**Opinion No. 89-03**

April 10, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Charles R. Peifer, Chief Assistant Attorney General and Carol, A. Baca, Assistant Attorney General

**TO:** The Honorable Ray M. Vargas, New Mexico State Representative, 2510 Zearing, N.W., Albuquerque, NM 87104

## QUESTIONS

1. Is there any conflict between Albuquerque Ordinance 0-51 and the New Mexico Clean Indoor Air Act, Sections 24-16-1 through 24-16-11 NMSA 1978?

2. a. Is there a rational basis for Section 9's exemption of certain areas from the smoking ban when the basis for Ordinance 0-51 itself is public health?

b. If there is not a rational basis for the exemptions in Ordinance 0-51, does this create a constitutional problem which could cause it to be overturned?

3. Does Albuquerque Ordinance 0-51 violate the civil rights of city employees in that Section 5 of the Ordinance imposes smoking restrictions on city employees working in the Albuquerque city/county building but does not apply to county employees working in the same building?

4. Does Albuquerque Ordinance 0-51 violate the civil rights of public employees covered by Section 5 of the Ordinance in that Section 7 allows a private sector business to adopt either the limited smoking ban stated therein or a smoking policy approved by a majority of its employees?

5. Does Section 7 of Albuquerque Ordinance 0-51 violate the civil rights of any private employees in that its two options for smoking policies allow different treatment of private employees working for different businesses?

## CONCLUSIONS

1. No, but see Part B.

2. (a) Yes

(b) We find a rational basis for the exemptions in the Ordinance.

3. No.

4. No.

5. Depending on how the ordinance is interpreted and enforced, the voting provisions of the ordinance may constitute an unconstitutional delegation of legislative power.

INTRODUCTION: THE ALBUQUERQUE CLEAN INDOOR AIR ORDINANCE.

Albuquerque Ordinance 0-51, the Albuquerque Clean Indoor Air Ordinance, declares the reduction of tobacco smoke in city buildings, public places and places of employment to be a public health priority. The ordinance, accordingly, restricts smoking in areas not covered by the 1985 New Mexico State Clean Indoor Air Act, Sections 24-16-1 to 24-16-11 NMSA 1978. See Albuquerque, N.M., Ordinance 0-51, §§ 2, 3 (1988) ("Ordinance").

Section 8 of the Ordinance establishes three categories of smoking restrictions to be implemented within six months of the Ordinance's effective date. First, the Ordinance requires that all buildings owned or occupied by the city shall be smokefree,[1] except as provided otherwise. Section 1 defines "smokefree" as "no smoking within the enclosed indoor areas."

Second, the Ordinance declares that "all public places" shall be smokefree, except in designated places. A public place is "any enclosed area to which the public is invited or in which the public is permitted, not including the offices or work areas not entered by the public in the normal course of business or use of the premises. A private residence is not a 'public place."' Ordinance § 4(9). Public places include, but are not limited to: elevators, buses, taxicabs, other city-regulated means of public transit, restrooms, all areas available to and customarily used by the public in all businesses (including nonprofit entities), public areas of aquariums, galleries, libraries, and museums when open to the public, every room under the city's control while a public meeting is in progress, waiting rooms, hallways, wards, and patient rooms of health facilities, unless a doctor prescribes smoking for a patient in his room, the common areas of the Albuquerque Convention Center, except that a private lessee may determine the smoking regulations for the areas under lease, and polling places. Id. § 6. Restaurants, common areas of Albuquerque airports, and bowling alley establishments also are public places, except that in such places smoking areas may be set aside in accordance with the Ordinance. Id. Restaurants, for example, may designate as a smoking area a contiguous area that contains a maximum of thirty-three percent of the indoor seating capacity. Id. § 6 (5).

Third, all "places of employment" must establish a smoking policy as described in the Ordinance. "Place of employment" means:

an enclosed indoor area under the control of a private or public employer intended for occupancy by employees during the course of employment, including, but not limited to, work areas, lobbies, reception areas, offices, conference and meeting rooms, employee

cafeterias and lunchrooms, classrooms, auditoriums, hallways, stairways, waiting areas and restrooms.

Ordinance § 4(8) (emphasis added). The ordinance does not define "public employer," but "employer" means "any person, partnership, corporation, including municipal corporation, or non-profit entity who employs the services of one or more individual persons." Id. § 4 (7) (emphasis added).

