And during those routine  
16                  inspections, did you have occasion to observe whether  
17                  Mrs. Alford, this defendant, was in compliance with  
18                  the no smoking ordinance?

19                  A           I did and she was still not in  
20                  compliance and I so noted this on her inspection  
21                  sheets and she understood this. We discussed it and  
22                  she signed the inspection sheets.

23                  Q           Did you advise her on those  
24                  occasions she was not in compliance with the smoking  
25

ordinance?

A I did.

Q What was her response?

A Well, basically the same as before. She just felt like it wasn't right and she was going to stand up for her rights and she wasn't going to do it.

MR. MERCER: I have no further questions at this time, Your Honor.

THE COURT: All right. Mr. Morgan, you may cross examine.

MR. MORGAN: Mr. Yeapanis will.

CROSS EXAMINATION

BY MR. YEAPANIS:

Q Mr. Kanoy, how long have you been working for the City?

A I don't work for the City. I work for the State of Virginia.

Q How long have you been working with them?

A Four and a half years.

Q Did you have any previous jobs



1 with the City of Newport News prior to that?

2 A No, sir.

3 Q With the State?

4 A No, sir..

5 Q Who is your supervisor?

6 A I have two supervisors, sir, in  
7 my section, and the overall supervisor is Mr. Ray  
8 Allmond and the one directly under him is Mr. Henry  
9 Bowen.

10 Q Where were you employed prior  
11 to going to work in your job?

12  
13 MR. MERCER: I object to the  
14 question. Where the witness was employed  
15 four and a half years ago has no bearing.

16 THE COURT: I'm going to let him  
17 answer the question.

18  
19 A Montgomery Ward.

20 BY MR. YEAPANIS:

21 Q Why did you leave there?

22 A Why did I leave there?

23 Q Yes.

24 A Because of money.  
25

1 Q Did you know Mrs. Alford prior  
2 to being involved in this particular charge or this  
3 summons?

4 A Oh, yes.

5 Q How long have you known her?

6 A Approximately thirty years.

7 Q Do you know her son?

8 A Certainly do.

9 Q How long have you known him?

10 A Well, approximately same length of  
11 time, thirty years.

12 Q How many citations have you issued  
13 as violations of this ordinance?

14 A Of this ordinance, one.

15  
16 MR. MERCER: I object to the  
17 question.

18 THE COURT: Sustained.

19 MR. YEAPANIS: Well, Your Honor,  
20 reason for that question is, of course, one  
21 of our arguments is selective application  
22 of this ordinance and I think it's pertinent  
23 that we know if he's cited someone else,  
24 because that's going to be the basis of our  
25

1 argument of selective enforcing. Whether  
2 he's done it or not goes to one of the  
3 issues we're raising.

4 THE COURT: Mr. Mercer?

5 MR. MERCER: Your Honor,  
6 selective enforcing of this ordinance has  
7 nothing to do with the Constitution. I  
8 submit whether there have been 150 arrests  
9 or 10 arrests has absolutely no materiality  
10 in this issue.

11 MR. MORGAN: Your Honor, if an  
12 ordinance is adopted and is not enforced  
13 or is not enforced consistently and the  
14 entire community, with the knowledge of the  
15 prosecution of by those in charge of law  
16 enforcement, does not abide by the ordinance  
17 and a person is singled out under the ordinance  
18 and prosecuted, then a substantial question of  
19 equal protection of the law as guaranteed  
20 by the fourteenth amendment has been raised.

21 THE COURT: I'll let you ask the  
22 question.

23 MR. MERCER: Your Honor, the  
24 defendant has the burden of showing selective  
25

enforcement.

MR. YEAPANIS: I'm trying to show it right now by cross examination of your witness.

THE COURT: I'm going to let him answer the question.

A Repeat your question.

BY MR. YEAPANIS:

Q Yes. My question, have you cited anyone else for violation of this ordinance?

A Of this ordinance?

Q Yes, sir.

A No, sir. I have not.

Q Where is your jurisdiction, your enforcement jurisdiction of this ordinance, no smoking ordinance?

A I'm sorry. I didn't hear you, sir.

Q I'm sorry. What area does your jurisdiction for the enforcement of the smoking ordinance involve?

A You're talking about geographical location?

Q Yes, sir.

1                   A           Area around here, around City Hall,  
2                   from the water over to the railroad tracks, down to  
3                   the James River Bridge.

4                   Q           All the way to the bridge?

5                   A           Uh-huh.

6           BY THE COURT:

7                   Q           It's not clear to me what your  
8                   area is. You're a state employee?

9                   A           Yes, sir.

10                  Q           And your area is what part of  
11                  Newport News?

12                  A           Well, from here at City Hall area,  
13                  from the waterfront over to the railroad tracks, down  
14                  to the James River Bridge.

15                  Q           Down to the James River Bridge?

16                  A           Yes, sir.

17                  Q           And where is Mrs. Alford's  
18                  restaurant?

19                  A           On West Avenue. Okay. Hotel  
20                  Warwick Dining Room.

21                  Q           And that's on 25th Street in  
22                  Newport News?

23                  A           Is that 25th? Yes, sir. That's  
24                  25th Street, yes, sir, corner of West Avenue.  
25

Q All right, sir. So you go up to the James River Bridge and someone else has the area beyond that?

A Yes, sir. That's correct.

THE COURT: All right.

BY MR. YEAPANIS:

Q Have you visited any other restaurants in your area since you issued this citation to Mrs. Alford?

A Since I issued the citation to Mrs. Alford? Oh, sure, I've been to other restaurants.

Q Have you checked for violation of the no smoking ordinance?

A Yes, I have.

Q Have you found any?

A No, sir. I have not.

Q Have you visited every restaurant in your jurisdiction since you cited her?

A I have visited every restaurant in my district concerning the no smoking ordinance and, on going back to June 21, yes, I visited every restaurant in my district since that time, yes, sir.

Q And you said the purpose, also, that you visited was for purposes of checking to see if

1 they were in conformity with the ordinance?

2 A I didn't say that, no, sir.

3 Q Well, what was the reason for  
4 your visit?

5 A Well, I check restaurants on a  
6 regular basis, on a regular food inspection basis.  
7 Okay?

8 Q Yes, sir.

9 A When I went to Mrs. Alford's  
10 restaurant on the 25th of May, that specifically was  
11 to inform her about the no smoking ordinance. I also  
12 visited some other restaurants at the same time  
13 concerning that. Now, I have been in there, in these  
14 restaurants since that time for the no smoking  
15 ordinance and also for regular food inspections.

16 Q You do them both at the same time?

17 A Sir?

18 Q Do you make an inspection for both?

19 A I did not when the law first  
20 came out, no. I went to some restaurants specifically  
21 for that purpose because it was new and we wanted to  
22 get the word out.

23 Q But in any of your inspections  
24 since the issuance of the summons to Mrs. Alford, have  
25

1                   you made a joint inspection of those restaurants you  
2                   have been to?

3                   A           Have I made a joint inspection?

4                   Q           Right.

5                   A           When I inspect a restaurant,  
6                   naturally, I inspect to see if they're conforming  
7                   with the no smoking ordinance.

8                   Q           So then I understand you visited  
9                   every restaurant at least once since you have cited  
10                  her?

11                  A           Yes.

12                  Q           So is it fair to say that you have  
13                  also inspected every one of these restaurants  
14                  for whether or not they're in violation of the no  
15                  smoking ordinance?

16                  A           Yes, sir.

17                  Q           I've got three pictures here that  
18                  I want to show you. This picture, do you recognize  
19                  that?

20                  A           Yes. That's Mrs. Alford's  
21                  restaurant.

22                  Q           Would you say that fairly  
23                  represents the front entrance of her restaurant?  
24

25                  A           Yes.



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Q And that picture?

A That's her restaurant.

Q What's that?

A It's the kitchen.

Q And what about that one?

A Dining room.

Q That is an accurate representation  
of her dining room?

A Yes, sir.

Q Not the entire dining room?

A One corner thereof.

MR. YEAPANIS: Judge, I would like  
to offer these in evidence as representing  
Mrs. Alford's restaurant, the front, kitchen,  
and section of her dining room as identified  
by Mr. Kanoy.

THE COURT: Any objection?

MR. MERCER: No objection.

THE COURT: All right. They  
will be admitted as Defendant's Exhibits  
1, 2 and 3.

(Three photographs were received  
in evidence as Defendant's Exhibits 1, 2 and 3)

MR. YEAPANIS: I have some others.

MR. MERCER: I have no objection to the entry of these into evidence. Of course, I would submit they're only certain sections.

MR. YEAPANIS: I would like to show them to Mr. Kanoy.

BY MR. YEAPANIS:

Q Can you identify that picture?

A Yes. That's her dining room.

Q What about this picture?

A Yes.

Q That has a sign there, does it not?

A It certainly does.

Q And where is that sign located that's shown in that picture?

A That's located back right near the waitress station, I think at the rear, in front of it.

MR. YEAPANIS: Can I go back just a minute, Your Honor? For purposes of identification at this point, in referring to these, could we mark this first one --

I think we have in three as evidence.

Could we mark this in evidence as Exhibit  
No. 4?

THE COURT: Yes, sir.

(The photograph was marked, for  
purposes of identification, as Defendant's  
Exhibit No. 4.)

BY MR. YEAPANIS:

Q This is Exhibit No. 4 and this  
represents the restaurant; is that correct?

A Yes. There's your sign right  
there you were referring to there. I call that a  
waitress station.

MR. YEAPANIS: I offer this into  
evidence.

THE COURT: Any objection?

MR. MERCER: No, Your Honor.

THE COURT: Admitted as Defendant's  
Exhibit No. 4.

(The photograph was received in  
evidence as Defendant's Exhibit No. 4.)

BY MR. YEAPANIS:

Q What does that represent?

A What does that represent?

Q Yes. Will you describe the picture?

A It's a table, chair, two coffee pots, and sign saying, "All Who Smoke Or Do Not Object To The Presence Of Tobacco Smoke Are Welcome!"

Q Where is that?

A At the waitress station.

Q Where is that in relationship to the front door?

A To the back side, to the left.

MR. YEAPANIS: We offer this as Exhibit No. --

THE COURT: Five. Any objection, Mr. Mercer?

MR. MERCER: No, Your Honor.

(The photograph was received in evidence as Defendant's Exhibit No. 5.)

MR. YEAPANIS: For purposes of

1 identification, Exhibit No. 6?

2 THE COURT: All right, sir.

3  
4 (A photograph was marked, for  
5 purposes of identification, as Defendant's  
6 Exhibit No. 6.)  
7

8 BY MR. YEAPANIS:

9 Q This picture, what does that  
10 represent?

11 A Front door, the entrance to the  
12 restaurant, again with the same sign attached.

13 Q Have you seen that sign?

14 A I just recently saw it. Evidently,  
15 this was just put up in the last day or two.

16 Q That is her front door?

17 A It was as of yesterday morning.  
18

19 MR. YEAPANIS: I would like to  
20 offer this into evidence -- No. 6, I believe.  
21

22 (The photograph was received in  
23 evidence as Defendant's Exhibit No. 6.)  
24  
25

BY MR. YEAPANIS:

Q We were talking about your jurisdiction earlier. Is the Saratoga Restaurant in your jurisdiction?

A Yes, sir. It is.

Q What about the Sports Palace Restaurant?

A Yes, sir. It is.

Q Chris' Steak House?

A Yes, sir. It is.

Q Top's Restaurant?

A Yes, sir.

Q Billy D's Restaurant?

A Yes, sir.

Q Paramount Restaurant?

A Yes, sir.

Q Downtown Steak House?

A Yes, sir.

Q Sanitary Restaurant?

A Yes, sir.

Q Central Restaurant?

A Which one?

Q 2906 Washington Avenue?

A Yes, sir.

1 Q Al's Delicatessen on the second  
2 floor of the First and Merchants Building?

3 A Yes, sir.

4 Q Lee's Chinese Restaurant?

5 A Yes, sir.

6 Q Rosa's Grill?

7 A I'm sorry?

8 Q Rosa's Grill on 25th and  
9 Jefferson Avenue?

10 A No, sir. That's not mine.

11 Q The New York Restaurant?

12 A No, sir.

13 Q Okay. The City Hall?

14 A Yes, sir.

15 Q Snack bar?

16 A Yes, sir.

17 Q Whittaker Hospital?

18 A No, sir.

19 Q Sonny's Inn?

20 A Did you say Sonny's Inn?

21 Q Right.

22 A No, sir.

23 Q Marie's Grill? Are you familiar  
24 with that?  
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A No, sir.

Q 637 - 25th Street?

A No, sir.

Q Okay. Doctors' offices at 316 Main Street, are they in your jurisdiction?

A No, sir.

Q Are there any doctors' offices in your jurisdiction, that you know of?

A Yes, sir.

MR. YEAPANIS: That's all at this time, Your Honor. We might desire to call him back at a later time.

THE COURT: All right. Mr. Mercer, you may examine on redirect.

MR. MERCER: I just have one question.

REDIRECT EXAMINATION

BY MR. MERCER:

Q Mr. Kanoy, when you inspect a restaurant, how many different items are you ordinarily looking for in terms of inspection criteria?



1                   A           On our inspection sheet, off the  
2                   top of my head, either 113 or 118. I forget. That's  
3                   sections.

4                   Q           Additionally, Mr. Kanoy, as an  
5                   inspector, do you inspect anything other than  
6                   restaurants and doctors' offices?

7                   A           Well, now, I inspect restaurants  
8                   on a regular basis. I do not inspect doctors' offices,  
9                   no, sir, I do not. I inspect restaurants, grocery  
10                  stores, processing plants, barber shops, beauty  
11                  parlors, filling stations, swimming pools, general  
12                  environmental conditions, etc.

13                  Q           Do you inspect elevators, sir?

14                  A           No, sir. I do not.

15                  Q           Do you inspect theaters?

16                  A           I inspect the food, the  
17                  concessionaries and the restaurants.

18                  Q           And we can presume, also, that  
19                  you don't inspect art galleries, libraries, museums,  
20                  that type facilities?

21                  A           That's correct. Only time I  
22                  would do an inspection such as that would be on a  
23                  complaint basis.

24                  Q           With respect to the defendant's  
25

1 exhibits of the interior of the restaurant, I notice  
2 that there was a smoking permitted sign in several  
3 of the pictures. Can you tell the Court when you  
4 first observed that sign to be posted in the  
5 restaurant, sir?

6 A The sign on the door, I first  
7 observed it yesterday. The one at the rear, I don't  
8 know. Off the top of my head, I'd say a couple months  
9 or something like that. I honestly don't remember  
10 right off.

11  
12 MR. MERCER: I have no further  
13 questions at this time, Your Honor.  
14

15 BY THE COURT:

16 Q What you said is that the smoking  
17 permitted sign shown in Exhibit 6, you observed the  
18 first time yesterday?

19 A Yes, sir.

20 Q And the smoking sign shown on  
21 Exhibit 5, do you know when you first observed that?

22 A Not right off the top of my head.

23 Q Did you observe that before or  
24 after you cited Mrs. Alford?  
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A After I cited her.

Q All right, sir. The smoking sign which is shown on this one, which isn't readable, but I assume that's a smoking sign, when did you first observe that?

A That's the same sign as the one you just showed me.

Q So that was sometime after you cited her?

A Yes, sir.

Q You stated that you, in your examination of the other restaurants as defined in the ordinance, within your territory, found no smoking ordinance violations since June 21, 1978; is that correct? Is that what you said?

A That's what I said. Yes, sir.

MR. YEAPANIS: I have a couple more questions.

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. YEAPANIS:

Q Mr. Kanoy, who does inspect the

elevators to see if they're complying with --

A You mean as far as the smoking?

THE COURT: We're not talking about elevators in this case. I don't think it's a proper question.

MR. YEAPANIS: Judge, the ordinance is being challenged, the entire ordinance.

THE COURT: You can't challenge the ordinance except to the extent it applies to your client, Mr. Yeapanis. There is no evidence thus far there is any elevator in her store or restaurant.

MR. YEAPANIS: Your Honor, we think this goes to the equal protection question and also back to the selective enforcement.

THE COURT: I'm not going to let you ask him that.

MR. YEAPANIS: We would like to make an offer of proof, Your Honor.

THE COURT: All right. You may do so.

BY MR. YEAPANIS:

Q Who does the elevators for the  
no smoking compliance?

A As far as the Health Department  
is concerned?

Q Right.

A No one, to my knowledge.

Q Who inspects the hospitals and  
doctors' offices in your department?

A No one, to my knowledge, unless  
it would be on a complaint basis. If it was on a  
complaint basis, we would be.

Q Do you know of anyone in the  
City that inspects any of these, either the elevators  
or hospitals or doctors' offices?

A No, sir.

MR. YEAPANIS: Judge, I believe  
we stipulated the ordinance, but we have not  
offered into evidence the copy of the  
ordinance, which I think ought to be in the  
record.

THE COURT: Yes, sir. Do you  
have a copy teste?

1 MR. YEAPANIS: I have a copy  
2 teste.

3 THE COURT: Maybe we better take  
4 yours. I have a Xerox copy, what purports  
5 to be one. Would you like to examine the  
6 one I have, Mr. Yeapanis? I'll just mark  
7 that filed.

8 MR. YEAPANIS: All right. We  
9 had one that was a copy teste. I can't  
10 locate it.

11 THE COURT: If you feel more  
12 comfortable with yours --

13 MR. YEAPANIS: No. There's no  
14 problem. I would like to offer this  
15 into evidence.

16 THE COURT: All right. I'm going  
17 to mark that City's Exhibit No. 1.

18  
19 (The Xerox copy of ordinance  
20 was received in evidence as City's Exhibit  
21 No. 1.)  
22

23  
24 MR. YEAPANIS: I would like to  
25 show this to Mr. Kanoy in line with the last

line of questioning, Your Honor.

THE COURT: Yes, sir.

BY MR. YEAPANIS:

Q Have you read this ordinance at all?

A Yes, sir. I have.

Q This Ordinance No. 2446-78?

A Yes, sir. I have.

Q Which is Chapter 33 of the City Code?

A Yes, sir.

Q Now, to your knowledge, does this deal with elevators and hospitals, opticians' and doctors' offices?

A Yes, sir. It does.

Q Last section on this, wonder if you'd read that for us?

A You mean right here, 33-26?

Q Yes.

A "The provisions of this division shall be enforced by the director of the health department, or any other person duly designated by council."

1 Q To your knowledge, no one in  
2 that department is enforcing the section pertaining  
3 to elevators, hospitals, doctors' offices, opticians  
4 or other health facilities?

5 A No one is enforcing it, you say,  
6 or inspecting it?

7 Q Enforcing it and inspecting it.

8 A To the best of my knowledge, no  
9 one is inspecting it.

10 Q Is anyone enforcing it?

11  
12 THE COURT: I don't think he can  
13 answer that. Is that the conclusion of  
14 your offer of proof?

15 MR. YEAPANIS: Yes, sir, and we  
16 take exception to your ruling.

17 THE COURT: All right. The  
18 exception is noted.

19 MR. MERCER: Your Honor, with  
20 respect to the defendant's offer of proof,  
21 I had a number of questions. Additionally,  
22 I would note, for the record, Mr. Kanoy,  
23 of course, is not a supervisor in the  
24 department and may well not be aware of what  
25



the inspection requirement features are.

THE COURT: You'd better ask him  
instead of testifying to it.

MR. MERCER: Thank you, Your  
Honor.

REDIRECT EXAMINATION

BY MR. MERCER:

Q Mr. Kanoy, do you know of any  
requirement in your department that you regularly  
inspect elevators or health care facilities?

A No, sir. Now, as far as a health  
care facility, if you want to define that, for  
example, a nursing home, yes, we do inspect the food  
facilities in a nursing home.

Q Do you know of any requirement  
in your department that you regularly inspect food  
facilities and restaurants?

A I'm sorry. Repeat the question,  
please.

Q Do you know of any requirement in  
your department that you regularly inspect food  
facilities and restaurants?

A Food facilities and restaurants?

1 Q Yes. Speaking in general, in  
2 other words.

3 A Yes.

4 Q What is that requirement?

5 A Requirement is food establishments,  
6 state requirements, should be inspected at least eight  
7 times per year, four times every six months.

8 Q Do you know of an analogous  
9 state requirement that your department inspect  
10 elevators or health care facilities?

11 A Not that I'm aware of.

12  
13 MR. MERCER: I have no further  
14 questions, Your Honor.

15 THE COURT: All right, sir.  
16 Anything on recross on the offer of proof?

17 MR. YEAPANIS: No, sir, Your  
18 Honor.

19 THE COURT: All right, sir.  
20 Anything further from this gentleman?

21 MR. MERCER: I have nothing  
22 further, Your Honor.

23 THE COURT: All right. Any reason  
24 this gentleman may not be excused?  
25

1 MR. MERCER: Your Honor, I  
2 would ask he be excused, subject to recall.

3 THE COURT: Do you want him  
4 separated in the interim?

5 MR. YEAPANIS: Yes, sir.

6  
7 (Witness stood aside and separated.)  
8

9  
10  
11 MR. MERCER: Your Honor, I presume  
12 that the ordinance in issue here has been  
13 formally presented into evidence. If not,  
14 the City would offer it into evidence.

15 THE COURT: Sir?

16 MR. MERCER: I would presume the  
17 ordinance at issue in this case has been  
18 formally presented in evidence?

19 THE COURT: Yes, sir. I marked  
20 the ordinance, which is Ordinance No. 2446-78,  
21 has been marked Exhibit No. 1 and admitted  
22 as Exhibit No. 1 for the City.

23 MR. MERCER: I would ask that the  
24 title of the ordinance be added in for the  
25

1 record, "Smoke And Air Pollution Control."

2 THE COURT: The title is in this  
3 one.

4 MR. MORGAN: I beg your pardon,  
5 Your Honor, I think the ordinance speaks  
6 for itself.

7 THE COURT: Title is in this,  
8 "Chapter 33. Smoke And Air Pollution Control."  
9 It's about a fourth of the way down on this  
10 page I have here.

11 MR. MERCER: Excuse me, Your Honor.

12 THE COURT: What is the pleasure  
13 of the City? Has the City rested?

14 MR. MERCER: City has not rested.  
15 We have nothing further at this time.

16 THE COURT: I think the position  
17 of the City has got to be either it has  
18 another witness to offer or it rests.

19 MR. MERCER: Well, subject to Mr.  
20 Kanoy's additional testimony, we would rest.  
21 Mr. Kanoy may be called to clarify --

22 THE COURT: Well, I'll give you  
23 an opportunity to offer rebuttal evidence,  
24 Mr. Mercer, but the City rests or you put  
25

1 on another witness.

2 MR. MERCER: City rests.

3 MR. YEAPANIS: We have a written  
4 motion to strike, Your Honor, which, of  
5 course, in Virginia, we usually give orally,  
6 but we give it to the Court in a formal,  
7 written motion. Mr. Morgan will argue  
8 that at this point.

9 THE COURT: All right, sir. I'll  
10 file your motion, the written motion to  
11 strike and I will now hear you, Mr. Morgan.

12 MR. MORGAN: Yes, sir. And the  
13 motion to strike, of course, is in writing.  
14 We would like to move orally, if permissible,  
15 to the Court for additional ground in the  
16 motion to strike, that ground being, on the  
17 basis of the record, that there is an  
18 absolutely devoid record upon which to base  
19 a criminal conviction, thereby applicating  
20 the due process clause of the fifth amendment  
21 of the Constitution, regarding the evidence  
22 in the record.

23 On the motion, our argument, Your  
24 Honor, is simply that the government has  
25

1 an obligation to regulate, to adopt  
2 statutes, of a criminal nature or otherwise,  
3 which are the least restrictive upon  
4 protective freedoms. At least twice the  
5 City has represented that an ordinance is  
6 presumptively constitutional and, of course,  
7 an ordinance is presumptively constitutional  
8 unless it enters into an area of preferred  
9 freedoms such as the first amendment area.  
10 In this instance, even though the position  
11 has been taken in court that Mrs. Alford  
12 lacks standing to raise the right of  
13 freedom of association, Mrs. Alford is  
14 one of 220,000,000 citizens who have standing  
15 to raise that question.

16 MR. MERCER: Your Honor, I have  
17 to object.

18 THE COURT: Let Mr. Morgan  
19 complete his presentation, then I'll give  
20 you an opportunity to respond.

21 MR. MORGAN: And with respect  
22 to that, we contend, of course, she does  
23 have standing, a right to raise the  
24 constitutional issues she's raised, and that  
25

1 the prosecution witness has testified,  
2 with respect to unequal enforcement of the  
3 law, that he has visited a number of estab-  
4 lishments that he has a duty to inspect,  
5 that he discharges that duty, that he  
6 charged Mrs. Alford and he knows of no one  
7 else charged but her. I'm sure the record  
8 will be amplified on the protection  
9 question as we proceed with our case.

10 That's all we have to argue.  
11 We do have a brief to present, which we  
12 will present at your convenience. If the  
13 prosecution would like to see it -- it  
14 applies to all motions which will be filed  
15 in the case with the exception of the lack of  
16 evidence-due process question I raised  
17 orally. With the Court's permission, we  
18 will serve him a copy now.

19 THE COURT: Mr. Mercer, would you  
20 like to respond to Mr. Morgan's argument?

21 MR. MERCER: Yes, sir. I'm not  
22 certain how a motion to strike can be  
23 founded upon constitutional arguments,  
24 Your Honor. The constitutional question  
25

1 is not before the Court directly at this  
2 point. This is strictly a factual issue,  
3 way I understand it, Your Honor, and the  
4 facts before the Court indicate Mrs. Alford  
5 was given notice of the smoking ordinance  
6 requirement on the 25th of May, she was  
7 again given notice on the 20th of June,  
8 and in both instances, she indicated she had  
9 no intention of complying with the ordinance.  
10 I believe the evidence, in fact, shows she  
11 had not posted a sign as required by the  
12 ordinance and has not since that time posted  
13 a sign as required by the ordinance.  
14 Additionally, she has failed to designate  
15 a no smoking area and, in fact, has posted  
16 a sign permitting smoking. I believe the  
17 case has been made completely for conviction  
18 of the defendant, and certainly no evidence  
19 upon which the Court could rule at this  
20 time has been offered concerning the  
21 constitutional issues. I believe there is  
22 no, at this point, at least, motion which  
23 can be substantiated on a constitutional  
24 basis, Your Honor. Thank you.  
25



1 THE COURT: All right. Mr.  
2 Morgan, do you have anything further to say?

3 MR. MORGAN: No, sir, Your Honor.

4 THE COURT: All right, sir. The  
5 motion of the defendant to strike the  
6 City's evidence is overruled.

7 MR. MORGAN: May we note an  
8 exception?

9 THE COURT: Yes, sir. Your  
10 exception is noted.

11  
12 EVIDENCE ADDUCED IN BEHALF OF THE DEFENDANT  
13

14 MR. ASHWORTH: Defendant calls  
15 Mr. James Livengood. At this time, I have  
16 some more photographs to be marked for  
17 identification.

18 THE COURT: Yes, sir. Your last  
19 exhibit, I believe is Exhibit 6, so that  
20 would be Exhibit 7.  
21  
22  
23  
24  
25

1                                    JAMES H. LIVENGOOD, JR., after  
2                    being first duly sworn, testified in behalf of the  
3                    Defendant, as follows:

4                                    DIRECT EXAMINATION

5                    BY MR. ASHWORTH:

6                                    Q                    Would you, Mr. Livengood, state  
7                    your name and address?

8                                    A                    James H. Livengood, Jr.; 702  
9                    Mayland Drive, Newport News.

10                                  Q                    Do you have an occupation?

11                                  A                    Yes, sir. Assistant manager,  
12                    photograph department, Daily Press newspaper. I  
13                    also have a commercial license for the State of  
14                    Virginia and Newport News as a commercial photographer,  
15                    which I do on the side.

16                                  Q                    How long have you been a photographer,  
17                    Mr. Livengood?

18                                  A                    I have been in the State of  
19                    Virginia twenty years and five years before that in  
20                    North Carolina.

21                                  Q                    And you said you were licensed  
22                    by the State as a commercial photographer?

23                                  A                    Yes, sir. I buy licenses every  
24                    year.  
25

1 Q How long have you been with the  
2 newspaper?

3 A Twenty years as of next April.

4 Q And how long were you a photo-  
5 grapher? Prior to your job as being an assistant  
6 supervisor, what was your position at the newspaper?

7 A Approximately fourteen, fifteen  
8 years, I was a staff photographer.

9 Q Can you estimate for the Court  
10 approximately how many photographs you have taken  
11 in twenty years?

12 A No. Would be many thousands.

13  
14 MR. MERCER: Your Honor, we'll  
15 stipulate the witness knows how to take  
16 a picture.

17 MR. ASHWORTH: Thank you very much.

18  
19 BY MR. ASHWORTH:

20 Q Have you also taught photography?

21 A Yes. From time to time, I have  
22 worked with the Boys' Club; we've gone into the schools  
23 over the years and we've worked with classes in  
24 photography and journalism over the time I have been  
25

1 employed with the Daily Press.

2  
3 MR. MERCER: Your Honor, I don't  
4 have any remarks with respect to the  
5 pictures until I have some idea when they  
6 were taken, where they were taken, how  
7 they were taken.

8 THE COURT: All right. You may  
9 note your objection as they're presented.  
10

11 BY MR. ASHWORTH:

12 Q I now show you what has been  
13 marked for identification as Defendant's Exhibits  
14 7 through 15, ask you to examine them, please.

