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HAND DELIVERY

The Honorable Tom Lee, Chair
The Florida Senate Select Committee
On Constitutional Amendment Implementation
Senate Office Building, Room 400
Tallahassee, FL 32399-1100

Re: Amendment 6 - Smoke-Free for Health
Statement of Sponsors' Intent

Dear Senator Lee:

It is my pleasure to furnish you the attached statement of intent of the sponsors of Amendment 6. These sponsors include Smoke-Free for Health, Inc., the American Cancer Society, Florida Division, the American Lung Association of Florida, Inc., and the American Heart Association, Florida/Puerto Rico Affiliate. As you know, Amendment 6 was passed by 71 percent of the voters thereby indicating that the will of the people is for the Legislature to implement the amendment in a way that meaningfully protects the public health of all people in Florida.

In the task that lies before you, the sponsors urge the Senate to be ever mindful of the intent of the sponsors as expressed in the clear language of the amendment itself and as explained in the attached statement. I, along with representatives of each of the sponsors, pledge to make myself available as a resource to you throughout the legislative process, and we look forward to the passage of an implementing act that will mark Florida once again as a leader in protecting the public health.

Sincerely yours,

HOLLAND & KNIGHT LLP

Stephen H. Grimes

Enclosure

TAL1 #262090 v1

STATEMENT OF SPONSORS' INTENT
AMENDMENT 6 – SMOKE-FREE FOR HEALTH

SMOKE-FREE FOR HEALTH, INC. 2/3/03
TRI-AGENCY COALITION ON SMOKING
American Cancer Society, Florida Division
American Lung Association of Florida, Inc.
American Heart Association, Florida/Puerto Rico Affiliate

1. Coverage and Construction.

The intent of the sponsors of Amendment 6 was to protect as many people in Florida as possible against exposure to second-hand tobacco smoke in as many instances as possible. The amendment states its intent to protect "people" – not just employees or workers, not just citizens or legal residents of Florida, but rather all people present in Florida who might otherwise be exposed to second-hand tobacco smoke. The sponsors intended for the law to ban smoking in all but a very few narrowly defined places in Florida, in order to significantly reduce exposure to second-hand tobacco smoke. The amendment defines "work" in such a broad way that smoking will be prohibited in virtually all enclosed indoor places in Florida. It is the intent of the sponsors that the amendment be implemented and enforced in a meaningful way in order to protect the largest possible number of people from exposure to second-hand tobacco smoke in as many instances as possible.

2. Exceptions.

The amendment allows very limited and expressly specified exceptions, but it does not require them. The amendment does not create a constitutional or legal right to smoke anywhere in Florida. On the contrary, the amendment creates a legal right not to be exposed to second-hand tobacco smoke. If the Legislature decides to allow any exceptions, the sponsors intend for the allowed exceptions to be very narrowly construed and enforced in a manner consistent with the express terms of the exceptions and in furtherance of the intent of the amendment.

The Legislature may further restrict smoking and may pass laws allowing local government to further restrict smoking (i.e., repealing state pre-emption only to the extent of allowing more restrictive local regulations), but no more liberal or lenient regulation of smoking may be allowed. Any provisions of Florida law, including the Florida Clean Indoor Air Act, that are inconsistent with the

Amendment cannot stand. On the other hand, provisions of law that are consistent with the amendment will continue to apply unless repealed.

3. Specific Terminology/Definitions.

"Work" is defined broadly with the intent of including activities performed even by non-employees and outside a typical employment setting. Thus, for example, partners, owners, proprietors, and family-owned businesses are also covered by the amendment, as are migrant workers and aliens, whether legally present in Florida or not. Further, the amendment defines "work" to include activities that are social, gratuitous, or volunteer in nature, and thus gatherings, meetings, dinners, dances, and so forth that involve social clubs, Bingo play, VFW activities, Alcoholics Anonymous, Weight Watchers, and the like also fall within the scope of the amendment even if no hired staff assist. Such gatherings or meetings involve activity within the definition of "work," such as setting up before and cleaning up after the meeting, preparing and serving meals, and so forth. The amendment specifies that smoking is prohibited without regard to whether "work" is occurring at any given time, and thus smoking cannot be allowed in a workplace during break times or before or after work. In sum, the effect of the broad definition of "work" is, and was intended to be, that smoking will be prohibited in virtually all enclosed indoor places in Florida.

"Enclosed indoor workplace." The amendment uses the term "place" broadly to mean that smoking is to be prohibited in all enclosed indoor parts of any place that meets the terms of this definition; and to extend more broadly than "building," or "structure" so as to encompass all manner of enclosures, whether fixed and permanent such as office buildings; or temporary, such as tents. If the "place" in question is inside a larger structure that itself is an enclosed indoor workplace, such as a mall, an airport, or an office building, then smoking cannot be allowed in that place because to allow it would expose other people and workers within the larger structure to second-hand tobacco smoke. Smoking is to be prohibited at all times in all such places and parts of places.