Section 7 of the Ordinance imposes on employers the duty to provide smokefree areas for nonsmoking employees within existing facilities "to maximum extent possible." Each employer "shall adopt, implement, post and maintain a written smoking policy which shall contain at a minimum either the City's option ... or ... a smoking policy that is approved by the majority vote of the employees." The "City's option" requires prohibition of smoking in common work areas, conference and meeting rooms, offices, lobbies, reception areas, auditoriums, classrooms, elevators, hallways, medical facilities, and restrooms. The City's option also requires the employees to set aside not less than 75 percent of the seating capacity and floor space in cafeterias, lunch rooms, break rooms and employee lounges as nonsmoking areas. If a building houses more than one building, the City's option requires common areas to be smokefree, except that an employer may establish smoking areas of not more than twenty-five percent of the seating capacity in cafeterias, lunchrooms, break rooms, and employee lounges.

Section 9 exempts some areas from all regulation of smoking. "Notwithstanding any other provision of this article[2] to the contrary," the following are not subject to the Ordinance's restrictions: bars, retail tobacco stores, jails, individual enclosed private offices, and shared offices containing only smokers. Restaurants, hotel and motel conference or meeting rooms, and public and private assembly rooms also are exempt when used for private functions.

## ANALYSIS

We have divided our legal analysis of the Ordinance into five parts. Part A, Technical Issues, describes several technical problems with the Ordinance. Part B, Conflict with the Clean Indoor Air Act, addresses Question 1. Part C, Equal Protection, addresses Questions 2(a) and 2(b). Part D, Application to City/County Work Areas, addresses Question 3. Part E, Delegation and Vagueness, addresses Question 4 and 5. Part F contains suggestions that would remove some constitutional problems presented by the Ordinance as enacted.

A. Technical Issues:

Before analyzing the specific questions asked by Representative Vargas, we must note that portions of the Ordinance are ambiguous. The ambiguity of the Ordinance has in some cases made it difficult for us to address the questions presented.

First, Section 5 of the Ordinance declares that all city owned or occupied or public service buildings shall be smokefree within six months of the passage of the Ordinance. The only exception to that total smoking ban would appear to be the limitation expressed in paragraph 5 of Section 9, which allows smoking in individual private offices or shared offices containing only smokers. Because the Ordinance defines "employer" to include "municipal corporations," however, the city, as an employer, appears to be subject to the exceptions on the smoking ban allowed under Section 7. Thus, it is not clear from the Ordinance whether the city employees are subject to a total ban on smoking except as provided in Section 9 or whether the city's employees are entitled to the same rights as private employees under Section 7.

Second, Section 5 and 8(a) of the Ordinance do not define consistently the city buildings to which the smoking restrictions apply. Third, as discussed below in Part E, Section 7 contains ambiguities that make it difficult to ascertain the duty of private employers. Fourth, it is difficult to tell from the language of the Ordinance or the context of Section 5 what a "public service building" is. Finally, although Section 9(5) exempts jails from the Ordinance, it is unclear whether the Ordinance exempts jails from the minimum restrictions in the Clean Indoor Air Act.[3]

Violation of the Ordinance constitutes a petty misdemeanor punishable by a written warning during the initial nine months after the Ordinance's effective date and a fine of one hundred dollars following the nine-month period. Id. § 12. An ordinance may be challenged on the ground that it is impermissibly vague and uncertain thereby denying due process to persons subject to its punishment. See, e.g., **Papachristou v. City of Jacksonville,** 405 U.S. 156, 162 (1973). We recommend that the Council clarify the ambiguities in the Ordinance before attempting to enforce any of the Ordinance's ambiguous provisions.

B. Conflict with the Clean Indoor Air Act.

Albuquerque is a "home rule" municipality and as such "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art X, § 6. See also **Apodaca v. Wilson,** 86 N.M. 516, 519-21, 525 P.2d 876, 879-81 (1974) (discussing home rule powers generally). The New Mexico legislature has granted municipalities specific powers to adopt ordinances "not inconsistent with the laws of New Mexico" for the purpose of providing for the safety, health, comfort, and convenience of the municipality and its inhabitants. Section 3-17-1(B) NMSA 1978. Consistent with the Ordinance's recitals, promote public health and safety. See, e.g., **Swanson v. City of Tulsa,** 633 P.2d 1256, 1257 (Okla. 1981); **Alford v. City of Newport News,** 220 Va. 584, 585-86, 269 S.E.2d 241, 242-43 (1979).