15 A These are all photographs that  
16 I made.

17 Q When did you take these photo-  
18 graphs, Mr. Livengood?

19 A Okay. These photographs were  
20 taken September 15, 1978.

21 Q And why did you take those photo-  
22 graphs?

23 A I took these photographs under  
24 the direction and for Mr. Pete Yeapanis.  
25

1 Q Were you or will you be paid for  
2 these photographs?

3 A Yes, by Mr. Yeapanis.

4 Q On Defendant's Exhibit 7, could  
5 you tell me where that photograph was taken?

6 A Yes, sir. That photograph was  
7 taken at the Saratoga Restaurant.

8 Q And the address of the Saratoga  
9 Restaurant?

10 A 3407 Washington Avenue.

11 Q Is there a no smoking sign in  
12 that restaurant?

13 A Yes. That's what the sign is.

14 Q Can you tell how tall the letters  
15 are in the no smoking portion of that sign?

16 A Yes. You can scale it if you  
17 want to, because we put a pen in there so we could  
18 have some means of determining the size of the letters  
19 on the sign.

20 Q Is this that pen?

21 A Yes, sir.

22 Q Would you please measure the  
23 pocket clip on that pen?

24 A The pocket clip on the pen is an  
25

1           inch and a quarter.

2                   Q           Now, can you tell me whether or  
3           not the "No Smoking" letters on that sign, Defendant's  
4           Exhibit 7, are one and a half inches or more?

5                   A           Okay. The clip on the photograph  
6           comes out to less than one inch, so the letters are  
7           not -- they all fit in between the parallel dividers  
8           we have here.

9                   Q           What does that indicate?

10                  A           Means the letters are too small,  
11           about -- smaller than one inch and a quarter.

12           BY THE COURT:

13                  Q           That was one inch and a quarter?

14                  A           They are smaller than that.

15  
16                               MR. ASHWORTH: We offer Defendant's  
17           Exhibit 7.

18  
19           BY MR. MERCER:

20                   Q           How large did you say the letters  
21           were?

22                  A           Smaller than an inch and a quarter.

23                  Q           Can you tell how big they are? Are  
24           they over an inch?

1 A They're over an inch, yes, sir.

2 Q Okay.

3 A On this particular photograph, I  
4 believe they put their lines up, they've got an inch  
5 and a half there. It says "1½."

6  
7 MR. MERCER: I notice they spelled  
8 less "l-e-s-t."

9 MR. ASHWORTH: And they also  
10 spell smoking "s-m-o-k-e-i-n-g."

11  
12 BY MR. ASHWORTH:

13 Q Defendant's Exhibit 8, can you  
14 tell me what that is?

15 A That's Sports Palace, 3420  
16 Washington Avenue.

17 Q I notice you're using some notes  
18 with which to identify --

19  
20 MR. MERCER: Pardon me. What  
21 was the last picture?

22 THE COURT: Sports Palace,  
23 Washington Avenue.

24 MR. MERCER: What was the number?

25

1 THE WITNESS: Exhibit 8.

2  
3 BY MR. ASHWORTH:

4 Q You're using some notes?

5 A Yes. These are notes we made  
6 the afternoon we went around and made these photo-  
7 graphs. I went around with Mr. Ashworth, Mr. Yeapanis,  
8 and as we went into each restaurant or establishment  
9 Mr. Yeapanis wrote on a pad the address, the place  
10 we went in and the number picture that we made and  
11 this is a correct list of that. We went over that.  
12 This is a copy of that list.

13 Q Have you examined that list prior  
14 to today?

15 A Yes.

16 Q And it does accurately list the  
17 photographs you took?

18 A Yes, it does.

19 Q Can you also vouch for the  
20 accuracy of the photographs?

21 A Yes.

22 Q Do they distort the lettering in  
23 any way?

24 A No.  
25



1 Q Do they fairly and accurately  
2 portray the signs which you photographed?

3 A Yes, sir.

4 Q Can you measure on Defendant's  
5 Exhibit 8 and tell me whether or not the "No Smoking"  
6 letters in that sign are less than one and a half  
7 inches?

8 A Yes, they are less than one and  
9 a half and this one gets smaller as it goes down.

10 Q Thank you.

11  
12 MR. ASHWORTH: We would offer  
13 Defendant's Exhibit 8 into evidence.

14 THE COURT: Did you offer  
15 Defendant's Exhibit 7?

16 MR. ASHWORTH: Yes, sir. I did.

17 THE COURT: All right. It will  
18 be admitted as Defendant's Exhibit 7.

19  
20 (The photograph was received in  
21 evidence as Defendant's Exhibit No. 7.)

22  
23 BY MR. MERCER:

24 Q Again, how big are these letters?  
25

1 Can you give us an estimation?

2 A They're over an inch.

3 Q They're over an inch?

4 A The top ones are. Right.

5 Q How big is this sign?

6 A Without getting in and working  
7 with the pen --

8 Q Why don't you work with the pen  
9 the way you worked it with the letters?

10  
11 MR. MORGAN: Your Honor, if I  
12 may object, is this on voir dire or if he  
13 may do it on cross examination --

14 MR. MERCER: Your Honor, I don't  
15 know whether I can object to the picture  
16 or not unless I have some idea what it's  
17 about.

18 THE COURT: I think it would  
19 expedite things to ask whatever questions  
20 would be pertinent with respect to what is  
21 admissible in evidence as we go along  
22 rather than come back with nine exhibits.  
23  
24  
25

1 BY MR. MERCER:

2 Q Can you estimate the size of the  
3 sign, sir?

4 A I can estimate the size of the  
5 sign by calling it to my memory.

6 Q How tall would you say the sign is?

7 A Sign is about eight inches.

8 Q The physical body of the sign is --

9 A About eight inches high and it's  
10 approximately ten inches wide.

11 Q Each one of these letters are  
12 approximately an inch, sir?

13 A The capital letter is probably  
14 a little over an inch, yes, sir.

15 Q And the rest of these would be  
16 roughly an inch?

17 A Yes, sir.

18 Q So with respect to the City  
19 requirement that the sign be five and a half inches  
20 tall --

21 A I don't know what the City  
22 requirement is.

23  
24 THE COURT: Letting him testify as  
25 to the City requirement?

1 MR. MERCER: I'm not asking him  
2 to testify to the City requirement.

3 MR. MORGAN: Can I make comment?  
4 He's cross examining Mr. Livengood; in other  
5 words, he's asking him about the size of  
6 the letters, which, he's not explained what  
7 this has to do with putting it in evidence.  
8 He's really cross examining about what  
9 he's testified to. I don't think it's the  
10 appropriate time to do it.

11 MR. MERCER: When this is  
12 submitted in evidence, it can be used for  
13 many purposes.

14 THE COURT: You can move to strike  
15 it after I have admitted it. I'll hear  
16 you on that.

17 MR. MERCER: Thank you, Your Honor.

18  
19  
20 BY MR. MERCER:

21 Q But the sign is eight inches high?

22 A Yes.

23  
24 MR. ASHWORTH: Defendant moves that  
25 Defendant's Exhibit 8 be admitted.

1 THE COURT: So admitted, subject  
2 to the right of cross examination.  
3

4 (The photograph was received in  
5 evidence as Defendant's Exhibit No. 8.)  
6

7 BY MR. ASHWORTH:

8 Q Mr. Livengood, would you examine  
9 Exhibit 9?  
10

11 MR. MERCER: Your Honor, I might  
12 say we'll stand next to him to see how he  
13 measures these.  
14

15 A Exhibit No. 9, taken of Lee's  
16 Chinese Restaurant, 3315 Washington Avenue.  
17

18 BY MR. ASHWORTH:

19 Q What does it say?

20 A "No Smoking Area."

21 Q Did they have a no smoking sign,  
22 that you saw inside?

23 A No, sir.

24 Q Where was this sign located?

25 A As we went in his restaurant, I

1 think we noted they were only open certain hours of  
2 the day, but open for walk-in business other times  
3 of the day. This was a little vestibule right  
4 inside the door.

5  
6 MR. ASHWORTH: We offer Defendant's  
7 Exhibit 9.

8 THE COURT: It will be admitted,  
9 subject to the City's right of cross  
10 examination.

11  
12 (The photograph was received in  
13 evidence as Defendant's Exhibit No. 9.)  
14

15 BY MR. ASHWORTH:

16 Q I ask you to move to Defendant's  
17 Exhibit 10.

18 A That is Rosa's Grill at 25th and  
19 Jefferson Avenue.

20 Q Can you tell me whether or not  
21 those letters in the no smoking sign are an inch and  
22 a half or less than an inch and a half?

23 A They're less than an inch and a  
24 half.  
25

1 BY MR. MERCER:

2 Q Are they more than an inch, sir?

3 A They're approximately an inch.

4 BY MR. ASHWORTH:

5 Q Would you read what's on that sign?

6 A "No Smoking."

7 Q Is there any other lettering on  
8 that sign?

9 A No, there's no other lettering  
10 at all.

11 Q No other words?

12 A No other words.

13 Q Thank you.

14  
15 MR. ASHWORTH: We would offer  
16 Defendant's Exhibit 10.

17 THE COURT: All right, sir.

18  
19 (The photograph was received in  
20 evidence as Defendant's Exhibit No. 10.)  
21

22 BY MR. ASHWORTH:

23 Q Would you please examine  
24 Defendant's Exhibit 11?  
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A You want to know where that is?

Q Yes.

A New York Restaurant. It's  
Jefferson Avenue. I don't have the exact address  
for that.

Q What does that sign say?

A This sign says "No Smoking."

Q Are there any other words on that  
sign?

A No, sir.

Q Can you tell whether those  
letters are an inch and a half or less?

A Those letters are less than an  
inch.

Q Thank you.

MR. ASHWORTH: We would offer  
Defendant's Exhibit No. 11 into evidence.

(The photograph was received in  
evidence as Defendant's Exhibit No. 11.)

BY THE COURT:

Q Exhibit 10, what restaurant is



1 Exhibit 10? Number on the back is 15.

2 A That is Rosa's Grill.

3 Q Jefferson Avenue?

4 A Yes, sir. 25th and Jefferson.

5 BY MR. ASHWORTH:

6 Q Would you please examine  
7 Defendant's Exhibit 12 and tell me where that  
8 photograph was taken?

9 A Yes, sir. This is the City Hall  
10 elevator No. 3.

11  
12 MR. MERCER: Your Honor, I would  
13 object to any testimony in relation to these  
14 signs. They're not related to restaurants,  
15 food places. It has no relevance whatever  
16 to the issue in this case.

17 THE COURT: Let me see the exhibit.

18 MR. ASHWORTH: Yes, sir. And  
19 Exhibit 13 is a separate elevator in City  
20 Hall.

21 THE COURT: Nos. 12 and 13 are  
22 both City Hall elevators?

23 MR. ASHWORTH: Yes, sir.

24 THE COURT: 2400 Washington Avenue?  
25

1 MR. ASHWORTH: I would ask Mr.  
2 Mercer, is that true?

3 THE WITNESS: Yes, sir.

4 THE COURT: I'll permit him to  
5 identify those and lay a proper foundation  
6 as exhibits, subject to your cross examination.  
7

8 BY MR. ASHWORTH:

9 Q You were looking at Defendant's  
10 Exhibit 12. Which elevator is that in the City Hall?

11 A That's No. 3.

12 Q Can you tell whether or not those  
13 letters are less than an inch and a half?

14 A Yes, they are.

15 Q And what does that sign say?

16 A That sign says "No Smoking."

17 Q Does it say anything else?

18 A Nothing else.

19 Q Thank you very much.  
20

21  
22 MR. ASHWORTH: We would offer  
23 Defendant's Exhibit 12.

24  
25 (The photograph was received in

1 evidence as Defendant's Exhibit 12.)

2  
3 BY MR. ASHWORTH:

4 Q Would you please identify  
5 Defendant's Exhibit 13?

6 A Okay. That's elevator No. 4,  
7 City Hall.

8 Q And are those letters an inch  
9 and a half or less?

10 A Yes, they are.

11 Q Less than an inch and a half?

12 A Yes, sir. The sign is identical  
13 to the other one.

14 Q And does the sign appear to be --  
15 can you estimate how wide or how tall that sign is?

16 A That sign is -- the plate that the  
17 sign is on is approximately two inches.

18 Q And there are no other words on  
19 that sign?

20 A No other words on it.

21  
22 MR. ASHWORTH: We would offer  
23 Defendant's Exhibit 13 in evidence.

24 THE COURT: This will be admitted  
25

1 subject to the cross examination of the City.

2  
3 (The photograph was received in  
4 evidence as Defendant's Exhibit No. 13.)

5  
6 BY MR. ASHWORTH:

7 Q Would you examine Defendant's  
8 Exhibit 14 and tell me where the picture or photograph  
9 was taken?

10 A Yes. That photograph was taken in  
11 the lobby of Whittaker Hospital, 1003 - 28th Street.

12  
13 MR. MERCER: I renew my objection,  
14 Your Honor, on the same basis as the  
15 previous ones of the City's elevator signs.

16 THE COURT: All right.

17 MR. ASHWORTH: We'll have an  
18 opportunity to respond later?

19 THE COURT: Yes, sir.

20 MR. ASHWORTH: Thank you.

21  
22 BY MR. ASHWORTH:

23 Q Can you tell me whether or not  
24 the letters in that sign are less than an inch and  
25

1 a half?

2 A Yes, they're less than an inch  
3 and a half, also.

4 Q Thank you. And what does that  
5 sign say?

6 A It says "Visitors - No Smoking."

7 Q Is there some kind of symbol in  
8 there?

9 A Symbol of no smoking, a circle  
10 with a cigarette and line across it.

11 Q Are there any other words in that  
12 sign?

13 A No, sir.

14 Q Thank you.

15  
16 MR. ASHWORTH: We would offer it  
17 as Defendant's Exhibit 14.

18  
19 (The photograph was received in  
20 evidence as Defendant's Exhibit No. 14.)

21  
22 BY MR. ASHWORTH:

23 Q Would you please examine Defendant's  
24 Exhibit 15 and tell me, if you can, where that photograph  
25

1 was taken?

2 A This photograph was taken at  
3 Sonmy's Inn. That's Parrish Avenue and 25th Street.

4 Q Now, can you tell me whether or  
5 not the letters in that sign are less than an inch  
6 and a half?

7 A They're a little less than an  
8 inch and a half.

9 Q Thank you.

10  
11 MR. ASHWORTH: We would offer  
12 Defendant's Exhibit 15.

13 THE COURT: All right. Will be  
14 so admitted.

15  
16 (The photograph was received in  
17 evidence as Defendant's Exhibit No. 15.)  
18

19 BY MR. ASHWORTH:

20 Q Would you please examine  
21 Defendant's Exhibit 16 and identify the place where  
22 that photograph was taken, if you can?

23 A Taken in the snack bar, basement  
24 of City Hall.  
25

1 Q Is there a no smoking sign in  
2 that photograph?

3 A Yes, there is.

4 Q Would you please read it?

5 A It says "No Smoking."

6 Q There are no other words on there?

7 A No, sir.

8 Q Are there any persons depicted  
9 in that photograph?

10 A Yes, sir. One man walking out  
11 the door, two seated at the table.

12 Q What, if anything, are the two  
13 people seated at the table doing?

14 A One of the gentlemen seated at  
15 the table had a pipe in his mouth.

16 Q Can you remember whether or not  
17 that gentleman was smoking?

18 A No, sir. I do not.

19  
20 MR. MERCER: Before you finish  
21 with that photograph, you described the  
22 size of the letters on all other photo-  
23 graphs. How about describing the size of  
24 that one?  
25

1 BY MR. ASHWORTH:

2 Q Can you determine from that  
3 photograph the size of the letters?

4 A The only way that we can deter-  
5 mine the size of the letters on this, because we  
6 did not put the pencil in this one --

7 Q There's no pen in that with which  
8 you could determine it?

9 A We would have to get the size of  
10 a cinder block, because the sign is between cinder  
11 blocks.

12 Q Were there other no smoking signs?

13 A Yes, sir.

14 Q Where were they?

15 A Right on down on the right of  
16 this.

17 Q On the same wall?

18 A On the wall.

19 Q What wall was that, right or  
20 left, as you face the rear?

21 A As I faced the rear, would be  
22 the right wall.

23 Q And were there smoking permitted  
24 signs?  
25



1 A Yes, sir.

2 Q What side were they on?

3 A On the opposite side of the room.

4 Q Were there any smoking signs  
5 on the same side as no smoking signs?

6 A I didn't see any, no, sir.

7  
8 MR. ASHWORTH: We would offer  
9 Defendant's Exhibit 16 into evidence.

10 THE COURT: All right.

11  
12 (The photograph was received in  
13 evidence as Defendant's Exhibit No. 16.)  
14

15 BY MR. ASHWORTH:

16 Q Mr. Livengood, I show you what  
17 has been marked for identification as Defendant's  
18 Exhibits 17 and 18, that is, after I show them to  
19 Mr. Mercer.

20 BY THE COURT:

21 Q Your Exhibit No. 16, where is  
22 that?

23 A My No. 16, that's New York  
24 Restaurant, Jefferson Avenue.  
25

1 Q Where is it on Jefferson Avenue?

2 A It's within one or two blocks of  
3 25th Street, but I do not have a correct address on  
4 that.

5 MR. MERCER: I thought that was  
6 Exhibit 11, New York Restaurant.

7 THE COURT: It is.

8 THE WITNESS: It's my 16.

9 THE COURT: It's his 16.

10  
11 BY MR. ASHWORTH:

12 Q I'll show you these photographs  
13 marked 17 through 28 and ask you whether you can  
14 identify those photographs?

15 A Yes. I made these photographs.

16 Q When did you take them?

17 A These photographs were taken  
18 September 19, 1978.

19 Q And for what purpose did you  
20 take the photographs?

21 A They were taken at the direction  
22 of Mr. Yeapanis.

23 Q Were you or will you be paid for  
24 these photographs?  
25

1                   A           Yes, I will be paid.

2                   Q           By whom?

3                   A           Mr. Yeapanis.

4                   Q           And do they fairly and accurately  
5 depict the signs or the events which they portray?

6                   A           Yes, sir.

7                   Q           Is there any distortion of the  
8 letters of the signs?

9                   A           None that I can tell. .

10                  Q           And can you vouch for the accuracy  
11 of these photographs as of the time they were made?

12                  A           Yes, sir.

13                  Q           I'll ask you to look at, examine  
14 Defendant's Exhibit 17 and ask whether you can  
15 determine where the photograph was taken and, again,  
16 I notice you're referring to a list?

17                  A           Yes. This is a list we made the  
18 same way we did the other list, except this was just  
19 Mr. Yeapanis and myself.

20                  Q           Have you examined it before today?

21                  A           Yes, sir.

22                  Q           Does it accurately list the  
23 photographs you took?

24                  A           Yes, sir.

25

1 Q And the places you visited?

2 A Yes.

3 Q Does it also list places you  
4 visited but did not take photographs?

5 A Yes.

6 Q And would you please examine  
7 Defendant's Exhibit 17 and tell me where that  
8 photograph was taken?

9 A This is the James River Clinic  
10 at 316 Main Street.

11 Q Do the letters in that -- is  
12 there a no smoking sign?

13 A There's a no smoking sign, yes, sir.

14 Q Is there anything on that sign  
15 other than the words "No Smoking"?

16 A No, sir. Just "No Smoking."

17 Q And are the letters in that sign  
18 less than an inch and a half?

19 A Yes, sir. They are.

20

21 MR. ASHWORTH: We offer Defendant's  
22 Exhibit 17 into evidence.

23 MR. MERCER: Your Honor, to save  
24 time, any of these not related to restaurants  
25

1 or food establishments, I would object to.

2 THE COURT: All right. That will  
3 be admitted, subject to cross examination.

4  
5 (The photograph was received in  
6 evidence as Defendant's Exhibit No. 17.)

7  
8 BY MR. ASHWORTH:

9 Q Would you please examine  
10 Defendant's Exhibit 18 and tell me, if you can, where  
11 that photograph was taken?

12 A Yes, sir. Made in Dr. Woodson's  
13 and Dr. Lawson's office at 316 Main Street.

14 Q Please read what's on that sign.

15 A "No Smoking. Thank You."

16 Q There are no other words on that  
17 sign?

18 A No.

19 Q Can you determine in that sign  
20 whether or not the letters in the words "No Smoking"  
21 are less than an inch and a half?

22 A They're less than an inch and  
23 a half, although the clip isn't showing on the pen.

24 Q How do you know that?  
25

1                   A           Pen is only five inches and  
2 almost covers the whole sign.

3                   Q           Thank you.  
4

5                               MR. ASHWORTH: We would offer  
6 Defendant's Exhibit 18.  
7

8                               THE COURT: All right. Admitted,  
9 subject to cross examination.  
10

11                               (The photograph was received in  
12 evidence as Defendant's Exhibit No. 18.)  
13

14 BY MR. ASHWORTH:

15                   Q           Would you please examine Exhibit 19  
16 and tell me, if you can, where that was taken?

17                   A           Yes, sir. This was made in the  
18 same doctors' office, Dr. Woodson, Dr. Lawson, at  
19 316 Main Street. This sign was on the wall.

20                   Q           Where was the other sign?

21                   A           In the waiting room, backed up  
22 to the window. This is over a couch here.

23                   Q           What does that sign say?

24                   A           Says "No Smoking, Please."

25                   Q           Are there any other words in that

1 sign?

2 A No. Just "No Smoking, Please."

3 Q Is the clip of the pen visible?

4 A Yes, it is.

5 Q All right. Whose pen is that  
6 shown in that photograph and the one previous to that?

7 A That's Mr. Yeapanis' pen.

8 Q Does this look like Mr. Yeapanis'  
9 pen?

10 A Yes, it does.

11 Q Would you measure the clip on  
12 that, tell me how long that clip is?

13 A It's an inch and a quarter, also.

14 Q Now, can you tell me whether the  
15 letters in the words "No Smoking" in Defendant's  
16 Exhibit 19 are less than an inch and a half?

17 A Yes, they are.

18 Q Thank you.

19  
20 MR. ASHWORTH: We would offer  
21 Defendant's Exhibit 19 into evidence.

22 THE COURT: All right. Admitted,  
23 subject to cross examination.  
24  
25

1 (The photograph was received in  
2 evidence as Defendant's Exhibit No. 19.)  
3

4 BY MR. ASHWORTH:

5 Q I show you now Exhibit 20, marked  
6 for identification, and ask if you can tell me  
7 where that photograph was taken?

8 A This is Dr. Orphanidys' dentist  
9 office.

10 Q Would you please tell me what  
11 that sign says?

12 A It says, "For Your Health's Sake  
13 and the Comfort of Others, No Smoking, Please."

14 Q Are there any other words on that  
15 sign?

16 A No, sir.

17 Q Can you tell me whether the  
18 letters in the words "No Smoking" are less than an  
19 inch and a half?

20 A Yes, they are.

21 Q The clip is visible on that one?

22 A Yes.

23  
24 MR. ASHWORTH: We would offer

25 Defendant's Exhibit 20.



1 MR. MERCER: Your Honor, at this  
2 point, I'm going to note an objection.  
3 There's so much of this and it's so redundant,  
4 I submit it's becoming irrelevant.

5 THE COURT: Well, either they're  
6 irrelevant to begin with, Mr. Mercer, or not.  
7 I previously stated it's not material to  
8 this inquiry as to whether or not any signs  
9 were posted or any inspections made of  
10 elevators. This lady stands charged with  
11 failing to comply with that portion only  
12 dealing with the operation of a restaurant  
13 and now we're getting into photographs not  
14 only of elevators, but of no smoking signs  
15 in doctors' offices and dentists' offices.  
16 I don't see the relevancy of it. I'm admit-  
17 ting them subject to cross examination.

18 (The photograph was received in  
19 evidence as Defendant's Exhibit No. 20.)

20 MR. ASHWORTH: May I respond?

21 THE COURT: Yes, sir.

22 MR. ASHWORTH: The ordinance with  
23 which Mrs. Alford is charged is, of course,  
24 the City's no smoking ordinance. The  
25 summons -- and I would like to, if Mr.

1 Mercer would, can we stipulate into evidence  
2 this is the summons which Mrs. Alford  
3 received?

4 MR. MERCER: Yes. I don't have  
5 any objection to that.

6 MR. ASHWORTH: Would you please  
7 mark this Defendant's Exhibit --

8 THE COURT: It will have to be 29.  
9 You've got 17 through 28.

10 MR. ASHWORTH: Thank you.

11  
12 (The summons was received in  
13 evidence as Defendant's Exhibit No. 29.)  
14

15 MR. ASHWORTH: Your Honor, the  
16 summons reads she was charged, was asked  
17 to appear here ". . . to answer for the  
18 following violation of law, to wit: Failure  
19 to comply with no smoking ordinance."  
20 There's no indication in the summons she  
21 was charged because she was a restaurant  
22 operator.  
23

24 THE COURT: There's no evidence  
25 she's failed to post in any elevator,

1 doctor's office. Only evidence is she was  
2 advised as to the necessity of posting  
3 certain signs in her restaurant, failed to  
4 do so. So I really don't think failure to  
5 post signs in elevators or doctors' offices  
6 or the failure to inspect to see that the  
7 proper sign has been posted or enforced  
8 has anything to do with whether she, at the  
9 restaurant, is in violation of the ordinance.

10 MR. ASHWORTH: May it please the  
11 Court, it goes to the issue of whether the  
12 City is selectively enforcing the ordinance.  
13 singling out Mrs. Alford, whether a  
14 restaurateur or anyone else, but Mr. Kanoy  
15 has testified he issued no summonses for  
16 any other violations, whether restaurateurs  
17 or not.

18 THE COURT: He said he examined  
19 all restaurants within his jurisdiction and  
20 he said none has failed to comply with the  
21 ordinance other than the defendant.

22 MR. ASHWORTH: I would submit the  
23 statement by Mr. Kanoy was not accurate,  
24 because the photographs we have, or some of  
25

1 the photographs which we introduced have  
2 shown that the sign was, in fact, where the  
3 letters were less than an inch and a half --  
4 and the ordinance requires letters an inch  
5 and a half, also requires certain other  
6 words be on it --

7 THE COURT: I think the admissi-  
8 bility of those signs is going to be  
9 predicated on your showing of the signs  
10 existing in a restaurant as defined by the  
11 ordinance, and I think that in order to  
12 make these photographs admissible -- maybe  
13 I'm jumping the City Attorney's cross  
14 examination, but it looks like to me you've  
15 got it tied in with the number, that each  
16 one of the restaurants, within the definition  
17 of the ordinance, has got to have 50 seating  
18 capacity, I think is what the ordinance says,  
19 among other things.

20 MR. ASHWORTH: Who has the  
21 photographs?

22  
23 (Off record discussion)  
24  
25

1 BY MR. ASHWORTH:

2 Q I show you what has been admitted  
3 now as Defendant's Exhibit 7, which has your No. 4.  
4 These were the photographs that you took first,  
5 15th of September?

6 A Yes, sir.

7 Q Where was that photograph taken?

8 A Saratoga Restaurant, 3407  
9 Washington Avenue.

10 Q Do you know whether or not the  
11 Saratoga Restaurant seats 50 or more people?

12 A Yes. We checked the restaurants  
13 when we made the pictures to see they did.

14 Q Did you check all the restaurants  
15 to see whether they --

16 A We checked all those and ones  
17 we didn't make the pictures, where we could get in.

18 Q Thank you. Defendant's Exhibit 8,  
19 that, again, was taken on September 15th.

20 A That's Sports Palace, 3420  
21 Washington Avenue.

22 Q Did the Sports Palace seat 50 or  
23 more persons?

24 A Yes.  
25

1 Q And this is Defendant's Exhibit 9.  
2 I believe it's Lee's Chinese Restaurant?

3 A Yes, sir.

4 Q Did that restaurant seat 50?

5 A We could not get in, so I don't  
6 know how many that seats. We were only in the  
7 vestibule.

8  
9 THE COURT: All right. That one,  
10 definitely, I'm not going to admit.  
11 Exhibit 9 will be refused.

12  
13 (Defendant's Exhibit No. 9 was  
14 marked Refused.)

15  
16 BY MR. ASHWORTH:

17 Q Defendant's Exhibit 10?

18 A That is Rosa's Grill, 25th and  
19 Jefferson Avenue.

20 Q Does Rosa's Grill seat 50 or more  
21 people?

22 A Yes, it does.

23 Q Did you count the seats?

24 A Yes. We went in and counted them.  
25

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25

Q Defendant's Exhibit 11?

A That's New York Restaurant,  
Jefferson Avenue.

Q Does that seat 50 or more persons?

A Yes, sir.

Q And Defendant's Exhibit 15, I  
believe it's Sonny's Inn.

A Sonny's Inn, Parrish Avenue. It  
seated 50 or more.

Q Thank you. Now, we'll pick up  
where we left off. That is what has been marked  
Defendant's Exhibit No. 21, and I'll ask whether  
you can tell me where that photograph was taken?

A This is Dr. Mirmelstein's dentist  
office.

Q What does that sign say?  
BY THE COURT:

Q Which Mirmelstein is this?

A Howard C. That's also 316 Main  
Street.

BY MR. ASHWORTH:

Q Tell what the sign says.

A "For Your Health's Sake And The  
Comfort Of Others, No Smoking, Please."

1 Q Does the sign say anything else?

2 A No, sir.

3 Q Are the letters in the words "No  
4 Smoking" less than an inch and a half?

5 A Yes, they are.

6  
7 MR. ASHWORTH: We would offer  
8 Defendant's Exhibit 21 into evidence.

9 THE COURT: Subject to cross  
10 examination, admitted.

11  
12 (The photograph was received in  
13 evidence as Defendant's Exhibit No. 21.)  
14

15 BY MR. ASHWORTH:

16 Q I show you now Defendant's  
17 Exhibit 22, ask you if you can identify where that  
18 was taken?

19 A That was made at Dr. Edward  
20 Smith's and Margaret B. Smith, M.D., 316 Main  
21 Street, their office, in the waiting room.

