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DISTRICT COURT DIVISION

10 CVD 6496

10 CVD 7256

## MEMORANDUM OF LAW

IN SUPPORT OF APPEALS

FROM GUILFORD COUNTY

DEPARTMENT OF PUBLIC HEALTH

CASES No. 10-01 AND 10-02

NOW COMES appellant, Don Liebes, Gate City Billiards Country Club ("Gate City Billiards"), and files this Memorandum of Law in support of two appeals from Orders Upholding Civil Penalty, issued by the Guilford County Department of Public Health, for violation of N.C.G.S. § 130A-491, *et seq.*, An Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment ("Smoking Statute").<sup>1</sup> For the reasons set out herein, Gate City Billiards respectfully requests that this Court overturn the decisions of the Guilford County Department of Public Health on the grounds that N.C.G.S. § 130A-491, *et seq.*, as applied to Gate City Billiards, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19, of the North Carolina Constitution. Gate City Billiards also requests that this Court issue an injunction prohibiting the enforcement of this law against Gate City Billiards.<sup>2</sup>

<sup>1</sup> The parties request that the Court consolidate Gate City Billiards' two appeals, 10 CVD 6496 and 10 CVD 7256 for this hearing.

<sup>2</sup> The parties have filed a Stipulated Record containing all relevant documents for these appeals.

## FACTUAL AND PROCEDURAL HISTORY

### A. **House Bill 2, An Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment.**

On May 19, 2009, Gov. Beverly Perdue signed into law House Bill 2, an Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment, codified in N.C.G.S. § 130A-491, *et seq.* The new law was effective January 2, 2010. (*See* appeal from Guilford County Department of Public Health Case No.: 10-02, Exhibit 1)

In amending Article 23 of Chapter 130A of the North Carolina General Statutes to prohibit smoking in certain public places and places of employment, the General Assembly clearly set out its intent. Stated differently, the governmental interest in adopting the smoking ban is as follows:

(a) Findings. - The General Assembly finds that secondhand smoke has been proven to cause cancer, heart disease, and asthma attacks in both smokers and nonsmokers. In 2006, a report issued by the United States Surgeon General stated that the scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke.

(b) Intent. - It is the intent of the General Assembly to protect the health of individuals in public places *and places of employment* and riding in State Government vehicles from the risks related to secondhand smoke. It is further the intent of the General Assembly to allow local governments to adopt local laws governing smoking within their jurisdictions that are more restrictive than the State law.

N.C.G.S. § 130A-491 (emphasis added).

More specifically, with regard to protecting the health of individuals in public places and places of employment, the new legislation prohibits smoking in restaurants and bars. *See* N.C.G.S. § 130A-496.<sup>3</sup> However, without explanation in the bill, the General Assembly provided three

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<sup>3</sup> Prior to the enactment of House Bill 2, N.C.G.S. § 130A-493 already prohibited smoking inside State vehicles. *See* N.C.G.S. § 130A-493(c1).

exceptions to the smoking ban, only one of which is relevant to this appeal. In N.C.G.S. § 130A-496(b)(3), the General Assembly declared that smoking would be permitted in a “private club.”

A private club was then defined as follows:

(11) “Private club.” - A country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest, *and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1).* For purposes of this Article, private club includes country clubs.

N.C.G.S. § 130A-492(11) (emphasis added).

**B. Gate City Billiards.**

Gate City Billiards is a North Carolina limited liability company, doing business at 6004-A Landmark Center Blvd., Greensboro, North Carolina. Since December 2008, Gate City Billiards has been a “private club” under Chapter 18B of the North Carolina General Statutes, Alcoholic Beverages (“ABC Statute”). *See* N.C.G.S § 18B-1001(10c) (Mixed Beverages Private Club Permit) (*See also*, Stipulated Record, Exhibit A, Gate City Billiards’ current ABC Mixed Beverages Private Club permit)<sup>4</sup> The definition of “private club” in the ABC Statute is similar to, but not identical with, the definition of “private club” in the Smoking Statute. Private club is defined in the ABC Statute as follows:

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<sup>4</sup> In order to be a private club under the ABC Statute, Gate City Billiards must meet numerous requirements, such as collecting an annual membership fee, maintaining a written policy on the granting of full and limited memberships, requiring each prospective member to complete a written application, retaining each completed application in its permanent records as long as the individual’s membership continues, issuing written or printed evidence of membership to each member, maintaining on the premises a current alphabetical roster of all members and their complete addresses, and maintaining and providing to each member a written policy concerning the use of facilities by guests. *See* 4 NCAC 2S.0107.