The purpose of the Clean Indoor Air Act (the "Act"), Sections 24-16-1 to 24-16-11 NMSA 1978, is to protect the public health from smoking hazards without imposing exorbitant costs upon the managers of the public places and places of employment to which the Act applies. Section 24-16-4 of the Act prohibits smoking in public places, except in "smoking-permitted areas." The Act defines "public places" as enclosed indoor

areas in buildings owned or leased by the state or any of its political subdivisions. Section 24-16-3(D). "Smoking-permitted areas" are fully enclosed offices or rooms occupied exclusively by smokers or rooms used for a nongovernmental function where the seating arrangements are under the control of the sponsor. Section 24-16-5. In addition, Section 24-16-6 provides that the person in charge of a public place or public meeting shall designate as a smoking-permitted area "a contiguous area or areas which shall not exceed fifty percent of the public place."

Section 24-16-7 also requires the employer to develop a written smoking policy for "places of employment."[4] Smoking policies must meet certain minimum requirements, including the prohibition of smoking in elevators and nurse's aid stations and similar facilities, accommodation of employees who request smoke-free work stations, and establishment of nonsmoking areas of not less than one-half of the seating capacity and floor space in employee lounges and lunchrooms. The employer may designate any work area as a nonsmoking area. Section 24-16-7 (D). Section 24-16-1 provides: "It is not the intent of the legislature to preempt the field of regulation of smoking in public from the enactment of ordinances by local governing bodies which are not inconsistent with the Clean Indoor Air Act."

Where an ordinance imposes requirements stricter than those imposed by state law and the ordinance complements the purposes of the statute, courts will not find the ordinance in conflict with the state law. See **City of Hobbs v. Biswell,** 81 N.M. 778, 782, 473 P.2d 917, 921 (Ct. App. 1970); see also **Leavenworth Club Owners Ass'n v. Atchinson,** 208 Kan. 318, 492 P.2d 183 (1971) (finding no conflict between state law that prohibited the serving of alcohol during certain hours and ordinance prohibiting the serving of alcohol during additional hours).

The Albuquerque Ordinance is broader than the Clean Air Act in that the Ordinance applies to private businesses and work areas. We conclude that this extension of smoking restrictions is permissible because it complements rather than conflicts with the purpose of the Act.

Whether the Ordinance conflicts with the Act in its application to county and city employees is a more difficult question. We understand from the letter accompanying the opinion request that the Ordinance was not intended to affect county employees, who continue to be governed by state law. Nevertheless, the exemptions in Sections 9(3) and 9(5) of the Ordinance apply in city of Albuquerque buildings and work places and are equivalent to the exemptions in Section 24-16-5 for offices occupied by smokers and rooms used for nongovernmental purposes. We also note that Section 24-16-7 does not preclude a total smoking ban in work areas and other "places of employment." Section 24-16-7 merely limits the size of areas in places of employment that employers may designate as smoking-permitted areas. There is no limit on the size of areas in which an employer may prohibit smoking. Thus, we find no conflict between the Ordinance and the Act in their application to city and county employees.

We also find no conflict between the Act and Ordinance in their treatment of open meetings. While the Act requires a smoking-permitted area to be designated in a public meeting place, Section 6(7) of the Ordinance prohibits smoking in public meeting places under the city's control. Inasmuch as the Ordinance's greater restrictions do not run counter to the Act's general purpose and tenor, there is no impermissible conflict.

One possibility of conflict is created by the Ordinance's ambiguity in the area of jails. The Ordinance specifically exempts jails from its restrictions, but does not indicate specifically whether the Act's minimum restrictions continue to apply. We believe that they must. As a building leased or owned by a political subdivision of the state, a jail is a "public place" within the meaning of Section 24-16-3(D) of the Act. An Ordinance may not relax the standards in general state law. Att'y Gen. Op. 74-13 (1974).

C. Equal Protection

The second question asks whether the Ordinance is flawed, in light of its public health purpose, because its smoking restrictions apply to some public places but not to others. That question asks whether the Ordinance's exemptions violate the guarantee to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States or article 2, section 18 of the Constitution of the State of New Mexico.