22 Q What does that sign say?

23 A "No Smoking."

24 Q Any other words on the sign?  
25



1 A No, sir.

2 Q Can you tell whether or not  
3 the letters in the words "No Smoking" are --

4 A There again, the clip we've been  
5 showing isn't showing. The whole pen is showing, so  
6 we could get from that --

7 Q Do you remember?

8 A Yes. It's a very small sign,  
9 not an inch and a half.

10 Q Thank you.

11

12 MR. ASHWORTH: We would offer 22.

13 THE COURT: That is admitted,  
14 subject to cross examination.

15

16 (The photograph was received in  
17 evidence as Defendant's Exhibit No. 22.)

18

19 BY MR. ASHWORTH:

20 Q And I show you Defendant's Exhibit  
21 23 and ask if you can identify where that sign is?

22 A Yes. That's Orthopedic Clinic  
23 at 324 Main Street.

24 Q What does that sign say?

25

1 A "Be Considerate Of Other Patients.  
2 No Smoking, Please."

3 BY THE COURT:

4 Q Street address on that?

5 A 324 Main Street.

6 BY MR. ASHWORTH:

7 Q And are the letters in the  
8 words "No Smoking" less than an inch and a half?

9 A Yes.

10 MR. ASHWORTH: Defendant offers  
11 Exhibit 23 into evidence.

12 THE COURT: Admitted, subject to  
13 cross examination.

14 (The photograph was received in  
15 evidence as Defendant's Exhibit No. 23.)

16 BY MR. ASHWORTH:

17 Q I now show you what has been  
18 marked Exhibit 24 and ask whether you can tell the  
19 Court where that photograph was taken?

20 A This was made at Dr. J. M.  
21 Shepherd and Dr. L. C. Hinson's office at 310 Main  
22 Street.

23 Q And what does the sign say in  
24 that photograph?  
25

1                   A            "For Your Health's Sake And The  
2                   Comfort Of Others, No Smoking, Please."

3                   Q            Are there any other words in that  
4                   sign?

5                   A            No.

6                   Q            And are the letters in the words  
7                   "No Smoking" less than an inch and a half?

8                   A            They are.

9  
10                               MR. ASHWORTH: We would offer  
11                   Defendant's Exhibit 24 into evidence.

12                               THE COURT: Admitted, subject to  
13                   cross examination.

14  
15                               (The photograph was received in  
16                   evidence as Defendant's Exhibit No. 24.)

17  
18                   BY MR. ASHWORTH:

19                   Q            I would ask if you can identify  
20                   what has been marked Defendant's Exhibit 25?

21                   A            Yes. That's the sign in the  
22                   waiting room of Hampton Roads Urology Clinic.

23                   Q            What does that sign say?

24                   A            "Thank You For Not Smoking."  
25

1 Q Does it say anything else?

2 A No, sir.

3 Q Are the letters in the words  
4 "Not Smoking" less than an inch and a half?

5 A They sure are. That was a little  
6 one.

7 Q Thank you very much.

8  
9 MR. ASHWORTH: We would offer  
10 Defendant's Exhibit 25.

11 THE COURT: Admitted, subject to  
12 cross examination.

13  
14  
15 (The photograph was received in  
16 evidence as Defendant's Exhibit No. 25.)

17  
18 BY MR. ASHWORTH:

19 Q I show you what has been marked  
20 Defendant's Exhibit 26, ask if you can tell the  
21 Court where that photograph was taken?

22 A That's Peninsula Orthopaedic  
23 Associates. That's 309 Main Street.

24 Q And where is that sign?

1                   A           That sign is in the waiting room.

2                   Q           And what does that sign say?

3                   A           "No Smoking, Please."

4                   Q           And can you tell the Court  
5 whether or not the letters in that sign are an inch  
6 and a half or less?

7                   A           They are less than an inch and  
8 a half.

9  
10                   MR. ASHWORTH: We would offer  
11 Defendant's Exhibit 26.

12                   THE COURT: All right, sir.  
13 Admitted, subject to cross examination.

14  
15                   (The photograph was received in  
16 evidence as Defendant's Exhibit No. 26.)

17  
18 BY MR. ASHWORTH:

19                   Q           I show you now what has been  
20 marked Defendant's Exhibit 27 and ask if you can tell  
21 the Court where that photograph was taken?

22                   A           Yes. That's made at Dr. Sherman's,  
23 dentist, at 113 Main Street.

24                   Q           What does that sign say?  
25

1                   A            "For Your Health's Sake And The  
2                   Comfort Of Others, No Smoking, Please."

3                   Q            Does the sign say anything else?

4                   A            No, sir.

5                   Q            Are there any other words on  
6                   the sign?

7                   A            No, sir.

8                   Q            Can you tell the Court whether or  
9                   not the letters in the words "No Smoking" are less  
10                  than an inch and a half?

11                  A            Yes, they are.

12  
13                               MR. ASHWORTH: We would offer  
14                   Defendant's Exhibit 27 into evidence.

15  
16                               (The photograph was received in  
17                   evidence as Defendant's Exhibit No. 27.)  
18

19                   BY MR. ASHWORTH:

20                  Q            I show you Defendant's Exhibit  
21                   for identification No. 28 and ask whether you can  
22                   tell the Court where that photograph was taken?

23                  A            This is the Sea Ranch Restaurant,  
24                   9294 Warwick Boulevard.  
25

1 Q And can you tell the Court what  
2 that sign says?

3 A Says "Enter Here For No  
4 Smoking Dining Room."

5 Q Are there any other words on  
6 that?

7 BY THE COURT:

8 Q Where is this one?

9 A Sea Ranch Restaurant, 9294  
10 Warwick Boulevard.

11  
12 MR. MERCER: Your Honor, is that  
13 the Sea Ranch above the bridge, James  
14 River Bridge? I think it is. I don't  
15 think it has anything to do with this.

16 THE COURT: Neither are the  
17 doctors' offices, 316 Main Street.

18 MR. MERCER: I just want to point  
19 out for the record.

20  
21 BY MR. ASHWORTH:

22 Q Did you read it?

23 A Says "Enter Here For No Smoking  
24 Dining Room."  
25

1 Q Any other words on that sign?

2 A No, sir.

3 Q Thank you.

4  
5 MR. ASHWORTH: We would offer 28  
6 into evidence.

7  
8 (The photograph was received in  
9 evidence as Defendant's Exhibit No. 28.)

10  
11 BY MR. ASHWORTH:

12 Q On the 19th, when you took the  
13 photograph you just described, did you visit any  
14 other doctors, dentists or health care centers that  
15 day?

16 A Yes, sir.

17 Q Did some of those offices have  
18 signs?

19 A Some of them had signs.

20 Q Which you did not take photographs  
21 of?

22 A Yes, sir.

23 Q What were those offices?

24 A Let me see. Some of them, they  
25



1 refused to allow us to make the picture. One of  
2 them was Hampton Roads Ear & Throat Associates. This  
3 was -- it's in the 300 block Main Street. I don't  
4 have the total address.

5 Q Was there any other such office  
6 which had a no smoking sign, but did not allow you  
7 to photograph it?

8 A Yes, there was. Let me find it.  
9 We didn't go in, because they had so many people.  
10 White Optical Company, 310 Main Street. They had a  
11 sign. We did not make a picture. We could see the  
12 sign from outside.

13 Q Did you go into a Dr. Thomas  
14 Lanier's office?

15 A Yes, we did.

16 Q Did Dr. Lanier have a no smoking  
17 sign in the waiting room?

18 A No signs. He did not have a sign,  
19 no sign.

20 Q Did you go in a Dr. J. P.  
21 Jones' office?

22 A Yes.

23 Q Do you know what the address of  
24 that office is?  
25

1                   A           He's in the building at 316  
2                   Main Street.

3                   Q           Did Dr. Jones have a no smoking  
4                   sign?

5                   A           No sign.

6                   Q           Did you go into an office called  
7                   the Associates of Obstetrics and Gynecology, Limited?

8                   A           Yes, we did.

9                   Q           And what is the address?

10                  A           316 Main Street.

11                  Q           Did they have a no smoking sign?

12                  A           They did not. Smoking was  
13                  allowed, but no ash trays.

14                  Q           I'm sorry. Smoking was allowed?

15                  A           Smoking was allowed, but no ash  
16                  trays.

17                  Q           Did you go into the office of  
18                  Peninsula Internal Medicine Associates?

19                  A           Yes, we did.

20                  Q           What is the location of that  
21                  office?

22                  A           316 Main Street.

23                  Q           Did they have a no smoking sign?

24                  A           No. Smoking was allowed, but no  
25

1 ash trays.

2 Q Are you saying no smoking or --

3 A Smoking was allowed, but they  
4 had no ash trays.

5 Q Did they have a no smoking sign?

6 A No.

7 Q They did not have ash trays and  
8 they allowed smoking?

9 A They allowed smoking and they  
10 did have ash trays, that office.

11 Q Did you go into a Dr. Ward  
12 Anderson's office?

13 A Yes.

14 Q Did he have a no smoking sign?

15 A No, sir.

16 Q What is the address of that  
17 office?

18 A 316 Main Street.

19 Q Did you go into a Dr. W. J. Baggs  
20 and Dr. R. L. Amor's office?

21 A Yes, sir.

22 Q Did they have a no smoking sign?

23 A No, sir.

24 Q What is the location of their  
25

1 office?

2 A 328 Main Street.

3  
4 MR. MERCER: I'm going to  
5 object to this again. This is reaching  
6 absurd proportions. They have founded a basis  
7 for objection, I believe.

8 THE COURT: What is the theory of  
9 the case which would permit the introduction  
10 of photographs of physicians' offices and  
11 elevators?

12 MR. ASHWORTH: Selective enforce-  
13 ment of the ordinance, which deprives the  
14 defendant of due process and equal pro-  
15 tection. The statute is somewhat compre-  
16 hensive. It lists several places that must  
17 have no smoking signs posted, doctors, health  
18 care facilities, restaurants which seat 50  
19 or more persons, theaters, other places open  
20 to the public. It doesn't single out  
21 restaurants. It also puts the power of  
22 enforcement in the same people who are  
23 charged with enforcing the ordinance against  
24 Mrs. Alford. Therefore, if those people  
25

1 haven't enforced the statute against these  
2 places and have enforced it against Mrs.  
3 Alford, then there has been a denial of  
4 equal protection, denial of due process,  
5 and selective enforcement.

6 THE COURT: Are you going to show  
7 there has been no effort to enforce the  
8 ordinance with respect to the doctors and  
9 dentists' offices?

10 MR. ASHWORTH: Yes, sir.

11 THE COURT: How do you propose  
12 to show it?

13 MR. ASHWORTH: We have one witness  
14 who will testify none have been charged.  
15 We know they have been inspected.

16 Consequently, there has been no enforcement.

17 THE COURT: Do you have a witness  
18 who will testify?

19 MR. ASHWORTH: Yes, sir. Mr.  
20 Yeapanis will examine the next witness and  
21 he's with the Health Department, Mr.  
22 Kanoy's supervisor.

23 THE COURT: All right.

24 MR. ASHWORTH: May it please the  
25

1 Court, I have only three more.

2  
3 BY MR. ASHWORTH:

4 Q Did you enter the offices of  
5 W. H. Allen and Mitchell A. Avent, who are, I believe,  
6 dentists?

7 A Yes, sir.

8 Q Did Drs. Allen and Avent have  
9 a no smoking sign posted?

10 A No, sir.

11 Q What is the address?

12 A 310 Main Street.

13 Q Did they have ash trays?

14 A They allowed smoking and did have  
15 ash trays, yes, sir.

16 Q How do you know they allowed  
17 smoking?

18 A We asked permission to take  
19 these photographs of signs in every office and  
20 when we asked the receptionist or the doctor if  
21 they allowed smoking, they told us. That's how we  
22 knew about the no ash trays, also.

23 Q Thank you. And did you go in an  
24 eye-ear specialist's office, named Dr. George Hankins?  
25

1 A Yes, sir.

2 Q Did Dr. Hankins have a no smoking

3 sign posted?

4 A No, sir.

5 Q Did he allow smoking?

6 A No, sir.

7 Q Did you enter Dr. Frank Pape, Jr.'s

8 office?

9 A Yes, sir.

10 Q What is the address of that office?

11 A It's 10376 Warwick Boulevard.

12 Q Did Dr. Pape allow smoking in his

13 office?

14 A Yes, sir, allowed smoking.

15 Q Did he have a no smoking sign

16 posted?

17 A No, sir.

18 Q Thank you. I have one other

19 question. Did you enter, on September 15th, did you

20 go into any restaurants which sat more than 50 persons

21 but which did not have a no smoking sign posted?

22 A Yes, sir.

23 Q Which restaurants were those?

24 A I recall one is Marie's Grill,

25

1                   637 - 25th Street.

2                   Q           And how do you know that the  
3 restaurant sat more than 50 persons?

4                   A           Well, we had -- we were counting,  
5 if they didn't have that, to make sure.

6                   Q           Thank you.

7  
8                   THE COURT: All right, Mr. Mercer,  
9 you may cross examine.

10  
11                   CROSS EXAMINATION

12                   BY MR. MERCER:

13                   Q           Mr. Livengood, I take it you  
14 have lived in the City of Newport News for a while  
15 and, of course, you are a photographer for the Daily  
16 Press, so you are familiar --

17                   A           Yes, sir.

18                   Q           -- with the City of Newport News.  
19 I gather from the addresses of most of the restaurants  
20 that you visited that they were in the downtown area;  
21 is that not correct?

22                   A           Yes, sir.

23                   Q           Can you describe the neighborhoods  
24 of most of these restaurants, sir?

25                   A           Good percentage of them on



1 Washington Avenue, which is right immediate downtown.

2 Q Can you describe what kind of  
3 neighborhood that is, sir?

4  
5 MR. ASHWORTH: I object. I don't  
6 see the relevance of the kind of neighborhood.

7 MR. MERCER: I'll establish the  
8 relevance.

9 THE COURT: Subject to establishing  
10 relevance, I'll allow the question to be  
11 answered.

12  
13 BY MR. MERCER:

14 Q What kind of neighborhood is it,  
15 sir?

16 A More or less kind of a run-down --  
17 it's not too run down, but it's on the way, trying to  
18 be revived, but it's not yet.

19 Q Are many of them in the downtown  
20 redevelopment, sir?

21 A I don't know exactly where the  
22 redevelopment is. They're within a ten block area of  
23 City Hall.

24 Q And that's not too run down?  
25

1                   A           City Hall itself isn't run down,  
2                   this part, but on down toward the shipyard it is.

3                   Q           Some of these restaurants are  
4                   located near the shipyard?

5                   A           Some of them are near the  
6                   shipyard, yes, sir.

7                   Q           In the course of your investigation,  
8                   sir, did you visit any -- well, let me ask you this  
9                   first. Are you aware of any Holiday Inns in the  
10                  City of Newport News?

11                  A           Aware of any Holiday Inns?

12                  Q           Yes, sir.

13                  A           Yes, sir.

14                  Q           Aware of any Sheraton Inns?

15                  A           Sheraton Inn is in Hampton.

16                  Q           Okay. Are you aware of any  
17                  Sambo's Restaurants?

18                  A           Yes, sir. There are two.

19                  Q           Other restaurants of that sort?  
20                  How would you describe to the Court the average  
21                  restaurant you went in? I take it that you're familiar  
22                  with the entire of these restaurants because you did go  
23                  in, take pictures of the interiors. If I was to ask  
24                  you to classify these restaurants as being on a basis  
25

1 of high class, middle class or a lower class type  
2 restaurant, where you just go in, grab a bite to  
3 eat, few tables and chairs around, things like that,  
4 how would you classify most of these restaurants, sir?

5  
6 MR. ASHWORTH: I would object.

7 THE COURT: Just a minute. The  
8 last question you've given him is too  
9 subjective to be relevant, Mr. Mercer.

10 MR. MERCER: Okay, Your Honor.  
11 I'll be happy to rephrase the question.

12  
13 BY MR. MERCER:

14 Q Do you recall visiting the Saratoga  
15 Restaurant, sir?

16 A Yes, sir.

17 Q Would you describe the interior  
18 of the Saratoga Restaurant?

19 A The Saratoga would be about a  
20 medium class, not a fine restaurant, but it's a  
21 place where you would go in and get a bite to eat.  
22 I wouldn't worry about going in, eating there. It's  
23 not the type of place I'd want to take my family to.

24 Q Oh. It isn't?  
25

1 A Not at night.

2 Q You say the seating capacity was  
3 50 or more people?

4 A Yes, sir.

5 Q How did you establish that, sir?

6 A The ones that had the sign, we  
7 asked if they had more than 50 seats, and ones  
8 didn't have the sign, we asked, also, if they had more  
9 than 50 seats.

10 Q You did not personally count the  
11 seats?

12 A I only personally helped count  
13 the ones didn't have a sign.

14 Q So you did not personally count  
15 the seats in this restaurant, sir?

16 A No, sir.

17  
18 MR. MERCER: I'm going to raise  
19 an objection now to the qualification of  
20 the exhibits.

21 THE COURT: I think you'd better  
22 go down each one of the exhibits, ask  
23 whether he personally counted the seats  
24 in every one of the restaurants, Mr. Mercer,  
25

1 if you want me to rule on it.

2  
3 BY MR. MERCER:

4 Q You examined the interior of  
5 this restaurant fairly closely, I take it, searching  
6 for signs, the Saratoga Restaurant?

7 A No, sir. We asked them where the  
8 no smoking area was, when we asked permission, and  
9 we went straight there.

10 Q But you did not observe the rest  
11 of the restaurant?

12 A No. Really, no, sir.

13 Q Were you familiar with how large  
14 the no smoking areas were in the restaurants or --

15 A Yes, sir. Most of the no smoking  
16 areas were in just a one booth area, on one booth or --

17 Q Is the Saratoga Restaurant a one  
18 room facility or two room or three room facility?

19 A I couldn't answer that. To my  
20 knowledge, it's one room, but that's only a guess.

21 Q Could you answer whether or not  
22 there was more than one no smoking sign in the  
23 Saratoga Restaurant, sir?

24 A At the Saratoga, we only made one  
25

1 photograph of one sign. That's the only sign I saw.

2 Q Have you been in the Saratoga  
3 Restaurant previous to September 15th?

4 A No, sir.

5 Q Have you been in it since?

6 A No, sir.

7  
8 MR. MERCER: Your Honor, with  
9 respect to the Saratoga Restaurant, I  
10 would object to the entry into evidence on  
11 the basis it has not been established that  
12 the seating capacity of the restaurant was  
13 50 or more people.

14 THE COURT: All right. Mr. Ashworth?

15 MR. ASHWORTH: Your Honor, Mr.  
16 Livengood was told that the restaurant  
17 seated more than 50 people.

18 THE COURT: That's hearsay.

19 MR. ASHWORTH: It wasn't objected to.

20 THE COURT: I'm not going to  
21 permit it to go in.

22 MR. ASHWORTH: He's already  
23 testified to it.

24 THE COURT: I'm not going to let it  
25

1 in as credible evidence. I admitted all  
2 these exhibits subject to cross examination  
3 and if he didn't count the seating capacity  
4 in the Saratoga Restaurant, I'm going to  
5 refuse Exhibit 7.

6 MR. ASHWORTH: We except, Your  
7 Honor.

8  
9 (Defendant's Exhibit No. 7 was  
10 marked as Refused by the Court.)  
11

12 THE COURT: All right, Mr. Mercer?

13  
14 BY MR. MERCER:

15 Q With respect to the Sports Palace  
16 Restaurant, do you recall what the interior of the  
17 Sports Palace Restaurant looks like, sir?

18 A No, sir. I do not.

19 Q Have no idea?

20 A No.

21 Q Was it a nice restaurant?

22 A It's more or less -- I don't know.  
23 I've never eaten in there. I have never been in there  
24 before. I have never been in there since.  
25

1 MR. ASHWORTH: Your Honor, I  
2 renew my objection to the character of  
3 the restaurant.

4 THE COURT: I sustain it.

5 MR. YEAPANIS: Your Honor, may I  
6 interject --

7 THE COURT: Gentlemen, I can't  
8 have all three lawyers jumping up on each  
9 side. One lawyer is going to conduct the  
10 examination of a particular witness and Mr.  
11 Ashworth commenced examining this gentleman  
12 and I just don't think it's proper for  
13 anyone else objecting.

14 MR. YEAPANIS: I don't, either.  
15 I was going to ask the Court to reserve  
16 ruling until Mr. Kanoy is called back to  
17 the stand with respect to how many people  
18 could be seated in the restaurant.

19 MR. MERCER: I'm going to object  
20 to all that.

21 THE COURT: We can't go all after-  
22 noon. You offered these exhibits subject  
23 to cross examination. The City has come in,  
24 examined this gentleman. He stated he did  
25



1 not count the seating capacity in the  
2 Saratoga Restaurant. I'm not going to  
3 permit you to come back, show what the  
4 seating capacity was. You offered the  
5 exhibit subject to cross examination.  
6 I don't think it's fair to keep belaboring  
7 this point.

8 MR. MERCER: Your Honor, I would  
9 point out with respect to selective enforce-  
10 ment, even while they're accusing the City  
11 of selective enforcing of the ordinance,  
12 indeed, in their selection of evidence  
13 they have been selective themselves and  
14 have avoided the restaurants which are  
15 chain operations.

16 THE COURT: I'm not going to let  
17 you ask that question.  
18

19 BY MR. MERCER:

20 Q With respect to the Sports Palace  
21 Restaurant, did you, sir, personally count the number  
22 of seating capacity in the Sports Palace Restaurant?

23 A I can't tell you exactly how many  
24 seats were in there. I can tell you how we arrived --  
25

1 Q Please tell me how you established  
2 that.

3 A When we entered the restaurant,  
4 we automatically looked to see how many booths. If  
5 they had 10 or 12, 13 booths, times four, you had 50,  
6 or the number of tables in the center of the floor  
7 had four chairs around. I did not make a tally  
8 one, two, three, four, no, sir.

9  
10 MR. MERCER: I'm going to object.

11 THE COURT: He can tell you  
12 how he arrived at it. Just ask him whether  
13 or not he determined that particular  
14 restaurant, what the seating capacity was.

15 MR. MERCER: I'm not sure what  
16 Your Honor is stating.

17 THE COURT: He has told you how  
18 he went into the restaurants and made a  
19 determination of whether there were 50 or  
20 more seating capacity. If you want to ask  
21 him about the Sports Palace, you may now ask  
22 him how he made that determination with  
23 respect to the Sports Palace.  
24  
25

1 BY MR. MERCER:

2 Q How, sir, did you make the  
3 determination with respect to the seating capacity of  
4 the Sports Palace and, if you did, how many seats did  
5 you determine the Sports Palace had?

6 A Over 50. I can't tell you  
7 the exact number because I don't know. While they  
8 were asking, I was counting. I was counting booths,  
9 then multiplying that by four, then counting tables  
10 or bar stools.

11 Q If you were multiplying booths,  
12 how many seats would you say were in a booth?

13 A Four.

14 Q How many booths are in the  
15 restaurant?

16 A How many booths are in the Sports  
17 Palace?

18 Q Yes, sir.

19 A I can't answer that, because  
20 booths and tables are in all of them, then bar stools,  
21 too.

22 Q Sir, you just said you established  
23 the number of seats in a restaurant by counting the  
24 number of booths and multiplying by four, then you're  
25

1           telling us you don't know how many booths were in  
2           the Saratoga Restaurant; is that correct?

3  
4                   THE COURT: He said he determined  
5           there were more than 50 seating capacity  
6           in the Saratoga Restaurant.

7  
8           BY MR. MERCER:

9                   Q           You, personally, counted 50?

10                  A           Every one that we went in.

11           BY THE COURT:

12                  Q           With respect to the Saratoga  
13           Restaurant?

14                  A           Yes.

15  
16                   MR. MERCER: I'm going to object  
17           to the entry of that evidence, Your Honor,  
18           on the basis that I don't believe, based on  
19           his own testimony, the witness had any  
20           real idea what the seating capacity of the  
21           Saratoga Restaurant was. I think his own  
22           testimony indicates this.

23                   THE COURT: He stated categorically  
24           it was over 50.

1 MR. MERCER: Your Honor, I don't  
2 see how he can know it was over 50 if he  
3 doesn't know how many booths were in the  
4 restaurant.

5 THE COURT: Mr. Mercer, he said he  
6 determined while they were in the restaurant  
7 how many booths were there and tables and  
8 made a determination in the case of the  
9 Sports Palace they had a seating capacity  
10 of over 50. Now, he tells you he doesn't  
11 remember how many booths or tables were  
12 there. I think he's established there were  
13 more than 50 seating capacity in the Sports  
14 Palace.

15 MR. MERCER: I'm not going to  
16 belabor the point. I'll say I understand  
17 Your Honor's point, but I believe the  
18 man doesn't remember how many booths were in  
19 it, he certainly probably doesn't remember  
20 how many seats.

21  
22 BY MR. MERCER:

23 Q With respect to Rosa's Grill,  
24 sir, do you recall how many signs were in that  
25

1 restaurant, sir?

2 A Rosa's Grill at 25th and Jefferson  
3 Avenue?

4 Q Yes, sir.

5 A There was one sign over one booth.

6 Q Did you examine the whole restaurant,  
7 sir?

8 A We were in two doors at that  
9 restaurant, yes, sir.

10 Q You were in two doors?

11 A Yes, sir.

12 Q How many rooms were there, sir?

13 A Basically, it's one.

14 Q So you can categorically state to  
15 the Court you, personally, observed the whole area  
16 and there was only one sign in the restaurant?

17 A Yes, sir.

18 Q Did you, sir, count the number of  
19 seats in the restaurant?

20 A In that restaurant?

21 Q Yes, sir.

22 A We established that there --

23 Q I'm not interested in what "we"  
24 established. I'm interested in what you established.  
25

1 Did you count them personally, sir?

2 A I looked at the number of booths  
3 and determined it was over 50, yes, sir.

4 Q Do you know exactly how many?

5 A No, sir.

6 Q Do you know roughly how many?

7 A No, sir. I would say it was  
8 close to 50 or 50-some. It's not that large a  
9 restaurant, but it was over 50.

10 Q Could it have been under 50, sir?

11 A When people are sitting around on  
12 stools, it possibly could have been, I guess. I don't  
13 know.

14 Q So there was a question in your  
15 mind, sir?

16 A It was no question in my mind,  
17 because the owner knew the law.

18 Q Please answer the question, sir.  
19 There was a question in your mind, sir?

20 A No, sir. There was no question  
21 in my mind. There was a sign.

22 Q You just told us it was possible  
23 it could have been under 50. Can you approximate  
24 within ten seats how many seats were in the restaurant,  
25

1                   sir -- 20 seats?

2                   A           Can I approximate?

3                   Q           Within 20 seats?

4                   A           Yes, sir. There were 50 seats in  
5 there, 20 either way.

6 BY THE COURT:

7                   Q           Either way?

8                   A           Yes, sir. That would be either  
9 30 or 70.

10  
11                   MR. MERCER: I'm going to renew  
12 my objection with respect to Rosa's Grill.

13  
14 BY THE COURT:

15                   Q           You say it's possible there were  
16 less than 50 seats in there?

17                   A           I don't see how it could be.

18                   Q           You said that in your testimony?

19                   A           Yes, sir.

20  
21                   THE COURT: All right. I'm going  
22 to refuse Exhibit 10. You all may not e your  
23 exception.

24                   MR. ASHWORTH: Yes, sir.  
25



1 BY MR. MERCER:

2 Q With respect to the New York  
3 Restaurant, sir -- incidentally -- pardon me. I have  
4 two other questions with respect to Rosa's Grill.  
5 Have you been in Rosa's Grill prior to September 15th?

6 A No, sir.

7 Q Have you been in it since?

8 A No, sir.

9 Q With respect to New York Restaurant,  
10 I assume this is also one you visited September 15th.  
11 Have you been in there prior to September 15th, sir?

12 A No, sir.

13 Q Or since?

14 A No, sir.

15 Q Was the New York Restaurant one  
16 or two rooms, sir, or --

17 A One room.

18 Q And did you examine the whole  
19 restaurant, sir, for a no smoking sign?

20 A If I could see the picture, I could  
21 tell you.

22 Q Is the picture of the whole  
23 restaurant, sir?

24 A No, sir, but I remember the signs,  
25

1 where they were in the restaurant.

2  
3 MR. MERCER: I don't have any  
4 objection to him looking.

5 THE COURT: I think we ought to  
6 show him. Which pencil number?

7 THE WITNESS: New York Restaurant  
8 is No. 16 with my pencil.

9 THE COURT: New York Restaurant is  
10 No. 11 Exhibit.

11  
12 A That's the one I thought it was,  
13 yes, sir. Okay. I'm familiar with this one.

14 BY MR. MERCER:

15 Q I take it from looking at that  
16 picture, you can obviously see it was taken from a  
17 booth?

18 A Yes, sir.

19 Q Did you examine each booth?

20 A No, sir, but we had to ask where  
21 the sign was. When the gentleman -- I assume he was  
22 the manager or owner -- said we could take the picture  
23 of the sign, we could not find the sign. That's why  
24 this one rang a bell in my mind.  
25

1 Q So in this case, you were  
2 relying strictly on the manager's statement there  
3 was a sign at the booth?

4 A There was no other sign in the  
5 restaurant. We had to go search this sign out.

6 Q You, personally?

7 A Yes, sir. I did.

8 Q While you were personally  
9 inspecting it, sir, did you count the number of  
10 seats in the restaurant?

11 A This restaurant, I did. I did  
12 not count beyond 50. This restaurant has more booths  
13 in the inside than it looks from the outside. I was  
14 stunned when I walked in. That's why this comes to  
15 mind.