"Enclosed" and its use of the phrase "predominantly or totally bounded" means more than 50% enclosed by a roof or walls. Thus, if a business has enclosed areas and outdoor areas, smoking may be allowed in the outdoor area only if it meets this definition of "enclosed." In the case of patios, porches, decks, and the like that can be enclosed at some times and opened at other times, smoking cannot be allowed in any such place when its barriers are closed so as to make it "enclosed" and expose the people inside it to second-hand smoke. In keeping with the spirit and intent of the amendment, further consideration should be given to

protecting against infiltration of smoky air from such outdoor areas into enclosed indoor areas; i.e., creating a "smoke-free zone" around entrances and ventilation equipment of non-smoking buildings.

The definitions of both "work" and "enclosed indoor workplace" in Amendment 6 use the present tense, and thus the temporal test of compliance with the law will be whether at the time of an alleged violation or enforcement action the place in question qualified as a place where smoking must be prohibited.

"Commercial" use of a private home to provide child care, adult care, or health care converts it into a place in which smoking cannot be permitted so long as the commercial use is occurring. For example, if an in-home children's day care operates in a private residence from 7 a.m. to 7 p.m. Monday through Friday, smoking may not be permitted in the home during those days and hours. In contrast, if a homeowner hires someone to come in to the home to babysit the homeowner's own children or provide health care to an adult member of the homeowner's family, that is not a commercial use within the meaning of the amendment. If, however, the homeowner hires or sub-contracts with a provider of child, adult, or health care to come into the home and care for children, adults, or ill or disabled persons who are not the homeowner's own children or family, or otherwise allows the home to be used for that purpose, and third parties are paying for such care taking place in the home, smoking may not be permitted there. In other words, for example, a homeowner cannot get around this prohibition by having an arrangement where they hire someone else to come into their home and run or manage a day care for neighborhood children there. If that kind of work is occurring in the home, it must be nonsmoking during the business hours.

Smoking may be permitted in a private home that is used for other kinds of businesses or social gatherings and, of course, in private homes that are not used for any kind of business. The fact that a private residence is included within a larger structure does not convert the entire structure into a place where smoking may be permitted.

"Retail tobacco shop." A retail tobacco shop located within a mall or airport cannot allow smoking because it is a place within a larger enclosed indoor workplace. Other retail tobacco shops may allow smoking if any items they sell in addition to tobacco and tobacco products are only "merely incidental" to the primary tobacco products. The intent of this restriction is to prohibit smoking in retail tobacco stores that sell other, non-tobacco-related items (such as collectibles, artwork, food, and so forth). "Incidental" is used primarily in its sense of being related in nature to the primary product (tobacco) but only casually or secondarily

present, and "merely" emphasizes that such additional items offered for sale are subordinate in relation to the primary product. Thus, persons shopping for an item unrelated to tobacco will not be in danger of exposure to second-hand tobacco smoke, and the only persons who will be so exposed are those who are seeking out tobacco or a tobacco-related product, who are presumed to expect such exposure in any event. The sponsors intend for this limitation on the sales by retail tobacco shops to be accomplished by providing a list of the types of items that such shops may sell. The sponsors intended that approach because, among other reasons, they believe that it is more effective and simple to implement than designating a percentage of revenue that may not be exceeded for incidental items. The sponsor did not intend to burden either businesses or the state with requirements of a financial statement or sales report type of analysis to determine the relative percentages of sales for tobacco and for other items, because the intent can be accomplished more efficiently, with less regulatory burden, and without the problems of potentially daily fluctuation, if the legislation merely lists the kinds of items that are allowed, all other kinds being excluded.

"Designated smoking guest rooms at public lodging establishments." This definition is already very specific and limits smoking in public lodging establishments of every kind throughout Florida to sleeping rooms and directly associated private areas such as bathrooms, living rooms, and kitchen areas (as in a suite), if any, rented to guests for their exclusive transient occupancy. If the Legislature allows this exception, this means that a hotel may continue to designate some bedrooms as smoking rooms, but may not allow smoking in lobbies, hallways, foyers, restaurants, meeting rooms, banquet rooms, ballrooms, hospitality suites, bars, or tobacco shops located within the hotel. If allowed by the Legislature, and subject to any restrictions the law may impose on flow of smoke from outdoor areas to indoor areas, the hotel could permit smoking in outdoor areas that do not fall within the definition of an enclosed indoor workplace, such as pools, patios, and the like.

