STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
10 CVD 6496
10 CVD 7256

IN RE:

Appeal of Civil Penalty:

DON LIEBES, GATE CITY BILLIARDS COUNTY CLUB,

Appellant,

v.

GUILFORD COUNTY DEPARTMENT OF PUBLIC HEALTH,

Appellee.

**BRIEF IN SUPPORT OF APPELLEE GUILFORD COUNTY DEPARTMENT OF PUBLIC HEALTH'S ORDERS UPHOLDING CIVIL PENALTIES**

**NOW COMES** Appellee, Guilford County Department of Public Health, by and through the undersigned counsel, and files this Brief in support of Appellee's Orders Upholding Civil Penalties:

## STATEMENT OF THE CASE AND RELEVANT FACTS

On May 18, 2010 Appellant filed its appeal from the Guilford County Department of Public Health, Case Number 10-01 (10 CVD 6496), pursuant to N.C. Gen. Stat. § 130A-24(b) appealing an Order Upholding Civil Penalty, issued by the Guilford County Department of Public Health on April 23, 2010. This matter arose from a civil penalty of Two Hundred 00/100 Dollars ($200.00) issued against Appellant for violation of N.C. Gen. Stat. § 130A-96 *et seq.*, Smoking Prohibited in Restaurants and Bars.

On June 11, 2010 Appellant issued and filed its appeal from the Guilford County Department of Health, Case Number 10-02 (10 CVD 7256) appealing another Order Upholding Civil Penalty, issued by the Guilford County Department of Public Health on June 2, 2010. This matter arising from another civil penalty of Two Hundred 00/100 Dollars ($200.00) issued on March 11, 2010 for violation of N.C. Gen. Stat. § 130A-96 *et seq.*, Smoking Prohibited in Restaurants and Bars.

Civil Penalties were issued by the Guilford County Health Director and subject to appeal hearings before the Guilford County Board of Public Health. At the hearings certain facts were stipulated regarding these matters.

Appellant, Don Liebes, is the owner of Gate City Billiards Country Club, a commercial establishment offering alcoholic beverages and food to its patrons, in addition to a number of billiard tables which serve as the primary attraction for its clientele according to the owner's business plan. Prior to the effective date of N.C. Gen. Stat. § 130A-96 *et seq.* (hereinafter referred to as the "Act"), the establishment had offered a smoking section to its patrons.

In its enforcement of the above referenced statute, staff from the Guilford County Department of Public Health conducted inspections of Appellant's establishment. Pursuant to those inspections Appellant was sent two Administrative Penalty Letters and two Notices of Violation. (Copies of these documents are included in the record of this matter.) Those letters assert that activities were taking place in the establishment, which were violations of the Act. Appellant stipulates that the actions asserted to have taken place in the letter, including the issuance of the penalties, did, in fact take place. Appellant has asserted that those activities do not constitute violations for two reasons; (1) Appellant asserts that it is a country club within the meaning of statute and, therefore, exempt from the requirements of the statute and (2) Appellant has asserted that the statute is unconstitutional in that it violates Appellant's right to equal protection of the laws as applied. All parties have stipulated that all documents were timely sent and timely received as included in our Stipulated Record on Appeal.

## THE APPLICABLE LAW

In the instant cases, Appellant was charged with two civil penalties pursuant to N. C. Gen. Stat. § 130A-491 *et seq.* Appellant then appealed the penalties to the Guilford County Board of Health; the Orders upholding the civil penalties and the minutes from those meetings are included in the record in these matters.

Appeals from Board of Health decisions are governed by N. C. Gen. Stat. § 130A-24 which reads:

> (d) A person who wishes to contest a decision of the local board of health under subsection (b) of this section shall have a right of appeal to the district court having jurisdiction within 30 days after the date of the decision by the board. The scope of review in district court shall be the same as in G.S. 150B-51.

N. C. Gen. Stat. § 150B-51 sets out the scope of review of appeals such as the instant ones:

> (b) Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary, capricious, or an abuse of discretion.

The substance of Appellant's appeals are based upon N. C. Gen. Stat. §150B-51(b)(1) and (4).