16 Q You were stunned?

17 A I was stunned it had so many  
18 seats in there.

19  
20 THE COURT: All right, sir. I'm  
21 going to admit that one.  
22

23 BY MR. MERCER:

24 Q With respect to Sonny's Inn on  
25

1 Parrish Street, sir, do you recall how many rooms  
2 there were?

3 A Yes, sir. That did have  
4 approximately two rooms, is what we saw.

5 Q Approximately two rooms?

6 A Yes, sir, because that one was  
7 a shady place.

8 BY THE COURT:

9 Q Are you talking about lighting  
10 conditions?

11 A Not exactly, sir. I remember that  
12 one well, also.

13 BY MR. MERCER:

14 Q Your memory seems to be very  
15 good with respect to most everything but how many  
16 seats they had in these restaurants.

17  
18 MR. ASHWORTH: I object and move  
19 to strike.

20 THE COURT: Sustained.

21  
22 BY MR. MERCER:

23 Q Did you, sir, personally count the  
24 number of seats in this restaurant?  
25

1                   A           I established that there was  
2 more than 50 when they let me in. They met me outside.

3                   Q           How did you establish this?

4                   A           By counting.

5                   Q           You specifically did count?

6                   A           When I reached 50, I didn't go  
7 beyond, because the ordinance told me I needed 50,  
8 so when I got 50, I'm there. I do not know how many  
9 beyond. There were chairs and tables stacked on  
10 top of tables in the back, tremendous amount of them.  
11 In fact, we had to shoot the picture through the  
12 chairs back there.

13                  Q           Were there any booths?

14                  A           Yes, sir. There were booths, too,  
15 and it was very dark in there, also.

16                  Q           How many?

17                  A           I couldn't tell you how many.

18                  Q           Do you know how many tables?

19                  A           They were stacked on top of each  
20 other and a tremendous amount of chairs.

21                  Q           Was it a small restaurant or large  
22 restaurant, sir?

23                  A           Medium size.

24                  Q           Medium size? If it was very dark  
25

1 in the restaurant, sir, there's a possibility you  
2 could have been mistaken as to your count?

3 A No, sir. When I walked around the  
4 bar, the bar was full and there was a fairly decent  
5 size bar there, too, with everyone sitting on a bar  
6 stool, watching me as I went by.

7 Q Did you count the bar stools, sir?

8 A I usually, in my figuring there  
9 were more than 50, yes, sir. I do not know exactly  
10 how many.

11 Q Did you count the tables, sir,  
12 the seats at the tables?

13 A I noticed there were at least  
14 six or eight tables or booths in the front where  
15 we went through to get through to the sign. The sign  
16 was way in the back, yes, sir.

17 Q How many booths are there, sir?

18 A There again, I'm only going to  
19 give you an approximation. There were approximately  
20 six or eight booths plus the bar plus the tables in  
21 the back.

22 Q Is it possible there could have  
23 been under 50 seats in this restaurant, sir?

24 A No way.  
25

1                   Q           I refer you to your earlier  
2 testimony. I don't think I recall the exact words,  
3 but seems to me it was something to the effect  
4 which indicated, at the beginning of your testimony,  
5 you, personally, had not established the number of  
6 seats in these restaurants. Would you care to  
7 clarify that?

8                   A           Yes, sir. I would. I'm glad  
9 you gave me the opportunity to do that. The one  
10 you asked me earlier, we had just started. I did  
11 not know the law. I did not know, really, what we  
12 were doing except making pictures of signs. As we  
13 went on, and these others are on the list, I did get  
14 more understanding of what we were doing and then I  
15 started counting, also. I did it -- the Saratoga was  
16 the second one on our list.

17                   Q           Were there any other restaurants  
18 on your list, sir?

19                   A           Yes, sir. Must have been 16 or 18  
20 of them.

21                   Q           What happened at the rest of them?

22                   A           What happened at the rest of them,  
23 we went in and got permission to do them like we'd  
24 done and each of us counted to make sure there were --  
25

1 some of them only had a few seats beyond 50. So we  
2 didn't make a picture if they had 49 seats.

3 Q Did you make a picture of that  
4 establishment?

5 A No, sir. We did not make a  
6 picture if it had 49.

7 Q Did you go in any restaurant  
8 that had 50 or more seating capacity and not take  
9 any picture?

10 A To the best of my recollection,  
11 no one refused to let us make a picture in the  
12 restaurant except the Chinese restaurant. He would  
13 only allow us in the vestibule. We were there late  
14 in the day.

15 BY THE COURT:

16 Q What he asked you was, did you  
17 go in any restaurant that had more than 50 seating  
18 capacity and did not take any pictures of it? Is  
19 there any restaurant you went to during the two times  
20 you made these visitations where it was determined  
21 that the seating capacity was 50 or more and you did  
22 not take a picture, is what he's asking you.

23 A Yes, sir. There was one, Marie's  
24 Grill, 637 - 25th Street. That was one. They didn't  
25



1 have a sign. They have 71 seats. I, personally,  
2 counted that. I counted that and multiplied it  
3 out and came up with 71 rough. That might be a few  
4 off one way or the other. She had never heard of the  
5 law.

6 Q Was that the only restaurant where  
7 you observed there was no sign, no no smoking sign  
8 posted?

9 A Yes, sir. That was the only one  
10 that was large enough.

11 Q And the rest of the restaurants,  
12 then, I take it your testimony is that there was, at  
13 a minimum, at least one sign posted which indicated  
14 there was no smoking in the restaurant?

15 A Yes, sir.

16 Q And your testimony is all of  
17 the restaurants or majority of the restaurants were  
18 in downtown Newport News?

19 A Yes, sir. They were.

20 Q Within ten blocks of the  
21 shipyard, say?

22 A Majority of them were, yes, sir.

23  
24 MR. MERCER: That's all I have,  
25

1 Your Honor. Thank you very much.

2 THE COURT: This might be a  
3 capricious time to go to lunch unless you've  
4 got a short five minute witness, Mr.  
5 Ashworth.

6 MR. ASHWORTH: I would like to  
7 ask a couple other questions of this  
8 witness, won't take but a minute.

9 THE COURT: All right, sir. Then  
10 we can excuse this witness.

11  
12 REDIRECT EXAMINATION

13 BY MR. ASHWORTH:

14 Q Mr. Livengood, the Saratoga  
15 Restaurant, you testified, was the second restaurant  
16 which we visited that day?

17 A Yes, sir.

18 Q Did you ascertain, when you went  
19 in that restaurant, whether it was 50 or more seating  
20 capacity?

21 A By the appearance, it was.

22 Q You didn't know what the ordinance --

23 A I really didn't understand what  
24 we were doing at that time.  
25

1 Q On Rosa's Grill, did you,  
2 personally, determine whether or not it sat more  
3 than 50 persons, whether it had a seating capacity  
4 greater than 50?

5 A Yes, sir. It did.

6 Q Mr. Mercer has asked you whether  
7 you could determine exactly the seating capacity of  
8 Rosa's Grill and you testified you could not; is that  
9 correct?

10 A The exact seating number, no,  
11 sir, I could not come up with.

12 Q Mr. Livengood, were you interested  
13 at all in the exact seating capacity of a restaurant  
14 which had a sign?

15 A I found none that had a sign that  
16 had under 40 seats.

17 Q Forty or 50?

18 A Most of the restaurants, with the  
19 exception of that one, did know the law.

20 Q Under 40 or 50?

21 A Under 50.

22 Q When you went in these restaurants  
23 and made a determination of the seating capacity,  
24 you were only trying to establish whether the restaurant  
25

1 sat 50 or more people and you quit counting at that  
2 point?

3  
4 MR. MERCER: That's a leading  
5 question.

6 THE COURT: There were several  
7 leading questions. I was waiting to hear  
8 from you.

9  
10 BY MR. ASHWORTH:

11 Q What was your purpose in counting?

12 A To determine if the restaurant had  
13 to comply with the sign.

14 Q The majority of the restaurants  
15 in which you went, did you count beyond, say, 50 or 52  
16 or 55?

17 A No.

18 Q Once you made a determination it  
19 was 50, then you stopped?

20 A Right. Then I would look for  
21 the sign.

22  
23 MR. MERCER: Your Honor, the  
24 whole nature of this discourse is leading.  
25

1 I object to it.

2 THE COURT: All right. You may  
3 continue to examine.

4 MR. ASHWORTH: Your Honor, I don't  
5 believe I have any further questions. I  
6 would like to re-offer the exhibit which  
7 shows the photograph of the sign in Rosa's  
8 Grill.

9 THE COURT: He said it was  
10 possible there were less than 50 on that  
11 one and I'm refusing it. That's Exhibit 10.

12 MR. ASHWORTH: We except, Your  
13 Honor.

14 THE COURT: All right.

15 MR. MERCER: Your Honor, I just  
16 want to renew my objection -- might as well  
17 finish up this section of it now -- with  
18 respect to the entry of any photographs  
19 Your Honor, concerning establishments other  
20 than food serving establishments. The City  
21 objects to their entry and we object on the  
22 basis that they're irrelevant, Your Honor,  
23 and there's no requirement whatsoever that  
24 the defense has shown that the City inspects  
25

1                   these places on a regular basis. I submit  
2                   that the signs in those establishments,  
3                   whether or not they're in comport with  
4                   the statute has no more relevance than  
5                   the sign out on this door here, as to whether  
6                   or not the defendant was guilty of violating  
7                   the ordinance and I object on that basis.

8                   THE COURT: Defendant has stated  
9                   she intends to introduce evidence tying in  
10                  the doctors' and dentists' offices and  
11                  subject to that and subject to your  
12                  objection, I'd let these exhibits in,  
13                  subject to their being tied in and your  
14                  objection and argument on them.

15                 MR. MERCER: On the same basis, I  
16                  object to the entry of all the evidence with  
17                  respect to the photographs of restaurants,  
18                  also.

19                 THE COURT: All right, sir.

20  
21                 BY THE COURT:

22                         Q             Mr. Livengood, did you go to  
23                         every restaurant in downtown Newport News?

24                         A             No, sir.  
25

1 Q Did you go to every restaurant  
2 in the East End?

3 A No, sir.

4 Q Did you go to every restaurant  
5 on Jefferson Avenue?

6 A No, sir.

7 Q Did you go to every restaurant  
8 between the James River Bridge road, West Mercury  
9 Boulevard extended, and the boat harbor in Newport  
10 News seating 50 persons or more?

11 A There again, I haven't been in  
12 these -- I think there would be some that would be  
13 larger, yes, sir. We were trying to stay within a  
14 ten block area of the Hotel Warwick.

15  
16 THE COURT: All right. Thank  
17 you. You've answered my question.

18 MR. ASHWORTH: May I ask a  
19 couple follow-up questions to those?

20 THE COURT: Yes, sir.

21  
22 BY MR. ASHWORTH:

23 Q Mr. Livengood, did we, on the  
24 15th of September when you and I and Mr. Yeapanis  
25

1           went to take these photographs, did we consciously  
2           skip any restaurants which were open at that time?

3           A           Yes, sir. We did.

4  
5                       MR. MERCER: I object to that.  
6           I don't think he can testify as to whether  
7           or not Mr. Yeapanis or the attorney here  
8           consciously skipped any restaurants.

9                       MR. ASHWORTH: I'll reframe the  
10          question, Your Honor.

11  
12         BY MR. ASHWORTH:

13                 Q           Did you not go in any restaurant  
14          that was open?

15                 A           There were restaurants open that  
16          we did not go in, yes, sir.

17                 Q           That we went by?

18                 A           Yes, sir.

19                 Q           Why did we not go in those  
20          restaurants?

21                 A           It was obvious from appearance,  
22          and we could see in a lot of them, they did not have  
23          50 seats, was no way they could have had 50 seats.  
24          Some of them were carry-out.



1 MR. MERCER: I object to the  
2 witness' conclusion, Your Honor.

3 MR. ASHWORTH: May I ask one  
4 follow-up question to that?

5 THE COURT: Yes, sir.  
6

7 BY MR. ASHWORTH:

8 Q How did you determine? Did you  
9 look in the windows of these restaurants that we did  
10 not go in? Did you observe the size of the building  
11 in which the restaurant was or that portion of the  
12 building?

13 A Some of them we could, yes, sir.

14 Q Is that how you made your deter-  
15 mination of whether or not the restaurant sat less  
16 than 50 persons?  
17

18 MR. MERCER: This is leading, Your  
19 Honor. I object formally, Your Honor. It's  
20 a leading question.  
21

22 A We had a list of restaurants  
23 already, of the bigger ones. We did add some to the  
24 list as we went and we did skip some others because  
25

1 they were small. There was an existing list when we  
2 started. We added some and deleted others.

3 BY THE COURT:

4 Q Did you go to the restaurants at  
5 2600 Washington Avenue?

6 BY MR. ASHWORTH:

7 Q Do you know what the restaurants  
8 are?

9 A One of them is Al's Delicatessen.

10 BY THE COURT:

11 Q Yes, sir.

12 A Yes, sir. We did go to Al's  
13 Delicatessen.

14 Q Did you take any pictures there?

15 A Yes, sir.

16 Q Did you then go to the restaurant  
17 on the 10th floor of 2600 Washington Avenue?

18 A No, sir. That was closed at the  
19 time. I think it's only open for lunch and this was  
20 much later in the day.

21 Q Did you go back at any time when  
22 it was open for lunch?

23 A No, sir.

24 MR. MERCER: I have one further  
25

1 question.

2 THE COURT: Let Mr. Ashworth  
3 complete his examination unless he already  
4 has.

5  
6 BY MR. ASHWORTH:

7 Q Mr. Livengood, did you go into  
8 restaurants and take photographs of signs which have  
9 not been offered into evidence today?

10 A Yes, sir.

11  
12 MR. ASHWORTH: Your Honor, I would  
13 represent to the Court that the reason I  
14 chose not to offer those exhibits was because  
15 those signs were, in fact, conforming, and  
16 we have a list of them if you would be  
17 interested in seeing it.

18 THE COURT: All right.

19 MR. MERCER: I do have one further  
20 question.

21 RECROSS EXAMINATION

22 BY MR. MERCER:

23 Q With respect to the establishments  
24 which you testified you did not go into because at a  
25

1 cursory viewing you felt there were less than 50  
2 seats in them, did you establish how many rooms were  
3 in those restaurants, sir?

4 A How many rooms?

5 Q Yes, sir.

6 A There was no need to establish  
7 rooms, because the majority of them were carry-out,  
8 like box lunch or something. There's another one,  
9 stand up type. It's just one room, no number of  
10 booths we could count, no number of stools. We  
11 could see that.

12 Q Were there restaurants with  
13 booths and seats in them which you passed by?

14 A I'm not familiar with all the  
15 restaurants and we couldn't see in all the  
16 restaurants, so there possibly was some.

17 Q You couldn't see, but you decided  
18 to pass them up, sir?

19  
20 MR. MERCER: I have no further  
21 questions, Your Honor.  
22

23 (Whereupon, the court was adjourned  
24 for luncheon recess at 2:15 o'clock p.m.,  
25 to be reconvened at 2:45 o'clock p.m.)

## AFTERNOON SESSION

September 22, 1978

\* \* \*

(Court was reconvened, pursuant  
to adjournment for luncheon recess, at  
2:45 o'clock p.m.)

Appearances: As hereinbefore noted.

\* \* \*

THE COURT: Call your next witness,  
please.

MR. YEAPANIS: I would like to  
call Mr. Ray Allmond.

RAY T. ALLMOND, after being first  
duly sworn, testified in behalf of the Defendant, as  
follows:

## DIRECT EXAMINATION

BY MR. YEAPANIS:

Q Please give us your name.

A My name is Ray T. Allmond.

Q What is your job?

1                   A           Sanitarian supervisor at the  
2 Peninsula Health Center.

3                   Q           How long have you been in that  
4 capacity?

5                   A           About fourteen years.

6                   Q           Mr. Kanoy works under you; is  
7 that correct?

8                   A           Mr. Kanoy works under me.  
9 He's the independent supervisor and Mr. Kanoy works  
10 out of my East End branch. I do not see him but  
11 maybe once a month.

12                  Q           To your knowledge, have there  
13 been any other citations for violation of the smoking  
14 laws recently adopted by the City?

15                  A           No, sir.

16  
17                               MR. YEAPANIS: That's all the  
18 questions I have.

19                              THE COURT: All right, sir. Mr.  
20 Mercer, you may cross examine.

21  
22                                       CROSS EXAMINATION

23                   BY MR. MERCER:

24                   Q           Mr. Allmond, are you familiar  
25

1 with whether or not the police have made any  
2 arrests with regard to the smoking ordinance?

3 A Not to my knowledge, no, sir.

4 Q Would you be aware of what  
5 their arrests were?

6 A Sir?

7 Q Would you be aware of that,  
8 what their arrests were, sir?

9 A I'm certain I would.

10 Q Do you keep an eye on their  
11 records, sir?

12 A Yes, sir. I keep an eye on my  
13 records. My men are police officers, too, as such  
14 and I keep an eye on their records.

15 Q All I'm referring to, sir, is the  
16 City police department. Do you check their records?

17 A No, sir.

18 Q In other words, you wouldn't be  
19 aware of whether or not they've made any arrests with  
20 respects to violation of the smoking ordinance?

21 A No, sir.

22 Q Thank you.

23  
24 MR. MERCER: Your Honor, that's all.  
25

(Witness excused)

PHYLLIS L. ALFORD, the Defendant,  
after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

Q What is your name?

A Phyllis Alford.

Q Where do you reside?

A 110 - 35th Street.

Q And do you have a business or  
occupation?

A I'm the manager and owner of the  
Hotel Warwick Dining Room, 25th and West Avenue,  
Newport News.

Q That's the premises that are  
described in the complaint, in the testimony we've  
heard earlier today?

A That's true.

Q With respect to the charge that  
is against you; is that correct?

A Yes.

Q Mrs. Alford, did you have any



1 signs on your door prior to the time that you put the  
2 sign on the door which is set forth in Exhibit No. 6?

3 A Yes, I did.

4  
5 MR. MORGAN: I'm going to  
6 identify this photograph, then I'll show  
7 it to counsel.

8  
9 A It's the front door with "No Bare  
10 Feet and No Tank Top Shirts."

11 BY MR. MORGAN:

12 Q All right. Fine.

13  
14 MR. MORGAN: I show this to the  
15 prosecuting attorney. I'd ask it be marked,  
16 I believe Defendant's Exhibit 30.

17 THE COURT: Yes, sir.

18  
19 (The photograph was marked, for  
20 purposes of identification, as Defendant's  
21 Exhibit No. 30.)  
22

23  
24 BY MR. MORGAN:

25 Q Does this photograph properly

1 depict your premises?

2 A Yes, it does.

3 Q At the time the photograph was  
4 taken?

5 A Yes, it does.

6  
7 MR. MORGAN: I offer it in  
8 evidence, Your Honor.

9 THE COURT: Any objection, Mr.  
10 Mercer?

11 MR. MERCER: No, Your Honor.

12 THE COURT: It will be admitted  
13 as Defendant's Exhibit No. 30.

14  
15 (The photograph was received in  
16 evidence as Defendant's Exhibit No. 30.)

17  
18 BY MR. MORGAN:

19 Q Mrs. Alford, do you sell tobacco  
20 products in your restaurant?

21 A Yes, I do.

22 Q Do you pay taxes?

23 A Yes, I do.

24 Q To the City of Newport News?  
25

1                   A           Yes, I do.

2  
3                   THE COURT: Let your counsel get  
4 the question out. You might find yourself  
5 answering a question you wished you hadn't  
6 answered. So let him ask the question, then  
7 you can respond.

8                   THE WITNESS: Okay.

9  
10                  BY MR. MORGAN:

11                   Q           You have placed in the premises  
12 and on the front door a sign. I ask you if this is  
13 an exact replica of the sign?

14                   A           It is, sir.

15  
16                   MR. MORGAN: I ask this be  
17 marked Defendant's Exhibit 31.

18                   THE COURT: Any objection, Mr.  
19 Mercer?

20                   MR. MERCER: I didn't quite  
21 see the sign.

22                   THE COURT: I would appreciate  
23 your eliciting from the witness when it  
24 was placed.  
25

1 MR. MORGAN: I'm going to do it.

2 MR. MERCER: No objection, Your  
3 Honor.

4 THE COURT: All right, sir.

5 MR. MORGAN: We offer Defendant's  
6 Exhibit 31 in evidence.

7 THE COURT: Yes, sir.

8  
9 (The sign was received in evidence  
10 as Defendant's Exhibit No. 31.)

11  
12 BY MR. MORGAN:

13 Q Mrs. Alford, are there two such  
14 signs in your premises?

15 A That's correct.

16 Q And when did you put up the  
17 first such sign with relation to the date of  
18 your arrest?

19 A Shortly after, possibly a week.  
20 It could have been two.

21 Q And the second such sign?

22 A This past week, last Friday.

23 Q And the second such sign was  
24 placed where?  
25

1                   A           On the front door of the  
2 entrance of the dining room.

3                   Q           What happened with the sign with  
4 respect to no tank top shirts?

5                   A           I had to move it down to the  
6 bottom of the door so that the smoking sign could be  
7 in the center of the door.

8                   Q           Fine.

9 BY THE COURT:

10                  Q           And the second sign was placed  
11 on the front door last Friday?

12                  A           Yes, sir.

13                  Q           That would be the 15th, wouldn't  
14 it?

15                  A           Right.

16 BY MR. MORGAN:

17                  Q           Mrs. Alford, for what reason did  
18 you post the signs on your door?

19                  A           Well, I would like for everybody  
20 to know that they're welcome, not one person, but  
21 that we do smoke and will give them the right, if  
22 they don't want to come in where there is smoke,  
23 they could go away.

24                  Q           Do you smoke, personally?  
25

1                   A           I have never had a cigarette in  
2 my mouth.

3                   MR. MORGAN: That's all.

4                   THE COURT: You may cross  
5 examine, Mr. Mercer.

6                   MR. MERCER: Thank you, Your Honor.  
7

8                   CROSS EXAMINATION

9                   BY MR. MERCER:

10                  Q           Mrs. Alford, roughly speaking,  
11 how many customers do you serve in the restaurant  
12 daily?

13                  A           Mr. Mercer, I couldn't tell you  
14 exact, but I predict around 75, give or take. Some  
15 days there's more, some days there's less.

16                  Q           And Mr. Kanoy referred to  
17 another room that you had attached to the restaurant?

18                  A           Yes, sir.

19                  Q           Have you ever operated that portion  
20 of the restaurant as a --

21                  A           For noon meals, only for one year.  
22 I have not used it for one year except for banquets.

23                  Q           But you do have two rooms which  
24 you can operate?  
25

1 A Yes, sir.

2 Q Earlier there was testimony from  
3 Mr. Kanoy, I believe on cross examination, that  
4 he's known you for thirty years, ma'am, and I believe  
5 that he's known your son for thirty years; is that  
6 correct?

7 A My son and he, yes.

8 Q Do you know of any reason why Mr.  
9 Kanoy, based upon that relationship, would personally  
10 select you for enforcement of this ordinance?

11 A Ask that again, please.

12 Q Are you aware of any reason, ma'am,  
13 why Mr. Kanoy would personally select you and your  
14 restaurant for enforcement of this ordinance?

15 A No.

16 Q Were you notified, ma'am, by  
17 Mr. Kanoy on or about May 25 of the requirements of  
18 this smoking ordinance?

19 A That's correct.

20 Q And what was your response at  
21 that time, ma'am?

22 A I told him it was unconstitutional  
23 and that I wasn't going to put it up.

24 Q And were you again notified by him  
25

1 on June 20th?

2 A That's correct.

3 Q Of the requirements? And what  
4 was your response at that time?

5 A Same.

6 Q At any time did Mr. Kanoy  
7 discuss with you what you needed to do to be in  
8 compliance with the ordinance?

9 A Yes, he did.

10 Q Would you please tell the Court  
11 what he said to you, ma'am?

12 A That the law was to designate a non-  
13 smoking area; it didn't have to be a whole big area,  
14 just a small one, one table.

15 Q A one table area, ma'am?

16 A That would be sufficient.

17 Q And what did you advise him when  
18 he told you that one table would be sufficient?

19 A I still stand up for my  
20 constitutional rights.

21 Q I ask you, ma'am, what prompted  
22 you to put up the smoking permitted sign?

23 A I was advised by my attorneys.

24 Q And on that basis, you put the  
25



1 smoking permitted sign up?

2 A That's correct.

3 Q And you were aware, of course,  
4 that allowing smoking in your restaurant was in  
5 violation of the ordinance?

6 A Yes, sir.

7  
8 MR. MERCER: Your Honor, I don't  
9 have any more questions. Thank you.

10 THE COURT: All right, Mr. Mercer.  
11 Anything on redirect, Mr. Morgan?

12 MR. MORGAN: No, sir.

13  
14 (Witness stood aside)

15  
16 MR. MORGAN: Defense rests.

17 THE COURT: All right, sir. Any  
18 rebuttal from the City?

19 MR. MERCER: I have none.

20 THE COURT: City rests?

21 MR. MERCER: City rests, Your Honor.

22 THE COURT: Mr. Morgan?

23 MR. MORGAN: At this time, we'd like  
24 to file a motion for judgment for the Defendant.  
25

1 THE COURT: All right, sir. It  
2 will be filed. All right, sir. Would you  
3 like to argue the motion?

4 MR. MORGAN: Yes, sir.

5 THE COURT: Be delighted to hear  
6 you, Mr. Morgan.

7 MR. MORGAN: The law of Virginia  
8 has been for a great number of years,  
9 beginning with Jehovah's Witnesses cases,  
10 that the proprietor of an apartment building --  
11 the first of the major cases -- had a right  
12 to limit by lease the right of solicitation  
13 within the building, even though that was a  
14 first amendment protected right, quite clearly  
15 under the religion and speech clauses.  
16 The Supreme Court of Virginia upheld that  
17 right in the private property owner.

18 In 1916, the Boynton case, the  
19 Supreme Court of the United States held  
20 that the seating in a restaurant facility  
21 connected with an interstate commerce  
22 facility such as a train or a bus, that the  
23 restaurant facility became an integral part  
24 of the interstate commerce facility and  
25

1 that the application of Virginia laws of  
2 segregation to that facility were  
3 unconstitutional.

4 Virginia has a trespass after  
5 warning statute. One of the reasons for  
6 the provisions, I'm quite certain, in the  
7 city ordinance and city ordinances generally,  
8 that state not only the message of the  
9 ordinance but also the prospective loss or  
10 fine to the individual to make certain that  
11 the individual knows what the cost is to him  
12 or her, is because a person cannot be held  
13 to be a trespasser without some notice or  
14 knowledge of the conduct required of the  
15 property or whether or not they have a  
16 right to be there.

17 In this instance, we have a woman  
18 who owns a restaurant facility and, under  
19 the law of the State of Virginia, can exclude  
20 from that facility anyone or any class of  
21 people she wants to except on the grounds  
22 of race, nationality or general religion.  
23 Now, those items are covered by the Federal  
24 Civil Rights Act, in Title II, the public  
25

1 accommodation section thereof. She stands  
2 to the whole world as though she said,  
3 "Your home is your castle and my restaurant  
4 is mine." Now, she opens that restaurant  
5 to the public, but only to a limited part  
6 of the public. She doesn't open it to  
7 those who don't wear shoes. She doesn't  
8 open it to those who wear shirts without  
9 sleeves in them. And she doesn't open it  
10 to those who object to smoking.

11 The City of Newport News injects  
12 itself into a current controversy over  
13 smoking and not smoking, which, incidentally,  
14 a majority of citizens do not smoke, and it  
15 says, "We pass an ordinance which requires  
16 you and takes from you this property right,"  
17 and says, "You must post this kind of a  
18 sign. You must set aside a portion of your  
19 property for a particular kind of person."

20 Assume, for instance, that the  
21 person is a husband who smokes and a wife  
22 who does not and he wants to smoke during  
23 his meal or after dinner. That happens to  
24 be a time when many folks who smoke want to  
25

1 smoke. She has absolutely no objection,  
2 even though she had not had the signs posted  
3 prior to her arrest, she has no objection  
4 to anyone who doesn't want to smoke or does  
5 want to smoke, putting up a sign, notice to  
6 those who want to be in the presence of it  
7 or don't want to be in the presence of it.

8 Now, the Constitution is so geared  
9 that it attempts to say to the government,  
10 "The least interference you have on the  
11 average citizen's life, the better we all  
12 will be." As long as Mrs. Alford gives  
13 notice to anyone entering her premises  
14 and they know whether to come there or not  
15 come there -- they can go to any other  
16 restaurant in town, whether it's low class,  
17 high class or middling class. That is the  
18 democracy of the marketplace.

19 Now, she also has a constitutional  
20 right guaranteed to her to associate with  
21 whom she wants to associate. If she wants  
22 to lay out a rule saying, "I just want to  
23 associate with smokers," or, "I just want to  
24 associate with non-smokers," or, "I just  
25

1 want to associate with those who don't  
2 object to smoking," she's got a right to  
3 do that and right to serve or not serve  
4 those people on that basis alone.

5 The only conceivable ground that  
6 the state could have or city could have to  
7 pass an ordinance requiring her to seize  
8 part of her personal property, her real  
9 property and a part of her right of  
10 association is that there is some great  
11 perceived danger. She has taken care of  
12 that danger with a less drastic alternative.  
13 She passed for herself a new notice and  
14 that notice says to the whole world, "Come  
15 in here. If you do, you're going to be  
16 around folks who smoke." Nobody could  
17 conceivably be injured or even annoyed  
18 with that notice.