At the outset of this discussion, we must note that all legislative acts are presumed to be constitutional. **State v. Segotta,** 100 N.M. 498, 500, 672 P.2d 1129, 1131 (1983); **Board of Dirs. of Mem. Gen. Hosp.** v. County Indigent Hospital Claims Bd., 77 N.M. 475 477, 423 P.2d 994, 996 (1967). The presumption of constitutionality extends to municipal ordinances. **City of Albuquerque v. Jones,** 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975). See also **Garcia v. Village of Tijeras,** 108 N.M. 116, 767 P.2d 355, 360 (Ct. App. 1988). In reviewing the constitutionality of an ordinance, the New Mexico courts indulge every presumption favoring the validity of the enactment and will uphold it unless satisfied beyond all reasonable doubt that the enactment exceeds constitutional limitations. Id. 108 N.M. at 118, 767 P.2d at 357.

Federal and New Mexico courts employ the same tests in reviewing an enactment under the equal protection clause of the United States and New Mexico constitutions. **Garcia v. Albuquerque Public School Bd.,** 95 N.M. 391, 393, 622 P.2d 699, 701 (Ct. App. 1981). Unless a legislative classification of persons or objects trammels fundamental personal rights or is based upon inherently suspect distinctions such as race, religion, or alienage, the court will presume the constitutionality of legislative discriminations and require only that the challenged classifications be rationally related to legitimate state interests. Id.; **New Orleans v. Dukes,** 427 U.S. 297, 304 (1976).

The principle that courts will defer to the classifications made by legislators in areas that neither affect fundamental rights nor discriminate against suspect classes has a number of corollaries. First, in order to violate equal protection requirements, legislative classifications must be clearly arbitrary and unreasonable. **Gallegos v. Homestake Mining Co.,** 97 N.M. 717, 722 643 P.2d 281, 286 (Ct. App. 1982). One who challenges

a classification carries the burden of showing that it is so arbitrary that it does not rest upon any reasonable basis. **Lindsley v. Natural Carbonic Gas Co.,** 220 U.S. 61, 78 (1911). Second, a classification will be upheld if any state of facts reasonably can be conceived to justify it. Id.; **McGowan v. Maryland,** 366 U.S. 420, 426 (1961); **Garcia v. Albuquerque Public Schools Bd.,** 95 N.M. at 393, 622 P.2d at 701. Third, equal protection requirements do not preclude the legislature from approaching a problem in a piecemeal fashion:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think .... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The Legislature may select one phase of one field and apply a remedy there, neglecting the others.

**Williamson v. Optical of Oklahoma,** 348 U.S. 483, 489 (1955) (citations omitted).[5]

There is no constitutional right per se to smoke in public places. **Gasper v. Louisiana Stadium and Exposition District,** 577 F.2d 897, 898 (5th Cir. 1978); **Craig, by Craig v. Buncombe County Board of Education,** 80 N.C. App. 683, 685, 343 S. E.2d 222, 223 (Ct. App. 1986). We also perceive in the Ordinance no discrimination against suspect classes. Classifications drawn in the no-smoking Ordinance therefore, need only be rationally related to a legitimate state interest.

The types of classifications drawn by the Albuquerque ordinance have been upheld against challenge in other jurisdictions. For example, the law at issue in **Rossie v. State/Dept. of Revenue,** 133 Wis. 2d 341, 395 N.W.2d 801 (Ct. App. 1986), cert. denied, 134 Wis. 2d 457, 401 N.W. 2d 10 (1987), prohibited smoking at work places in government buildings and in public conveyances, hospitals and public waiting rooms. The statute permitted smoking in designated smoking areas (such as lunchrooms), offices occupied by smokers, rooms used for private functions and under the control of a sponsor, restaurants holding certain types of liquor licenses accounting for more than fifty percent of receipts, offices privately owned and occupied, jails, bowling alleys, and restaurants with seating capacities of fifty persons or less. A state employee disciplined for violating the smoking ban at his work place challenged the statute on equal protection grounds because the law allowed others to smoke in various other locations. The court upheld the statutory classification, stating:

These distinctions are both substantial and germane to the purpose of the statute, which is to regulate smoking. Section 101.123, stats., was enacted after the legislature heard testimony concerning the health and safety risks of smoking and of exposing nonsmokers to cigarette smoke. The statutory smoking ban is a valid exercise of the legislature's police power .... The areas excepted from the ban, for the most part, do not present the same degree of risk to nonsmokers because those places can be avoided without great inconvenience to the nonsmoker, because nonsmokers are not present, or because the plenary authority of those in charge makes state regulation of smoking unnecessary.