(5) Private club. - An establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests. . . .

N.C.G.S. § 18B-1000(5).

Comparing the two definitions of "private club," there is one obvious difference: to be a private club for purposes of the smoking ban exemption, the club must be a nonprofit corporation. By contrast, there is no such requirement for being a private club for purposes of the ABC Statute. *Cf.* N.C.G.S. § 130A-492(11) *with* N.C.G.S. § 18B-1000(5). Both definitions, however, contain the key element for a private club, i.e., the establishment is not open to the general public, but is only open to members of the organization. *See id.*

After the smoking ban went into effect on January 2, 2010, Gate City Billiards, believing the law was unconstitutional as applied to it, continued to allow smoking in its facility. As a result, it has been fined numerous times by the Guilford County Health Director. Gate City Billiards appealed its first two \$200 fines to the Guilford County Department of Public Health, which upheld both violations. (*See Stipulated Record, Exhibits G & I*)

Gate City Billiards appealed the first Order Upholding Civil Penalty, Case No. 10-1 to this Court, 10 CVD 6496, and also appealed the second Order Upholding Civil Penalty, Case No. 10-2 to this Court, 10 CVD 7256. Both appeals were timely pursuant to N.C.G.S. § 130A-24(d) and both appeals are currently before this Court for decision.

## LEGAL ANALYSIS

### **HOUSE BILL 2, N.C.G.S. § 130A-491, *et seq.*, VIOLATES GATE CITY BILLARDS' RIGHT TO EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS IN THAT THERE IS NO RATIONAL BASIS FOR DISTINGUISHING BETWEEN FOR-PROFIT AND NONPROFIT PRIVATE CLUBS.**

Gate City Billiards is a for-profit private club and is therefore subject to the smoking ban set out in N.C.G.S. § 130A-496. A *nonprofit private club*, however, is exempt from the smoking ban. See N.C.G.S. § 130A-496(c) (smoking permitted in private clubs) and N.C.G.S. § 130A-492(11) (private club must be a nonprofit corporation). The narrow issue before this Court, therefore, is whether there is a rational basis for distinguishing between for-profit and nonprofit private clubs, given that the undisputed legitimate government interest in passing the new legislation was to "protect the health of individuals in public places *and places of employment*. . . ." See N.C.G.S. § 130A-491(b) (emphasis added). Absent a rational basis for this legitimate government interest, the smoking ban as applied to Gate City Billiards violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

Not surprisingly, this is a case of first impression, given that the statute did not go into effect until January of this year. However, the general framework for equal protection challenges is well settled.

"Arbitrary and capricious acts by the government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions." *Dobrowolska v. Wall and The City of Greensboro*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599, *disc. rev. allowed*, 352 N.C. 588, 544 S.E.2d. 174 (2000), *dismissed as improvidently allowed*, 355 N.C. 205, 558 S.E.2d 174

(2002). The purpose of the Equal Protection Clause “is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Id.*, quoting, *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 433, 471 S.E.2d 342, 346 (1996), *cert. denied*, 519 U.S. 1112 (1997). “The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Sec. 19 of the North Carolina Constitution.” *Id.*, quoting, *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). “This principle requires all persons similarly situated be treated alike.” *Id.*

Courts traditionally use a two-tiered scheme of analysis when evaluating equal protection claims. The upper tier of equal protection analysis requires strict scrutiny of a governmental classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, such as African-Americans. *Id.* at 14, 530 S.E.2d at 600, citing, *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983). When a governmental classification “does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied.” *Id.* at 14-15, 530 S.E.2d at 600. The “rational basis” standard “merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government.” *Id.* Furthermore, when rational basis is applied, “the governmental act is entitled to a presumption of validity.” *Id.*