19 Now, throughout the country there is  
20 product notice, notices on bottles, notices  
21 even under Virginia law with respect to  
22 invitees and the kind of obligation or  
23 duty she owes to her guests on her premises,  
24 notices to visitors of their rights, because  
25

1 they waive the right when they come in.

2 Now, the signs do not constitute  
3 a defense to Mrs. Alford on this charge  
4 except they show a less drastic alternative,  
5 and the City, in this area that is constitu-  
6 tionally protected, has a duty and obligation  
7 to take the less drastic alternative to  
8 regulate citizen conduct. That sign, just  
9 as signs that I've seen elsewhere which  
10 say "Thank You For Not Smoking" or "No  
11 Smoking," that is the prerogative of the  
12 person in the office or in the place or on  
13 the premises to set up their own rules, and  
14 it is every bit as wrong in this instance,  
15 constitutionally, because it is done by a  
16 state institution, an agency, to say, "You  
17 must do with your property what we demand  
18 that you do rather than what you desire to  
19 do after giving notice." It's the kind of  
20 a problem that government has no hand in,  
21 because people can make up their own minds.  
22 The sign gives notice that, "As far as  
23 this property and property owner is con-  
24 cerned and as far as the rest of the world  
25

1 is concerned, I want to do business with  
2 those of you who agree with what is on this  
3 sign and those other signs that say 'No  
4 Bare Feet' and 'No Shirts Without Sleeves.'"

5 THE COURT: Thank you, Mr. Morgan.  
6 Mr. Mercer?

7 MR. MERCER: Your Honor, are we  
8 just arguing with respect to the point that  
9 was raised by the defendant or are we  
10 arguing the case as a complete matter?

11 THE COURT: I'll let you determine  
12 how you want to argue it, Mr. Mercer. I  
13 think there was some suggestion that there  
14 would be time to exchange briefs and I have  
15 received the defendant's brief. I have not  
16 read it, haven't gone over it, and at this  
17 time, if you want me to before you --

18 MR. MERCER: Your Honor, in that  
19 case, I'll go ahead and treat this as a  
20 closing argument in addition to argument  
21 against his motion to dismiss. I'm not  
22 exactly sure of the title of it.

23 THE COURT: "Motion To Dismiss."  
24 Motion for acquittal under our procedure, I  
25



1 believe.

2 MR. MERCER: Your Honor, the  
3 freedom of association argument is, on  
4 first impression, is quite attractive.  
5 I think that it is a specious argument in  
6 that it truly misses the point of what the  
7 police power of the City is all about. The  
8 City has not said in any ways or means,  
9 Your Honor, that Mrs. Alford cannot associate  
10 in her restaurant, has not said she can't  
11 have five people in it or a hundred people  
12 in it, unless she violates the City Health  
13 Ordinance. All it does is simply controls  
14 the behavior of those who would enter the  
15 restaurant, simply says if they're going  
16 to enter the restaurant, they're not going  
17 to smoke, and if they do, Mrs. Alford has  
18 to designate an area where they may smoke.  
19 Other than that, it says nothing with respect  
20 to her freedom of association and people  
21 can come in there any time and I don't see  
22 any difference between saying people can't  
23 come in and smoke and saying people can't  
24 come in and fight. She could legitimately,  
25

1 based on this argument, say that, "The City  
2 has no right to tell me I can't have people  
3 come in this restaurant who want to commit  
4 assault and batteries on each other or  
5 fighting." City says, "No. That's not the  
6 way it's going to be. They're not going to  
7 come in and fight and commit assault and  
8 batteries on each other." It's a reasonable  
9 control on people's behavior. It's common  
10 sense. You just can't operate places like  
11 this without such controls.

12 The City Council, in its wisdom,  
13 has ordained that there's not going to be  
14 any smoking in restaurants. Your Honor,  
15 I believe that there is ample evidence in  
16 the law of the United States and in the law  
17 of Virginia the legislatures and city  
18 councils do have the power, broadly speaking,  
19 to enact ordinances such as this to control  
20 behavior.

21 I would like, in that respect,  
22 Your Honor, to quote from a couple of Supreme  
23 Court cases briefly, Your Honor. In the case  
24 of Day-brite Lighting v. Missouri, 342 U.S.  
25

1 421 -- this is a 1952 case, quite famous  
2 case, Your Honor, where the Court indicated  
3 that the state of Missouri could pass a  
4 law which required employers to release  
5 their employees to vote while still paying  
6 their salaries, and in that case, Your  
7 Honor, it said, "The state legislatures  
8 have constitutional authority to experiment  
9 with new techniques; they are entitled to  
10 their own standard of the public welfare;  
11 they may within extremely broad limits  
12 control practices in the business-labor  
13 field, so long as specific constitutional  
14 prohibitions are not violated and so long  
15 as conflicts with valid and controlling  
16 federal laws are avoided." I think the  
17 language of that part of the decision speaks  
18 for itself. And additionally, later the  
19 Court noted, "But the police power is not  
20 confined to a narrow category. It extends,"  
21 and I'll omit the citation, "to all great  
22 public needs."

23  
24 Additionally, in that case, Your  
25 Honor -- and this is very important with

1                   respect to the defendant's argument con-  
2                   cerning property or, rather, her due process,  
3                   violations with relation to her property.  
4                   Incidentally, Your Honor, I would note at  
5                   this point, there has been absolutely no  
6                   evidence whatsoever that the defendant has  
7                   suffered any loss in terms of property or  
8                   rights to her property or that she will  
9                   ever suffer any loss to her property or  
10                  rights to her property. But the Court  
11                  continues, returning to the point of  
12                  business losses, the Court says, "Of course,  
13                  many forms of regulation reduce the net  
14                  return of the enterprise, yet that gives  
15                  rise to no constitutional infirmity. Most  
16                  regulations of business necessarily impose  
17                  financial burdens on the enterprise for  
18                  which no compensation is paid. Those are  
19                  part of the costs of our civilization."

20                         It continues further, in a  
21                         later paragraph, "The judgment of the  
22                         legislature that time out for voting  
23                         should cost the employee nothing may be a  
24                         debatable one . . . but if our recent cases  
25

1 mean anything, they leave debatable issues  
2 as respects business, economics, and associa-  
3 tion affairs to legislative decision."

4 I submit in this case, Your Honor,  
5 it may be debatable whether or not smoking  
6 should be allowed in restaurants, but the  
7 Court very clearly held, and I believe it's  
8 the law in Virginia, the Courts don't weigh  
9 the wisdom of legislation and the only time  
10 they will become involved in matters such  
11 as this on a constitutional basis is where  
12 there is a clear violation of the defendant's  
13 constitutional rights.

14 Your Honor, frankly, I submit  
15 the freedom of association argument holds  
16 no water. This is simply an exercise of  
17 the police power of the State, of the  
18 City as a lawful agent of the State, and  
19 we have not prohibited anybody from  
20 associating in her restaurant. Additionally,  
21 Your Honor, I have a question in my mind  
22 with respect to whether or not she has  
23 standing to raise this argument as a business-  
24 woman. Now, as an individual, she may well  
25

1 have standing to say, "I have been denied  
2 my right to meet with anyone," but I don't  
3 see it. My understanding of the freedom  
4 of association argument is that it reaches  
5 the great constitutional freedoms, politically  
6 or otherwise, and it does not necessarily  
7 delve into areas of simple police power  
8 where the City has said, "If you wish to  
9 enter a restaurant, certain modes of  
10 behavior are acceptable, certain modes are  
11 not," and this is clearly within the  
12 police power of the City, Your Honor.

13 I would like to continue now and  
14 just go ahead and make my closing argument.  
15 with respect to the facts of the case.  
16 I submit the facts we have here before the  
17 Court, from Mr. Kanoy and by the defendant's  
18 own admission, indicate that she was  
19 advised of the requirements of the smoking  
20 ordinance on the 25th of May and on the 20th  
21 of June and on both occasions, she indicated  
22 that she had no intention of complying with  
23 the ordinance. Additionally, in order to  
24 work with the defendant, the inspector  
25

1 personally notified her that all she needed  
2 to do to comply with the ordinance was set  
3 aside a single table for a no smoking  
4 section. Your Honor, I submit that that  
5 is more than meeting the defendant halfway  
6 in trying to help everybody live with each  
7 other in situations such as this.

8 I would additionally point out  
9 that in the statute --

10 THE COURT: She has consistently  
11 stated to her representatives she was aware  
12 of the ordinance and did not comply with it,  
13 because she thought it violated her  
14 constitutional rights.

15 MR. MERCER: I understand that.  
16 I'll address that later. What I'm trying  
17 to point out is that the burden on the  
18 defendant is very minimal and the smoking  
19 ordinance, Your Honor, in the section that  
20 I refer to, points out, ". . . designation  
21 of such rooms or areas," referring to the  
22 smoking area, "shall be reasonably separated  
23 from those rooms or areas entered by the  
24 public in the normal course of use of the  
25

1 particular business or institution." The  
2 word "reasonably" there, of course, creates  
3 an ambiguity in the statute which only  
4 the administrative personnel who are in  
5 charge of enforcing the statute can truly  
6 apply to given circumstances and conditions  
7 of each individual restaurant. I think  
8 the Court is well aware of that from pre-  
9 vious evidence which has been submitted  
10 with respect to compliance in other cases  
11 in downtown Newport News. All I'm pointing  
12 out, Your Honor, at this juncture is that  
13 Mrs. Alford, although we have attempted to  
14 work with her, attempted to explain the  
15 requirement of the statute is a very minimal  
16 requirement, has simply refused to work  
17 with us.

18 THE COURT: It would appear there  
19 are differences between some of the  
20 establishments of which photographs have  
21 been put into evidence, in that Mrs. Alford  
22 has from the outset advised him she did not  
23 intend to comply with the ordinance while  
24 some of the others have attempted to comply  
25



1 with the ordinance and have fallen short  
2 in some respects.

3 MR. MERCER: Yes, Your Honor.

4 And apparently the defendant, of course,  
5 is arguing on this basis the City has  
6 singled her out. Of course, there is  
7 quite a big difference between her behavior  
8 and the behavior of most of the others in  
9 that they have at least attempted to  
10 comply with it, in other words, letting  
11 people know there is no smoking in certain  
12 sections. Mrs. Alford has refused from  
13 the beginning to comply on a constitutional  
14 basis. Of course, the reason I raise this  
15 point is that one of the arguments here is  
16 due process violation, minimal regulation  
17 must be applied. I don't know of any  
18 more minimal way to enforce what the City  
19 Council has determined to be within the  
20 City's police power, and if it is, I would  
21 suggest the defendant submit some evidence  
22 on that point, Your Honor.

23 With respect to the law, I would  
24 simply state that the City Charter, Chapter 2,  
25

1 entitled "Powers of City," Section 2.01  
2 reads -- and this is paraphrased, Your  
3 Honor -- that the City shall have and may  
4 exercise all powers conferred upon it by the  
5 Constitution and laws of the Commonwealth  
6 and all other powers not expressly prohibited,  
7 which in the opinion of City Council are  
8 necessary or desirable to promote the general  
9 welfare of the City and the safety, health,  
10 peace, good order, comfort, convenience and  
11 morals of the City's inhabitants.

12 Section 2.04 of the Newport News  
13 City Charter also provides that the City  
14 shall have the specific power to adopt  
15 ordinances with respect to safety, health,  
16 peace, good order, comfort, etc.

17 Your Honor, earlier in the  
18 proceedings, I raised the argument that  
19 the defendant, when she does raise a  
20 constitutional argument, is faced with an  
21 uphill battle, Your Honor, and that is  
22 exactly what this is, because the law in  
23 Virginia and United States says there is a  
24 presumption of validity. I would cite two  
25

1 cases to the Court on this.

2 In the United States Supreme  
3 Court decision of Goldblatt v. Town of  
4 Hempstead, 369 U.S. 590, a 1962 case,  
5 Your Honor, it was said that, ". . . exercise  
6 of police powers is presumed to be constitu-  
7 tionally valid," and that, ". . . exercise  
8 of police power will be upheld if any state  
9 of facts, either known or which could be  
10 reasonably assumed, afford support for it."

11 Additionally, in the case of  
12 Peree v. Virginia Board of Funeral Directors  
13 and Embalmers, et al, 203 Va. 161, a 1961  
14 case, the Virginia Supreme Court stated  
15 that, "It has long been established that  
16 every presumption is to be made in favor  
17 of an act of the legislature, and it is  
18 not to be declared unconstitutional except  
19 where it is clearly and plainly so."

20 Additionally, in Mumpower v.  
21 Housing Authority of Bristol, 176 Va. 426,  
22 a 1940 case, the Virginia Supreme Court,  
23 quoting from an earlier case, said, "'A large  
24 discretion is vested in the legislature  
25

1 to determine what the interests of the  
2 public require and also as to what is  
3 necessary for the protection of such  
4 interests, and every possible presumption  
5 is to be indulged in favor of the validity  
6 of the statute."

7 THE COURT: That's when the  
8 Supreme Court of Virginia said that the  
9 Housing Authority's act was constitutional;  
10 is that correct?

11 MR. MERCER: Yes, sir. Each of  
12 these cases is with respect to a particular  
13 point, but I chose these cases personally  
14 because I felt the phrasing indicated these  
15 were general principles of law and were  
16 well suited points. If you wish, I could  
17 provide the citations to you. They were  
18 cited from many earlier Supreme Court cases.

19 So there is a presumption of  
20 validity of the statute, Your Honor, con-  
21 stitutionally and otherwise. With respect  
22 to that presumption, Your Honor, the Virginia  
23 and United States law shows that the burden  
24 of showing the statute to be invalid falls  
25

1 clearly on the defendant and I submit,  
2 Your Honor, the defendant has not shown the  
3 statute to be invalid. I have seen no  
4 evidence showing any due process violations.  
5 I have seen no evidence showing the  
6 defendant has been put out of business or  
7 her income has been limited in any way or  
8 truly her freedom of association has been  
9 limited in any substantial way.

10 With respect to the burden being  
11 on the defendant to show the invalidity of  
12 the statute was the case of Butler v.  
13 Thompson, 97 F. Supp. 17. This was an  
14 Eastern District of Virginia case, 1951.  
15 The Court said there, "There is a primary  
16 presumption of the constitutionality of a  
17 state statute in the light of the Federal  
18 Constitution and a strong showing must be  
19 made by the party attacking the constitu-  
20 tionality of the statute." There are other  
21 cases, but I think that case speaks for  
22 itself. Virginia cases, additionally, which  
23 hold the same thing, there are numerous  
24 Virginia cases.  
25

1 With respect to the case which  
2 is before the Court, Your Honor, again, I  
3 would submit that the defendant has neither  
4 strongly or clearly shown this ordinance  
5 to be invalid. Indeed, I think that the  
6 defendant's arguments in and of themselves  
7 with respect to freedom of association  
8 speak for themselves, Your Honor.

9 Finally, Your Honor, in conclusion,  
10 I would ask the Court to consider the public  
11 good which is being served by this smoking  
12 ordinance in relation to the minimal burden  
13 which it's effectively placing upon the  
14 defendant to comply with. A restaurant is  
15 a public place which may be frequented by  
16 persons of all ages and of all conditions  
17 of health. It's a place in which we place  
18 particular trust for cleanliness, sanitation  
19 and comfort because we eat and drink there.  
20 There are undoubtedly many, perhaps numerous  
21 people in Newport News or in the Newport  
22 News area who suffer from allergies, from  
23 emphysema or other respiratory ailments,  
24 who cannot and should not be subjected to  
25

1 the cigar and cigarette smoke of others.

2 MR. MORGAN: Your Honor, I object  
3 to that argument and move to exclude for  
4 there is no evidence in the record whatever.

5 THE COURT: Objection sustained.

6 MR. MERCER: I believe the Court  
7 can take reasonable notice --

8 THE COURT: I think notice of that  
9 is hotly contested by the tobacco industry,  
10 that there is any validity to the Surgeon  
11 General's determination, I think in January  
12 of 1963, that smoking is harmful to your  
13 health.

14 MR. MERCER: Your Honor, with  
15 respect to that, the United States Supreme  
16 Court has held that the legislature does  
17 not have to have any empirical proof of a  
18 conclusion of law that somebody may or may  
19 not be sickened or some deleterious result  
20 may come from that.

21 I would like to cite the case,  
22 if it please Your Honor, of Paris Adult  
23 Theater v. Slaton, 413 U.S. 49, 1973, dealing  
24 with obscenity. One of the defenses raised  
25

1 was, "We've got a statute here which pro-  
2 hibits obscenity. There's an argument that  
3 obscenity is deleterious to the morality of  
4 the community and that it causes crime, in  
5 fact." And he said, Your Honor, "There  
6 is absolutely no empirical data which will  
7 show this argument to be true and the  
8 prosecutor has shown nothing in this regard."

9 Well, let me read you what the  
10 Court's response was to that, Your Honor.  
11 It said, "But, it is argued, there are  
12 no scientific data which conclusively  
13 demonstrate that exposure to obscene  
14 material adversely affects men and women  
15 or their society. It is urged on behalf  
16 of the petitioners that, absent such a  
17 demonstration, any kind of state regulation  
18 is impermissible. We reject this argument.  
19 It is not for us to resolve empirical  
20 uncertainties underlying state legislation,  
21 save in the exceptional case where that  
22 legislation plainly impinges upon rights  
23 protected by the Constitution itself."

24 Additionally, later the Court said,  
25



1 "The sum of experience affords an ample  
2 basis for legislatures to conclude that  
3 a sensitive, key relationship of human  
4 existence, central to family life,  
5 community welfare, and development of human  
6 personality, can be debased and distorted  
7 by crass commercial exploitation of sex;  
8 nothing in the Constitution prohibits a  
9 state from reaching such a conclusion and  
10 acting on it legislatively simply because  
11 there is no conclusive evidence or empirical  
12 data."

13 I submit that is directly analagous  
14 of the situation where the City Council may  
15 determine that smoking may be deleterious  
16 to one's health, particularly in a situation  
17 where you're eating or drinking.

18 THE COURT: I don't think that  
19 Mr. Morgan was questioning that, Mr.  
20 Mercer.

21 MR. MORGAN: That's right. I  
22 wasn't.

23 THE COURT: There is no question  
24 under police power City Council could  
25

1                   legislativewise determine that smoking is  
2                   harmful and enact whatever ordinances they  
3                   considered would be helpful in alleviating  
4                   that circumstance. I think he was alluding  
5                   to some other factor.

6                   MR. MERCER: I'm sorry. I  
7                   apologize if I missed the point. Perhaps  
8                   if you'd explain the point to me if I  
9                   missed it --

10                  THE COURT: No, sir. I think  
11                  we're on the right course. Why don't you  
12                  continue?

13                  MR. MERCER: Thank you.  
14                  Additionally, Your Honor, I would ask  
15                  the question, is it unreasonable for the  
16                  City to make provision for those individuals  
17                  who wish to be able to do so to enter a  
18                  public restaurant, to eat their meal with  
19                  a minimum of cigar and cigarette smoke?  
20                  I submit, additionally, Your Honor, there  
21                  are probably many of us in the courtroom  
22                  who have had the experience of eating  
23                  their meal while being subjected to cigar  
24                  or cigarette smoke. On the other hand, I  
25

1 ask, what burden has been placed on the  
2 defendant, in truth, by this statute?  
3 Have we abridged her constitutional rights?  
4 I submit we have not. Additionally, have  
5 we taken away her right to do business?  
6 We have not. Have we substantially  
7 reduced her ability to earn income? We  
8 have not. I submit all we have asked her  
9 to do effectively, according to the  
10 testimony here, is set aside one table for  
11 a no smoking area.

12 In view of the presumption of  
13 validity of this statute, Your Honor,  
14 and the minimal burden which it effectively  
15 places upon the defendant and the good  
16 which this statute promotes for the public,  
17 I would ask judgment be given against the  
18 defendant. Thank you.

19 THE COURT: Mr. Morgan?

20 MR. MORGAN: Yes, sir. I would  
21 like to respond specifically to several  
22 of the arguments made.

23 THE COURT: Yes, sir.

24 MR. MORGAN: The words used by  
25

1                   counsel that strike me as central to the  
2                   theme of this case -- and I hope and trust  
3                   I quote correctly and if I don't, then I,  
4                   of course, apologize. The record will show.  
5                   Sure, the State can enact regulations on  
6                   business. Sure, ordinances are presumed  
7                   constitutional and state statutes are.  
8                   But when they enter a protected area  
9                   of a first amendment guaranteed right, then  
10                  the statute or ordinance is subjected to  
11                  different tests. The Supreme Court adopts  
12                  sometimes murky language, but often not  
13                  murky, clear language to tell the kind of  
14                  tests. For instance, was there a compelling  
15                  state interest? Was there a compelling  
16                  governmental interest? Should the statute  
17                  be subjected to "strict scrutiny"?

18                               Now, on the question of standing,  
19                               there's not much question but a criminal  
20                               defendant in a case has standing to raise  
21                               the question of the constitutionality of the  
22                               ordinance. Were this a civil action where  
23                               Mrs. Alford was suing for declaratory judgment  
24                               or otherwise seeking to enforce rights, the  
25

1 question of standing might be raised, but  
2 here it's not.

3 Thirdly, I do not believe a  
4 parallel between the morality of the people  
5 and smoking in Mrs. Alford's restaurant is  
6 quite correct, nor do I believe that  
7 would be the public policy as expressed  
8 by the legislature or the City Council.  
9 I think instead that we're really talking  
10 about the phrases such as, "We attempted  
11 to work with her, she has simply refused  
12 to work with us," and the State is entitled  
13 to a "reasonable control on how citizens  
14 behave." (16)

15 MR. MERCER: I object, Your Honor.  
16 I don't think those were my words with  
17 respect to the last statement.

18 THE COURT: Let him complete his  
19 argument, Mr. Mercer.

20 MR. MORGAN: Let me complete my  
21 argument.

22 THE COURT: He has stated in the  
23 event he's misquoting, the record will  
24 bear him out.  
25

1 MR. MERCER: Thank you, Your  
2 Honor.

3 MR. MORGAN: Citizens of the  
4 United States any place are entitled to  
5 whatever behavior they want to engage in  
6 as long as it's not in violation of a  
7 constitutionally enacted statute or law,  
8 as long as their behavior does not interfere  
9 with the rights of whole world, with rights  
10 of a single citizen. In the State of Virginia,  
11 it is quite clear to me that Mrs. Alford has  
12 the right to say to the whole world out  
13 there, for example, "I don't want to serve  
14 anybody but Republicans. I don't want to  
15 serve anybody but Democrats. I'm opening my  
16 restaurant up to people who wear suits. We  
17 will seat only couples, and only couples of  
18 the opposite sex of each other in this  
19 restaurant." That is her right. The State  
20 has a right to regulate conduct of citizens,  
21 but it has that right only when it adopts the  
22 alternative that interferes least with the  
23 citizens' rights guaranteed by the Bill of  
24 Rights and that is why I particularly wrote  
25

1 down the phrases about the control of how  
2 citizens behave.

3 I can only say to everyone, with  
4 respect to the Day-brite case and questions  
5 which relate to the right to vote, the  
6 right to vote is, of course, guaranteed  
7 under state law by the Federal Constitution  
8 under the fourteenth amendment, and initially  
9 the right to vote was ruled on by the  
10 Constitution and it was up to the state to  
11 determine qualifications. Those have been  
12 altered both constitutionally and by statute,  
13 but the right to vote is also a first amend-  
14 ment right to freedom of speech. The right  
15 to vote is the essence of free speech, do  
16 it in privacy of the polling place, do it in  
17 secret, and it seems to me that a statute  
18 designed by a state such as Kansas to say  
19 to citizens, "We're going to make it  
20 easier for you to vote," is quite different  
21 from a statute designed to say to citizens,  
22 "We're going to take away your right to  
23 associate with whomever you wish," also  
24 guaranteed by the first amendment, and I  
25

1 believe that we set forth the issues.

2 Some of the restaurants have  
3 signs, some have non-conforming signs,  
4 some have conforming signs, some have no  
5 signs. Some doctors' offices have signs,  
6 some have no signs. The thrust of Mrs.  
7 Alford's case is it's fine for the City to  
8 say, "Put up a sign," but not to dictate  
9 to her which course of action she has to  
10 follow.

11 THE COURT: Thank you, sir.

12 Normally in the presentation of the case,  
13 Mr. Mercer, you would be entitled, at the  
14 conclusion of all of the evidence and if I  
15 overruled the motion to strike and for  
16 acquittal, you would be entitled to respond.  
17 I assume that these are your closing remarks,  
18 Mr. Morgan, because I'm going to take the  
19 question of the motion to strike and for  
20 acquittal under advisement. In the event  
21 you would like to exercise the prosecutor's  
22 right to rebut, I'll give it to you, Mr.  
23 Mercer.  
24  
25



1 MR. MERCER: No, thank you, Your  
2 Honor. I would simply renew my objections  
3 again to the entry of evidence which were  
4 made earlier in the case.

5 THE COURT: When would you like  
6 to respond to Mr. Morgan's brief?

7 MR. MERCER: Well, Your Honor,  
8 I'm not certain what's usually proper in  
9 cases like this. Would three or four weeks  
10 be too long, Your Honor?

11 THE COURT: Be all right with me.

12 MR. MORGAN: Fine with us.

13 THE COURT: I think we ought to  
14 have a schedule so we won't have any mis-  
15 understanding, gentlemen. We're well into  
16 September. Would October 27 work a hardship  
17 on you, Mr. Mercer? What is today's  
18 date? 22nd.

19 MR. MERCER: No, Your Honor. That  
20 will be fine, October 27.

21 THE COURT: October 27 to file  
22 your brief in response to -- or to file your  
23 brief. I'll put it that way. No need to  
24 make response to his. You can make it  
25

1 responsive to his brief or anything you  
2 want to. October 27, 1978, brief by the City.  
3 And what is your pleasure, Mr. Morgan?

4 MR. MORGAN: I don't think it  
5 would take us long after we receive the  
6 brief. Ten days.

7 THE COURT: All right, sir. Would  
8 you like to respond, then, assuming that  
9 the brief is mailed to you on or about  
10 October 27th, you'd be in receipt of it  
11 by October 30, three day mail rule will  
12 apply. Would November 10 be pushing you?  
13 That would be the succeeding Friday.

14 MR. MORGAN: No, sir. That's  
15 fine.

16 THE COURT: All right, gentlemen.  
17 I must say the case is novel for me as a  
18 new jurist. I will welcome the opportunity  
19 to go through the briefs. But as has been  
20 my policy since October 12, 1977, I'm not  
21 going to read any briefs until I get the  
22 City's brief in response and then I might  
23 wait until I hear from Mr. Morgan. I have  
24 enjoyed the presentation, look forward to  
25

1 hearing from you both and I promise you I'll  
2 give you an early decision.

3 MR. MORGAN: Thank you, Your  
4 Honor.

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CERTIFICATE OF COURT REPORTER

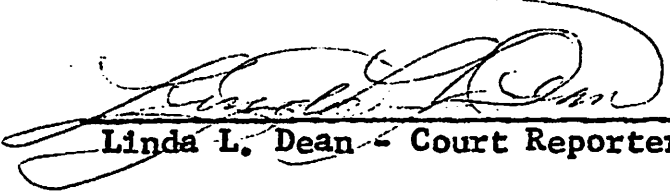
COMMONWEALTH OF VIRGINIA,

CITY OF NEWPORT NEWS, to-wit:

I, Linda L. Dean, hereby certify  
that I, having been duly sworn, was the Court Reporter  
in the Circuit Court for the City of Newport News,  
Virginia, on September 22, 1978, at the time of  
the trial of the City of Newport News, Virginia v.  
Phyllis L. Alford.

I further certify that the  
foregoing was reported in stenotype by me and  
reduced to typescript under my direction and is  
a true and accurate record of the proceedings herein.

Given under my hand this 7th  
day of November, 1978.

  
Linda L. Dean - Court Reporter

VIRGINIA:

Circuit Court of the City of Newport News, Friday, the  
22nd day of September, 1978.

PRESENT: Judge J. Warren Stephens.

Commonwealth )

Vs )

Upon an Appeal Warrant  
June 29, 1978 Appeal Date

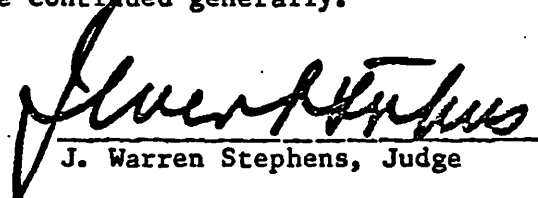
Phyllis L. Alford )

Failure to Comply with No  
Smoking Ordinance

This day came the attorney prosecuting for the Commonwealth and the defendant Phyllis L. Alford (who was represented by Panos A. Yeapanis, Charles Morgan, Jr. and Edward Ashworth, attorneys of her own choosing) appeared in Court on condition of her recognizance, and Linda Dean, Court Reporter, was sworn to faithfully and accurately take down and transcribe the proceedings herein, and the defendant pleaded not guilty to said warrant, and after being advised by the Court of his right to trial by jury, the Court having made inquiry and being of the opinion that the defendant fully understood his plea, his waiver of trial by jury, and the defendant knowingly and voluntarily waived trial by jury, and with the concurrence of the attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine this case without the intervention of a jury.

And, the evidence being heard for the Commonwealth, the defendant, by counsel, presented a written motion and grounds to strike the Commonwealth's evidence and for judgment of acquittal to the Court, which motion is taken under advisement by the Court and it is ordered that the Commonwealth file its brief by October 27, 1978 and the defendant file her rebuttal brief by November 10, 1978.