"It is no requirement of equal protection that all evils of the same genus be eradicated or none at all" .... Section 101.123, Stats., prohibits smoking in many public places where people must go, and does not prohibit it in many places where people need not go. We conclude that there is a reasonable basis for the statutory classifications.

Id. at 355056, 395 N.W.2d at 807 (citations omitted).

In another notable case, high school students contended that a county board of educations smoking ban violated the equal protection guarantee because the ban applied to students but not to teachers who chose to smoke in the teachers' lounge. **Craig by Craig v. Buncombe County Board of Education,** 80 N.C. App. 683, 343 S.E.2d 222 (Ct. App. 1986). The court rejected the challenge on the ground that there are reasonable differences justifying application of the regulation to students but not to adults. The court stated that the primary justification of the ban, discouragement of smoking to prevent impressionable adolescents from becoming addicted to tobacco products, did not apply to adults. Moreover, teachers were not permitted to set a bad example for the students by virtue of the fact that smoking was confined to the teachers' lounge.

The unreported decision in **Greater Rockford Food Services v. Orthoefer,** No. 76-2447 (Ill. Cir. Ct. 1976), is the only case we have found holding that the classifications drawn by a no-smoking law violated equal protection requirements. The ordinance reviewed in that case forbade smoking in restaurants and cafeterias, among other places, but permitted owners of restaurants with seating capacities of fifty persons or less to choose to permit smoking. The court held that the classification for restaurants with fewer than fifty seats was unreasonable and unconstitutional because the hazards presented by smoke exist regardless of a restaurant's size. Id.

Based on the federal and New Mexico authorities cited above, we believe a court would determine that the exemptions in the Albuquerque Ordinance are based on reasonable justifications and that the Ordinance is constitutional. The policy choices reflected in the Ordinance's prohibition of smoking in some areas but not others can be justified either because smoking-prohibited areas cannot be avoided as easily ba nonsmokers as can be other smoking-permitted areas, because children are more likely to be present in the nonsmoking areas, or because the city council gave to employees the right to waive smoking restrictions that would otherwise apply. These justifications are sufficient to support the distinctions drawn by the Ordinance.

In reaching our conclusion we are particularly persuaded by the Wisconsin court's decision in **Rossie v. State/Dept. of Revenue,** which upheld a similar scheme of exceptions to a general smoking ban. The ordinance struck down in Greater Rockford Food Services is factually distinguishable from the Albuquerque case, the Ordinance could be unconstitutional as applied. See **Alford v. City of Newport News,** 220 Va. 584, 260 S.E.2d 241 (1979) (finding smoking ordinance to violate equal protection as enforced against a restaurant owner).

D. Application to City and County Work Areas

Though Question 3 assumes that the Ordinance does not apply to county-occupied areas of the building shared by the city and Bernalillo county, we cannot find in the Ordinance any exemption for county property. We have been advised, however, that the exemption would be necessary because the city has no jurisdiction over county buildings.

Without deciding the jurisdictional issue, we note that, if the city has no authority over county-occupied areas, the Ordinance is not assailable on equal protection grounds merely because it is deciding the jurisdictional issue, we note that, if the city has no authority over county-occupied areas, the Ordinance is not assailable on equal protection grounds merely because it is enforceable in areas subject to the city's control but not enforceable in areas subject to county control. It is as anomalous to complain the the Ordinance does not apply in areas under the county's jurisdiction as it would be to complain that the laws of New Mexico do not apply in the other states. Cf. **Salsburg v. Maryland,** 346 U.S. 545, 550-52 (1954) (territorial uniformity is not a constitutional requisite); **Ft. Smith Light Co. v. Paving Dist.,** 274 W.S. 387, 391 (1927) (equal protection does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state); **Missouri v. Lewis,** 101 U.S. 22, 31 (1979) (if diversity of laws may exist among the several states without violating equal protection, there is no reason why there may not be such diversity in different parts of same state). We conclude that the civil rights of city of Albuquerque employees are not violated merely because of the possibility that they may be subject to ordinances that do not apply to county employees.

E. Delegation and Vagueness

While we have concluded that the classifications drawn by the Ordinance do not violate the constitutional guarantee of equal protection, we do believe that the sections of the Ordinance governing a private employer's adoption of a smoking policy present difficulties under the Due Process Clauses of the state and federal constitutions. Section 7 of the Ordinance imposes two requirements on private employers. First, it directs private employers to provide smokefree areas for nonsmoking employees to "the maximum extent possible." We believe the second requirement is an unconstitutional delegation of legislative power to private parties.