"Stand-alone bar." The phrase "stand-alone" was intended to mean bars that are physically independent of any and all other enclosed indoor workplaces, and this intent is emphasized by the requirement that such a bar may not share any common entryway or common indoor area with a restaurant or other workplace. A stand-alone bar cannot exist within a mall, an airport, a restaurant, an office building, a hotel, etc.

The phrase "during any time of operation" applies to all of the restrictions listed within the definition itself, and was intended to mean that a bar cannot "switch-hit" – i.e., it cannot be a restaurant or other business by day (in which

smoking will not be permitted) and then turn into a bar that allows smoking at night. Thus, if "at any time" the bar serves food, or if "at any time" the bar shares a common entryway or common indoor area with any other enclosed indoor workplace, it cannot allow smoking at any time. The presence of this language in this definition was not intended to change the interpretation of any other definition in the amendment; specifically, the sponsors' intent remains that a retail tobacco shop or other place where smoking may be allowed in some circumstances also cannot be part of or within another enclosed indoor workplace.

"Merely incidental," the same phrase that was used for accessory products sold by a retail tobacco shop, was intended to mean the service of prepackaged snack food items commonly consumed as a light accompaniment to alcoholic beverages and not requiring any food service license, and only to a subordinate degree. It was the specific intent of the sponsors that bars that allow smoking may not provide, make available, or allow on their premises (even if brought in by a caterer or a patron), full meals or food items such as a restaurant would serve. A stand-alone bar cannot serve, nor allow to be brought onto its premises in any way, food of a type or a quantity that would require it to obtain a food service establishment license if it were selling or otherwise providing such food to its patrons. As is the case with the use of this phrase for retail tobacco shops, it is the sponsors' intent that the legislation should list the types of snack items permitted, and should specify that no other food should ever be provided or consumed on the premises through any method (with the exception of employees' bringing their meals to work for their own exclusive consumption and never to be shared with patrons).

The amendment also states that sales of any food or any other product or service cannot be more than an incidental source of gross revenue. This statement is not intended to change or detract from the sponsors' intent as expressed in the "merely incidental" analysis set forth above. That is, the sponsors expect that if service of food or provision of other products or services are limited to a list of permitted snack foods as indicated above, then such other sales will naturally be a very small part of gross revenues for the bar. It is not the intent of the sponsor to require financial statement or sales report analysis of dollar amounts of sales in order to satisfy this criteria; such an analysis would be unnecessary, unduly burdensome, and subject to fluctuations from day to day.

4. Implementing Legislation.

The amendment requires legislation to be adopted in the 2003 regular legislative session, effective no later than July 1, 2003. The legislation must

authorize and require the implementing agency to adopt rules for implementing the law, and must provide civil penalties for violations of the law.

All provisions of the current Florida Clean Indoor Air Act will be repealed to the extent inconsistent with Amendment 6 and its implementing legislation.

The amendment expressly allows the Legislature to enact laws constituting or allowing more restrictive regulation of smoking. However, the Legislature may not enact or allow laws that are more lenient on smoking than the amendment itself is.

The amendment does not repeal state preemption of smoking regulation, which exists as a matter of general law. If the Legislature wishes to repeal preemption, it can do so, after which local governments could adopt more strict smoking regulations, but not regulations more lenient than Amendment 6 provides.

5. Implementing Agency.

The amendment does not specify which state agency will implement the law. The amendment does, however, specify that it is to be implemented "in a manner consistent with its broad purpose and stated terms." Thus, the sponsor's position is that implementation must be delegated to the agency or agencies most likely to enforce the amendment zealously and meaningfully, and having the personnel and equipment resources to do so. The sponsors suggest that the law follow the regulatory structure already in place for the Clean Indoor Air Act, with the Department of Health having jurisdiction over most workplaces, the Department of Business and Professional Regulation over restaurants, and the Department of Agriculture over truck stops. The sponsors understand that the Department of Health is best suited to the task of being a central repository (database) for complaints and citations for violations of the law, to be referred to the appropriate agency for investigation and enforcement action. A central database of all complaints and citations is necessary so that the State may keep track of repeat offenses and for other regulatory purposes.

6. Civil Penalties.

Penalties provided must be sufficiently serious in amount, and must be enforced in such a manner, as to induce meaningful compliance with the amendment. It is not, however, the intent of the sponsors to make owners or managers of businesses liable for the acts of individuals beyond their control, so long as such owners or managers can demonstrate that they have exerted good faith

efforts to require compliance with the law. It is also not the intent of the sponsors to require a new level of governance to implement the amendment, but rather to implement it efficiently and economically by using existing personnel and procedures within state government, and to empower private citizens to report observed violations of the act.

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