It is ordered that this case be continued generally.

  
J. Warren Stephens, Judge

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

CITY OF NEWPORT NEWS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action
	:	No. _____
PHYLLIS L. ALFORD,	:	
	:	
Defendant.	:	

BRIEF FOR THE PLAINTIFF

GEORGE J. MERCEP  
Assistant City Attorney  
2400 Washington Avenue  
Newport News, Virginia 23607

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

CITY OF NEWPORT NEWS,  
Plaintiff,  
v.  
PHYLLIS L. ALFORD,  
Defendant.

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Criminal Action  
No. \_\_\_\_\_

BRIEF FOR THE PLAINTIFF

POINTS OF ARGUMENT

- I. THE NEWPORT NEWS ORDINANCE IS PRESUMED CONSTITUTIONALLY VALID.
- II. UNDER UNITED STATES AND VIRGINIA LAW, THE CITY HAS BROAD POWER TO REGULATE THE USE OF PRIVATE PROPERTY.
- III. THE DOCTRINE OF SUBSTANTIVE DUE PROCESS HAS NO APPLICATION IN THIS CASE.
- IV. THE CITY ORDINANCE DOES NOT VIOLATE THE "RIGHT OF ASSOCIATION".
- V. THERE HAS BEEN NO DENIAL OF EQUAL PROTECTION IN ENFORCEMENT OF THE CITY ORDINANCE.

ARGUMENT

- I. THE NEWPORT NEWS ORDINANCE IS PRESUMED  
CONSTITUTIONALLY VALID.

In Virginia, a presumption of constitutionality arises where an ordinance is attacked as being unconstitutional, and the party asserting unconstitutionality bears the burden of

clearly showing such invalidity. In State Board of Elections, et al v. Forb, 214 Va. 264, 199 S.E.2d 527 (1973), where a state election statute was challenged as being unconstitutional in its treatment of independent candidates, the Court said:

"It is axiomatic that the statute in question is presumed to be valid and that the burden is upon [the defendant] to show clearly its invalidity." 199 S.E.2d at 528.

Similarly, in Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971), where a rule promulgated by the Virginia Real Estate Commission was challenged as being vague and indefinite in violation of the due process clauses of the Constitution of the United States and Virginia, the Court said:

" . . . no legislative act should be construed as intended to deny any constitutional rights unless such a conclusion is unavoidable." 183 S.E.2d at 171-2.

With respect to the burden upon the party asserting invalidity, it was said in Butler v. Thompson, 97 F. Supp. 17 (E.D. Va. 1951):

"There is a primary presumption of the constitutionality of a state statute in the light of the Federal Constitution and a strong showing must be made by the party attacking the constitutionality of the statute." 97 F. Supp. at 24.

If there is any doubt of the constitutionality of an ordinance, the law is equally clear. For example, in Town of Ashland, et al v. Board of Supervisors for Hanover County, 202 Va. 409, 117 S.E.2d 679 (1964),<sup>238</sup> the Court said:

"It is a settled principle of law that all statutes and ordinances are presumed to be constitutional, and that if there is any doubt, such doubt should be resolved in favor of their constitutionality." 117 S.E.2d at 684.

Corresponding to the above mentioned cases regarding presumption of validity is the United States Supreme Court case of Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), wherein the Court noted that its previous cases left "no doubt" that:

- "(1) The burden of showing an ordinance to be constitutionally unreasonable rested upon the party attacking its validity,
- (2) The 'exercise of police powers is presumed to be constitutionally valid', and
- (3) The 'exercise of police power' will be upheld if any state of facts, either known or which could be reasonably assumed, afford support for it." 369 U.S. at 596.

In view of Goldblatt and the abovementioned Virginia decisions, it may be concluded that the Defendant has the burden of clearly showing the City's smoking ordinance to be constitutionally invalid. The Defendant's laborious attempt to clothe its attack on the City ordinance with strict scrutiny standards of the First and Fourteenth Amendment should thus be construed in light of this presumption of constitutional validity.

II. UNDER UNITED STATES AND VIRGINIA LAW, THE CITY HAS BROAD POWER TO REGULATE THE USE OF PRIVATE PROPERTY

Virginia law is clearly inclusive of the concept that under police power, the legislature may restrict the use of

property in the interest of public health, safety, and general welfare. It was so held in Gorieb v. Fox, et al, 145 Va.554, 134 S.E. 914 (1926), which dealt with the question of a City Council's power to zone land; and in Mumpower v. Housing Authority of Bristol, 176 Va. 426, 11 S.E.2d 732 (1940), dealing with State slum clearance power, the Court quoted from Slaughter-House Cases, 16 Wall. 36, 21 L.Ed. 394 (1873), noting that:

"[P]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." 11 S.E.2d at 737.

Later in the Mumpower decision, the Court quoted from Miller v. Board of Public Works, 195 Cal. 477, 234 P 381, further delineating the nature and extent of the state's police power:

"It is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral and intellectual evolution of the human race. \* \* \* there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'" 11 S.E.2d at 738.

In Repass v. Town of Richlands, 163 Va. 1112, 178 S.E. 3 (1935), the Supreme Court of Virginia upheld a town ordinance which prohibited the sale of beer and other beverages within three hundred feet of public schools as a proper exercise of

police power. Regarding the question of whether or not that ordinance was reasonable and necessary, the Court quoted from its earlier decision of Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 ( 1927), where it was said:

"The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances. Every intendment is to be made in favor of the lawfulness of the exercise of municipal powermaking regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the powers vested in municipalities for the promotion of the public safety.'" 178 S.E. at 5.

In view of the foregoing decisions, it may be concluded that the City of Newport News, under Virginia law, has wide ranging police power to enact ordinances which regulate the use of private property in a manner reasonably related to the health, safety, comfort, and general welfare of the community. With regard to the smoking ordinance at issue in this case, the reasonableness of the provision it makes for the health, comfort and general welfare of the public as patrons of Newport News restaurants is self-evident. The animating purpose of this regulation is in fact reasonable and just: to enable the general public to consume and enjoy meals in city restaurants, in an atmosphere reasonably free of potentially noxious and irritating tobacco smoke. Nor may it be said that the ordinance is arbitrary in nature, in view of the provision it makes for "designated smoking areas" in order to accommodate those who wish to smoke.

As will become apparent in subsequent discussion, (infra) the Defendant's inflated claims that the smoking ordinance infringes upon the First Amendment, Freedom of Association, and the Fourteenth Amendment, Substantive Due Process Standards, are plainly unfounded. With respect to the question of reasonableness, the Defendant has not offered any evidence or argument in the record or pleadings, to show that the smoking ordinance would work an economic or practical hardship on the Defendant, or that its provisions are difficult or impractical to comply with. Additionally, no showing has been made that this ordinance is not substantially related to the public health, safety, morals, or welfare. In this regard, the Court in Mumpower, supra, when faced with similar circumstances, said:

"There is nothing in the pleadings to suggest that the legislature has acted arbitrarily or unreasonably. Its enactment must be sustained unless - 'it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'. West Brothers Brick Company v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937)."

The rationale underpinning the City's police power to regulate smoking in a restaurant serving the public, particularly in view of modern convention and attitudes towards smoking, is best summed up in the West Brothers case, supra, where a land-use zoning restriction was challenged as being unreasonable. Therein the Court said:



"[P]olice power 'embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, public morals, or public safety.'" (Citation omitted.)

"The power is not limited to regulations designed to promote public health, public morals, or public safety, or to the suppression of what is offensive, disorderly, or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." (Citation omitted).

"Aesthetic considerations alone are not enough, but they should be considered."

"It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the bann of the law, but ugly sights and distorted surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered. (Citations omitted.) . . .

"Indeed the inalienable rights of the individual are not what they used to be."

"All of these considerations address themselves primarily to the legislature (city council) and its judgment stands unless there has been a plain abuse of its wide discretion." 192 S.E. at 885-6.

Although the case at bar deals with smoking rather than land-use, the principles it sets forth for application of police power are appropriate. "Social standards" regarding smoking and its effects have clearly changed in the past two decades. To paraphrase from the West Brothers decision:

"Nauseous smells have always come under the ban of the law, but . . . [cigarette or cigar and pipe smoke] may be just as distressing to keener sensibilities."

III. THE DOCTRINE OF "SUBSTANTIVE DUE PROCESS"  
HAS NO APPLICATION IN THIS CASE.

The Defendant's Memorandum of Law (hereinafter referred to as Defendant's brief), submitted in support of its motion for judgment, advocates that the Court apply the doctrine of "substantive due process" to overturn the City ordinance. Defendant bases this contention upon the alleged violation of "fundamental rights, such as those associated with private property and free association" (Defendant's brief, page 16).

As has been discussed, supra, the City has comprehensive police power under Virginia law to reasonably regulate the use of private property. It will presently be shown that the Supreme Court of the United States recognizes this broad power of states and municipalities to regulate the use of private property, and that the doctrine of substantive due process for purposes of this case, is defunct and has no application. Also in this connection, the Defendant's allegation that the City's

smoking ordinance wrongfully interferes with her "fundamental right" to associate with smokers or non-smokers, is misconceived; the doctrine of freedom of association is not intended to prohibit the City from reasonably regulating activities such as smoking under appropriate circumstances.

In the decision of Goldblatt v. Hempstead, supra, where a town ordinance which prohibited excavations below two feet above maximum groundwater level was found to be constitutionally valid, the Court defined the extent of a municipality's power to regulate private property interests.

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness', this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steel, 152 U.S. 133 (1894), is still valid today:

'To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals'.

"Even this rule is not applied with strict precision, for this court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . . .'  
369 U.S. at 594-5.

The Court in Goldblatt, found that the evidence concerning the reasonableness of the town ordinance was indecisive, and accordingly, held that the appellants had failed to overcome

the presumption of reasonableness. Similarly, in Queenside Hills Realty Company v. Saxl, 328 U.S. 80 (1946), where the Court considered the constitutionality of an ordinance requiring the installation of sprinkler systems in lodging houses, it was said that:

"The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." 328 U.S. at 83.

In finding no violation of due process standards, the Court also pointed out that:

"It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of . . . property . . . ." 328 U.S. at 83.

Of similar effect was Berman v. Parker, 348 U.S. 26 (1954), an eminent domain case, where Mr. Justice Douglas, speaking for the Court, said:

"Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, . . . ." 348 U.S. at 32.

The argument that the City ordinance unconstitutionally infringes on the Defendant's rights of private property (Defendant's brief, pp. 8-18) waxes pale in contrast to the Supreme Court's broad definition of state and municipal police

power, and the corresponding authority to infringe on private property rights. In support of its allegation of infringement on property rights, the Defendant has cited numerous cases of dubious relevance, which are inapposite and distinguishable, but hardly deserving of the space and time which would be required to show their lack of efficacy. For example, the Defendant does not cite a single case which is directly related to the question of whether or not the City's smoking ordinance is an infringement of the right to property under due process standards. Rather, the Defendant cites numerous cases which establish individual property owners' rights to exclude certain individuals from their premises, as being supportive of the alleged interference with the Defendant's property rights. (Defendant's brief, pp. 8-12.) The crux of the Defendant's argument is revealed on page 9 of its brief, wherein it is said that the City ordinance regulating smoking, limits the Defendant's right to exclude whomever it pleases from its place of business, thus establishing associational restrictions which in turn constitute an unlawful denial of property rights. In this regard, the City submits the following:

(1) No state action of infringement on property rights or associational rights was involved in any of the cases cited by the Defendant, accordingly, there is no support for this tenuous allegation of denial of property rights.

(2) If City action has resulted in any unreasonable infringement on the Defendant's right to associate, the question will rise and fall under First Amendment analysis, not under the arcane theory that infringement of associational rights constitutes a denial of property rights.

(3) Finally, and most importantly, the City ordinance does not under any reasonable analysis deny the Defendant's right to associate with smokers or non-smokers. Rather, it regulates the activity of smoking on the restaurant premises.

The Defendant cites cases which hold in particular that private property owners have the power to exclude "union pickets", (Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), Defendant's brief, p. 8); "women suspected of prostitution" (Kelly v. United States, 348 A.2d 884 (1975)). In this regard, could the Defendant reasonably argue, that because it had the power to exclude such individuals from its premises, that the City accordingly, had no power to prohibit prostitution or union picketing within restaurants? (e.g. smokers and smoking.) More importantly, could it be said by virtue of such a prohibition that the City was unlawfully interfering with the Defendant's First Amendment right to associate with prostitutes, or union pickets, or to advocate prostitution or unions?

Regarding the City's power to enact newly conceived legislation under its police power, to regulate smoking in restaurants, the decision of Day-brite Lighting v. Missouri,

342 U.S. 421 (1952) is revealing of the Supreme Court's attitude. In that case, a state statute which provided that an employee could absent himself from employment for four hours on election day for purposes of voting, without penalty or deduction of wages, was upheld as being constitutional.

Therein the Court said:

"Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits as Tot v. United States, 319 U.S. 463 holds. The state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated . . . ." 342 U.S. at 423.

As the cases and analysis discussed, supra, have shown, the City clearly has the fundamental power to enact an ordinance regulating smoking in restaurants. Additionally, the doctrine of "substantive due process" which allowed the Courts to overturn economic and social legislation (such as the ordinance in question) which they believed to be unfair or unwise, has been discredited by the Supreme Court. Thus in Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court stated:

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have

returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The Court subsequently concludes:

"It is now settled that states 'have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific constitutional prohibition . . . ." 372 U.S. at 730-31.

Accordingly, only where fundamental rights or individual liberties are in question, may the doctrine of substantive due process or some hybrid thereof be applied. To this effect was United States v. Carolene Products Company, 304 U.S. 144 (1938), wherein the Court indicated that in cases which touched upon areas of specific constitutional guarantees (e.g., fundamental rights) it would not necessarily be held to its rejection of the substantive due process doctrine. Areas which have subsequently been found by the Court to involve "fundamental" or "individual" rights include: the right to privacy - abortion, Roe v. Wade, 410 U.S. 113 (1973); the right to privacy - contraception, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote and participate in the election process, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and the right to freedom of association as implied by First Amendment guarantees, N.A.A.C.P. v. Alabama, ex rel. Patterson, 357 U.S. 449 (1958). It is under the latter category of freedom of association, that the Defendant bases



the claim that the City ordinance infringes upon fundamental rights, necessitating employment of the doctrine of substantive due process. This argument must fail, however, because the City ordinance does not in fact infringe in any unreasonable way on the Defendant's right to freely associate; it must additionally fail because the doctrine of freedom of association was never intended by the Supreme Court to be employed as a barrier to obstruct reasonable municipal police power regulation.

The decision of Whalen v. Rowe, 429 U.S. 589 (1977), illustrates the Court's attitude in this respect. In that case a New York statute which required physicians to identify patients obtaining certain prescription drugs for recording in a centralized computer file operated by the New York State Department of Health was challenged as violating the Plaintiff's right of privacy. It was argued that revealing such information regarding patients' drug use constituted an invasion of the constitutionally protected "zone of privacy". In upholding the validity of the statute, the Court said:

"We are persuaded . . . that the New York program does not, on its face, pose a sufficiently grievous threat . . . [to the zone of privacy] to establish a constitutional violation." 429 U.S. at 600.

Rejecting application of the doctrine of substantive due process to the case, the Court said:

"The holding in Lochner has been implicitly rejected many times. State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because the Court finds it unnecessary, in whole or in part. For we have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern." 429 U.S. at 597. (Emphasis added.)

Given the Court's recognition that some infringement on individual liberty by state legislation does not predicate unconstitutionality, the question arises, what is extent of the City ordinance's infringement on the Defendant's freedom of association - if any?

#### IV. THE CITY ORDINANCE DOES NOT VIOLATE THE "RIGHT OF ASSOCIATION"

As a threshold matter, examples of how the Supreme Court has applied the doctrine of freedom of association will be useful. The Defendant's brief (page 5-7) makes reference to numerous cases involving freedom of association, espousing generalities concerning the right, without specifically detailing any of the factual situations which gave rise to the application of the doctrine. This curious deficiency is not without purpose: the briefest review of the factual circumstances underlying the freedom of association cases (of which there are many) reveals that the doctrine only has an extremely tenuous or non-existent application to the case at bar.

The animating principle of the doctrine as set forth in the leading case of N.A.A.C.P. v. Alabama, ex rel.,

Patterson, supra, is to protect the free "advocacy" and "advancement of beliefs and ideas" through group association, whether those beliefs "pertain to political, economic, religious or cultural matters". 357 U.S. at 460. In that case, the State of Alabama sought to have the N.A.A.C.P. produce records and papers which included names and addresses of all of its Alabama membership. Overruling the State Court's Order for production of the membership lists, the Court discussed the reasons for its action:

"We think that the production order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioners/members of their right to their freedom of association. Petitioner has made an uncontroverted showing that on past occasions, revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of the petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." 357 U.S. at 462-3.

Other examples of how the Supreme Court has applied the doctrine of freedom of association are: Cousins v. Wigoda, 419 U.S. 477 (1975), where an Illinois state law governing qualification and eligibility of national convention delegates was overturned, as violating the constitutional right of

"political association" (interference with delegate selection procedures); Schneider v. Smith, 390 U.S. 17 (1968), where the "Magnuson Act" (50 U.S.C. Section 191(b)), which authorizes the President to issue regulations protecting all vessels in United States territorial waters from destruction, injury, or sabotage, was construed narrowly to prevent the Coast Guard marine licensing process from screening out individuals who had been members of certain allegedly subversive organizations; United States v. Robel, 389 U.S. 258 (1967), where a United States government act which precluded Communist Party members from working in defense facilities was held to be a violation of the right of association; and United Mineworkers of America v. Illinois State Bar Association, 389 U.S. 217 (1967), where an Illinois state court order precluding the United Mineworkers from employing an attorney to represent its members for workmen's compensation proceedings (e.g., unauthorized practice of law) was overturned as being violative of First Amendment principles. This list of examples is by no means comprehensive, however, it is representative of the nature and character of First Amendment intrusions by the state, which fall under the ambit of freedom of association.

Professor Laurence H. Tribe, in his treatise, American Constitutional Law, (1978) has defined what may constitute an infringement of the freedom of association, in light of United States Supreme Court decisions:

" '[A]bridgment of the First Amendment Freedom of Association' [may be defined as] any insufficient-

ly justified governmental rule, practice or policy that interferes with or discourages a group's pursuit of ends having special First Amendment significance - such as literary expression, or political change, or religious worship. Government can abridge this implied First Amendment freedom, and therefore be guilty of violating due process unless a showing of compelling necessity is made, in any of four ways: (1) directly punishing the fact of membership in a group or association or the fact of attendance at a meeting of such a group or association; (2) intruding upon the internal organization, or integral activities of an association or group; (3) withholding a privilege or benefit from the members of a group or association; and (4) compelling disclosure of a group's membership or of an individual's associational affiliations, either through a focused investigation or as part of a general disclosure rule, in circumstances where anonymity is likely to prove important to the continued viability of various associational ties.<sup>1</sup>

The foregoing cases and quotations illustrate the fundamental nature of the right of association. It is submitted that under any reasonable analysis, the City smoking ordinance cannot be held to violate the right to associate. It does not penalize or interfere with membership in any group or organization, cohesive or otherwise, which advocates smoking, nor does it burden the First Amendment activities of such a group or its members. It does not exclude anyone who is a smoker or who advocates smoking from entering the Defendant's premises; nor does it prohibit or interfere with the Defendant freely associating with such individuals. What the ordinance does accomplish, is to reasonably regulate the activity of smoking on the Defendant's premises, as a legitimate exercise of police power for the benefit of the health, comfort, and

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<sup>1</sup>Tribe, American Constitutional Law § 12-23.

welfare of the public. If such minimal regulation of smoking should be regarded as a violation of individual rights, then it is additionally submitted that the doctrine set forth in Whalen v. Rowe, supra, permits "some effect on individual rights" without occasioning a finding of unconstitutionality.

The "least restrictive alternative" test has no relevance in cases such as this one, which do not involve fundamental rights. The applicable rule is that, " . . . the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals". Goldblatt v. Hempstead, supra. Defendant's brief (pp. 13-22) harps at length on the assertion that that posting a sign at the doorway of the premises, informing patrons of management policies regarding smoking, is the only requirement necessary. Although the least restrictive alternative doctrine has no application in this case, the impracticality of the Defendant's proposed solution is evident, for it bears upon all police power regulation which protects the public health, comfort and safety within private business establishments, such as restaurants. For example: the City regulates and prescribes fire prevention measures within businesses, Newport News City Code Section 16-14, et seq.; it additionally regulates food handling and preparation in restaurants, Newport News City Code Section 17-1, et seq.; and the State of Virginia strictly regulates or prohibits the sale and consumption of alcoholic beverages,

Virginia Code Annotated Section 4-1, et seq., see particularly sections 4-58, 4-60 and 4-61.

Applying the Defendant's sign-at-the-door theory, a warning posted at the entrance of the establishment notifying potential patrons that certain fire prevention techniques were not being employed, or that alcoholic beverages were being consumed within, should provide sufficient notice for the individual to make a choice of whether to enter (eliminating the need for such regulation). The question arises under the Defendant's analysis, of whether the State's prohibitions and regulation of the activity of alcohol consumption infringes upon a proprietor's right to associate with drinkers.

Smoking is an activity engaged in by certain individuals, which by its nature, can be offensive or potentially irritating and harmful to others who are in the area where it occurs. Accordingly, it has been the subject of regulation by the Civil Aeronautics Board in 14 C.F.R. §252 (1978), which constrains that airlines must provide no smoking areas aboard passenger aircraft. Additionally, the Interstate Commerce Commission (I.C.C.) by Order dated November 8th, 1971, promulgated a no smoking regulation which prohibits all smoking on interstate passenger buses, with the option that bus operators can, if they desire, provide a smoking section in the rear of buses not to exceed twenty percent of

the passenger capacity of the vehicle. In National Ass'n. of Motor Bus Owners v. United States, 370 F. Supp. 408 (D. C. Dist. Ct. 1974), the regulation was upheld as being within the ICC's incidental power to protect "passenger comfort, safety and health". 370 F. Supp. at 411. Therein the Court quoted from the ICC Report issued in the rulemaking proceeding which had led to the no smoking regulation, where it was said:

"We do believe, however, that the evidence presented by Petitioner, as well as the voluminous material present in this record in support of the petitioner's position, overtly demonstrates that second-hand smoke is an extreme irritant to humans (particularly with respect to its effect upon eyes and breathing) within its range and that, therefore, smoking on passenger carrying motor vehicles must be found to be a serious nuisance, capable of disrupting the orderly enjoyment of public transportation . . . " 370 F. Supp. at 411.

V. THERE HAS BEEN NO DENIAL OF EQUAL PROTECTION IN  
ENFORCEMENT OF THE CITY ORDINANCE

In the case of Yick-Wo v. Hopkins, 118 U.S. 356 (1886), a San Francisco ordinance prohibited the operation of laundries in structures other than those constructed of brick or stone without the consent of the city board of supervisors. In applying the law, the Board granted permits to operate laundries in wooden buildings to all but one of the non-Chinese applicants, but to none of the approximately two hundred Chinese applicants. Yick-Wo, a Chinaman, was convicted of operating a laundry in a wooden building in violation of the ordinance. The Supreme Court

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found that this discriminatory



application of the law was motivated by an underlying "hostility to the [Chinese] race and nationality", in violation of the fundamental principles of equal protection of law. Based upon Yick-Wo, the Defendant alleges that because the City has not strictly enforced the smoking ordinance in other establishments which are subject to its provisions, the Defendant has been deprived of equal protection of the law, by virtue of discriminatory enforcement. Defendant's allegation in this regard is incorrect.

There has been no showing of intentional discrimination by the City against the Defendant or any class of individuals of which she is a member. The Supreme Court in Snowden v. Hughes, 321 U.S. 1 (1944), pointed out that:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination . . . . there must be a showing of 'clear and intentional discrimination'." 321 U.S. at 8.

Additionally, in Oyler v. Boles, 368 U.S. 448 (1958), where state convictions under a habitual offender statute were challenged on the basis that only a minority of habitual offenders were being prosecuted under the law, constituting a denial of equal protection, the Court said:

"Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal

constitutional violation. Even though the statistics of this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore, grounds supporting a finding of denial of equal protection were not alleged." 368 U.S. at 456.

No comprehensive pattern of discrimination in the enforcement of the City ordinance has been shown, nor has any intent on the part of the City to discriminate against the Defendant or other individuals based upon some suspect or arbitrary classification, been alleged or shown. The recent case of Butler v. Cooper, 554 F.2d 645 (4th Cir. 1977), illuminates principles which the Court has applied in cases of discriminatory administration of the law. There, an action was filed against various police officers and officials of the City of Portsmouth, Virginia, alleging a conspiracy to deny the Plaintiff and all black citizens of Portsmouth equal protection by racially selective enforcement of Virginia liquor laws. The particular statute in question was Section 4-58 of the ABC Code which prohibits the sale of liquor without a state license. The defendant offered evidence to show that ninety-eight percent of the people who had been arrested under Section 4-58 were members of the Black race. Concluding that no case of discrimination had been made, the Court said:

"[O]ne must do more than allege and prove that others have violated the law and are not being prosecuted. (Citation omitted.) Before a claim of unlawful discrimination in the enforcement of criminal laws can be established, the Plaintiff

must allege and prove a deliberate selective process of enforcement based upon race (or other arbitrary classification)." (Emphasis added.) 554 F.2d at 646.

Commenting on the evidence which had been presented in District Court at trial, the Court noted:

"Judge Kellam was right when he said, 'Assuming . . . that plaintiff's contention is true (that ninety-eight percent of these arrests were of blacks), that fact alone is wholly inadequate to support the conspiracy charge in this case. [S]he offers no other factual material of any type in support of her allegations . . . .'" 554 F.2d at 647.

Later, in the closing paragraph, the Court concluded:

"It is evident from the pleadings and affidavits that there was never a showing of an affirmative policy or plan linking the plaintiff's alleged deprivation of constitutional rights with actions by any of the defendants." 554 F.2d at 648.

In light of the foregoing cases, it is submitted that the Defendant has failed to show a denial of equal protection in enforcement of the City smoking ordinance.

#### CONCLUSION

The case law which has been discussed in this memorandum shows that there has been no unconstitutional infringement or denial of the Defendant's property rights or right to associate. Additionally, no denial of equal protection has been substantiated. On this basis, and inasmuch as a strong

presumption of constitutional validity exists in favor of the City ordinance, it is respectfully submitted that the Defendant's Motion for Judgment should be denied, and judgment entered in favor of the Plaintiff, City of Newport News.

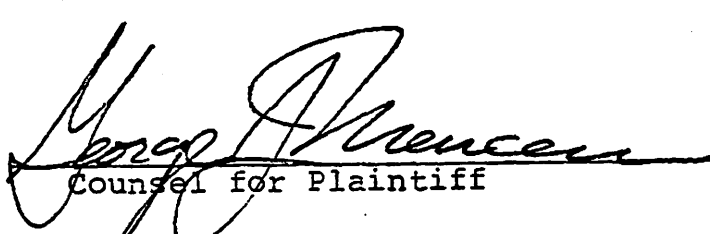
CITY OF NEWPORT NEWS

By 

Of Counsel

GEORGE J. MERCER  
Assistant City Attorney  
2400 Washington Avenue  
Newport News, Virginia

I hereby certify that a true copy of the foregoing Brief was mailed on this 30<sup>th</sup> day of October, 1978, to all counsel of record.

  
Counsel for Plaintiff

DEFENDANT'S REPLY TO BRIEF FOR THE PLAINTIFF

This is a criminal prosecution in which the City of Newport News challenges the constitutional right of Defendant to choose whom she will serve when that choice is not based upon race or color. Defendant has freely availed herself of that choice. She prohibits persons with bare feet and those dressed in sleeveless T-shirts. And she has posted a sign which reads: "SMOKING PERMITTED ALL THOSE WHO SMOKE OR DO NOT OBJECT TO THE PRESENCE OF TOBACCO SMOKE ARE WELCOME!" For Newport News to "control"<sup>1</sup> Defendant by requiring her to set aside a portion of her property for the exclusive use of non-smokers is domination of the strong kind, untempered by any necessity "to safeguard the vital interests of its people." Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 434 (1934); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

There is no dispositive statute, federal, state, or local, which covers tobacco smoking. Smoking is a lawful activity not only permitted but encouraged by Newport News.<sup>2</sup> The Court is

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1. Transcript at 166.

2. The Newport News port is said to have been founded on tobacco exports. In 1977, tobacco made up approximately 15% of the Port's general tonnage cargo. In 1977, the city received

not faced with a fire ordinance, an ordinance prohibiting prostitution, or similar police power enactment to protect the public from a real and substantial danger to life and property.

Thus, when the Prosecution asks

could the Defendant reasonably argue, that because [the Defendant] had the power to exclude [women suspected of prostitution and union pickets] from its premises, that the City accordingly, had no power to prohibit prostitution or union picketing within restaurants? (e.g. smokers and smoking.) More importantly, could it be said by virtue of such a prohibition that the City was unlawfully interfering with the Defendant's First Amendment right to associate with prostitutes, or union pickets, or to advocate prostitution or unions?[,]<sup>1</sup>

Defendant replies as follows:

With regard to the power of Newport News to prohibit prostitution, there is no dispute. Newport News may prohibit prostitution.