Where a petitioner contends an agency's decision was based on an error of law, de novo review by the trial court is proper; in turn, an appellate court examines a trial court's order regarding an agency decision for errors of law. *Powell v. N.C. Crim. Justice Educ. & Training Stds. Comm'n,* 165 N.C.App. 848, 600 S.E.2d 56 (2004).

A court can take judicial notice of adjudicative facts at any stage of the proceeding. N. C. Gen. Stat. § 8C-1, Rule 201(f). A court may take judicial notice of matters included in prior proceedings, and if requested to take notice of its prior proceedings it must do so. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C.App. 362, 344 S.E.2d 302 (1986).

N.C. Gen. Stat. §130A-491 *et seq.*, being "An Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment" (sometimes referred to as the "Smoking Ban Law", or simply "The Act") was enacted by the General Assembly with an effective date of January 2, 2010. The Act includes the following Legislative findings:

> (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.

Pursuant to the statute the local Public Health Department is charged with enforcing the prohibition of smoking in restaurants and bars as defined within the statute. The statute includes the following definitions:

> "Restaurant": A food and lodging establishment that prepares and serves drink or food as regulated by the Commission pursuant to Part 6 of Article 8 of this Chapter.
>
> "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 the purposes of this Article, private club includes country club.

The Statute includes exceptions from the Smoking Ban for the following:

1) Guestrooms in lodging establishments.
2) A "cigar bar" as defined by the Statute.
3) Private Clubs as defined by the Statute.

Pursuant to the Act, the Smoking Ban is to be enforced by local County Departments of Public Health. The statute requires that prior to the issuance of civil penalties, each violator must receive two written notices of violation informing the violator of the nature of the violation and required corrective measures. On third and subsequent violations a penalty in the amount of Two Hundred 00/100 Dollars ($200.00) is mandated under the Act.

## ARGUMENT

### I. Appellant is operating a "bar" or "restaurant" within the meaning of N. C. Gen. Stat. 130A-492 and is, therefore, subject to the restrictions and penalties of the Act.

Appellant has stipulated that the conduct set out in the civil penalties did, in fact, occur in his establishment and that such activity would constitute violation of the Act except for the claims that: 1) Appellant's establishment is a 'country club' within the meaning of N. C. Gen. Stat. 130A-492 and thus exempt from the provisions of the Act; and 2) notwithstanding the former, the Act is unconstitutional as violative of the equal protection of the Constitution. The Constitutional claim is addressed in Section II of this Brief. As to the first claim, it is unsupported in law and fact.

The Act defines "private club", which includes "country club," 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 the purposes of this Article, private club includes country club.** (emphasis added.)

In the plain language of the Act a 'country club' includes, or is a subset of, 'private club.' 'Private clubs', as used in this statute, must contain a number of attributes including that of being 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)." Gate City Billiards, by Appellant's own admission, does not meet this criterium. Statutory language is to be given its plain language and is to be interpreted in such a way as to accomplish the goals or intent of the Act. *Carolina Power & Light Co. v. City of Asheville,* 358 N.C. 512, 518, 597 S.E.2d. 717,722 (2004); S*ee also Durham Land Owners Ass'n v. County of Durham* 177 N.C.App. 629, 633, 630 S.E.2d 200, 203 (2006).

In the hearing on the first civil penalty, Appellant asserted that the definition exempts country clubs ***or*** private clubs and gave no meaning to 'country club.' He further asserted that he changed the name of his establishment to include the words 'country club' and asserts he should be given an exemption as a 'country club' based upon his so naming his establishment. Such an interpretation is contrary to the plain, unambiguous language of the Act. Further, giving an exemption to a class of restaurants and bars without any definition flies in the face of the clear intent of the Act. The intent of the Act is clearly to regulate smoking in the vast majority of public bars and restaurants with narrowly tailored exceptions for those institutions which are designed to gather for purposes other than, or in addition to, those of ordinary bars or restaurants, such as cigar bars or the gathering of social groups such as the local Kiwanis or Rotary Club.