Stated differently, the “right to equal protection guards against the government’s use of invidious classification schemes.” *Clayton v. Branson*, 170 N.C. App. 438, 457, 613 S.E.2d 259, 272, *disc. rev. denied*, 360 N.C. 174, 625 S.E.2d 785 (2005). However, as recognized by the United

States Supreme Court, “most laws differentiate in some fashion between classes of persons. The Equal Protection Clause . . . simply keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike.*” *Id.*, quoting, *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1, 12 (1992) (emphasis added).

In this case, there is no dispute that the rational basis standard applies. There is also no dispute as to the State’s legitimate government interest. Indeed, the General Assembly explicitly set forth its legitimate government interest in enacting House Bill 2 when it declared:

(B) Intent. - It is the intent of General Assembly to protect the health of individuals in public places *and places of employment* and riding in State government vehicles from the risks related to secondhand smoke. . . .

N.C.G.S. § 130A-491(b) (emphasis added).

Finally, although private clubs may not be public places, there is no dispute that private clubs, whether they be for-profit or nonprofit, are “places of employment”. The definitions of “private clubs” in the Smoking Statute and ABC Statute both contain the key component which makes a club private, rather than public. That is, both definitions require that the club be open only to members, not to the general public. *See* N.C.G.S. § 130A-492(11) *and* N.C.G.S. § 18B-1000(5). It is abundantly clear from both definitions that both are places of employment, the key difference being the additional language in the Smoking Statute that the club be a nonprofit corporation.

Accordingly, this case boils down to this: what could possibly be the State of North Carolina’s rational basis for permitting smoking in a nonprofit private club while prohibiting smoking in a for-profit private club? The answer, simply put, is that the governmental classification

between for-profit and nonprofit private clubs bears absolutely no rational relationship to the legitimate interest of North Carolina in protecting the health of individuals in places of employment.<sup>4</sup>

Stated differently, what is the rational basis for treating employees of private, nonprofit country clubs and fraternal organizations differently from employees of private, for-profit billiards clubs or even for-profit country clubs? For example, the Raleigh Country Club is a private, for-profit limited liability company, while the Charlotte Country Club is a private, nonprofit corporation.<sup>5</sup> What is the rational basis for treating employees of the Raleigh Country Club differently from those of the Charlotte Country Club, given the intent of the General Assembly in protecting the health of individuals in places of employment. There simply is no conceivable rational basis.

Accordingly, N.C.G.S. § 130A-491, *et seq.*, is unconstitutional as applied to Gate City Billiards.

### CONCLUSION

For the reasons stated herein, Gate City Billiards respectfully requests that this Court reverse the decisions of the Guilford County Department of Public Health upholding two civil penalties, and also issue an injunction prohibiting the Guilford County Department of Public Health from enforcing N.C.G.S. § 130A-491, *et seq.*, against Gate City Billiards.

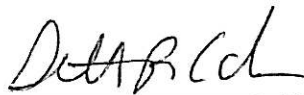
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<sup>4</sup> Whether there is a rational basis for excluding private clubs, regardless of whether or not they are for-profit or nonprofit, is a question for another day. The narrow issue in this case is whether there is a rational basis to distinguish for-profit private clubs from nonprofit private clubs as it relates to the government's interest in protecting the health of individuals in places of employment.

<sup>5</sup> See North Carolina Secretary of State website, [www.secretary.state.nc.us/corporations](http://www.secretary.state.nc.us/corporations).



This the 7 day of July, 2010.



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CERTIFICATE OF SERVICE

I, Seth R. Cohen, attorney for appellant in the above-entitled action, do hereby certify that I have served a copy of the foregoing, Memorandum of Law in Support of Appeal from Guilford County Department of Health Case Nos. 10-1 and 10-2, on opposing counsel of record at the last known address known to me, by placing said document in an envelope in the U.S. Post Office in Greensboro, North Carolina, this the 7 day of July, 2010, said envelope being addressed as follows:

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