With regard to the power of Newport News to prohibit union picketing within restaurants, Newport News cannot prohibit such picketing if done with the restaurant owner's permission. See Hudgens v. NLRB, 424 U.S. 507 (1976). If done without the owner's permission, then the owner, and Newport News after the owner has warned the trespasser, may apply the trespass laws to exclude the pickets. Hudgens v. NLRB, supra.

With regard to interfering with Defendant's right to associate with prostitutes or union pickets, prohibiting union

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over \$900,000 from the tax on cigarettes, including those sold in Defendant's restaurant. The sheriff's office sells tobacco products to inmates from its canteen. Even the snackbar at City Hall, which is operated by a private party pursuant to a lease, sells cigarettes from which Newport News profits.

1. Prosecution Brief at 12.

picketing within her restaurant would run aroud or the first amendment, whereas prohibiting prostitution within restaurants would be permissible. The difference? Union picketing, without more, is a lawful activity; prostitution, without more, is an unlawful activity.

Smoking is a lawful activity.

By construing the purpose of the ordinance<sup>1</sup> as enabling "the general public to consume and enjoy meals in city restaurants, in an atmosphere reasonably free of potentially noxious and irritating tobacco smoke," Prosecution Brief at 5, the Prosecution legislates the aesthetic sensibilities of its citizens, thereby denying Defendant and her customers the right to "legislate" their own rights--after notice and by contract. Surely, the rights of private ownership require greater constitutional protection than aesthetic sensibilities.

Where, as here, there is neither evidence of a health hazard from ambient smoke,<sup>2</sup> nor a lack of notice to those who may be adversely affected by it, the Prosecution's efforts to force Defendant to partition her restaurant, to advertise against smokers, to give up opportunities to cater exclusively to smokers (if she wishes), and, especially, to welcome only those who smoke or do not object to the presence of tobacco smoke must fail.

She should be allowed to post a sign, if she wishes, saying "all who smoke, are forbidden entry," or "thank you for not smoking," or "separate sections provided."

Recognition of this right of free choice requires that the individual take steps to avoid situations which may produce

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1. Ordinance No. 2446-78, ch.33, art. IV, of the Code of the City of Newport News.

unwanted unpleasantness. As noted in Defendant's brief filed at trial, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975), recognized,

the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Or nose.

THE NEWPORT NEWS ORDINANCE IS AN  
IMPROPER AND UNNECESSARY EXERCISE  
OF NEWPORT NEWS' POLICE POWER.

The Prosecution relies upon police power cases involving broad land-use issues.<sup>1</sup> Land-use ordinances focus not upon the individual private property owner, but instead upon municipal areas as a whole. Zoning interferes to some degree with the individual's liberty to erect walls on his property, but once those walls are erected, individual liberties are paramount and ordinances which dictate how owners engaged in otherwise lawful activity behave inside those walls are subject to strict scrutiny.

Under the broad rubric of "police power," Newport News may enact ordinances for the protection of the health, safety, and welfare of its citizens. Kelley v. Johnson, 425 U.S. 238 (1976); City of El Paso v. Simmons, 379 U.S. 497 (1965). However, "[w]here the police power conflicts with the Constitution, the latter is supreme . . . ." West Brothers Brick Co. v. City of Alexandria, 169 Va. 271, \_\_\_, 192 S.E. 881, 885, app.

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1. Gorieb v. Fox, 145 Va. 554, 134 S.E. 914 (1926), aff'd, 274 U.S. 603 (1927) (the erection of buildings in a "business district" or a "residential district"); West Brothers Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881, app. dismissed, 302 U.S. 658 (1937) (the excavation of an eighteen acre deposit of clay located largely in an area zoned for residential use); Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940) (the <sup>266</sup>eradicat<sup>266</sup>ion of a Housing Authority to eradicate slums and establish low-rent public housing projects).



dismissed, 302 U.S. 658 (1937), quoting Buck v. Bell, 143 Va. 310, \_\_\_, 130 S.E. 516, 519 (1925). An ordinance enacted under the police power that infringes a fundamental right protected by the Constitution is subject to strict judicial scrutiny. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Because the Newport News ordinance infringes fundamental rights, the presumption of constitutionality and the standard of reasonableness set out in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), and Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927), are inapplicable, and the reasonableness which the Prosecution contends is "self-evident"<sup>1</sup> is an insufficient justification. See Buckley v. Valeo, 424 U.S. 1 (1976); Bates v. City of Little Rock, 361 U.S. 516 (1960).

Conspicuously absent from the Prosecution's discussion is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the state's police power and individual property and contractual rights met head-on. Plaintiffs had purchased the land on which their house was located from the coal company. Under the terms of their deed (the contract), plaintiffs owned only the surface rights. The company expressly reserved "the right to remove all the coal under the same and the grantee [took] the premises with the risk and waive[d] all claims for damages that [might] arise from mining out the coal." Id. at 412.

Pursuant to a statute passed by the state after plaintiffs purchased the property, plaintiffs sought to enjoin the company from mining coal under their home. The Supreme Court of Pennsylvania ruled that the coal company had contract and property rights protected by the Constitution of the United

States, but held that the statute was a legitimate exercise of the police power. The Supreme Court of the United States reversed.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. . . . The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. . . . But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. . . . The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house.

Id. at 413-14 (emphasis added; citations omitted). Thus, rather than sacrifice the company's right to enjoy its property, the court relied on a less drastic alternative--notice.<sup>1</sup>

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1. The Prosecution argues that by "[a]pplying the Defendant's sign-at-the-door theory, a warning posted at the entrance of the establishment notifying potential patrons . . . that alcoholic beverages were being consumed within, should provide sufficient notice for the individual to make a choice of whether to enter (eliminating the need for such regulation)." Prosecution Brief at 21. That is precisely the point and precisely the case--notice is the policy. Thus, Defendant's response to the Prosecution's question of "whether the State's prohibitions and regulation of the activity of alcohol consumption infringes upon a proprietor's right to

Defendant, too, has contractual and property rights in her restaurant. A leasehold interest is an estate in land. Marston v. E.I. duPont de Nemours & Co., 448 F. Supp. 172 (W.D. Va. 1978); 11B Michie's Jurisprudence 256 (1978). A lease is also a contract which gives rights to both lessor and lessee. Smith v. Payne, 153 Va. 746, 151 S.E. 295 (1930); 11B Michie's Jurisprudence 252-58 (1978).

Additionally, there are express and implied contractual rights and obligations surrounding Defendant's offer to provide food and service to the public. Invitees agree to be suitably attired, to conform to common dining decorum, and to pay for their food and drink. Defendant promises wholesome food and satisfactory service. Like the surface owners in Mahon, customers are given notice that tobacco smoke may be present.

Although the statute in Mahon was aimed at promoting safety where there was tangible danger to a homeowner's security

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associate with drinkers" is "no." See Prosecution Brief at 21. Section 4-34(c) of the Code of Virginia provides that "[e]ach such license shall be kept posted in a conspicuous place by the licensee at the place where he carries on the business for which the license is issued." (Emphasis added.) The "conspicuous place" notice requirement alerts people that alcoholic beverages are consumed on the premises. The statute's effect is to offer service only to those who drink or do not object to the presence of alcohol. Prohibitionists and other objectors go elsewhere.

Notice is also the practice in Virginia (and elsewhere) with regard to movies. Theaters rate a film's content on a scale of "G" to "X" according to the amount of sex, violence, or vulgar language; viewers decide whether to see the film.

No one seriously suggests that separate sections be set aside for drinkers and non-drinkers or for "General," "Parental Guidance," "Restricted," and "X" film goers. The posting of notice that drinking (or smoking) is permitted suffices to eliminate any police-power concern for the health, safety, or welfare (or even comfort) of the patrons. They can protect themselves by choosing whether or not to enter.

In addition, the "Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce." Carter v. Virginia, 321 U.S. 131, 138 (1944) (Black, J., concurring); accord, California v. La Rue, 409 U.S. 109 (1972).

and even life, the Court found the less drastic alternative of notice adequate.

While "promotion of safety of persons and property is unquestionably at the core of the State's police power," Kelley v. Johnson, 425 U.S. at 247, "there is no unrestricted authority to accomplish whatever the public may presently desire." Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U.S. 613, 622 (1935); see Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911); City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914). No cases hold that the state (or a municipality thereof) can enact an ordinance solely to protect the comfort of its citizens. It is left to the individual to protect himself from life's annoyances.<sup>1</sup>

AS CONSTRUED BY THE PROSECUTION,  
THE NEWPORT NEWS ORDINANCE UNCON-  
STITUTIONALLY IMPAIRS DEFENDANT'S  
CONTRACT RIGHTS.

The Newport News ordinance modifies existing contractual rights and obligations between Defendant, her landlord, and her customers. See United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); Home

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1. This the Prosecution concedes when it quotes from West Brothers Brick Co. v. Alexandria, 169 Va. 271; \_\_\_, 192 S.E. 881, 885-86 (1937):

Aesthetic considerations alone are not enough, but they should be considered.

. . . The rights of property should not be sacrificed to the pleasure of an ultra aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.

Quoted in Prosecution Brief at 7.

With notice as a less drastic alternative, there can no "plague" on the average or dominant human sensibilities. Those who are allergic to tobacco smoke or who simply object to its presence are free to go elsewhere.

Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

This limits Defendant's contractual rights in violation of the contract clause of the Constitution of the United States.

Under Virginia law, a restaurateur is under "no common-law duty to serve everyone who applies to him. In the absence of statute [such as fourteenth amendment and commerce clause based civil rights laws], he may accept some customers and reject others on purely personal grounds." Alspaugh v. Wolverton, 184 Va. 943, \_\_\_, 36 S.E.2d 906, 908 (1946).

The Supreme Court once stated that the police power "is paramount to any rights under contracts between individuals." Manigault v. Springs, 199 U.S. 473, 480 (1905). The Court restricted Manigault this year in Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2721, stating: "[i]f the Contract Clause is to retain any meaning at all, . . . it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests." Id. at 2723.

The "first inquiry" under the contract clause is a determination of whether or not the legislation in question interferes with the requirement that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10.

The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

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Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2723.

The Newport News ordinance substantially impairs Defendant's contractual rights by limiting her patronage and choice of associates.

Next, the Court must examine the focus of the statute. Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2725. The Newport News ordinance's focus is extremely narrow. It includes only those restaurants which seat fifty or more persons, health care facilities, theaters, and cultural facilities such as art galleries, libraries, and museums. It does not cover other business facilities which are open to the public, which may be enclosed areas, and at which smoking could be an expected activity. Thus, "this law can hardly be characterized, like the law at issue in the Blaisdell case [supra], as one enacted to protect a broad societal interest rather than a narrow class." Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2725.

Finally, the Newport News ordinance was not enacted to deal with an emergency which urgently demanded relief, see Home Building & Loan Association v. Blaisdell, 290 U.S. at 444; accord, Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2721, 2725, or a broad, generalized economic or social problem, Allied Structural Steel Co. v. Spannaus, 98 S. Ct. at 2725, nor was it enacted to operate "in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken." Id. The ordinance "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change" in Defendant's relationships with her customers and landlord. Id. at 2726.

UNDER STRICT SCRUTINY AND THE PROSECUTION'S STANDARD THE NEWPORT NEWS ORDINANCE IS UNCONSTITUTIONAL AS APPLIED.

De Tocqueville observed that the "right of association is almost as inalienable in its nature as the right of personal liberty." 1 A. De Tocqueville, Democracy in America 196 (P. Bradley ed. 1945). "[T]he most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them." Id. As one author has argued, "whatever action a person can [lawfully] pursue as an individual, freedom of association must ensure he can pursue with others." Raggi, An Independent Right to Freedom of Association, 12 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 15 (1977).

The Prosecution attempts to justify what it admits is some infringement upon Defendant's freedom of association<sup>1</sup> by relying upon a medical privilege case which has nothing to do with the first amendment. Whalen v. Rowe, 429 U.S. 589 (1977). However, the City has no "vital local concern," 429 U.S. at 597, with the smoking of tobacco products. The City encourages and profits from the use of tobacco. The rights infringed are protected by the first amendment and are among the most cherished of freedoms. See, e.g., Buckley v. Valeo, supra; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); UMW v. Illinois State Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen

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1. The Prosecution states, "What the ordinance does accomplish, is to reasonably regulate the activity of smoking on the Defendant's premises, as a legitimate exercise of police power . . . ." Prosecution Brief at 19. By requiring Defendant to designate no smoking areas, Newport News infringes upon her property and contract rights and precludes her from limiting her patronage and choice of associates.

v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964);

NAACP v. Button, 371 U.S. 415 (1963).<sup>1</sup>

Borrowing a phrase first used by John Wycliffe in 1382, Abraham Lincoln noted years ago that our's is a government "of the people, by the people, and for the people." People, not government, is the proper perspective. Contrary to statements by the prosecution (Transcript at 171), governments cannot penalize persons who "simply refuse[ ] to work with us"<sup>2</sup> and, instead, choose to assert their constitutional rights.

Citizens are free to assemble and associate for political purposes. The Supreme Court has expanded the right of expression to cover speech for commercial purposes. See, e.g., Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977). Recently protection has been extended to the non-business related speech of corporations. First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

Analogous to these rights is the freedom of consumer and commercial association which enhances Defendant's property rights and provides for an altered standard of constitutional review. The coupling of fifth and fourteenth amendment protected property rights with the first amendment right of free association subjects restrictive legislation to the Supreme Court's

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1. The Prosecution attempts to draw support from the actions of the Civil Aeronautics Board's and the Interstate Commerce Commission's regulations regarding smoking on airplanes and buses respectively. However, as Defendant noted in her Memorandum of Law, public transportation facilities, such as airplanes and buses, are monopoly-use commercial property. Because of the lack of available alternative services (buses are and, until recently, airlines were granted limited monopolies which effectively limit the consumer's choice), this type of property may be subject to more regulation than optional-use commercial property. See Defendant's Memorandum of Law at 1 n.1.



most rigorous tests of constitutionality--the compelling interest test and strict scrutiny. Compare Buckley v. Valeo, supra (compelling interest), with San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (strict scrutiny).

Newport News' attempt to statutorily restrict or prohibit entirely smoking on optional-use commercial property infringes property owners' and smokers' associational rights. Defendant's property interests transcend economics and are fundamental to a free society. See Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1973). Proposed legislation must focus on the rights of the owner of real property and those who desire to assemble there. Once the rights of owners are asserted, the burden on the Prosecution is increased by the weight of the assembly clause. Consequently, as stated in Defendant's earlier Memorandum of Law, "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. at 81.

Because the ordinance infringes Defendant's fundamental rights, the Prosecution, not Defendant, has the burden of showing that the ordinance is constitutional.<sup>1</sup> San Antonio Independent School District v. Rodriguez, supra.

[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather

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1. The Prosecution incorrectly states that "[i]n Virginia, a presumption of constitutionality arises where an ordinance is attacked as being unconstitutional, and the party asserting unconstitutionality bears the burden of clearly showing such invalidity." Prosecution Brief at 1-2. The Prosecution's constitutional standard applies only when non-fundamental

than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives . . . .

Id. at 16-17, quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1971). The Prosecution has failed to meet its burden.<sup>1</sup>

The Prosecution argues that our "laborious attempt to clothe [our] attack on the City ordinance with strict scrutiny standards of the First and Fourteenth Amendment [sic] should thus be construed in light of [the] presumption of constitutional validity" contained in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). See Prosecution Brief at 3. The Prosecution appears to have misconstrued Goldblatt. Rodriguez clearly states that if strict scrutiny standards apply, the presumption of constitutionality falls away and the Prosecution must shoulder

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rights are at stake, in which case the presumption is entitled to great weight and the statute will be upheld if there is a conceivable rational basis for the act. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955). However, where fundamental rights are infringed the statute is subjected to strict scrutiny and the presumption of constitutionality carries little practical weight. See, e.g., Police Department v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972).

1. As the Prosecution concedes, Cousins v. Wigoda, 419 U.S. 477 (1975), and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), "illustrate the fundamental nature of the right of association." Prosecution Brief at 19. This right protects the ability of groups and their members "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." 357 U.S. at 462, quoted in Prosecution Brief at 17. Defendant clearly has a right to advocate her ideas, without Newport News (or the Prosecution) judging the merit of those ideas. As noted by the Supreme Court of the United States in Griswold v. Connecticut, 381 U.S. 479, 483 (1965), "The right of association . . . is more than the right to attend a meeting." If Defendant desires to welcome those who smoke or do not object to the presence of tobacco smoke and if she is willing to put others on notice that tobacco smoke may be present in her restaurant, Newport News cannot tell her otherwise.

the "heavy burden of justification." 411 U.S. at 16. Thus, the Prosecution's interpretation of Goldblatt is applicable only where non-fundamental rights are infringed, not where, as here, Newport News has significantly infringed Defendant's constitutionally protected rights of freedom of association, property, and the equal protection of the law. See Defendant's Memorandum of Law at 1-8.

Even under the Prosecution's test, the ordinance must fall.

"To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Prosecution Brief at 9, quoting Goldblatt v. Town of Hempstead, 369 U.S. at 594-95, quoting Lawton v. Steele, 152 U.S. 133, 137 (1894). The record is void of any evidence of a legally sufficient need by the public for the ordinance. The sign posted by Defendant provides complete protection by placing all who enter her restaurant on notice that smoking is permitted.

Notice also defeats the second prong of the test because it conclusively demonstrates that the ordinance is not reasonably necessary to accomplish the ordinance's purpose--"to enable the general public to consume and enjoy meals in city restaurants, in an atmosphere reasonably free of potentially noxious and irritating tobacco smoke." Prosecution Brief at 5. Those who object may take their business elsewhere.

ENFORCEMENT OF THE NO SMOKING ORDINANCE DENIED DEFENDANT THE EQUAL PROTECTION OF THE LAW.

The selective enforcement of the "no smoking" ordinance is possible simply because

the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular [individuals] deemed to merit their displeasure."

Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972), quoting Thornhill v. Alabama, 310 U.S. 88, 97-80 (1940).

Defendant, by asserting her constitutional rights, incurred the displeasure of the local authorities and became the sole target for enforcement of the ordinance, despite evidence in the record of numerous other instances of non-compliance.

[T]he rule of law implies equality and justice in its application. . . . The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

Id. at 171; see Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Prosecution's selective enforcement of the ordinance is a clear denial of Defendant's right to the equal protection of the laws.

#### CONCLUSION

The scope of the anti-smoking campaign appears boundless. Recently a syndicated columnist urged "Hire A Non-smoker." Newport News Daily Press, Oct. 31, 1978, at 10, col. 1. Perhaps that action would be lawful. Yet those who propose it fail to see that by denying others their right to engage in lawful but perhaps unstylish activity, they thereby risk a society in which one government or another regulates every aspect of citizen life. If individual liberty means anything at all, it means that the majority may popularize but may not dictate taste and style to the minority. Whether it is taste or style, the informed individual, not the government, ~~must~~<sup>278</sup> choose.

Respectfully submitted,

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Panos A. Yeapanis

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Edward Ashworth


Charles Morgan, Jr.

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Counsel for Defendant

November 9, 1978

I hereby certify that a true copy of the foregoing  
"Defendant's Reply to Brief for the Plaintiff" was mailed on  
this the 9th day of November, 1978, to George Mercer, Assistant  
City Attorney, 2400 Washington Avenue, Newport News, Virginia,  
23607.



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Edward Ashworth

Counsel for Defendant

November 16, 1978

Mr. George J. Mercer,  
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City of Newport News  
2400 Washington Avenue  
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Re: City of Newport News v. Phyllis L. Alford

Gentlemen:

After considering the evidence, briefs and argument of counsel, I find (i) that the ordinance under which the defendant is charged does not infringe upon her constitutionally protected rights of freedom of association, property or the equal protection of the law and, thus is constitutional and (ii) that there was no selective enforcement of the ordinance against the defendant amounting to a denial of her right to equal protection of the laws.

The motions of the defendant to strike the City's evidence and to dismiss the charge are denied and the exception of the defendant will be noted.

I find the defendant guilty as charged in the summons (warrant).

The inquiry provisions of the final sentence, respectively, of §19.2-298, Code of Virginia and Rule 3A:25(b), Rules of the Supreme Court of Virginia are mandatory but may be waived by the defendant. It is my intention to fix as the penalty a fine of \$10.00. I request that counsel for the defendant advise whether the defendant desires to appear in court for the pronouncement of the sentence or waives that right.

Mr. George J. Mercer  
Mr. Panos A. Yeapanis  
Mr. Charles Morgan, Jr.  
Page Two  
November 16, 1978

A sketch for order embodying the foregoing conclusions will in due course be prepared by the Clerk for consideration and entry by the Court.

Yours sincerely,

J. Warren Stephens  
Judge

JWS:svf

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

CITY OF NEWPORT NEWS,

Plaintiff

vs.

PHYLLIS L. ALFORD,

Defendant

SMOKING ORDINANCE VIOLATION

TRANSCRIPT OF TESTIMONY

Following is stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled case, in said court, on the 29th day of November 1978, before the Honorable J. Warren Stephens, Judge of said court.

APPEARANCES:

GEORGE J. MERCER, ESQ.,  
Assistant Attorney for  
the City

P. A. YEAPANIS, ESQ.,  
Attorney for the Defendant

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2 THE COURT: The case on the docket today is  
3 Commonwealth of Virginia versus Phyllis L. Alford.

4 MR. MERCER: Your Honor, I believe that's  
5 City of Newport News.

6 THE COURT: City of Newport News. One of the  
7 orders which the court has previously entered in  
8 the case, or the style of the suit, is  
9 Commonwealth versus Phyllis L. Alford. The  
10 proper style of the suit is City of Newport News  
11 versus Phyllis L. Alford. The rights will be  
12 changed in accordance with the facts of this case.

13 We're here then on the City of Newport News  
14 versus Phyllis L. Alford. Is the City ready?

15 MR. MERCER: City is prepared, Your Honor.

16 THE COURT: Is the Defendant ready?

17 MR. YEAPANIS: Yes, sir, Your Honor.

18 THE COURT: As I advised the parties by counsel  
19 on November 16, 1978, I found the Defendant  
20 guilty as charged in the summons of the warrant.  
21 At this time, we're here for the assessment.

22 Mrs. Alford, would you please stand up  
23 ma'am? How are you this morning?

24 MRS. ALFORD: Fine, sir.

25 THE COURT: Before I pronounce a sentence,  
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1 Mrs. Alford, do you desire to make any statement?  
2 You don't have to at this time, but this is your  
3 opportunity to make a statement for you if you  
4 desire.

5 MRS. ALFORD: No.

6 THE COURT: Do you desire to advance any reason,  
7 ma'am, why judgment should not be pronounced  
8 against you at this time? Do you have any reason  
9 that you'd like to state to me why I should not  
10 pronounce judgment against you at this time?

11 MRS. ALFORD: No, I don't.

12 THE COURT: I have found you guilty of violating  
13 the ordinance, as you recall.

14 MRS. ALFORD: Yes, sir.

15 THE COURT: So now this stage of the proceeding is  
16 that I determine what your punishment will be.  
17 Now, I'm asking you now if you have any reason  
18 why I should not determine that punishment?

19 MRS. ALFORD: No, I don't.

20 THE COURT: All right, ma'am. There being no  
21 reason for delay, I determine your punishment as  
22 a fine of ten dollars. All right, ma'am, you may  
23 sit down.

24 Mrs. Alford, you have a right to petition  
25 for an appeal to the Supreme Court of Virginia,

1 and if you desire to petition the appeal from the  
2 decision of this court, such appeal must be  
3 applied for promptly, and you should immediately  
4 discuss with your attorneys when you desire to  
5 petition for an appeal.

6 The records show that the Defendant,  
7 Mrs. Alford, and the attorneys for the Defendant,  
8 Mr. Morgan and Mr. Yeapanis and their associates,  
9 have each been personally present at every stage  
10 of this proceeding, and Mrs. Alford has been  
11 capably represented by those gentlemen.

12 There being no objection by either party,  
13 pursuant to Rule 5:9(a), Supreme Court of Virginia,  
14 I direct that the transcript of the entire  
15 proceedings in this case become a part of the  
16 record, when the transcript is filed in the  
17 clerk's office of this court, in accordance with  
18 the statutes and rules of such case made and  
19 provide, and I further direct that the final  
20 judgment order in this case shall so provide.

21 All right, gentlemen. Is there anything  
22 further?

23 MR. YEAPANIS: Judge, we'd like to note our appeal  
24 at this time.

25 THE COURT: Yes, sir. 285

1        MR. YEAPANIS: I don't know whether Your Honor  
2        will set an appeal bond in this situation.

3        THE COURT: What type of appeal bond?

4        MR. YEAPANIS: I don't know.

5        THE COURT: Mr. Mercer, do you have --

6        MR. MERCER: The City doesn't have any appeal  
7        bond in mind, Your Honor. I don't believe there  
8        is anything necessary.

9        THE COURT: All right, sir. Then the City  
10       waives the accepting of any appeal bond in the  
11       case on those circumstances. I'm not going to  
12       set any appeal bond.

13       MR. YEAPANIS: Thank you.

14       THE COURT: The bond would normally be three  
15       hundred dollars to take care of costs, but the  
16       City doesn't want to accept an appeal bond.  
17       I'm not going to require the Defendant to post  
18       a bond.

19       MR. YEAPANIS: Thank you.

20       THE COURT: Thank you very much.

21       \* \* \* \* \*

1                                   \* \* \* \* \*

2  
3       STATE OF VIRGINIA AT LARGE,  
4       CITY OF NEWPORT NEWS, to-wit:

5               I, Karen V. Jaeger, Notary Public, hereby certify  
6       that I was the Court Reporter in the Circuit Court of  
7       the City of Newport News, Virginia, on the 29th day of  
8       November 1978, at the time of the trial of the case of  
9       City of Newport News versus Phyllis L. Alford.

10              I further certify that the foregoing transcript  
11     is a true and accurate record of the testimony and  
12     other proceedings of the hearing herein.

13              Given under my hand this 30th day of November 1978.

14  
15                                   Karen V. Jaeger  
16                                   Karen V. Jaeger, Notary Public

17                                   \* \* \* \* \*

VIRGINIA: Circuit Court of the City of Newport News, Wednesday, the  
29th day of November, 1978.

PRESENT: Judge J. Warren Stephens.

City of Newport News )

Vs )

Upon an Appeal Summons (Warrant)  
June 29, 1978 Appeal Date

Phyllis L. Alford )

Failure to Comply with No  
Smoking Ordinance

This day came again the attorney prosecuting for the City and the defendant, Phyllis L. Alford (who was represented by Panos A. Yeapanis, attorney of her own choosing) appeared in Court on condition of her recognizance, and Karen Jaeger, Court Reporter, was sworn to faithfully and accurately take down and transcribe the proceedings herein.

The evidence of the plaintiff and defendant being heard on September 22, 1978 and the plaintiff and defendant having heretofore filed their briefs and all argument of counsel being heard this day, the Court doth find the said Phyllis L. Alford guilty as charged in said Summons (warrant) to-wit: Failure to comply with No Smoking Ordinance.

Thereupon, the Court doth fix and ascertain the punishment of the said Phyllis L. Alford to be a fine of Ten Dollars (\$10.00), the fine by the Court herein assessed against her and the cost of this prosecution. The Court advised the defendant that she had a right to petition for an appeal to the Supreme Court of Virginia if she so desired. And, the record made by the court reporter herein of the said proceedings is filed as part of the record in this case. The Court certifies that at all times during the trial of this case the defendant was personally present and her attorney was likewise personally present and capably represented the defendant. The defendant, by counsel moved the Court the Court to set an appeal bond for her and with the concurrence of the attorney prosecuting for the City, the Court doth order that no appeal bond be required in this case.

NOTICE OF APPEAL

PURSUANT TO RULE 5:6 of the Supreme Court of Virginia,  
on this the 8<sup>th</sup> day of DECEMBER, 1978, the defendant,  
Phyllis L. Alford, by counsel, hereby gives notice that she  
appeals the judgment finding her guilty as charged in the summons  
to-wit: violation of Ordinance 2446-78, Chapter 33, Article IV,  
Section 33-23 and Section 33-24 of the City Code of Newport News,  
Virginia, on November 29, 1978. A transcript of the proceedings  
is attached hereto and filed herewith as a part of these pro-  
ceedings.

PHYLLIS L. ALFORD

By: P. A. Yeapanis  
Of Counsel

I hereby certify that a copy of the above writing was  
mailed to George Mercer, Assistant City Attorney for the City of  
Newport News, Virginia, this 8<sup>th</sup> day of DECEMBER, 1978.

P. A. Yeapanis  
P. A. YEAPANIS

P. A. YEAPANIS  
WOOD & YEAPANIS

CHARLES MORGAN, JR.  
EDWARD ASHWORTH  
CHARLES MORGAN, JR. AND  
ASSOCIATES, CHARTERED  
1899 L Street, N.W.  
Washington, D. C. 20036

WOOD & YEAPANIS  
ATTORNEYS AT LAW  
1000 MARSHWICK BOULEVARD  
PORT NEWS, VIRGINIA  
23601

FILED  
12/8/78  
GEORGE D. DeSHAZOR, CLERK  
By [Signature] D. C.

289

Page 15

CITY  
EXHIBIT NO. 1  
1978  
JUDGE

ORDINANCE NO. 2445-78

AN ORDINANCE TO AMEND AND REORDAIN CHAPTER 33, SMOKE AND AIR POLLUTION CONTROL, OF THE CODE OF THE CITY OF NEWPORT NEWS, BY ADDING THERETO A NEW ARTICLE, ARTICLE IV, SMOKING PROHIBITED IN CERTAIN PUBLIC AREAS.