The Ordinance's requirement that employers provide smokefree areas to the "maximum extent possible" is unconstitutionally vague. Under the Ordinance a private employer can be charged with a petty misdemeanor and fined for failing to provide non-smoking areas to the "maximum extent possible."[6] Both state and federal courts have recognized that the imposition of criminal sanctions will not survive judicial scrutiny when a person cannot reasonably discern what is expected of him. "A statute will be held unconstitutional in violation of due process of law, if the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application." **State v. Segotta,** 100 N.M. 498, 499, 672

P.2d 1129, 1130 (1983). The constitutional implications are particularly great where, as here, the sanctions to be imposed are criminal. See, e.g., **Brecheisen v. Mondragon,** 833 F.2d 238, 241 (10th Cir. 1987).

"Legislative acts involving criminal violations are held to be unconstitutionally vague if, first, they do not provide sufficient notice of the conduct which is proscribed, and second, they do not provide law enforcement authorities with adequate standards for enforcement of the law." **Hejira Corp. v. MacFarlane,** 660 F.2d 1356, 1365 (10th Cir. 1981). The adequacy of standards defining the criminal conduct is critical since "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. (quoting **Grayned v. City of Rockford,** 408 U.S. 104, 108-09 (1972)).

The Supreme Court has declared unconstitutionally vague an act of Congress imposing criminal sanctions on persons who willfully "make any unjust or reasonable rate or charge." **United States v. L. Cohen Grocery Co.,** 255 U.S. 81, 89 (1921). Observing that the unconstitutionality of the terms "so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary," the court went on to identify four flaws:

(1) "[T]he section forbids no specific or definite act."

(2) "It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides."

(3) It permits "the widest possible inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."

(4) "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

Three of those four flaws plague the Albuquerque Ordinance. The requirement that an employer set aside non-smoking areas to the maximum extent possible does not forbid a specific or definite act, it places no limits on the scope of any inquiry under the statute seeking to determine whether the employer has complied with the Ordinance, and it allows a judge or jury to impose criminal sanctions on conduct based on a wholly subjective determination as to whether the employer has met the undefined requirements of the Ordinance. Accordingly, we conclude that Section 7(A) of the Ordinance is unconstitutional because it does not give sufficient notice to Albuquerque employers of what is required of them in setting aside no-smoking areas.

The provisions of the Ordinance governing a private employer's adoption of either the "City's option" or a smoking policy adopted by a vote of employees presents other

constitutional difficulties. For example, the Ordinance is silent as to who decides whether the City's option or a referendum policy shall govern workplace smoking. The Ordinance also does not tell us whether an employer may ignore a smoking policy adopted by a majority of employees and instead adopt the "City's option" to govern smoking at the workplace. The Ordinance does not give any guidance as to whether part-time employees may vote in a smoking-policy that employees may adopt. The Ordinance does not make clear whether the employees may adopt a policy less stringent that the Clean Air Act or less stringent than the City's option. The Ordinance also does not make clear whether the employees, in voting on a policy, would be required to allow any designated areas for smoking.

We believe that the absence of standards governing both the details of the voting procedure and the extent of the employees right to determine a smoking policy render the Ordinance unconstitutional because the guarantee of due process of law requires that delegations of legislative power be accompanied by clear standards governing the exercise of delegated authority. See **Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm.,** 103 N.M. 675, 682, 712 P.2d 21, 28 (Ct. App. 1985). Where, as with this Ordinance, a legislative body delegates to private parties the power to determine whether and under what circumstances conduct shall be subject to criminal sanction, that delegation "must be restricted by specific legislative standards: Limiting the possibility that the authority will be used arbitrarily. **Deer Mesa Corp.,** 103 N.M. at 682, 712 P.2d at 28. The failure to prescribe adequate standards "is repugnant to the due process clause of the Fourteenth Amendment." **Washington ex rel. Seattle Title Trust Co. v. Roberge,** 278 U.S. 116, 122 (1928); Cf. **United States v. Mazurie,** 419 U.S. 544, 557 (1975).

