Written by **Joe Wolverton, II, J.D.** on November 24, 2013

California City Bans Smoking at Home

Government isn't content to control public behavior, it is now clamping down on how citizens act at home, as well.

Multiple media outlets are reporting that the city council of San Rafael, California has passed an ordinance prohibiting smoking inside residences with shared walls. This would include, of course, apartments, condominiums, duplexes, and other multi-family dwellings.

The ordinance was passed in October 2012, but did not go into effect until November 14, 2013.

According to a statement made by the city council on the city's official website, the new regulation strengthens "the City's municipal code to further protect the community from secondhand smoke."

In particular, the ordinance "applies to all new and existing properties and does not allow grandfathering rights. Landlords and property owners are required to enforce this ordinance through new lease language or lease amendments as well as posting signage."

The ordinance may be the strictest in the country, and city officials are proud to be out front on the issue. Breitbart News quoted Rebecca Woodbury, "an analyst in the San Rafael's city manager's office who helped write the ordinance," as boasting: "I'm not aware of any ordinance that's stronger."

And the Blaze revealed:

> The city's mayor, Gary Phillips, is apparently well-aware of the leadership role San Rafael may have given itself with the decision. He said that the city is "happy to blaze a trail" before the vote took place.
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> "We're most happy to be in the forefront of the issue because we think it will greatly benefit our residents and those visiting San Rafael, and we think it will set the tone for other cities as well," the mayor proclaimed.

The Breitbart News story reported on the opposition to this alarming intrusion into the sanctity of the home:

> "The science for that is spurious at best," said George Koodray, the state coordinator for Citizens Freedom Alliance and the Smoker's Club in New Jersey.
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> Steve Stanek, a research fellow at the free-market oriented policy group Heartland Institute in Chicago, supported the rights of smokers.
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> Stanek, a non-smoker, said, "My sympathies aren't with smokers because I am one, it's because of the huge growth in laws and punishments and government restricting people more and more."

Beyond the city's reliance on questionable science, the violation of the "Takings Clause" of the Constitution may actually be actionable.

The Fifth Amendment to the U.S. Constitution reads, in relevant part, "nor shall private property be taken for public use, without just compensation."

Over the years, the U.S. Supreme Court has handed down several decisions aimed at defining the scope of the so-called Takings Clause of the Fifth Amendment.

An article from the University of Missouri-Kansas City School of Law reports:

> The Court has had a difficult time articulating a test to determine when a regulation becomes a taking. It has said there is "no set formula" and that courts "must look to the particular circumstances of the case." The Court has identified some relevant factors to consider: the economic impact of the regulation, the degree to which the regulation interferes with investor-backed expectations, and the character of the government action.

By applying the ordinance to owners and renters, an argument can be made that its enforcement will impact the ability of investors to receive a return on their investment in property within San Rafael. Where once owners could sign leases with any citizen, regardless of their smoking preference, that property will now be restricting to renting to those who do not smoke. That may be fine going forward, but considering the "no grandfathering" clause of the ordinance, many of those who have purchased buildings as investment income property will now see their ability to achieve occupancy severely reduced by an overzealous local government.

As the ordinance has been in effect for only about 10 days as this is being written, it seems that local land owners would have a cause of action against the San Rafael city council. Should the owners of apartments, condos, and all other residences that contain units that share walls be able to demonstrate that their property rights have been diminished by the city council without the "just compensation" required by the Constitution, then the ordinance would be subject to being struck down.

Should the ordinance be enforced as written, owners of qualifying property will find themselves unable to use their property as intended and unable to recover for their losses.

There are those opponents of the ordinance who have chosen, unfortunately, to focus on the soundness of the science rather than on the assault on the fundamental right of property.

In the long run, health risks identified by science or by "science" will change. There will rarely be consensus on such issues, particularly when forces on both sides have billions of dollars to pour into competing studies (Michael Bloomberg and the tobacco industry, for example).

What does not change, however, and is not subject to contemporary or corporate manipulation, is the sacrosanct place afforded property in the Anglo-American legal tradition.

Proponents of the law point to the "nuisance exception" that the Supreme Court has established. Put simply, the high court has ruled that the right to injure neighbors is not covered by the Takings Clause, and thus need not be compensated for should the government decided to regulate the injurious behavior.

This has gone too far, however.

Writing for the Cato Institute, Roger Pilon explains the potential for abuse of the nuisance exception to the Takings Clause:

> In defining the nuisance exception, therefore, care must be taken to tie it to a realistic conception of rights, which the classic common law more or less did. Thus, uses that injure a neighbor through various forms of pollution (e.g., by particulate matter, noises, odors, vibrations, etc.) or through exposure to excessive risk count as classic common-law nuisances because they violate the neighbor's rights. They can be prohibited, with no compensation owing to those who are thus

> restricted.
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> By contrast, uses that "injure" one's neighbor through economic competition, say, or by blocking "his" view (which runs over your property) or offending his aesthetic sensibilities are not nuisances because they violate no rights the neighbor can claim. Nor will it do to simply declare, through positive law, that such goods are "rights."
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> Indeed, that is the route that has brought us to where we are today. After all, every regulation has some reason behind it, some "good" the regulation seeks to bring about. If all such goods were pursued under the police power—as a matter of right—then the owners from whom the goods were taken would never be compensated. The police power would simply eat up the compensation requirement.

And that is where the citizens of San Rafael find themselves today. The city council has unconstitutionally exercised the police power and has "eaten up" the protected property rights of owners of multi-family dwellings.

Although the fight wouldn't be an easy one, property owners in San Rafael affected by the newly enforced ordinance would be wise to stand against their local government's deprivation of their right to enjoy their property. When regulations run amok, property rights are almost always the victim.

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