BE IT ORDAINED by the Council of the City of Newport News:

That Chapter 33, Smoke and Air Pollution Control, of the Code of the City of Newport News, be and the same hereby is, amended and reordained by adding thereto a new article, Article IV, Smoking Prohibited in Certain Public Areas, to read as follows:

### CHAPTER 33.

#### SMOKE AND AIR POLLUTION CONTROL

#### Article IV. Smoking Prohibited in Certain Public Areas.

##### Section 33-20. Definitions.

For the purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section.

*Health care facility.* The term "health care facility" shall mean any office or institution providing individual care or treatment of diseases, whether physical, mental or emotional, or other medical, physiological conditions, including but not limited to, hospitals, clinics, nursing homes, homes for the aging or chronically ill, laboratories, offices of any physician, dentist, psychologist, psychiatrist, physiologist, podiatrist, optometrist or optician.

*Person.* The word "person" shall mean any person, firm, partnership, association, corporation, company or organization of any kind.

*Restaurant.* The term "restaurant" or "cafeteria" shall mean any facility which is open to the public as an eating place, having a seating capacity of 50 or more.

*Smoking.* The term "smoking" or "to smoke" shall mean the act of smoking or carrying a lighted or smoldering cigar, cigarette or pipe of any kind or lighting a cigar, cigarette or pipe of any kind.

*Theater.* The word "theater" shall mean any indoor facility open to the public, which is primarily used for or designed for the purpose of exhibiting any motion picture, stage drama, musical recital, dance, lecture or other similar performance.



Section 33-21. Smoking prohibited in certain areas.

It shall be unlawful for any person to smoke in any of the following areas:

- (a) in an elevator, regardless of capacity, except in those elevators in single-family dwellings.
- (b) In any health care facility, regardless of capacity;
- (c) in any theater, except smoking by performers as part of the production;
- (d) in any art gallery, library, museum or similar cultural facility, supported in whole or in part with public funds.
- (e) in any restaurant, except in those areas specifically designated as public smoking areas.
- (f) in any Newport News public school and the grounds thereof.

Section 33-22. Exceptions.

The prohibitions of this article shall not apply to the following:

- (a) lawfully designated smoking areas;
- (b) an area of a theater commonly referred to as a lobby if physically separated from the spectator area;
- (c) offices or work areas not entered by the public in the normal course of business or use of the premises;
- (d) during the hours in which the particular business or institution is not open to the public;
- (e) the in-patient sleeping quarters of any health care facility, except hospitals. Each such facility shall make a reasonable effort to assign patients to sleeping rooms according to the patient's individual non-smoking or smoking preference;
- (f) the sleeping quarters of non-ambulatory hospital patients, when the physician writes an order in the patient's record allowing that patient to smoke.

Section 33-23. Designated smoking area.

The owner or person in charge of any building, structure, space, place or area in which smoking is prohibited may designate separate rooms or areas in which smoking is permitted, provided that:

- (a) designation of such rooms or areas shall be reasonably separated from those rooms or areas entered by the public in the normal course of use of the particular business or institution;

(b) existing physical barriers and ventilation systems shall be used in designated smoking areas when possible to minimize the toxic effect of smoke in adjacent non-smoking areas.

Section 33-24. Posting of signs.

Any person who owns, manages or otherwise controls any building, facility, room, area or place in which smoking is prohibited, is required to post or cause to be posted conspicuously, signs at least five (5) inches in height which read:

NO SMOKING.  
City Ordinance  
Prohibits the Carrying  
of Lighted Tobacco  
Products of Any Kind.  
\$25 Fine.

The letters in the words "No Smoking" shall be at least one and one-half (1 1/2) inches in height.

Section 33-25. Penalty.

Any person violating any of the provisions of this article shall be fined up to twenty-five dollars (\$25.00). Each day a violation of this article continues shall constitute a separate violation.

Section 33-26. Enforcement.

The provisions of this division shall be enforced by the director of the health department, or any other person duly designated by council.

PASSED BY THE COUNCIL OF THE CITY OF NEWPORT NEWS, MAY 15, 1978

Louise M. Schmid,  
City Clerk

Joseph C. Ritchie,  
Mayor

A true copy, teste:

City Clerk

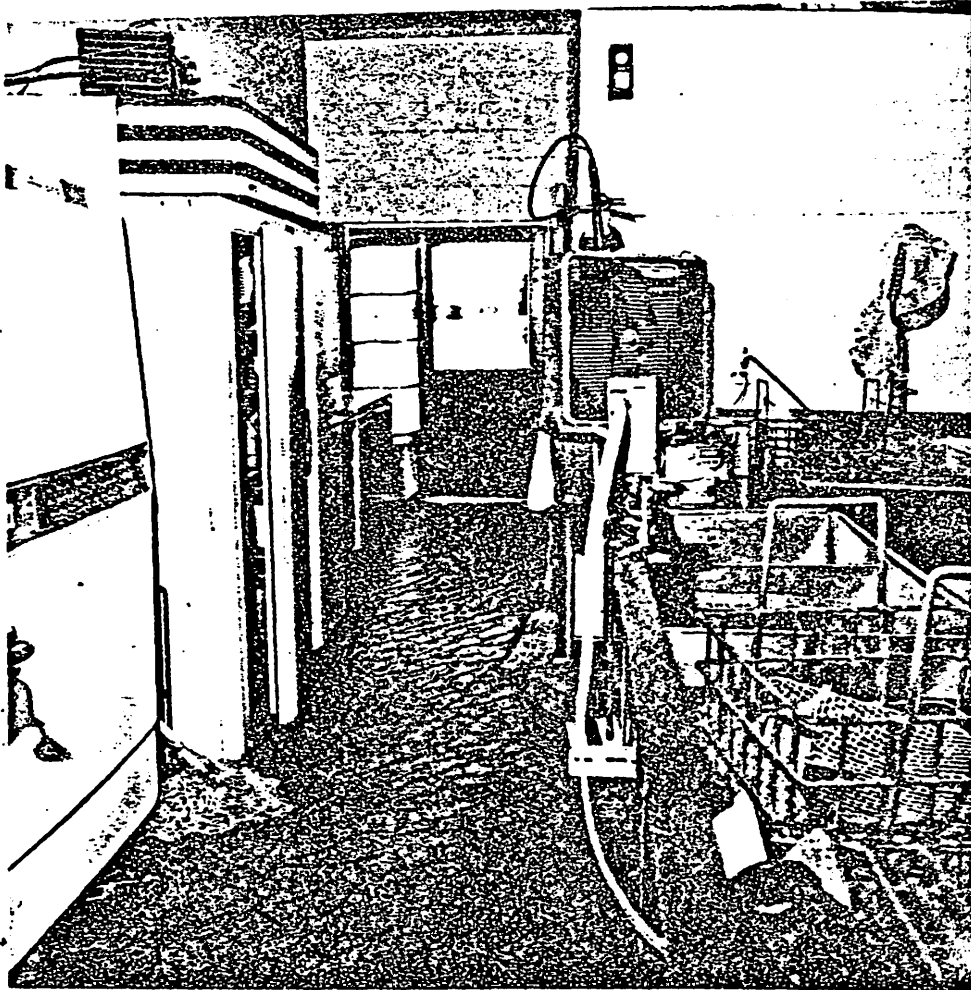


Exhibit No. 1



Exhibit No. 2



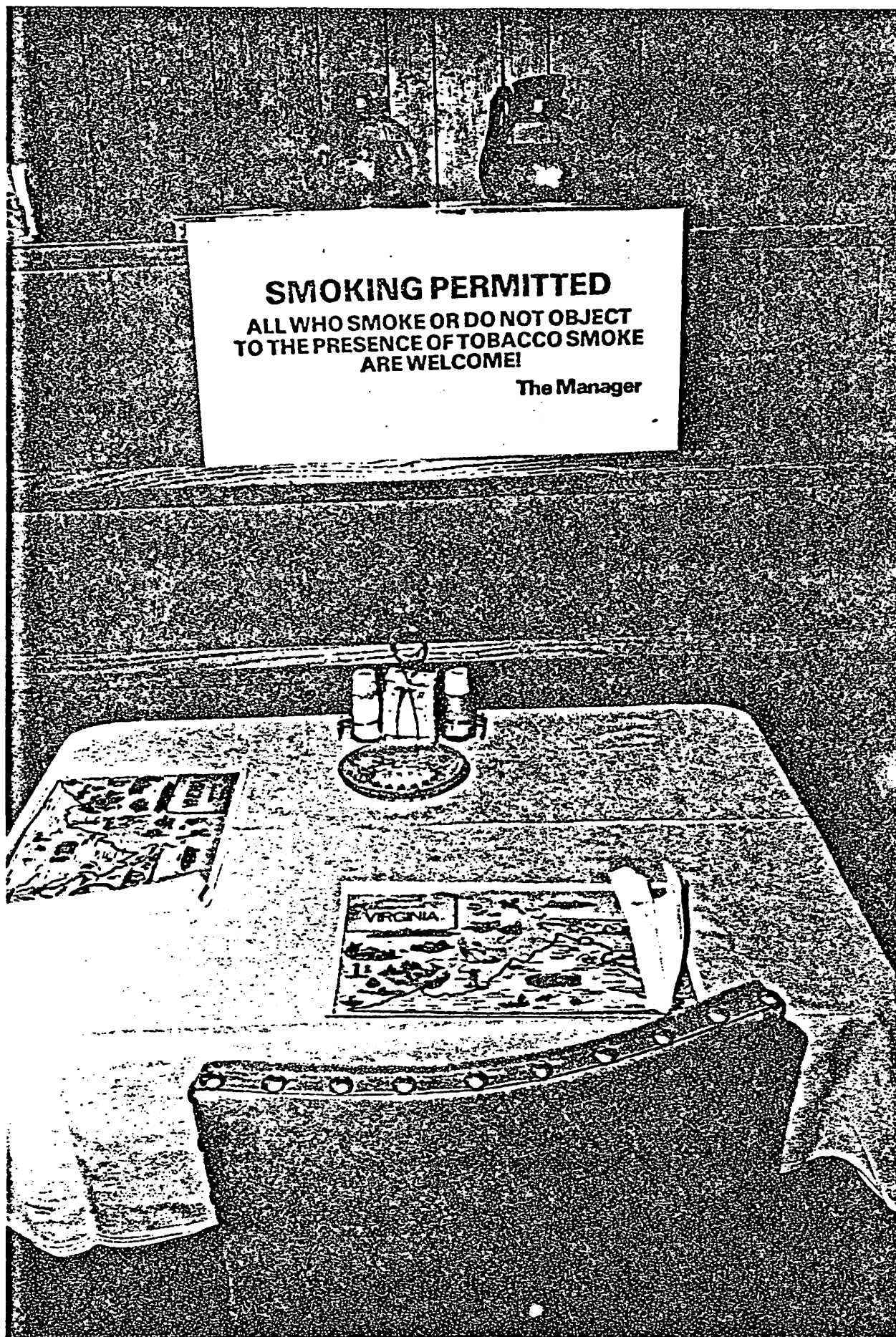
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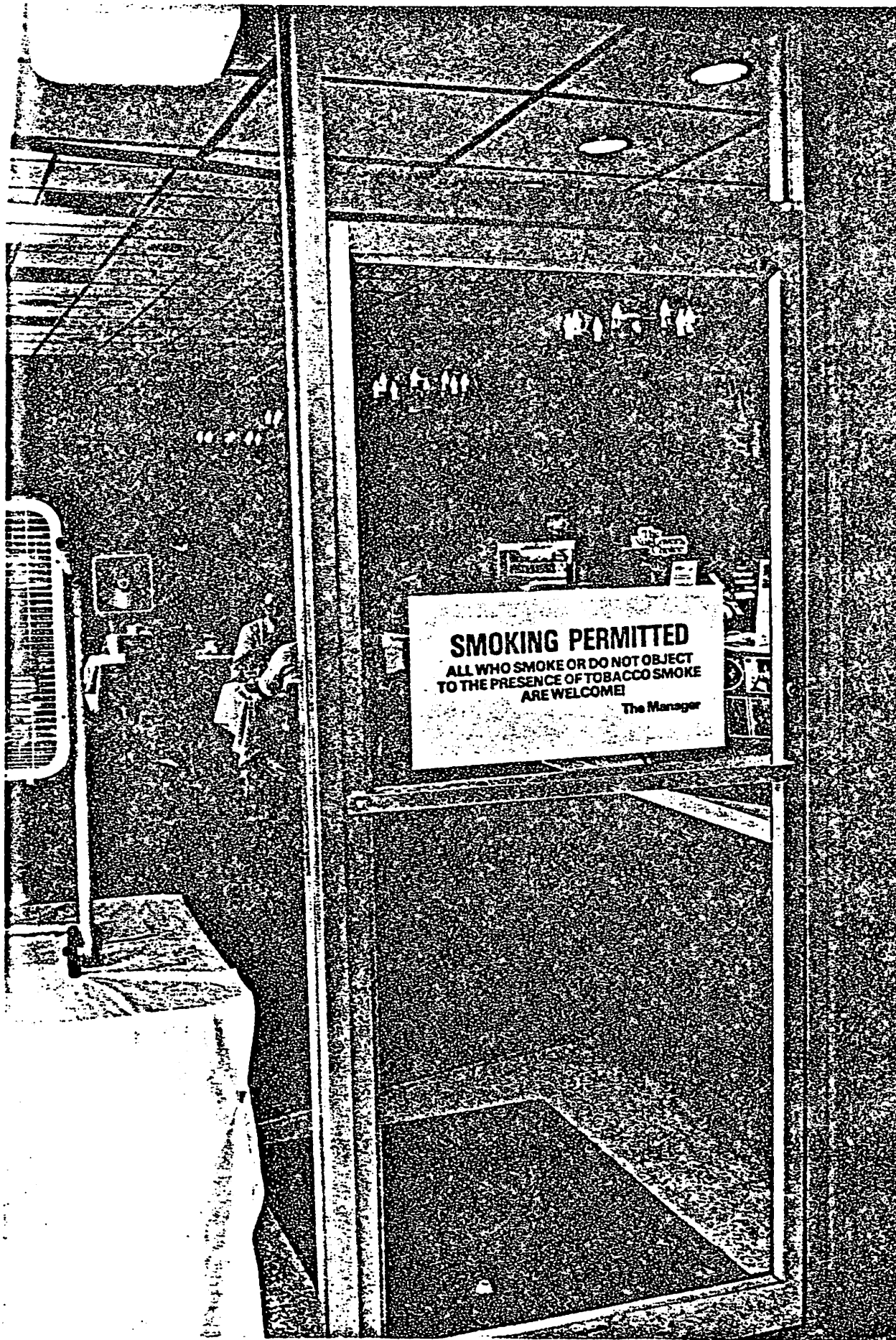


ENC

Exhibit No. 4









NO SMOKING AT LEST 1/4

CITY ORDINANCE

Prohibits the Carrying

of Lighted Tobacco

Products of Any Kind

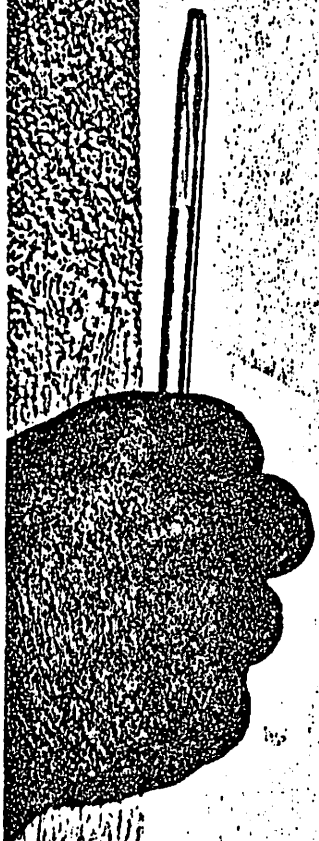
§ 2.5 Five

NO SMOKING

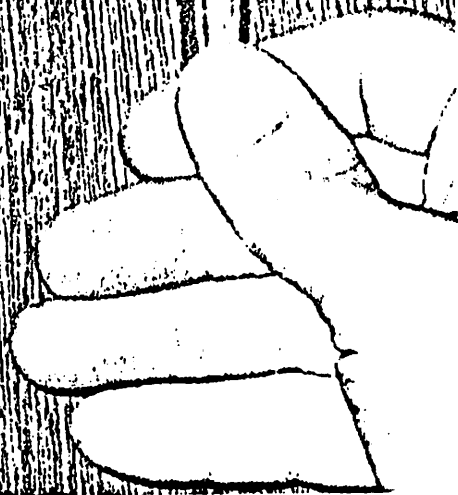
CITY ORDINANCE  
PROHIBITS CARRY  
OF LIGHTED TOBACCO  
PRODUCT OF ANY  
Kind, FINE \$25

*Handwritten*

Smoking  
Area



NO SMOKING



302

Exhibit No. 10

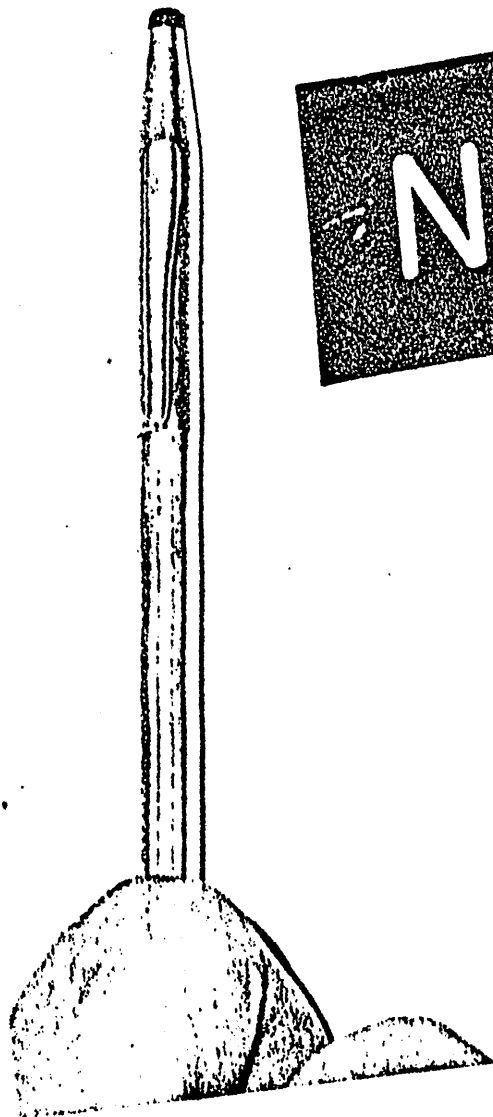


ABCDEF GHIJK  
1234567890

NO SMOKING

WARRA MASHIN  
"TAKI MI TONIGHT"  
"YOU MAKE ME NOT"

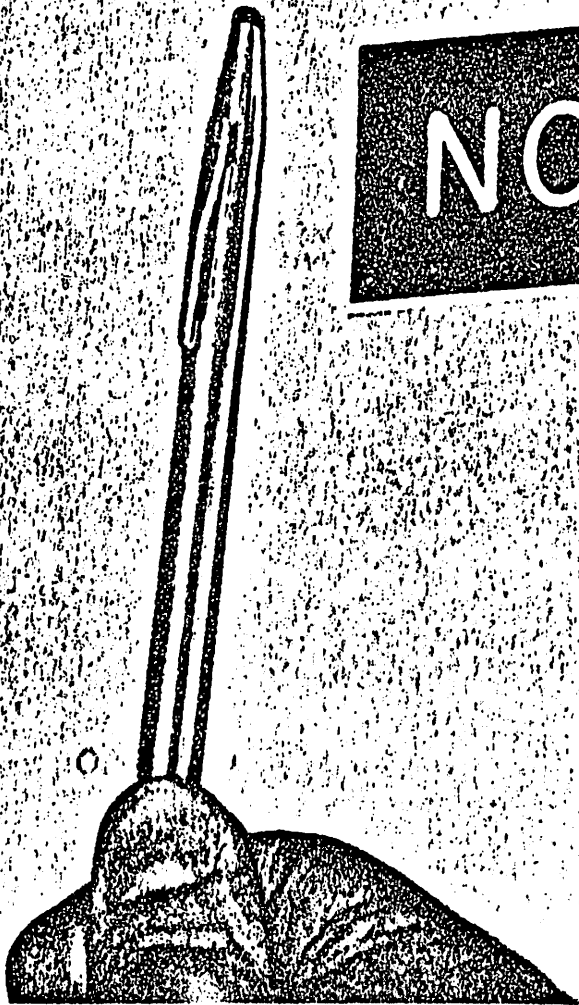
NO SMOKING



304

Exhibit No. 12

NO SMOKING



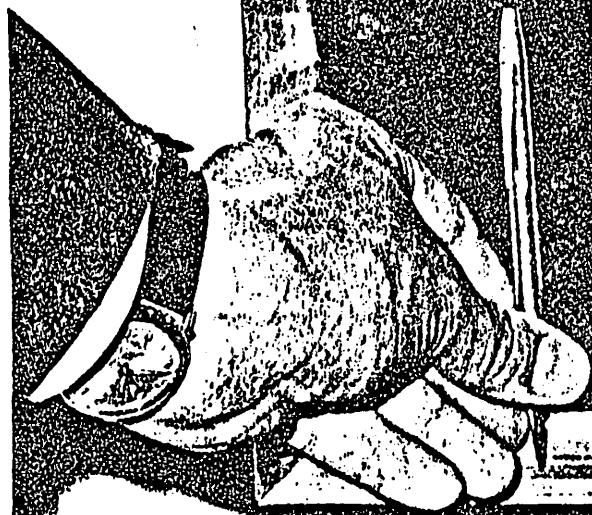
305

Exhibit No. 13

**Visitors**



**No Smoking**



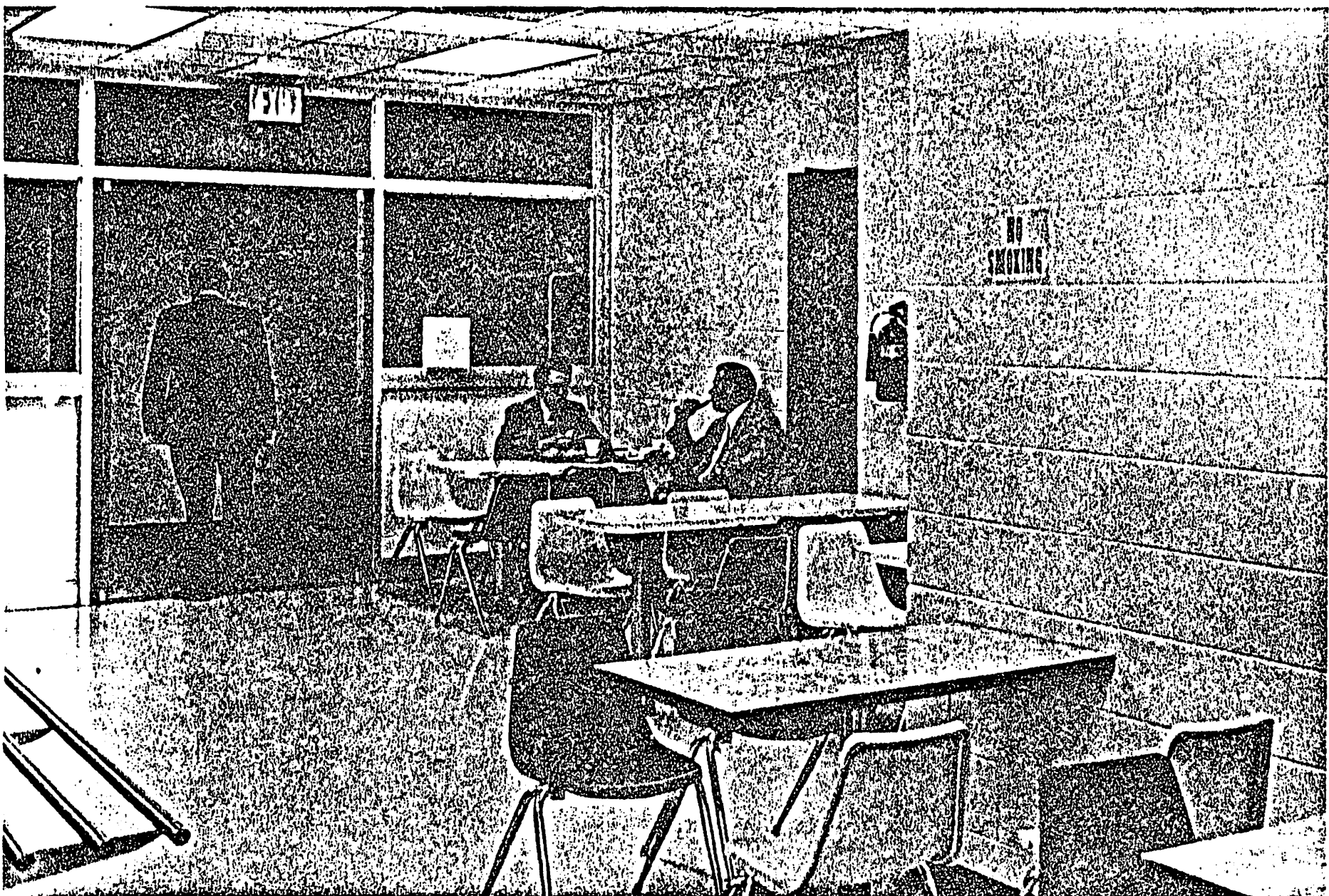
306

Exhibit No. 14



# NO SMOKING

City ordinance prohibits the carrying of lighted tobacco products of any kind at this table. \$25.00 fine each violation.



308

Exhibit No. 16

A high-contrast, black and white photograph. In the upper portion, a hand is visible, holding a lit cigarette. The hand appears to be wearing a textured glove or has a very rough skin texture. The cigarette is lit, with a small flame or tip visible. Overlaid on the lower half of the image is a rectangular sign with a dark, grainy background. The sign contains the text "NO SMOKING" in large, white, sans-serif capital letters. The overall image has a grainy, high-contrast quality, typical of a photocopy or a low-quality scan.

NO  
SMOKING





NO  
SMOKING  
THANK YOU

310

Exhibit No. 18

NO SMOKING  
PLEASE



FOR YOUR HEALTH'S SAKE  
AND THE COMFORT OF OTHERS



NO SMOKING PLEASE

NO SMOKING PLEASE

FOR YOUR HEALTH'S SAKE  
AND THE COMFORT OF OTHERS





FOR YOUR HEALTH'S SAKE  
AND THE COMFORT OF OTHERS



NO SMOKING PLEASE

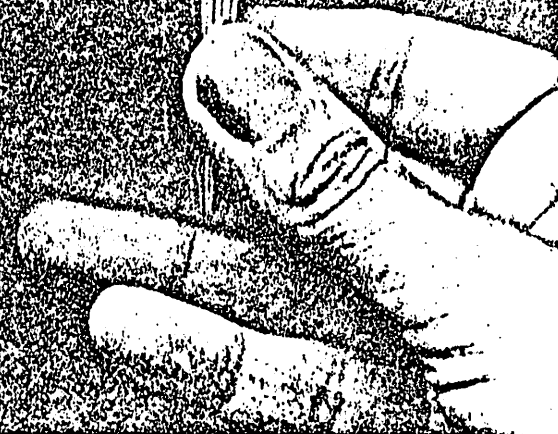
NO SMOKING

314

Exhibit No. 22



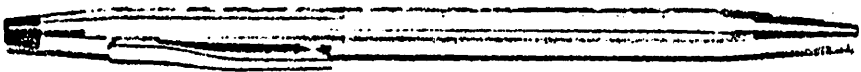
Be considerate of  
other patients  
**NO SMOKING**  
**PLEASE**



315 Exhibit No. 23



FOR YOUR HEALTH'S SAKE  
AND THE COMFORT OF OTHERS  
NO SMOKING PLEASE



316

Exhibit No. 24



THANK YOU  
FOR NOT SMOKING

317

Exhibit No. 25



Health dollars and he  
all have to use them

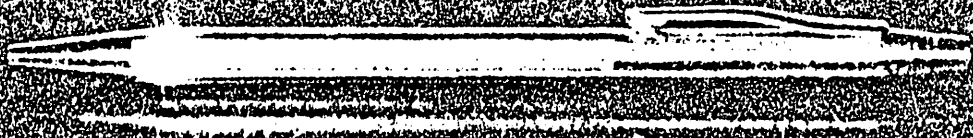
This message brought to you

NO SMOKING PLEASE

318

Exh: b.1 No. 26

FOR YOUR BENEFIT AND THE COMFORT OF OTHERS  
NO SMOKING PLEASE





**ENTER HERE FOR  
NO SMOKING  
DINING ROOM**

320

Exhibit No. 28

CITY OF NEWPORT NEWS, VIRGINIA

Date 6/21/78

Mrs. Phyllis L. Alford

You are hereby summoned to appear in the Municipal Court of the City of Newport News, 2501 Huntington Avenue, Newport News, Virginia at 9:00 o'clock A. M. on

June 29, 1978, to answer for the following violation of law, to wit: Failure to  
comply with No Smoking Ordinance. Ordinance No. 2446-78,  
Chapter 33, Article IV, Section 33-23 + Section 33-24 of City Code  
of Newport News, VA.

I hereby promise to appear at the time and place specified above.

Failure to comply with this summons constitutes a separate offense.

Defendant's Signature

(Signing this summons is not an admission of guilt)

SANITARIAN

Thomas C. Kanoy, Jr.

NEWPORT NEWS HEALTH DEPT.

THE COMMERCIAL PRINTER-NEWPORT NEWS

EXHIBIT 29

321



Exhibit No. 30



# **SMOKING PERMITTED**

**ALL WHO SMOKE OR DO NOT OBJECT  
TO THE PRESENCE OF TOBACCO SMOKE  
ARE WELCOME!**

**The Manager**