## II. The Act is not in violation of the U.S. Constitution or the North Carolina Constitution.

Appellant assert a claim that N. C. Gen. Stat. 130A-491 *et seq.,* An Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment, violates the North Carolina and US Constitutions and "with regard to appellant's equal protection claim, the exclusions contained in N.C.G.S. § 130A-496, including the exclusion for private clubs, are unconstitutional, in that they are not rationally related to a legitimate government interest..." Thus, it appears that Appellant's claim is a challenge to the classifications set out in the Act, as opposed to a challenge of the State's ability to regulate second hand smoke in certain public places.

The standard of review in equal protection claims is well established in both U.S. and North Carolina case law. Courts have used a two tier system of analysis in reviewing equal protection claims. The upper tier of equal protection analysis occurs where the classification impacted by the statute affects a protected class. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). Where a protected class is affected the Court must use a "strict scrutiny" standard requiring the Government demonstrate that the classification is imposed by the "compelling government interest." *Id.* at 11, 269 S.E.2d at 149; S*ee also Barnhill v. Gaston County*, 87 N.C.App. 532, 362 S.E.2d. 161 (1987). Appellant has not asserted that he or his establishment constitute a protected class, nor, does he assert that his clientele, i.e. patrons who wish to smoke while using his establishment, constitute a protected class. Therefore, it does not appear that Appellant is seeking the protections of a strict scrutiny standard.

In that Appellant has not, and cannot, assert membership in a suspect or protective class the second, or lower tier of equal protection analysis applies. Under this analysis, it is required that any statutory classification must be made upon a rational basis standard. The rational basis standard merely requires that the statutory classification bear some rational relationship to a conceivable legitimate interest of government". Barnhill, *supra*; Texfi Industries, *supra*; S*ee also*, *Coalition for Equal Rights, Inc. v. Owens,* 458 F.Supp.2d. 1251 (D. Colo. 2006) [Colorado statute banning of smoking in bars and restaurants held constitutional]; *Fagan v. Axelrod*, 550 N.Y.2d. 552 (S.Ct.1990) [N.Y. law banning smoking in bars and restaurants held to be constitutional].

Therefore, the question before this Court is whether or not the statute and, in particular, its definitions of exempt parties bears some rational relationship to a conceivable legitimate interest of government. It is important to note that under North Carolina and Federal law, the government, i.e. the statute, is entitled to a presumption of validity. *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983); S*ee also Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) [constitutional challenge must overcome the 'heavy presumption' in favor of the constitutionality of state laws]. Challengers to a state law must "bear the burden of proving it unconstitutional beyond a reasonable doubt." *Mosgrove v. Town of Federal Heights*, 190 Colo. 1,

543 P.2d. 715, 717 (1975); *See also Colorado Criminal Justice Reform Coalition v. Ortiz*, 121 P.3d. 288, 291 (Colo. Ct. App. 2005). A careful analysis of the Act demonstrates that Appellant has not, and cannot, overcome this presumption.

It is important to note that the subject statute is one designed to protect the public health. The Act contains the following legislative findings:

> (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.

The statute goes on to state that "the intent of the General Assembly is to protect the health of individuals in public places and places of employment and riding in State government vehicles."

Attempting to protect citizens from exposure to elements proven to cause cancer, heart disease, and asthma attacks is a conceivable, legitimate interest of the government. Moreover, placing those protections in public places, such as bars and restaurants, is a rational means of providing for the public health of its citizens. This is consistent with other long standing levels of health and safety regulations on bars and restaurants, such as food sanitation standards, alcoholic beverage control standards and other standards for public gatherings to protect the public patrons of North Carolina bars and restaurants.

Next, we look to the classifications set out within the statute, and, specifically, to the definitions and exemptions to the regulations of smoking in bars and restaurants. While the Act is broad based, it does not constitute a total prohibition of smoking in every public place outside the home. It is rational for a statute of this type to provide some outlet or opportunity for smoking on a limited and narrowly defined basis. In addition, some public clubs or social organizations may wish to be all inclusive in its public gatherings. It is reasonable to draft a law

that would not require the mandatory exclusion of smoking, for example, Elks Club members or Moose Lodge members who smoke from any and all Elks Club and Moose Lodge gatherings. Therefore, limiting exceptions from the Act for private clubs within the relatively narrow restrictions of that definition in this Act and Cigar Bars is rational and does not negate the purpose of the Act.