We acknowledge that legislative power may be delegated where the power delegated is the power to waive legislative restrictions. See e.g., **City of Eastlake v. Forest City Enterprises, Inc.,** 426 U.S. 668 (1976); Currin v. Wallace, 306 U.S. 1 (1939); **Thomas Cusack Co. v. Chicago,** 242 U.S. 526 (1917). In general, however, laws delegating to private parties the power to impose higher restrictions than those legislated are invalid if the delegation is not accompanied by specific standards. See **City of Eastlake,** 426 U.S. at 677 n. 12. "The legislature's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive protection of the prohibition." **Silverman v. Barry,** 845 F.2d 1072, 1086 (D.C. Cir. 1988) (citing, **Thomas Cusack Co.,** 242 U.S. at 531.)

We believe that the Ordinance's attempted delegation to private employees of the right to decide whether and under what circumstances smoking shall be illegal goes beyond constitutionally-permissible limits. The Ordinance's delegation provisions are not limited to allowing employees to waive smoking restrictions. The Ordinance allows employees to impose restrictions on smoking that go beyond the restrictions imposed by the City's option or the state Clean Air Act. While some of the restrictions adopted may be desirable for health or other reasons, we are concerned not with the wisdom of such policies, but the danger that some of the smoking policies adopted might be wholly arbitrary. Where there is a possibility that delegated power unaccompanied by specific

legislative standards will be exercised arbitrarily, that delegation is invalid. Deer Mesa Corp., 103 N.M. at 682; see also **National Association of Independent Television Producers and Distributors v. F.C.C.,** 516 F.2d 526, 541 (2d Cir. 1975).

F. Recommendations

While we believe that the Ordinance is flawed as presently enacted, we also believe that it can be amended to be constitutional. We recommend that the Albuquerque City Council remove the ambiguities identified in this opinion and by the Office of the City Attorney, make clear whether it is the employer or employees who choose whether the City's option shall be adopted in private workplaces. We also suggest that the Council set forth clear standards governing the adoption of smoking policies by private employees. Furthermore, to avoid the difficulties inherent in a delegation of the power to define criminal conduct, we suggest that the amended ordinance establish clear and consistent no-smoking rules and delegate to private employees the limited power to waive those rules should they choose to do so.

Finally, we would recommend that the city council examine Section 13 of the Ordinance. While we have not been asked for an opinion on that section of the Ordinance, we cannot help but note that the provisions of Section 13 might allow unreasonable searches and seizures in contravention of the Fourth Amendment to the United States Constitution. See **Marshall v. Barlow's, Inc.,** 436 U.S. 301, 325 (1978) (provisions of federal Occupational Safety and Health Act purporting to authorize inspections of business premises without warrant or equivalent found to violate the Fourth Amendment).

## ATTORNEY GENERAL

HAL STRATTON Attorney General

## GENERAL FOOTNOTES

n1 Section 5 of the Ordinance states the restriction somewhat differently: "All City owned or occupied indoor work areas or public service buildings will be smokefree within six months after passage of this Ordinance." The ordinance does not define "public service buildings."

n2 We assume "article" should read "ordinance."

n3 Contrast Section 9(5) with Section 6(11). Section 6(11) states expressly that the Act continues to apply to airport restaurants if the Act is more stringent than the Ordinance.

n4 A "place of employment" is an enclosed indoor area under the control of a public employer, including work areas, lounges, cafeterias and conference rooms. Section 24-16-3(B).

n5 See also **Minnesota v. Clover Club Creamery Co.,** 449 U.S. 456, 466 (1981) (holding that equal protection did not prohibit the state from banning one type of milk container that caused environmental problems while permitting the continued use of another type already established in the market); **New Orleans v. Dukes,** 472 U.S. at 304 (holding that ordinance banning all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, did not violate equal protection); **Railway Express v. New York,** 336 U.S. 106, 110 (1948) (holding the equal protection was not offended by traffic regulation that forbade the operation of any advertising vehicle on the streets but excepted delivery vehicles with owners' business notices if not used mainly for advertising); and **Vandolsen v. Constructors, Inc.,** 101 N.M. 109, 113-14, 678 P.2d 1184, 1188 (1984) (holding constitutional a statute that shielded landowner from certain liability arising from off-highway-motorcycle accidents on his lands but did not preclude recovery when accidents involving other types of vehicles.)

n6 We have construed the penalty provisions of the Ordinance as criminal in nature, and not civil. A legislative determination that an offense is a "petty misdemeanor: is entitled to a significant amount of deference when determining whether penalties are civil or criminal in nature. See, e.g., **United States v. Ward,** 448 U.S. 242, 248 (1980).