North Carolina Courts recognize the practicable impossibility of perfect distinctions in such classifications. In *Deadwood, Inc. v. North Carolina Dept. of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002), the court was presented with the argument that a tax classification creating a higher tax burden on live entertainment venues, i.e. plays, than on movie theatres. The Court determined that the classification was rational and that "the widest latitude must be accorded the Legislature in making the distinctions which are the bases for the classification..." *Id*, at 411. Moreover, "the Legislature is not required to preamble or label its classification or disclose the principles upon which they are made." *Id.*

Appellant has noted that his establishment is a "private club" within the meaning of the State's ABC laws. N.C. Gen. Stat. § 18B-1000, *et seq*. As such, Appellant has obtained certain economic advantages in his establishment over other establishments which do not fall within the definition of "private club" within the meaning of the ABC statute. On the other hand, Appellant's establishment does **not** fit within the definition of "private club" within the meaning of the Smoking Ban statute. Yet, Appellant appears to assert that the fact that the statute allows for an exemption for certain commercial establishments which may fit the definition of private clubs and not other, is an unfair and unconstitutionally unequal classification. This argument is not supported in law and fact.

As noted above, it is clear from a careful reading of the statute that the exemptions within the Act do rationally advance the clearly stated purpose of the Act. It is evident that the Act was intended to provided very limited and narrowly defined exemptions to the regulation of smoking in bars and restaurants; it is logical that the Act would define private clubs more narrowly than ABC laws in order to better and more rationally fulfill the purpose of the Act.

"The right to equal protection does not promise or guarantee economic or financial equality as long as the ordinance is rationally related to a legitimate governmental objective" Barnhill, *supra*. There are legitimate additional costs involved in compliance with this ordinance, just as there are legitimate costs occasioned by other public health regulations regulating bars and restaurants. It costs more to keep a clean, sanitary kitchen than a dirty one; similarly, there may be economic costs associated with the regulation of smoking in North Carolina bars and restaurants. Appellants real complaint, it appears, is that his establishment cannot make use of the "private club" exemption in the same manner in which he has made use of that exemption within the ABC regulations. **If** Appellant **could** claim "country club" or "private club" status within the meaning of N.C. Gen. Stat. § 130A-491 *et seq.*, he would have an economic advantage over other similar commercial establishments. If Appellant were deemed to fit within the "country club" or "private club" exemptions, as evidenced by his first grounds for challenge of these penalties, he would have no issues with a law that gave him an economic advantage over his competition.

The equal protection clause requires the government to treat similarly situated people in a similar manner. CEO v. Owens, *supra*; S*ee also Barney v. Pulsipher*, 143 F.3d. 1299, 1312 (10th Cir. 1998). The Act treats restaurants and bars, including Appellant's, in a similar manner and the narrow, well defined exemptions serve a rational means to afford the effective and rational implementation if the purpose of the Act.

## CONCLUSION

Based on the foregoing, the Appellee respectfully request that this Court uphold the decision of the Guilford County Board of Health in upholding the civil penalties issued in these matters.

This the 7th day of July, 2010.

J. Mark Payne
Guilford County
301 W. Market Street, 3rd Fl. Suite 301
Greensboro, NC 27401
Bar# 11046

OF COUNSEL:

Office of the Guilford County Attorney
PO Box 3427
Greensboro, NC 27402
336-641-3852
336-641-3642(fax)
mpayne@co.guilford.nc.us

## CERTIFICATE OF SERVICE

This certificate is to certify that on the 7th day of July, 2010 the undersigned deposited a copy of this **Brief in Support of Appellee Guilford County Department of Public Health's Orders Upholding Civil Penalties** in the United States Post Office for mailing first class mail, with proper postage attached, addressed to:

Mr. Seth R. Cohen
Smith, James, Rowlett & Cohen, LLP
P.O. Box 990
Greensboro, N.C. 27402

J. Mark Payne
Guilford County
301 W. Market Street, 3rd Fl. Suite 301
Greensboro, NC 27401
Bar# 11046

OF COUNSEL:

Office of the Guilford County Attorney
PO Box 3427
Greensboro, NC 27402
336-641-3852
336-641-3642(fax)
mpayne@co.guilford.nc.us